Compassion without Respect:
Nine Fallacies in R v Smith (2004)

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Compassion without Respect? Nine Fallacies in *R* v *Smith*†

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Abstract. We argue that the House of Lords' decision on the law of provocation in the recent case of *R* v *Smith* was mistaken in at least nine respects. In its excusatory doctrines, the criminal law admittedly needs to forge an intelligent response to human diversity in general and social pluralism in particular. But this decision is not it.

The facts of the case are well known. Alcoholics Morgan Smith and James McCullagh were longstanding drinking partners. Smith had various grudges against McCullagh, and in particular believed him lately to have stolen the carpenter's tools with which he, Smith, earned his living. On the fatal night, during a drinking session, Smith accused McCullagh of this theft, which McCullach strenuously denied, his repeated denials making an unbelieving Smith increasingly furious. Eventually Smith seized a kitchen knife and stabbed McCullagh to death. There was some evidence of mental illness (clinical depression) on Smith's part. At his trial for murder Smith sought to rely on this evidence for the purposes of both a diminished responsibility plea under s2 of the Homicide Act 1957 and a provocation plea under s3. The judge directed the jury in terms which indicated that the evidence of mental illness should not be taken into account for the purpose of determining the degree of self-control to be expected of the defendant under s3. Having evidently failed to convince the jury that the mental illness was sufficient to diminish his responsibility

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for the purpose of s2, Smith was convicted of murder, and appealed to the Court of Appeal on the ground that the direction in relation to provocation was too restrictive. The standard of the reasonable person under s3, it was argued on his behalf, ought to be adapted in the case of a defendant suffering from a mental illness to embody the degree of self-control to be expected of a reasonable person suffering from that mental illness. His claimed mental illness may not have been regarded by the jury as having been sufficient to diminish his responsibility, but properly directed (it was argued) the jury might nevertheless have regarded it as lowering the applicable standard of self-control under s3 to the point at which they would have granted him a provocation defence.

Smith's appeal came at a propitious time for the law. On the one hand there was the1996 decision of the Privy Council in *Luc Thiet Thuan*, which stood for the proposition that the reasonable person could not be endowed with the defendant's mental illness.[1] That was for the simple reason that mental illness, insofar as it affects one's self-control, deprives one of some or all of one's reasonableness. How can it make sense, asked the Privy Council, to speak of the unreasonable reasonable person? On the other hand, there was the 1997 decision of the Court of Appeal in *Campbell*, in which it was held that the reasonable person should indeed be endowed with the defendant's state of mental health for the purposes of setting the relevant standard of self-control.[2] Pleading *stare decisis*, the court in *Campbell* stood by the line of Court of Appeal authority that the Privy Council had doubted in *Luc Thiet Thuan*.[3] The law had already accepted for many years that, for the purposes of judging the accused's powers of self-

[1] *Luc Thiet Thuan* v *R* [1997] AC 131 (PC). The evidence in *Luc* was actually of brain damage rather than mental illness, but the Privy Council treated it as a case of 'mental abnormality'.

[2] *R* v *Campbell* [1997] 1 Crim App R 199 (CA).

[3] Including *R* v *Ahluwalia* [1992] 4 All ER 889 (CA), *R* v *Dryden* [1995] 4 All ER 987 (CA) and *R* v *Humphreys* [1995] 4 All ER 1008 (CA).

control, the reasonable person had to be endowed with the age and sex of the accused.[4] In the line of cases doubted in *Luc Thiet Thuan* but reaffirmed in *Campbell*, mental illness was held to be relevantly analogous to age and sex. After all, the whole idea of the defence of provocation was to make concessions to human frailty, and what could be a more central example of a suitable frailty than an illness reducing one's powers of self-control?

The Court of Appeal in *R* v *Smith (Morgan)*[5] held itself to be bound by the Court of Appeal's decision in *Campbell*, and hence allowed Smith's appeal on the ground that the trial judge had directed the jury too restrictively regarding the characteristics of the reasonable person in s3 of the Homicide Act. However, in view of the conflict with *Luc Thiet Thuan*, the Court of Appeal certified a question of law of general public importance and gave leave for a prosecution appeal to the House of Lords. The question was whether characteristics other than age and sex are attributable to the reasonable man under s3 for the purpose of setting the relevant standard of self-control.

By a majority of three to two (Lords Millett and Hobhouse dissenting) the House of Lords upheld the decision of the Court of Appeal. The majority (Lords Slynn, Hoffman and Clyde) went beyond the narrow ruling that they were invited to reach by the Court of Appeal's certified question. Not only should mental illness be allowed to go to the jury as a relevant factor in lowering the standard of self-control applicable to the defendant for the purpose of the provocation defence, but so should an indefinite list of other factors that the defendant might wish to adduce in his favour. Indeed the general principle under s3 is that there is no general principle limiting what the jury should be allowed to consider in setting the relevant standard of self-

[4] *R* v *Camplin* [1978] AC 705 (HL). In this paper we will not stop to consider whether the anomalous treatment of age and sex in *Camplin* was warranted. It may be thought by some that this was where the rot set in. But we tend not to share this view, and our criticisms of *Smith* do not depend on it.

[5] [1999] QB 1079 (CA).

control. They should not be constrained by judicial instructions on the point. They should be told that the setting of the standard of self-control is a matter for them. It is open to the judge to explain the doctrine by observing that, in general, the same standards of self-control are applicable to everybody, but in 'an appropriate case'[6] the judge should also make clear that the standard may need to be adjusted to accommodate the defendant's reduced capacity for self-control, which may have any number of different explanations.

In making this superficially liberal ruling, the House of Lords was attempting to deal in one fell swoop with a range of pressures to which the law of provocation has been subject in the last decade or so. They were not exercised only by the immediate problem of whether and how to accommodate mental illness in the provocation defence. They also had in mind a variety of indirectly related and somewhat overlapping problems associated with the alleged maleness of the 'reasonable man' standard and its alleged insensitivity to cultural difference. The question of law before them hence resolved itself into the following broader question: How are we to make room, within the standard of the reasonable person in s3, for the fact of human diversity? The answer favoured by the majority was the simplest answer of all: make the standard fit the person. Allow the jury to hear everything that might conceivably help them to be more understanding of the reactions of the person in the dock before them, and allow (but not require) them to make corresponding relaxations in the applicable standard of self-control.

We have nine complaints to make about the reasoning of the majority in the House of Lords. Although sympathetic to their Lordships' pluralistic anxieties, we find their response confused.

1. The majority in *Smith* thought that the jury should be left at liberty to rely on the defendant's incapacity to control himself as

[6] [2000] 3 WLR 654 at 678 per Lord Hoffmann.

a ground for lowering the standard of self-control to which he is to be held. According to Lord Clyde:

> Society should require that he exercise a reasonable control over himself, but the limits within which control is reasonably to be demanded must take account of characteristics peculiar to him which *reduce* the extent to which he is capable of controlling himself.[7]

But once one grants that a defendant's capacity for self-control might be relied upon to modify the standard of self-control by which he is to be judged, one would naturally expect this ruling to cut both ways. People with a higher capacity for self-control should be held to a higher standard just as people with a lower capacity are held to a lower standard. Of course there may be institutional reasons to have an asymmetry here. Often criminal law rules are and should be biased towards acquittal. But their Lordships make the asymmetry here seem like an aspect of the very logic of excuses. How could this be? If having higher capacities than the abnormally depressed means that one is held to higher excusatory standards than the abnormally depressed, then why shouldn't having higher capacities than the normally sanguine mean that one is likewise held to higher excusatory standards than the normally sanguine? Their Lordships cannot easily answer that the difference between the abnormal and the normal is the critical one here. For this is the very contrast, the reliability of which the majority doubts: 'The boundary between the normal and the abnormal,' objects Lord Hoffmann, 'is very often a matter of opinion.'[8] Is the thought simply that people with an abnormally high measure of self-control won't ever lose it to the point of killing? If so that is mistaken, for they may act out of character. So we are left with the question of why the standard of self-control for the purposes of the law of provocation is apparently apt to be lowered, and yet not apt to be

[7] Ibid at 684, emphasis added.
[8] Ibid at 673.

raised, in the light of the accused's personal capacities. As Avory J tersely expressed the challenge in *Lesbini*: 'It would seem to follow from your proposition that a bad-tempered man would be entitled to a verdict of manslaughter when a good-tempered man would be liable to be convicted of murder.'[9]

2. In reply to Avory J it may be said that it is not being bad-tempered that gains one excusatory advantage, but rather being incapable of being better-tempered. It is not those who merely lack self-control but those who lack the capacity for self-control who enjoy extra excusatory latitude according to the House of Lords in *Smith*. In the words, once again, of Lord Clyde:

> While I fully recognise the importance of not allowing the effects of a quarrelsome or choleric temperament to serve as a factor which may reduce the crime of murder to one of manslaughter, nevertheless I consider that justice cannot be done without regard to the particular frailties of particular individuals where their capacity to restrain themselves in the face of provocation is lessened by some affliction which falls short of a mental abnormality.[10]

But one's capacity for self-control is not something logically distinct from the self-control that one actually has. Like other traits of character, self-control is a capacity that one does not have unless one also has the tendency to exercise it.[11] There is no such thing as someone who lacks the tendency but has the capacity, or in other words someone who could be more self-controlled than he is. To lack self-control is to lack the capacity for self-control. Thus it makes no sense to regard the fact that someone lacks the capacity for self-control as helping to excuse their lack of self-control. This is akin to regarding someone's dishonesty as

[9] *R* v *Lesbini* [1914] 3 KB 1116 at 1118 (CCA)
[10] [2000] 3 WLR 654 at 682.
[11] These capacity-tendencies are often labelled with the ambivalent word 'propensity'. For more discussion see John Gardner, 'The Gist of Excuses', (1998) 1 *Buffalo Crim LR* 575 at 581-5.

helping to excuse their dishonesty. To be sure, the House of Lords stressed that a sensible jury would not give extra excusatory latitude to the merely bad-tempered, or in Lord Hoffmann's idiom, would 'not allow[ ] someone to rely upon his own violent disposition.'[12] Yet they also invited the jury to give extra excusatory latitude to someone who lacks the capacity to be better-tempered. This is exactly the same someone as the bad-tempered someone – the someone of 'violent disposition' - to whom no latitude should apparently be given.

3. In any event, is it always in one's interests to have one's incapacities taken into account in how one is judged? The majority in the House of Lords seems to think that it is. They seem to imagine that they are being humane by allowing standards of self-control to be lowered in the light of a defendant's peculiar 'frailties'. For Lord Clyde, the purpose of the provocation plea at common law

> was to enable the jury to take account of the plight of an individual accused where his particular situation called for relief from the rigours of the law. It was prompted by ... 'compassion to human infirmity.' ... Examples of those with a post-natal depression or a personality disorder readily come to mind. It would seem to me unrealistic not to recognise the plight of such cases and refuse the compassion of the law to them.[13]

But is it really compassionate to condescend to these rationally incapacitating conditions? A self-respecting defendant may well think otherwise. True, everyone has some interest in avoiding a criminal conviction, even when they are guilty. But it is not their only interest in the criminal trial, nor is it always their most important. Defendants also have an interest in being accorded their status as fully-fledged human beings, i.e. as creatures whose lives are rationally intelligible even when they go off the rails, and who can therefore give a rationally intelligible account of

[12] [2000] 3 WLR 654 at 678.
[13] Ibid at 681 and 682.

how they came to do so. Systematically to bring the criminal law's standards of judgment down to meet people's incapacities threatens this interest. It denies them the fully human measure by which to account for themselves and hold themselves out for judgment. It is true, of course, that excuses are there to make allowances for human frailties. But 'human' here serves mainly as the opposite of 'idiosyncratic'. The emphasis is on the frailties that people share with their fellow human beings *qua* human, rather than the frailties that set them apart. Pleas like diminished responsibility and insanity are different in this respect from excuses. They are reserved for those who are not quite among us, who cannot quite provide an intelligible account of themselves, and whose susceptibility to the full range of human judgment is therefore in doubt. Nobody should wish this status upon themselves. And all else being equal, it is inhumane to wish it upon other people. Yet this is what is wished upon defendants by a provocation defence that always brings the standard of self-control down to meet people's idiosyncrasies. It is because the provocation defence traditionally did not do this that self-respecting people would rather that their cases fell under provocation than under diminished responsibility. *Smith* takes the option away. It is no answer that, even after *Smith*, it is up to the defendant whether to invoke his incapacity in connection with the provocation defence. The point remains that for all defendants the all-important element of rigorous accountability to an objective (i.e. non-idiosyncratic) standard has been diluted. The defendant has no longer any option to be acquitted on the ground that he lived up to such an objective standard, for he is no longer held up to any such standard.

4. It may be said that what self-respecting people really aspire to is a *justification*. Perhaps a rigorously objective standard is what is needed if the defendant is to be able to give a rationally intelligible account of himself in the sense of justifying himself. But provocation is a (partial) excuse, not a (partial) justification. The law, according to Lord Hoffmann, moved away from the 'Re-

storation' idea that 'the angry retaliation ... was in principle justified.'[14] Yet the law still tests the angry retaliation for 'reasonableness'. Surely here the usually rigorous objectivity of the law's 'reasonableness' standard must be diluted in some way? Otherwise how can it be held up as an excusatory standard as opposed to a justificatory one? Although this worry underlay the majority speeches,[15] Lord Millet encapsulated it best in his dissenting speech:

> The expression 'the reasonable man' [in s3 of the Homicide Act 1957] ... is not intended to invoke the concept of reasonable conduct: it can never be reasonable to react to provocation by killing the person responsible. Nor by pleading provocation does the accused claim to have acted reasonably. His case is that he acted unreasonably but only because he was provoked. But while this may not be reasonable it may be understandable, for even normally reasonable people may lose their self-control and react unreasonably if sufficiently provoked.[16]

But this line of thought is confused. It is true that 'reasonable' in the law means something like 'justified'.[17] And it is true that the invocation of reasonableness in the law of provocation therefore gives that defence a kind of 'quasi-justificatory drift'.[18] But what is held out as justified, in the law of provocation, is not the killing, but rather the loss of temper which caused the defendant to kill. She was justified in 'doing as she did', as s3 puts it, where this means 'in getting so angry that she lost self-control to the point at which she killed'. Excuses and justifications, in other words, are exactly alike in respect of the objectivity of the

[14] Ibid at 665.
[15] Ibid at 677 per Lord Hoffmann, at 684 per Lord Clyde.
[16] Ibid at 712.
[17] For recent defences of this view see Neil MacCormick, 'Reasonableness and Objectivity', (1999) 74 *Notre Dame LR* 1575 and John Gardner, 'The Mysterious Case of the Reasonable Person' (2001) 51 *U Toronto LJ* [forthcoming].
[18] This excellent expression is owed to Simon Gardner, 'Instrumentalism and Necessity', (1986) *Ox J Leg Stud* 431 at 433.

standard to which they hold us, for the simple reason that excusing one thing just is justifying another. Only if our beliefs, passions, attitudes (etc.) are justified are our actions on the strength of them excused. This makes excuses a tolerable fallback for self-respecting people, albeit they also carry a certain admission of defeat. People who offer excuses were admittedly not justified in what they did but at least they were justified in what led them to do it.[19] So if tailoring of the reasonable person standard to the defendant's idiosyncrasies would undercut its availability as a justificatory standard, it also undercuts its availability as an excusatory standard. As for Lord Millet's rival 'understandability' standard, plenty of understandable actions are not even partly excusable. They are excusable only to the extent that they are *rationally* understandable, i.e. understandable because the beliefs, passions, attitudes (etc.) on the strength of which they were performed were (at least partly) justified (or reasonable).[20] The mistake is to assume that this makes the actions themselves (at least partly) justified (or reasonable), which of course it does not.[21]

[19] For further explanation see John Gardner, 'Justifications and Reasons' in A.P. Simester and A.T.H. Smith (eds), *Harm and Culpability* (Oxford 1996), 103 at 118-122.

[20] Similar points can be made about other substitutes for 'reasonable' in the provocation context, e.g. 'ordinary'. Obviously, the fact that something is widely done or thought or felt (etc.) does not make it reasonable The vast majority of ordinary people unreasonably overestimate their own driving skills and unreasonably decline to pay a fair rate of income tax. So 'ordinariness' in that sense will not suffice as an interpretation of reasonableness. Rather one needs to read the word 'ordinary' in the provocation context to mean 'reasonably ordinary', i.e. living up to the regular standard of justification applicable to all members of the relevant class (e.g. people, adults) rather than a special standard applicable only to members of some specialised sub-class (e.g. engineers, fathers). In short, it means something like 'reasonable, special roles and responsibilities apart'. Cf. MacCormick, above note 17, at 1580-1.

[21] Jeremy Horder occasionally courted this mistake in his ground-breaking book *Provocation and Responsibility* (Oxford 1992), in which he experimented with the justification-parasitic explanation of excuses relied upon here.

5. Sometimes the majority in the House of Lords see the lowering of the self-control standard to meet the defendant's idiosyncrasies not as a demand of *humanity* but as a demand of *justice*.[22] Here is Lord Hoffmann's comment to that effect:

> The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in an appropriate case be told ... that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the individual case.[23]

Where would the injustice lie, we may well ask, in relegating all questions of 'individual psychological make-up' to the diminished responsibility defence under s2? One can imagine a situation in which two statutory defences sit side by side but do not between them exhaust all the possible fact-combinations, so that some defendants fall into the crack between them.[24] But do provocation and diminished responsibility have such a crack for defendants to fall between? Lord Hoffmann seems to think that there are people who are not psychologically normal (i.e. not apt to have their reactions judged by a rigorously objective 'reasonable person' standard under s3) but also not psychologically abnormal (i.e. not suffering from 'an abnormality of mind'

[22] For an extremely illuminating and not-far-wrong account of the relationship between humanity and justice, see Tom Campbell, 'Humanity before Justice', (1974) 4 *British Journal of Political Science* 1.

[23] [2000] 3 WLR 654 at 678.

[24] One can also imagine two statutory defences that overlap, in the sense that some fact-combinations can be pleaded successfully under either. Lord Hoffmann devotes some energy to showing that this is possible. But nobody seriously doubts it. What they doubt is whether conceding such an overlap in respect of ss2 and 3 would be true to the moral logic of the provisions. This is not to say that they cannot be pleaded as alternatives. It is only to say that they must be pleaded as *genuine* alternatives, i.e. on the footing of two rival interpretations of the defendant's psychological condition.

for the purposes of s2.) We are hard-pressed to imagine who he has in mind here. To Lord Clyde's hint that people with 'post-natal depression or a personality disorder' might fall into this intermediate category unless s3 accommodates them, the answer is obvious: if these conditions are rightly regarded as illnesses or disorders in the first place then they are also rightly regarded as mental abnormalities falling under s2.[25] On this score it is hard to improve upon Lord Hobhouse's response that

> the perceived injustice which the strained construction [of s3 by the majority] is designed to avoid is in fact covered by an application of s2 in accordance with its ordinary meaning.

In preferring to deal with some cases of mental abnormality under s3 rather than under s2 where they would naturally belong, the majority are reacting to the fact that self-respecting defendants are reluctant to plead s2. They wish, as we said before, to be treated as fully responsible human beings who can explain themselves intelligibly and offer regular justifications and excuses for their actions. What is ironic is that the majority should imagine that it is helping such people to maintain their standing as fully responsible human beings, and hence their self-respect, by allowing them to rely on the fact that they were not fully responsible human beings for the purposes of s3 as well as for the purposes of s2. All this does is to make provocation itself the very defence of mental abnormality that self-respecting defendants would rather not plead. Their defence will have a more attractive label ('provocation') but this label is more attractive only because it gestures towards a reading of s3, the rigorously objective reading, which is the very one that the majority in the House of Lords repudiates. For anyone who wants to emerge from a

[25] Of course some so-called 'personality disorders' are really just moral vices. They are inculpating rather than exculpating and should not support a s2 defence any more than they should support a s3 defence.

criminal trial with her self-respect intact, this makes *Smith* an entirely hollow victory. It is a triumph of spin-doctoring.

6. There are various worrying hints in *Smith*, especially in Lord Hoffman's judgment, of a culturally relativised interpretation of the reasonableness standard in provocation. For example:

> Male possessiveness and jealousy should not today be an acceptable reason for loss of self control leading to homicide, whether inflicted upon the women herself or her new lover.[26]

This comment strikes us as odd in various ways. Presumably Lord Hoffman means to cite as unacceptable reasons today not jealousy and possessiveness themselves, but rather the reasons for which jealous and possessive people get angry and lose self-control - e.g. the flirtations of their lovers. He means that such reasons should not nowadays be regarded as sufficient reasons for anyone to lose their tempers to the point at which they kill. But were they ever sufficient reasons? Isn't it the timeless weakness of jealous and possessive people to exaggerate or distort the rational significance of flirtations and the like, or to misinterpret non-flirtatious behaviour as flirtatious and hence to give it the wrong rational significance, and hence, necessarily, to overreact? Is Lord Hoffman suggesting that jealousy and possessiveness were once morally inoccuous traits? We agree that it is possible that dispositions now immoral were once morally inoccuous. But one must be careful not to identify such moral changes with changes in public attitude or opinion. Immoral attitudes to women, such as possessiveness, have often been publicly accepted and even commended. This only goes to show that public opinion is often misguided. If Lord Hoffman had been a judge in such an era, would he have asked of the jury that it aim to apply the common standard, or the (*ex hypothesi* different) proper standard? Naturally juries aiming for the proper standard may sometimes get stuck at

[26] [2000] 3 WLR 654 at 674.

the common standard, for not everyone can achieve adequate critical distance from the common standards of their time. But that is not the issue. The issue is whether the jury should *aim* for the proper standard in the first place, i.e. whether they should be directed to apply it. We regard it as analytically true that they should aim for the proper standard. Many of Lord Hoffman's remarks strike us as being ambiguous on this score. When he cites with approval Lord Diplock's remark in *Camplin* that the reasonableness standard is to be relativised to 'society as it is today'[27] does he mean that it is to be relativised to the standards commonly invoked and relied upon today, never mind how awful? When he says that the jury 'have to apply what they consider to be appropriate standards of behaviour', does he mean that they should uncritically apply their *own* standards 'as representatives of the community'?[28] If so the test is misguided, not to say confused. The jury need to ask themselves what standards of anger and self-control are *right*, not what standards are regarded or treated as right by them, or by society at large, or by some other social constituency.

7. Clearly, the main purpose of s3 was to allow some defences of provocation to succeed that would not have succeeded at common law, for the common law was thought to have hedged the defence about with too many restrictions. According to the majority in *Smith*, fidelity to this statutory purpose has two implications for the reading of the section. One is that the 'reasonable man' standard invoked in s3 cannot possibly be the same rigorously objective standard that was used at common law. The other is that the judge cannot direct the jury to use one specification of the 'reasonable man' rather than another, for this would

[27] Ibid at 674, citing [1978] AC 705 at 717.

[28] [2000] 3 WLR 654 at 678. We think he must mean this because the only rival interpretation of this sentence, namely that the jury should apply appropriate standards of behaviour, tells us nothing beyond the analytic truth that the jury should do the right thing. What else should they do?

be to trespass on the new flexibility which the Act was designed to give to the jury. One may doubt whether either of these moves is really dictated by the statute. We will come to these doubts shortly. But first one may wonder how the two moves are to be reconciled. If the reasonableness standard of s3 cannot be specified by the judge without trespassing on the jury's statutory province, how can we be confident that the effect of the statute will be to distance the reasonableness standard from the (allegedly too restrictive) common law version of it? A jury that is entitled to set any standard at all is entitled to set an extremely severe one. In the face of this tension, the majority in *Smith* naturally try to have it both ways. On the one hand, according to Lord Hoffmann

> the jury was given a normative as well as fact-finding function. They were to determine not merely whether the behaviour of the accused complied with some legal standard but could determine for themselves what the standard in the particular case should be.[29]

But then on the other hand, Lord Hoffmann continues,

> that [does] not mean that [the judge is] required to leave the jury at large and without any assistance in the exercise of their normative role. He could tell the jury that the doctrine of provocation include[s] the principle of objectivity and that they should have regard to that principle in deciding whether the act in question was sufficiently provocative to be acceptable as a partial excuse.[30]

The problem faced by Lord Hoffmann here is obvious. In order to have the jury set an objective standard one needs to tell them which objective standard it is that they are supposed to set. Indeed the words of s3 make this much plain: the jury need to be told to set the objective standard *of the reasonable man*, rather than that of (say) the officious bystander or the proud warrior or the

[29] Ibid at 668.
[30] Ibid at 668.

homo economicus. The Law Lords may well be right in their unanimous view that the exact expression 'the reasonable man' need not be mentioned to convey this. But something needs to be said. The majority in *Smith* sometimes talk as if their approach to jury direction somehow overcomes this necessity. It does not. In the explanation favoured by Lord Hoffmann, the jury should be told to apply

> what they consider to be appropriate standards of behaviour; on the one hand making allowance for human nature and the power of the emotions but, on the other hand, not allowing someone to rely upon his own violent disposition.[31]

This guidance may or may not be better than that famously suggested by Lord Diplock in *Camplin*.[32] But it is just not true that it draws a qualitatively different line between the role of the judge and that of the jury. All are similar attempts to have the judge specify the relevant standard sufficiently to allow the jury to know which standard it is that they are expected to specify still further.

8. Is it true that the rigorously objective standard of self-control applied at common law must be regarded as having been relaxed in at least some dimensions by s3 in order to be faithful to section 3's liberalising purpose? Lord Hoffmann says yes:

> [I]f one reads the debates touching upon the subject in your Lordships House during the passage of the Bill, there can be no doubt that Lord Kilmuir, the Lord Chancellor, was of the opinion that the clause made no change in the concept of the reasonable man. ... Lord Kilmuir had not thought through the consequences of the changes made by the section in the way in which the House had to do in *Camplin*. If one approaches the question of construction in the orthodox way, namely by considering the language of the section against the backdrop of the

[31] Ibid at 678.
[32] [1978] AC 705 at 718

common law of provocation, one has to conclude that the concept of the reasonable man as a touchstone of the objective element could not have been intended to stay the same.[33]

But Lord Kilmuir was not so daft. The backdrop against which s3 was enacted was the extremely restrictive decision of the House of Lords in *Bedder*.[34] The situation in *Bedder*, it will be remembered, was that the defendant was taunted about his impotence, and a fight ensued in the course of which he killed his tormentor. The House of Lords tried to work within the accepted common law doctrine that mere words were incapable of amounting to provocation at common law. Their Lordships were asked to give the taunts some salience by saying that they had already inflamed the defendant by the time the 'real' provocation (the physical aggression) occurred. So the question was: Should one consider the fact that the defendant was already inflamed as relevant to the question of how much self-control he ought to exercise at the later time when he was provoked? The House of Lords said no, and rightly so. To do otherwise would be to allow extra excusatory latitude to the excitable, latitude that even the majority in *Smith* do not want to countenance. The 1957 Act put the problem in *Bedder* to rest not by allowing the fact that the defendant was already inflamed to count in his favour for the purposes of setting the applicable standard of self-control, but by the simpler expedient of allowing that mere words could sometimes be provocative in law. With that change in place the question in *Bedder* would today be different, and many criminal lawyers naturally project this new question back onto the old case. The question would now be: When someone is taunted about his impotence, and is thereby provoked to lose his self-control to the point at which he kills, are we to have regard to the fact that he is impotent (as opposed to the fact that he was already inflamed) in deciding whether the affront he faced was

[33] [2000] 3 WLR 654 at 667.
[34] [1954] 1 WLR 1119 (HL).

sufficiently grave to justify his losing self-control to that point? Obviously the answer to this question is yes, and that is part of what *Camplin* stands for. But notice that this answer has no bearing at all on the standards of self-control to which the defendant is held. There is no suggestion that impotent people have worse tempers than other people, so no suggestion that they should be judged by lower standards of temper. If one doubts this, ask whether impotent people are more prone than other people to lose self-control when confronted by, say, a racist insult. Even if it turns out to be true that impotent people are more generally bad-tempered, still the question of whether their impotence should be taken into account in interpreting the gravity of the provocation is quite distinct from the question of whether it should be allowed to lower the standard of self-control to which they are subject.[35] There is nothing in s3 to suggest that this or any other disability should be used to lower the latter standard, i.e. the rigorously objective standard of self-control that Lord Kilmuir rightly took the Act to be reasserting.

9. Apart from allowing that words as well as deeds could be provocative, thereby rendering moot the *Bedder* problem, s3 clearly wrought one other change in the law. It deprived judges of the power to say that certain provocations (be they words or deeds) were incapable of counting as provocations in law. All provocations borne out be evidence were fit to go the jury. For the majority in *Smith* it follows that directing the jury to make allowances for some but not all of the defendant's idiosyncrasies, and *a fortiori* directing them to make allowances for none at all, is incompatible with the new separation of powers envisaged by the Act. Lord Hoffmann again:

[35] This distinction was exactly and influentially stated by Andrew Ashworth in his path-breaking article 'The Doctrine of Provocation', (1976) 35 *Cambridge LJ* 292. Ashworth's rendition of the distinction was approved by the Privy Council in *Luc* but has now been disapproved by the House of Lords in *Smith*: [2000] 3 WLR 654 at 673-4 per Lord Hoffmann and at 689 per Lord Clyde.

I do not think it is possible to attribute to Parliament in making this change [i.e. the change in separation of powers] any intention other than to legitimate the relaxation of the old law in those cases in which justice appeared to require it and to allow the jury in good conscience to arrive at a verdict which previously would have been perverse [i.e. ones making surreptitious concessions to defendant idiosyncrasies].[36]

Yet it is not only possible, but also more plausible, to attribute a quite different intention to Parliament, namely the intention that such cases should *reach* the jury: nothing should be withheld from the jury by a judicial ruling that no reasonable man could possibly have been provoked by *that*. Whether the jury would then be more relaxed or more hard-nosed than a judge would be an open question. But not everything was left as an open question by the 1957 Act. One thing that the law did not leave open was that the jury were still to ask what effect the provocation (now in the form of words or deeds) would have on *the reasonable man*. Since this question (save for the parenthetical adjustment) was the very same question that they were also confronted with at common law, it is implausible to imagine that s3 was designed to make it a different question from the one it had been before. The point was only that the jury should get to *ask* it more often than before.

Like several other recent decisions of the House of Lords in criminal matters, the decision in *Smith* is lightweight.[37] It replaces important moral distinctions in the law with half-baked pseudo-theories and worthy-sounding platitudes. In its attitude to the jury, it manifests an unholy alliance of judicial cowardice and judicial condescension. Cowardice because the ruling passes the moral buck to the jury, remaining as studiously noncommittal as possible on the most basic questions of the criminal law's moral

[36] Ibid at 668.

[37] We are thinking of the methodologically similar cop-outs in *R* v *Reid* [1992] 1 WLR 793 (HL) and *R* v *Woollin* [1999] AC 82 (HL).

structure. Condescension because at the same time it reflects unhappy assumptions about the moral sensitivity and wit of jurors, who are thought to be incapable of grasping subtle but important moral distinctions when these are embodied in law and explained systematically in open court. Even leaving aside these unhappy reflections on judicial character, the resulting inclination to hand matters over to the jury without explaining exactly what matters are being handed over threatens the rule of law, because it disables prosecutors and defendants alike from knowing what exactly they are up against in court, and hence from making their case properly according to law. The exercise of the criminal trial – as gradually reshaped by the House of Lords - threatens to descend into an unstructured plea for this or that sympathy vote in place of careful deliberation about the legally specified requirements of criminal liability.

One can readily appreciate how their Lordships feel cornered into such softening-up manoeuvres, especially in controversial areas such as the law of provocation. They are plagued by worries about the continuing aptness and legitimacy of the criminal law in the face of ever-expanding social pluralism (understood as the diversity of people's ways of life and relationships rather than the diversity of their opinions and psychological conditions). Nor should this dimension of social change be ignored. In fact we believe – and hope to show in another article[38] – that ever-expanding social pluralism is relevant, in several important but relatively narrow ways, to the proper shape of the provocation defence understood as a (partial) moral excuse. It is one thing to recognise this and to set about working out the exact ways in which expanding social pluralism is relevant to the defence, so that one is equipped to devise a jury direction on provocation suitable to modern social conditions. But it is quite another thing – and in our view quite the wrong thing – to respond by throwing one's hands up in horror and

[38] 'Provocation and Pluralism', in preparation.

inviting an evaluative free-for-all in which anything that induces sympathy by the same token helps to excuse, and in which little more than lip service is paid to the all-important objective (impersonal) standard of the reasonable person in s3, and hence to the all-important self-respect of criminal defendants.