Provocation and Pluralism (2001)

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Provocation and Pluralism

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Until the recent House of Lords decision in *R* v *Smith*,[1] English criminal law harboured two competing views of the moral structure of its provocation defence. On one view, favoured in a line of Court of Appeal decisions beginning in the early 1990s,[2] the provocation defence is conceived as a close relative, morally speaking, of the diminished responsibility defence that appears next to it in the Homicide Act 1957. To be provoked to a murderous rage is to suffer a temporary diminution of one's responsibility, a moment of madness. On the rival view endorsed by the Privy Council in 1996,[3] the provocation defence is rather to be *contrasted* with the diminished responsibility defence. The diminished responsibility defence created by section 2 of the Act exists to make allowances for conditions of pathological unreasonableness. By contrast, the provocation defence referred to in section 3 of the Act is a defence available only in respect of *reasonable* losses of temper. It is reserved for cases in which (in the words of the section) 'the provocation was enough to make a reasonable man do as [the defendant] did.'

Rather than decide cleanly between these two views, the House of Lords in *Smith* helped itself to one of its favourite

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[1] [2001] 1 AC 146.

[2] *R* v *Ahluwalia* [1992] 4 All ER 889, *R* v *Dryden* [1995] 4 All ER 987, *R* v *Humphreys* [1995] 4 All ER 1008, *R* v *Campbell* [1997] 1 Cr App Rep 199.

[3] *Luc Thiet Thuan* v *R* [1997] AC 131.

pseudo-solutions: When in doubt, pass the buck to the jury.[4] The moral structure of the provocation defence, said the three Law Lords in the majority, was itself a matter for the jury to determine under the 1957 Act. Deciding which allowances to make to which angry defendants is not the business of the trial judge, and nor, accordingly, is it the business of the House of Lords. This self-denying ordinance on the part of the majority was not really as self-denying as it looked, however, for their Lordships gave as their main reason for passing the buck to the jury the need for the defence to be interpreted with sufficient sensitivity to differences between individual defendants. They rejected the view of the Privy Council as being too restrictive on this front, and (in effect) preferred the line of Court of Appeal authorities. The standard of 'reasonableness' in the provocation defence is not to be taken literally, said the House of Lords, for taking it literally would mean holding everyone to a uniform standard, rather than allowing the standard to be tailored, as the jury would naturally tailor it, to suit the special (sympathetic) features of each defendant and his or her predicament.[5]

We have criticised the decision in *Smith* in some detail, and on various grounds, elsewhere.[6] Our aim here is not to reiterate the same criticisms. Rather, our concern is with a philosophical problem that formed the backdrop to the decision in *Smith*. For although *Smith* was nominally a case about the adaptability of the provocation defence in the face of certain mental illnesses and personality disorders, there lurked behind it a broader set of worries about the suitability of the provocation defence, as traditionally understood, to today's cosmopolitan social

[4] For similar acts of buck-passing by the House in the recent history of criminal law, see *R* v *Reid* [1992] 1 WLR 793 and *R* v *Woollin* [1999] AC 82.
[5] cf the US Model Penal Code §210.3 and accompanying comment 5(a) by the drafters: 'In the end, the question is whether the actor's self-control can be understood in terms that arouse sympathy in the ordinary citizen.'
[6] In our article 'Compassion without Respect? Nine Fallacies in *R* v *Smith*' [2001] Crim LR 000.

conditions. It is one thing to insist on the uniform standard of the reasonable person when it can safely be assumed that people in the same physical space share the same social and cultural space. But an increasingly mobile populace creates increasingly fragmented social and cultural space, with a corresponding fragmentation of the standards that are expected of people and regarded as proper. How can the criminal law continue to uphold a uniform standard of character in this more cosmopolitan environment? Specifically, is there any longer a defensible role for a standardised 'reasonable person', the quality of whose temper is a suitable measure for all of us? Once this cosmopolitan worry takes hold in respect of *cultural* difference, it readily extends itself to the many other dimensions in which people differ as well. Supposed differences of temperament as between men and women, as between the gay and the straight, as between the educated and the uneducated, etc., also become sources of disquiet. It is not long before one is worrying about the potential unfairness of ignoring any personal idiosyncrasy that may have been a factor in explaining the defendant's reactions.[7] Against this backdrop, one can sympathise with the anxiety of the House of Lords that the Privy Council's uncompromising reaffirmation of the 'reasonable person' standard was not only lacking in compassion towards those suffering from some mental illnesses and personality disorders – the narrow legal issue at stake – but was also insufficiently astute, more broadly, to the moral consequences of human diversity.

One can sympathise with this anxiety, but should one share it? We think not. We believe that the moral consequences of human diversity are accommodated quite adequately within the moral structure of the provocation defence as conceived by the Privy Council, and in particular that the reasonableness standard

[7] To see how easily one may slide from worrying about cultural differences between people to worrying about *all* differences between them, see the classic discussion in Andrew Ashworth, 'The Doctrine of Provocation' (1976) 35 Cambridge LJ 292 at 300.

should remain unqualified as the proper standard for judging the defendant's loss of self-control. In defending this view, we proceed by disaggregating the various legal questions that dictate the availability of the provocation defence, questions which were distinct at common law and which were left distinct in the 1957 Act, but which the House of Lords in *Smith* preferred to run together. We find that there are no fewer than three distinct elements of standardisation built into the defence of provocation, each of which has its own pluralistic space already built into it. And we find that this pluralistic space is enough.

The need for a provocation

Neglected in *Smith* and in many other cases is the following very obvious point: that to have a defence of provocation one needs to have been provoked. It may be thought that to cross this initial threshold it is enough simply to point to things that were done or said that were the cause of one's anger. Section 3 of the Homicide Act 1957, however, does not merely (or even) require that the defendant have been *caused* to lose her self-control by the things done or said; preserving the common law on this point, it requires that she have been *provoked* to lose her self-control by the things done or said. Since 1957, the courts have increasingly suppressed the difference.[8] But should they have done so? What exactly *is* the difference that they have suppressed?

To grasp the difference, we need to begin by understanding what it is to provoke somebody. This is because the passive category 'being provoked' is parasitic on the active category 'provoking'. Of course this does not mean that one can only ever be provoked by someone's provoking one. There are cases of

[8] See *R* v *Doughty* (1986) 83 Cr App Rep 319: 'It is accepted by [the Crown] that there was evidence which linked causally the crying of the baby with the response of the appellant. Accordingly ... the section is mandatory.' In the remarks that follow we mean to cast doubt on on both the legal and the moral soundness of this well-known and so far still authoritative decision.

error of judgment in which one is provoked by what one mistakenly regards or treats as someone's provoking one. But even in those cases it is clear that to be provoked to lose one's self-control is not merely to be *caused* to lose one's self-control by things that someone did or said. In order to explain how it came to pass that one mistakenly regarded or treated something as provoking one must invoke the concept of a provocation. One must make the things said or done that caused one to lose one's self-control intelligible as examples of possible provocations. To put the point tersely: One can't make something a provocation by thinking it so except by understanding what could possibly make that same something a provocation *apart from* one's thinking it so. Accordingly, one always needs to know what it is to provoke somebody (active) in order to know what it is to be provoked (passive), even in cases in which one was (so to speak, mistakenly) provoked without anybody having provoked one. Not all possible causes of anger are provocations to anger, in short, for not all involve a provoker or someone mistakenly but intelligibly taken to be a provoker.

These remarks tell against a view according to which what counts as provocative lies simply in the apprehension of the provoked person. But they also tell, by the same token, against a view according to which it lies in the apprehension of the provoker, for he too cannot make something a provocation merely by thinking it so. So where should we look for the all-important threshold element of provocation? The answer is that we cannot but look to the social forms invoked in the transaction between the provoker and the provoked. This is true across all the possible ways of provoking people, which include goading them, nagging them, and hassling them, as well as insulting them. For simplicity's sake we will illustrate the point solely in relation to insult, but the conclusions we will draw apply equally to the other modes of provocation just mentioned. So how is the possibility of insult structured by social forms? Although it is always possible to develop new ways of insulting people, all of

them necessarily trade on ways of insulting people that are already socially established. One implication of this is that in each different social milieu there is a different menu of possible insults, and more broadly of possible provocations. We say 'possible' insults here partly to leave open the question of whether everything that is socially regarded as insulting really is insulting. Some things widely regarded as insults (for example, 'liberal' or 'academic' or 'gay') might well be compliments, and this will bear on how provocative the law should hold them to be, a question to which we will come in the next section. In this section the question is different. It is the prior threshold question of whether it is intelligible for the defendant to have claimed that what caused him to be so angry was something that provoked him, whether he was right to have been provoked by it or not.

What are the implications for the law of this way of thinking about the threshold question? The first point to note is that the courts have clearly been right to warn juries in provocation cases that different words and deeds have different significance for different defendants. It is true that jurors should not ask themselves, for example, what the alleged insult would have meant to *them* or to *the man on the Clapham omnibus*. But this is not because the defendant might have personal idiosyncrasies that set him apart from others. It is because he might inhabit a different social milieu from the jury or from the man on the Clapham omnibus, and so might participate in a different menu of possible slights and put-downs. In deciding whether the defendant was provoked, the jurors need to adjust their horizons to accommodate different social milieux, with their different indigenous forms of insult. The fact that the defendant is a Muslim, say, can be pertinent to the question of whether there was a provocation only if there is a Muslim social milieu in which there is a distinctive menu of possible insults, some of which are unknown or not

available as insults to non-Muslims.[9] Unless there is a similar social milieu of schizophrenics, say, the same argument does not apply to make the fact that a defendant was a schizophrenic relevant to the threshold question of whether she was provoked.

This shows that there was method in the madness of the common law's traditional assertion that only certain legally recognised insults were capable of constituting provocation in law.[10] The common law was warranted in this claim if and to the extent that these were the only (sufficiently grave) forms of insult that were possible in the locally available social milieux of the day. This concession to the common law's approach sheds new light, in turn, on the reforms to the common law that were made by section 3 of the Homicide Act 1957. The reforms evidently reflected the fact that the locally available forms of insult, and hence of provocation, were multiplying, and in some cases being displaced, with the fragmentation, and in some cases eradication, of social milieux. Since judges must look to precedent where juries need not do so, section 3's solution of leaving it to the jury to devise for themselves the menu of possible provocations was one way to remove certain conservative restrictions from that menu. But it did not imply that the menu had been abolished and replaced with a free-for-all in which anything at all could in principle amount to a provocation if the defendant lost his temper in the face of it. The jury still needed to ask itself, and still needs to ask itself today, much the same question that judges used to ask at common law: Were these deeds or words that caused

[9] For excellent illustrations of this principle in action see *R* v *Uddin*, *The Times*, 14 September 1929 and the original trial judgment (regrettably overturned on appeal) in *R* v *Parnerkar* [1974] SCR 449.

[10] See Holt CJ's important exposition of the categories in *R* v *Mawgridge* (1707) Kel 119. Notice that all the provocations known to the common law were insults. One could not be provoked by non-insulting annoyances inflicted on one by others, however serious. For excellent explanation of why, see Jeremy Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) 23ff.

the defendant to lose her self control *capable of amounting to provocation,* such that she was not just caused but *provoked* to lose her self-control?

It might be protested, at this point, that the requirement that the defendant have been provoked and not merely caused to lose self-control is but a legal technicality without moral substance. By common consent, provocation is a (partial) excuse for murderous actions. Surely what matters from the excusatory point of view is the defendant's turbulent state of mind, her loss of reason or will, not how it was triggered?[11] Things might be different if provocation were a (partial) justification, and the question were whether there was someone, a provoker, who was part author of his own misfortune, or who deserved to die, etc. Then it would clearly be important to distinguish the provoking of anger from the mere causing of anger. But when we think about excusing someone, what we care about is his state of mind and how it *inhibited* his acting justifiably, and from that point of view, surely, it doesn't matter whether the anger was triggered by a person or an animal or an electrical storm, so long as the effect on the defendant was the same in every case?

However, this protest mischaracterises the distinction between excuses and justifications. True, excused actions are unjustified ones. Nevertheless, in making an excuse one relies on the fact that one's unjustified action was taken on the strength of a justified belief or attitude or emotion, etc. An excuse for an angry action, *qua* angry, depends on the justification of the anger

[11] H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) 153, adopting a view of excuses made prominent by J.L. Austin in 'A Plea for Excuses', in his *Philosophical Papers* (Oxford: Clarendon Press, 1961) 124. Compare the Law Commission's argument for extending the duress defence to take in cases of so-called 'duress of circumstances': 'the effect of the situation on the actor's freedom to choose his course of action ought equally to provide him with an excuse for acting as he does.' *Legislating the Criminal Code: Offences against the Person and General Principles* LCCP 122 (London 1992) 60.

itself. Even in the realm of excuse, therefore, the analysis is moral and not merely causal, for the question of the justification of the anger (and hence the excuse of the angry action) is a moral question.[12] Those who take the opposite view fall into the trap of confusing excuses with denials of responsibility. People who are not responsible for their actions admittedly face no justificatory questions. But by the same token they face no excusatory questions either. They are beyond justification and excuse. Their actions do not call for justification, but neither do the emotions or attitudes or beliefs etc. on the strength of which they acted, and the justification of which would amount to an excuse for their actions.

Now anger is a fundamentally interpersonal emotion. At the heart of its cognitive component (for all emotions have a cognitive component) lies the idea that one has been wronged by another person.[13] This includes the vicarious case in which someone else has been wronged, and one feels angry on his or her behalf by putting oneself in his or her shoes. Either way, it is of the essence of anger that there is a (supposed) wrongdoer against whom the anger is directed. True, there are forms of incompletely directed anger, such as anger 'against the world', or an anger-like belligerent frustration at the way one's life is heading. But to make sense of these reactions, at least as kinds of anger, one cannot but regard them as anthropomorphic 'as if'

[12] For a more detailed explanation see John Gardner, 'The Gist of Excuses' (1998) 1 Buffalo Crim LR 575. Strictly speaking this explanation only covers excuses based on standards of character. Others are based on standards of skill, and are not relevant to the present context. Similar views of the logic of excuse emerge from Jeremy Horder, *Provocation and Responsibility*, above note 10, at 127ff, and from Dan M. Kahan and Martha C. Nussbaum, 'Two Conceptions of Emotion in Criminal Law', (1996) 96 Columbia LR 269 (although the latter prefer to avoid the word 'excuse', precisely because of the risk that it will be understood in the way that we are warning against here: *ibid* 318-319).

[13] A good discussion of this dimension of anger is Patricia Greenspan's in her book *Emotions and Reasons* (New York: Routledge, 1988) 48-55.

reactions. It is *as if* one has been wronged by the world. The fates, as we may put it, are against one. Such metaphorical personifications are necessary to make any sense of the anger as anger, for they conjure up the idea of a wrongdoer, an idea that lies at the heart of the emotion of anger. And just as this 'as if' feature needs to be brought out to make sense of incompletely directed anger, so it needs to be justified to justify that anger, and hence to excuse actions performed on the strength of that anger.

Defending the metaphorical deployment of a moral principle is, however, a tall order. It is not surprising, then, if we come to regard the persistent crying of babies, or the sudden good luck of one's neighbour set against one's own bad luck, as at best morally marginal cases of provocation, well outside the paradigm. If (in the thrall of a confused view of the logic of excuses) the courts have nevertheless been persuaded since 1957 to treat such cases as being on all fours with the paradigm of a provocative insult, then it is time the courts took a less jaundiced look at what animated the old common law on this front.[14] Of course it would be a moral mistake, as well as a violation of the letter and the spirit of the 1957 Act, to return to the era of a finite list of affronts which are capable in law of counting as provocations. But it would be both a moral insight and in accordance with the letter and the spirit of the Act to insist that, as a condition of a successful provocation plea, there must at least have been something intelligible as a provocation.

[14] To be fair the law since 1957 has not gone as far as to regard as potentially provocative the sudden good luck of one's neighbour set against one's own bad luck. The question, however, is why it should not go this far now that it has recognised the persistent crying of a baby as potentially provocative in *Doughty*, n 8 above. The technical legal answer is that in the misfortune case, unlike the baby case, nothing was 'done or said' to provoke. As Smith and Hogan observe in *Criminal Law* (London: Butterworths, 9th ed, 1999) 355, 'this distinction begins to look a little thin' once we have provocative babies.

Evaluating the provocation

The preceding remarks dealt with the threshold question: Was the defendant provoked? To answer this question in the affirmative the defendant need only show that what caused her to get angry to the point of losing her self-control (and hence to do as she did) was intelligible as an instance of a provocation in her cultural milieu. This leaves open, however, the question of whether she really *should* have been provoked by it as she was. This second question has come to be known in law as the *gravity* question. But in fact it conceals two subsidiary issues, only the second of which is aptly described in terms of gravity.

The first subsidiary issue is the issue of whether the things that are intelligible as insults in a particular cultural milieu really are insulting. (Again we focus on the case of insult for simplicity's sake, but analogous questions arise concerning other modes of provocation, such as goading.) Calling someone 'queer' is *intelligible* as an insult in many cultures. That it is *used* as an insult in many cultures proves this. But the question remains as to whether it really is insulting to be called 'queer' when there is absolutely nothing wrong with being queer and (apart from the prejudice one must endure at the hands of those who wrongly think it wrong) it does not blemish one's life. This is not a question of whether being called 'queer' is a particularly grave insult but a question of whether it really is an insult at all. In other words it is not a question of whether the defendant should have been angered as much as she was by it, but the question of whether she should have been angered by it at all.

The other subsidiary issue is the issue of how serious (or grave) an insult a certain insult is. We reach this subsidiary question of degree only when we have agreed that what we are dealing with really is an insult. Even if, in some contexts, it really is an insult to call someone 'queer', quite possibly it is not as much of an insult as, in those contexts, it is widely taken to be. We deal with these two subsidiary issues under the same heading

because, as far as making space for differences among defendants is concerned – as far as the problem of social pluralism is concerned – they raise variants of exactly the same puzzle. The first issue raises in a dramatic form the puzzle raised in a more muted (and sometimes almost imperceptible) form in the second.

The puzzle is structurally identical to a puzzle that is also found in the law of defamation: Under what circumstances would 'a right-thinking person' reduce his opinion of another thanks to the association of that other with a quality that is not truly obnoxious but is widely thought to be so? In the law of defamation there has been much doublespeak on this subject. In that context the courts are under some pressure to concede popular prejudices to the plaintiff who claims to have been defamed by their invocation, and the pressure is that those very prejudices may subsequently have been the immediate occasion of her special damage.[15] We have doubts about the wisdom of succumbing to this pressure, but concede that it may possibly be justified by the special focus on damage in the law of tort. No similar pressure exists in the law of provocation. So the puzzle should be approached, we think, with a more open mind. Granted that the justification of anger is a moral matter, one's first instinct is to say that the provocation should be judged for the provocation it really was, for its true moral import, quite irrespective of the provocation it was commonly thought to be. It is one thing to factor cultural milieu into the question of what is *intelligible* as an insult, but quite another – and one is tempted to say, a mistake – to factor cultural milieu into its evaluation.

Possibly the mistake is sometimes just that simple – the mere question 'are you gay?' normally justifies no anger at all, and

[15] *Yousoupoff* v *Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581. *Per* Slesser LJ: 'It is to shut one's eyes to reality to make these nice distinctions.' For interesting discussion of the way in which growing cosmopolitanism should impact upon the use of the 'right-thinking person' test in defamation, see John G. Fleming, *The Law of Torts* (Sydney: Law Book Co, 8th ed, 1992) 526-527.

would not excuse a venomous verbal response, let alone an enraged killing. But typically the situation is more complex. It is widely regarded in some sub-cultures as the gravest of insults, for example, to call somebody 'a grass' (meaning a police informer, or even, in some particularly degenerate milieux, someone who merely calls the police). Clearly the law cannot regard calling the police, in itself, as obnoxious. So can it regard the taunt 'grass' as justifying any anger? Strictly speaking, shouldn't one be proud to be a grass and react with pleasure? Or at least shouldn't that be the law's position on how one should react?

The solution is not so simple. To call someone a grass is, in the cultural milieu in question, *a specific way of calling him or her a traitor*. It is (let us concede) genuinely obnoxious to be a traitor, and the law need have no problem in conceding this. The problem in the interpretation of the insult arises from the fact that there is nothing truly treacherous about calling the police, or at least such must be the view of the law. The accusation of betrayal is false, therefore, yet it remains an accusation of betrayal, and (true or false) an accusation of betrayal really is an insult. It is this insult, the accusation of betrayal (and not the non-insult of being reminded that one has called the police), the gravity of which the law needs to assess for the purpose of assessing the justifiability of the defendant's anger. How, after all, could one assess the gravity of a non-insult?

The same is true in a multitude of other cases. There is nothing wrong with homosexuality. Yet calling someone a 'pansy' as a code-word for 'homosexual' wrongly associates homosexuals, and the person being addressed, with an unprepossessing kind of fey weakness. Therein lies its potential to be a real insult.[16] When the law comes to assess the gravity *qua* insult of calling someone a pansy, it is this – the allegation of fey

[16] Likewise, publicising someone's homosexuality (ie 'outing') is sometimes a way of accusing him or her of hypocrisy or cowardice, and that accusation can certainly be an insult. Notice that this insult has often been wielded by gay activists who presumably agree that there is nothing wrong with being gay.

weakness – that is the insult the gravity of which the law must assess. This is plainly true when the insult is addressed to a homosexual (who may rightly bristle not only at the innuendo that he is fey and weak, but also at the further stereotyping innuendo that gay men generally are fey and weak – in other words, that he is fey and weak because he is gay). But notice that it is also true when it is addressed to a heterosexual (who may still rightly bristle at the innuendo that he is fey and weak even though he does not suffer the further insult of being stereotyped). The only difference is that in the first case the insult is necessarily graver, thanks to the extra innuendo, than it is in the second.

So to return to the question: Can one be insulted by an allegation of some quality that is widely but wrongly taken to be obnoxious? The answer is yes and no. No, if that is the end of the story. But yes if the allegation is of something wrongly taken to be an instance of what is rightly regarded as a wider kind of obnoxiousness. Then the real insult, and the one which must be tested for gravity, is not the superficial, pseudo-insult, which is not in fact genuinely insulting, but the underlying insult, which is. It is possible for one to make a mistake here in either direction. One may become so absorbed in the certainty that there is nothing wrong with being homosexual that one fails to see the hidden insults imported into the language used by homophobes. On the other hand, one may become so committed to putting people into their social context that one correctly sees the presence of an insult but wrongly identifies the insult as that which it is locally, but wrongly, thought to be.

These remarks expose the limited way in which a defendant's personal idiosyncrasies can bear on the gravity of the provocation. It is not that he has his own judgment of what is insulting, and to what extent it is insulting, a judgment that needs somehow to be respected or accommodated by the law. His judgment in these matters is no more authoritative than that of his or any other community: he and all his peers might wrongly think that homosexuality is obnoxious and so might become

quite unjustifiably enraged, or at any rate much too enraged, at being (say) on the receiving end of a homosexual advance. In that case his provocation plea ought to be in serious trouble. Notice further that the question of whether he is or is not a homosexual does not affect how seriously his view of the insult is to be taken: merely as a view, this too is irrelevant. What his being or not being a homosexual does affect, or may affect, is how grave a certain insult *really is*, never mind how he feels about it. We saw this in the case of the 'pansy' taunt: it was double the insult to the homosexual, who was insulted both by being labeled fey and weak, and by having his sexuality stereotyped. So the gravity of this insult is greater for the homosexual addressee, whatever he himself may think.

Notice here that the sensitivity to personal idiosyncrasies that we are introducing turns conventional assumptions on their heads. It is, in our example, more grave for a homosexual to be called a pansy than for the same taunt, all else being equal, to be hurled at a straight man. Perhaps, of course, all else will not be equal: perhaps in some gay sub-cultures the word 'pansy' will have taken on an amusing nuance so that its ironic meaning predominates. Or perhaps there is a longer story to be told about the implications that this particular taunt carries within a certain relationship, in which it has been used before as a code-word. Or perhaps 'pansy' is a word that can be used to convey more than one insult, and we need to know who exactly the addressee of the insult is to work out which insult it was. None of these special circumstances (which may be thought of as special idiosyncrasies of the defendant, if you like) is necessarily ruled out as a factor in the assessment of what counts as a genuine insult and to what extent. But notice *how* such factors might be relevant to that assessment. They are relevant because they reveal whether the words or deeds in question really *were* insulting in some hidden way, or more or less insulting than at first they might seem to someone not *au fait* with the full circumstances. The mere fact that the parties or their peers or indeed all the

inhabitants of their social milieu *think* the words or deeds insulting, or more gravely insulting that others might suppose, does not even begin to make them so.

In this explanation we admittedly gloss over a range of special difficulties which might be thought of as difficulties of cross-purposes as between the provoker and the person provoked. Sometimes the provoker means something different by what he says from what he is understood by the person provoked to be saying. Sometimes, on the other hand, he has a further intention (such as the intention to provoke) to which the person provoked is oblivious. Our remarks do not point to any particular account of what should be done in such special cases. They do point to some possible significance in the speaker's intention, for often one expresses a different or additional insult if one intends something by what one says than if one does not. What we do not resolve are the further questions about what to do about mistakes on the defendant's side regarding such matters. Since we are in excusatory territory here the answer may be to extend the excusatory logic, and to allow the defendant the benefit of her reasonably mistaken beliefs about meaning.

But this takes us beyond the core issue, which is the issue of how to assess the gravity of a provocation where no cross-purposes are involved. Here our guidance is clear: An insult is only as insulting as it really is, when addressed to this defendant in these circumstances. No amount of thinking it more insulting, on the part of the defendant or his peers or society at large, can make it more insulting.

The standard of self-control

Having settled the issue of the gravity of the provocation, and identified the variables that can affect the gravity of the provocation to different people, one might expect there to be no further variables when we come to the question of whether the reasonable person would have lost self-control to the point of killing.

To the question 'would a reasonable person have lost self-control to that point in the face of this insult?', one might expect the answer to turn entirely on the gravity of the insult. Naturally, there may be some built-in latitude in the standard of the reasonable person. It is true that reasonable people vary somewhat in their reactions.[17] But for the purposes of the provocation defence we are presumably interested only in the lowest possible level of self-control that any reasonable person would have. Once we locate that constant, and we know the gravity of the insult, don't we also automatically know whether the reasonable person would have lost self-control to the point of killing?

Not quite. It is conceded in the *Smith* case, as in all the other cases, that the standard of self-control should not be lowered merely to meet the bad temper of the bad-tempered person.[18] This is trivially necessary to maintain the idea that there is such a thing as a standard of temper, without which the statutory reference to the reasonable person, as a standard of temper, would be unintelligible. We say that this much is trivially necessary because much else is also necessary in order to settle the question of which standard that standard is going to be, the gravity of the insult having been established. We need to know more positively whether there are any relevant variables beyond the excluded variable of mere bad temper, or whether the reasonable person is, as seemed at first sight, a constant in respect of temper. What of other special characteristics and predicaments that people might seek to rely upon that are not mere bad temper but are nevertheless offered as explanations of variations in

[17] Some people think of 'reasonableness' as a standard that is distinctive for the extra latitude it gives. Various reactions or judgments would be reasonable where only one would be right, rational, justified, etc. We have attacked this contrast in John Gardner and Timothy Macklem, 'Reasons, Reasoning, Reasonableness' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2001, forthcoming).

[18] *R* v *Smith*, n 1 above, 173 per Lord Hoffman, and 180 per Lord Clyde.

temper? This is the category of characteristics and predicaments that the law has been struggling with since *Camplin*.[19] What about age? What about a history of abuse? What about a mental illness? What about being a harassed parent?

It seems to us that a subtle misunderstanding often creeps into responses to this question. The question at this stage is not one of mere explanation. The question here is one of justification - that is, justification of one's becoming so angry as to lose self-control and kill, thereby excusing one's killing. It is not a matter of *why* one lost one's temper, but a matter of why one *should* have lost it. That 'should' is built into the very idea of having a standard, and hence built into the very idea of the reasonable person as a standard. So the question is, are there different standards of temper *that are properly applicable* to different people in respect of the same insult (that is, where the insult is equally grave to each)? Whatever those standards are, it must be possible to fail to live up to them. That is part of the very idea of a standard. If the standard were to be so personalised as to accommodate every feature of a person, other than the mere fact that they were bad-tempered, then it would effectively accommodate the fact that they were bad-tempered as well, for it would allow them to benefit from any explanation they might care to offer of why it was that they were bad-tempered. It would follow that they could not fail to meet the standard, except inexplicably,[20] and so strictly speaking would not be held to any standard at all.

So are there different standards of temper that are properly applicable to different people in respect of the same insult? When the question is put that way it seems obvious that there are. A recruitment advertisement for the Metropolitan Police recently challenged readers on the question of whether their self-control

[19] *DPP* v *Camplin* [1978] AC 705.

[20] Are there any cases falling within this exception? We doubt it. People sometimes use the word 'inexplicably' to mean 'unpredictably', or 'irrationally'. But in this context 'inexplicably' must mean literally 'without explanation'. Probably no failure to meet a standard is without explanation.

in the face of grave provocation would be up to the standard reasonably expected of a police officer. The reason for asking the question was that the standard is higher than that applicable to people generally. Notice that this is not because police officers necessarily have more self-control; it is because as police officers they ought to have. A police officer challenged by a superior on the question of why she lost her temper on a particular occasion would and should get nowhere by pointing out that she was no more temperamental than an ordinary member of the public. The point is that as a police officer she has no business being even ordinarily temperamental. Her business is to exhibit special coolness under pressure. If she is not up to that then plainly she should not be a police officer. Her loss of temper, if ordinarily temperamental, falls below the applicable professional standard and so gives her no excuse in disciplinary proceedings.

Should it nevertheless give her an excuse in criminal proceedings, if she lost her temper to the point at which she killed? No doubt there are arguments to be had about the extent to which special professional standards should be carried over into the general criminal law. But the very fact that these arguments are intelligible shows that variations in the standard of self-control are possible. These must be variations of a certain kind. To be precise, they must be variations in *roles*. The reason is that to meet a standard is a matter of being up to scratch at something, whether by being good at it or merely adequate, and the question always arises of what the something is that one should be up to scratch at. That something is what we mean by a role. The two roles in play in the present example are the role of police officer and that of ordinary member of the public.[21]

[21] Sometimes in legal treatments of provocation 'ordinary' is offered as a more perspicuous replacement for the statutory term 'reasonable': eg by Lord Goff in *R* v *Morhall* [1996] 1 AC 90. But as our discussion here shows, the relevant ideas of ordinariness and reasonableness are distinct. When the standard of self-control in provocation is said to be the standard of the merely 'ordinary' person, this must be interpreted to mean the *ordinarily reasonable* person. The

If in principle standards of self-control can be higher than the one applicable to people in their capacity as ordinary members of the public, they can surely also be lower. Of course in lowering the standard one faces the same kinds of moral and policy debates that one encounters in raising the standards. Those debates are debates about the desirability of institutionalising in the law standards that belong to roles that are out of the ordinary in calling for or permitting a more temperamental disposition. We all know, for example, that young people are typically more temperamental than adults. Perhaps one aspect of that is that they are less self-controlled. Yet one may and should ask whether and to what extent they should be like that. Arguably there is a role of being a teenager, in which being more temperamental than an adult is a good or fitting thing to be. Arguably that is how a teenager should be: impulsive, passionate, heedless. At the very least to be so seems morally acceptable in a teenager to an extent that it would not be in an adult. Again there is a question of whether it is a good idea to embody this different standard in the excuses available in the criminal law, as we presumably should embody it in the excusatory practices of good parenting. If a teenager is provoked to lose his self-control to the point at which he kills, when a reasonable adult would not have been so

reasonableness standard is not evaded but is implied: cf Neil MacCormick, 'Reasonableness and Objectivity', (1999) 74 Notre Dame LR 1575 at 1580–1581. The standard of 'ordinary' reasonableness is always the standard of reasonableness applicable to a role which is non-specialist relative to some more specialist one that people may have in mind. Thus, relative to the specialist role of a police officer, the role of being an ordinary member of the public sets the 'ordinary' reasonableness standard. It may be more natural not to call being 'an ordinary member of the public' a 'role' at all. The word 'role' may more naturally be reserved for something relatively specialist. But notice that being an ordinary member of the public can itself become relatively specialist, and hence more naturally be described as a role, when contrasted with (say) simply being a human being. Our semi-technical use of the term 'role' ignores these nuances and treats every dimension of one's life in which one may come up to scratch, or fail to do so, as a role.

provoked, should he be held to the adult standard or the teenage standard? Notice that the answer is not a function of the self-control that he actually has, nor of the self-control that people of his age generally have, but rather of the self-control that he and they ought to have if they are to be fit to call themselves proper, self-respecting teenagers.[22]

Is it possible to extend this point to the predicament, say, of battered women, whether their predicament is expressed as a syndrome or simply as a terrible history? The answer depends on whether there is such a thing as a set of special standards for being a good or adequate battered woman, such that this adds up to a role in the sense in which we have been using the term. Even if there are such special standards, is this a role that the criminal law should institutionalise? Both of these subsidiary questions are hard to answer. We tend to think that if there is a distinct role of being a battered woman, with its own distinctively lowered standards of self-control, it should not be institutionalised. This is not simply because the standards are lower, for lower standards should sometimes be upheld, when they are constitutive of worthwhile roles. It is because the role of a battered woman should not exist and its unwarranted existence in our society should not be given the stamp of legal approval. To draw a dramatic parallel, it is possible for people to be good slaves, not just in the sense of being good at performing the tasks of slaves, but also in the sense of being temperamentally and dispositionally well suited to slavery. In an attenuated sense such people can be 'self-respecting slaves', for they live up to the standards of the role that they are forced to play. Nevertheless the role is foul and its standards should not be institutionalised in law. If a slave is provoked to the point of killing someone, be it his master or some other person, in circumstances where a freeman would not

[22] cf the remark of Bridge LJ in the Court of Appeal in *Camplin*, n 19 above, 261: 'youth, and the immaturity which naturally accompanies youth, are not deviations from the norm; they are norms through which we must all of us have passed before attaining adulthood and maturity.'

be so provoked, the slave's response should be judged by the standard appropriate to freemen, not the lesser standard of a lesser being.[23] That is where real self-respect lies.

Of course this – the lowering of standards to fit the role – is not the argument that many campaigners make or wish to make with respect to battered women. The argument that many wish to make is an argument that abandons standards altogether. For them there is no question of *judging* the reactions of battered women, of seeing whether they are up to scratch, of assessing them as reasonable. It is just a matter of making the space to 'excuse' them, by accommodating the reactions that they have been reduced to by their batterers. This is, of course, quite literally to diminish their responsibility by abandoning any claim that they are people who can be judged by standards, in this case by standards of self-control. This makes the whole exercise of accommodation self-defeating, however, since the whole point of pleading provocation rather than diminished responsibility is to garner the respect and self-respect that flows from being judged by the proper standards. The plea of provocation then becomes merely euphemistic: It is really a defence of diminished responsibility by another name, with a more positive public relations spin. Nor should one imagine that the spin is *all*

[23] By the same logic the abhorrent standards which define being a good slavemaster have no place in a civilised criminal law. This is because even when they are by chance good standards they are good standards packaged in a bad role. Charged with excessively bad-tempered killing of a slave the criminal law should have little room for the argument that such bad temper is fitting in a slavemaster and marks him out as a good one. Responding to an earlier version of this argument Nicola Lacey presents it as resting on the idea that the criminal law should not recognise the internal character-standards of roles where those roles are in turn defined in terms of criminal conduct. But that is not the idea. The idea is that criminal law should not recognise the internal character-standards of morally disgraceful or degrading roles. See Lacey, 'Partial Defences to Homicide' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (Oxford: Oxford University Press 2000) 125.

positive. Those who use violence in domestic settings are often systematic torturers. Part of the evil of what they do lies in its tendency gradually to brutalise and dehumanise its victims. It is one thing for the law to admire the resilience of those who survive this torture and manage to maintain their reasonableness. It is quite another for the law to pretend that the torture is never successful, that it never does brutalise and dehumanise its victims to the point at which they no longer react reasonably so that their responsibility is diminished. To pretend that such torture is never successful by rebranding genuine diminished responsibility cases as provocation cases is to understate the evil of the torturer.

The question of fact for the jury

We have identified three objective (that is, impersonal) questions that the jury needs to confront in deciding whether 'the provocation was enough to make a reasonable man do as [the defendant] did' under section 3 of the 1957 Act. First, there is the question of whether the words or deeds identified by the defendant as provocative were capable of being provocative. Is it intelligible to claim to have been provoked by them? Second, there is the question of how provocative those words or deeds really were (to which the answer may still be: not at all). Not everything that is intelligible as a provocation is the grave provocation that it was taken to be. Finally, there is the question of whether loss of self-control to the point of killing was justified by the provocation as it has been identified at the second step, so as to (partially) excuse the killing. We call these three questions 'objective' because they are all standards to which the defendant is held and which necessarily he or she may fail to meet.

It is true that none of these objective questions can be asked entirely in the abstract, without knowing anything about the defendant and his background. To work out what is intelligible as a provocation one needs to know something about the defendant's cultural milieu, for different words and deeds are

intelligible as insults in different cultural milieux. To work out how provocative the words or deeds really were to the defendant one sometimes needs to know whether the defendant possessed or was merely accused of possessing the supposedly distasteful feature that was the subject-matter of the provocation, for sometimes extra insults are built into already insulting remarks when those remarks are addressed to people with particular features. Finally to work out what standard of self-control the defendant should be held to we may need to know in what role he reacted as he did, for different roles are constituted by different standards. These are three different dimensions in which facts about the particular defendant may be relevant to the objective aspects of the provocation defence, but these aspects of the provocation defence remain objective despite their sensitivity to facts about the particular defendant because the standards are not being adjusted merely to make them easier for a defendant who tells a morally sympathetic story to meet. They are all variations relevant in one way or another to the reasonableness of someone's anger, and hence do not require any suspension or qualification of the requirement of reasonableness itself.

Naturally, with all these standards in mind and correctly applied, the jury have not quite finished their task. They must also ask whether the defendant actually did lose her self-control to the point at which she killed. It is not enough that it would have been reasonable for her to do so if in fact she did not do so. This is sometimes known as the 'subjective' element in provocation, but that terminology is misleading. It is better described as the *narrative* element of the defence – that is to say, the story of the defendant's actual reactions, to which the objective standards are applied. The defendant is judged by standards of self-control in response to provocation only because she claims to have lost her self-control. If she did not lose her self-control, the standards do not apply to her. So there is no getting away from the question of whether she really did lose self-control.

In answering this question the jury naturally needs to hear about anything that makes it more or less likely, evidentially speaking, that the defendant did indeed lose her self-control. Every idiosyncrasy of the defendant, extending even to an hysterical or obnoxious temperament, is relevant to this question. In tackling the earlier three questions the courts have often spoken of them as raising problems of the admissibility of evidence. But there are no such problems. All information about the defendant's idiosyncrasies is admissible on the normal relevance condition, that is, if it helps to establish that he or she did indeed lose self-control to the point of killing. There is no question of the law keeping such information from the jury. The question is only what the jurors should do with it when they get it. Our proposal is that they can and should consider *all* of it as evidence of whether the defendant really did lose self-control to the point at which she killed. But they should not consider *any* of it – at least not at face value – in determining the standards to which her reactions will thereafter be subject. In determining those standards some but not all of the evidence adduced to show that she really did lose self-control may be collaterally or back-handedly relevant. That is to say, it is not relevant merely because it helps us to understand the defendant's reactions, to see things as she saw them. It is relevant because it helps us to work out how she *ought* to have seen them.

It is fair to add that in practice there are very limited prospects of a jury finding that a defendant who killed did not in fact lose self-control to the point at which she killed, even though a reasonable person would have done so in the same circumstances. For this possibility to arise the defendant has to be an unreasonably calm or thick-skinned person and yet to have killed for some other reason in the very circumstances in which a reasonable person (less calm, less thick-skinned) would have lost self-control to the point of killing. How might one set about establishing, in the prosecution's shoes, that the defendant is unreasonably calm or thick-skinned? Showing that she is calm or

thick-skinned on other occasions is of limited value to the prosecution in view of the possibility of people acting out of character (to say nothing of the admissibility problem relating to character evidence). So what they need is evidence that she was unreasonably calm or thick-skinned on this occasion.

Sometimes the manner of the killing, or the delay between the supposedly provocative conduct and the killing, may constitute such evidence. The reasonable person would have struck out blindly and/or at once, whereas the defendant attacked only methodically or after a delay. But notice that it is open to the jury, under section 3 of the 1957 Act, to hold that the reasonable person would also have had a methodical or delayed loss of self-control. Loss of self-control is not necessarily incompatible with such responses.[24] If the jury holds that the reasonable person would have shared these responses then the evidence of the method and/or delay on the part of the defendant no longer helps to show that she was unreasonably calm or thick-skinned. If, on the other hand, the jury holds that the reasonable person would not have shared these responses, then the provocation defence is doomed to fail on the objective standards and the question of whether the defendant really did lose self-control becomes moot. Either way, the evidence of method and/or delay in the defendant's reactions does not help the prosecution to win on the narrative element of the defence. Again, the issue is solved in the way that the jury approaches the objective standards. That is why in practice it is unlikely that a case will arise in which a defendant passes the objective standards but fails to establish the narrative element. In particular it is no more likely in cases of delay than in cases of sudden response.

[24] As correctly recognised in *R* v *Thornton* [1992] 1 All ER 306 and – for all its other flaws – *R* v *Ahluwalia*, n 2 above.

Conclusion

The majority of the House of Lords in *Smith* contradicted the traditional interpretation of Lord Diplock's judgment in *Camplin*. Many have thought that Lord Diplock meant to attribute different 'characteristics' to the reasonable person for the purposes of different 'objective' issues arising under section 3.[25] If, for example, the defendant was taunted about his bad temper, then (in a sense) the jury were to consider the effect of this on someone who was both bad-tempered and yet not bad-tempered. Bad-tempered for the purposes of assessing the gravity of the provocation (after all, bad-tempered people may well be taunted about the fact, and the taunts may mean something different to them because the taunts are true). Not bad-tempered, on the other hand, for the purposes of assessing the proper measure of self-control (to understand that somebody is bad-tempered is to understand that they ought to be better tempered and hence judged by higher standards of temper than they actually live up to).

The majority of the House of Lords in *Smith* denied that Lord Diplock meant to draw any such distinction, the application of which they thought would require excessive mental gymnastics of the jury.[26] We think, on the contrary, that Lord Diplock intended to draw exactly this distinction. For it strikes us as a brave but over-simplified stab at the truth.[27] In fact there are not two but *three* different issues in respect of which section 3 requires the jury to set standards by which the defendant is to be judged, and in respect of each of these issues different facts about

[25] No doubt under the influence of Andrew Ashworth's famous article 'The Doctrine of Provocation', n 7 above.

[26] *Smith*, n 1 above, 167-8 per Lord Hoffmann, and 184 per Lord Clyde.

[27] Contrast Yeo's hasty remark (cited with approval by Lord Hoffmann in *Smith*, n 1 above, 167) that the distinction 'bears no conceivable relationship with the underlying rationales of the defence of provocation.' Stanley Yeo, *Unrestrained Killings and the Law* (Delhi: Oxford University Press 1998) 61.

the defendant and his background may bear on what counts as his meeting those standards. In respect of whether the words or deeds that are claimed to have amounted to provocation are capable of amounting to provocation, the defendant's cultural milieu may be relevant. In respect of how grave the provocation really was it may be relevant (as Lord Diplock saw) whether the defendant actually possessed the characteristic about which he was taunted. And in respect of whether he should have lost self-control to the point at which he killed we may need to know what role he or she was occupying at the time. In each case facts about the defendant and his background are needed, not to make the objective standard of reasonableness any the less objective, but to identify exactly what would count as meeting the objective standard of reasonableness in the defendant's case. For the excusatory logic of the provocation defence is not the logic of lowering standards but the logic of upholding them.

We agree that Lord Diplock's attempt to capture this logic in his well-known model jury direction left something to be desired. The direction is a truncated and garbled rendition of the position that Lord Diplock advances, and making any sense of it at all takes very great powers of concentration. You may say that it would take even greater powers of concentration to grasp the pluralistic position that we attempted to spell out above. But it does not follow that the exercise is a difficult one for the jury. What we attempt to spell out above is merely what tolerably morally sensitive people inarticulately do when confronted with the question of whether a reasonable person would have done as the defendant did – unless, of course, they are misled by lawyers and judges who persist in attempting to impose alien (technical) ways of thinking about the problem. In our view there is a case for the judge, in directing the jury, to say nothing that goes beyond the language of section 3. The question of whether the reasonable person would have reacted as the defendant did became invested with regrettable technicality at common law. The reform in section 3 was designed to overcome the tendency

of judges to add their own further glosses to the question of how the reasonable person would have reacted. But judges have been unwilling to surrender their privilege to do so. The majority of the House of Lords in *Smith* may think that they have finally overcome the problem of judicial gloss in the law of provocation but in fact they have taken it to a new nadir. Their raising the question of what the standard is by which the defendant ought to be judged, only to allow that it can be just about any condescending standard that one may care to mention, is not the end of the taste for judicial gloss, but its *reductio ad absurdam*.