

**SHIFTING GROUNDS OF CRIMINAL LIABILITY: JUSTIFICATION
AND EXCUSE IN THE THEORY OF PROVOCATION**

George Mousourakis

Thesis submitted in accordance with the requirements of
the University of Edinburgh for the degree of Doctor of
Philosophy

C.C.S.P.S.L.

July 1991

I certify that this Thesis consists solely of my own original work, and that all the sources upon which I draw have been identified.

TO MY PARENTS

ACKNOWLEDGMENTS

I am deeply indebted to my supervisors Dr. B. Brown, Professor D.N. MacCormick and Dr. R.A. McCall Smith for their generous assistance and encouragement during the writing of the present thesis. Their criticism and suggestions at each stage have been of considerable help in clarifying the development of the argument. Mistakes, including linguistic mistakes, are my own.

I gratefully acknowledge the financial support that I received at various stages of my work from the Council of Europe, the European University of Berlin, the Erasmus Scholarship Fund and the University of Edinburgh.

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ABSTRACT

This thesis examines the fundamental distinction between justification and excuse in the theory of criminal law as it figures in relation to the partial defence of provocation. It is argued that, by contrast with German and other Continental criminal law systems, the distinction between justification and excuse has not been given enough weight in the development of Anglo-American criminal law doctrine. Although much attention has been paid to principles of legislation and problems of procedural justice and punishment, substantive issues concerning the grounds of criminal responsibility - such as those of justification and excuse - remained largely untouched. In recent years, however, there has been a revival of interest in justification and excuse in Anglo-American criminal jurisprudence. The governing task of the present work is to explore the implications of this approach in depth, arguing that the defence of provocation provides a particularly interesting site because of its potential interpretation as either justification- or excuse-based. The analysis focuses, in particular, on the defence of provocation as it operates in English law, although it includes references to other legal

systems.

The distinction between justification and excuse is crucial in tracking down the rationale of various pleas aimed at debarring or curtailing criminal liability. In general, claims of justification dispute the unlawful character of an act which nominally violates the law. Claims of excuse, on the other hand, do not challenge the unlawfulness of the act - rather, they presuppose an unlawful act - but call in question the blameworthiness of the actor for having committed the wrongful act. Nevertheless, attempts at a clear-cut classification of criminal defences as justifications or excuses run up against serious difficulties. These difficulties have much to do with fact that elements of both justification and excuse often appear to intersect in the same criminal defence, something particularly noticeable in the defence of provocation. Provocation, when pleaded as a partial defence to murder in English law, does not lead to complete acquittal but to the reduction of the crime to the lower criminal category of voluntary manslaughter. Besides its position as a partial defence to murder, provocation may also be pleaded as a factor in the mitigation of sentence as regards criminal offences other than murder. Conceptually the defence rests on two interrelated elements, namely, the wrongful act of provocation and the loss of self-control. On the assumption that the former

element pertains to justification whereas the latter to excuse, the rationale of the defence in law seems difficult to locate.

Following a delineation of the doctrine of provocation in English law, the thesis explores the way provocation can be conceptualised as a partial justification or as a partial excuse and examines the implications of either approach in a number of related issues. These issues include the "reasonable man" test, the requirement of proportionality, the distinction between murder and voluntary manslaughter, provocation and mistake, the relation between provocation and self-defence, cumulative provocation. Although these issues are examined in the doctrinal context of provocation, the arguments put forward in the thesis outline the contours of a general theoretical approach to criminal responsibility.

INTRODUCTION

This thesis examines the question of criminal liability in terms of the theoretical distinction between justification and excuse, using the defence of provocation to focus the issues. It proceeds from the conviction that much of the ambiguity surrounding the theory of defences in Anglo-American law could have been dispensed with had the distinction been given sufficient weight - as happened particularly in German law - while the law was developing. Certainly, the increasing literature on justification and excuse - notably the work of George Fletcher - in recent years shows a renewed interest in the benefits of this approach to conceptualising criminal liability.

[1] The present work focuses for the most part on how the notions of justification and excuse figure in the doctrine of provocation. Nevertheless, the problems it examines and the theoretical approach it adopts in dealing with these problems go beyond the confines of this particular defence. Throughout the thesis, the arguments put forward in discussing specific issues concerning the defence of provocation also indicate the contours of a general theory of criminal responsibility. This introduction has two main objectives. First, it offers a general account of the distinction as developed in German criminal theory and outlines its import in the domain of

criminal responsibility and, in particular, in the analysis of criminal defences. Second, it delineates the possible role of justification and excuse in the jurisprudence of provocation and maps out the main themes around which the subsequent chapters will revolve.

1. On Distinguishing Between Justification and Excuse

By contrast with the general trend in Anglo-American law, the distinction between justification and excuse has been instrumental in the formation of most Continental criminal law systems. [2] The distinction, first recognized in German criminal theory, was preceded and facilitated by a series of important theoretical developments. In German theory, the distinction is related to the elaboration of the even more fundamental differentiation between wrongfulness and blameworthiness. Although initially expressed in these general moral terms, this differentiation was brought closer to law as such through a contrast between unlawfulness (*Rechtswidrigkeit*) and guilt (*Schuld*). The latter distinction was first recognized in the domain of private law [3] and subsequently in criminal theory.

The first step towards forging a notion of guilt separate from unlawfulness has to do with the idea

that the normative principles of law that determine wrongfulness are not reducible to the body of enacted legal rules. According to Kant, this transcendental conception of law, captured in the notion of the legal norm, refers to the conditions of freedom that allow diverse choices in society to harmonise with each other.[4] The legal norm is perceived as pre-existing and transcending the enacted rule which merely prescribes what is to happen if the norm is violated. Whereas the legal rule is obligatory on the basis of formal criteria, the legal norm is obligatory on the basis of its inherent rightness.

Unlawfulness is defined primarily by relation to the legal norm. A criminal act is taken to violate the legal norm which informs a legal provision rather than the particular provision as such for this merely lays down the legal consequences of the violation. The distinction between legal norm and enacted law - as articulated by Karl Binding [5] - allowed German theory to advance a conception of unlawfulness independent of the statutory definition of criminal offence. This development was, in turn, essential to distinguishing between wrongfulness/unlawfulness and guilt/blameworthiness and, subsequently, between justification and excuse.

Binding's second important contribution was his analysis of guilt in terms of intention, recklessness

and negligence.[6] Although he still accepted the view - dominant in German theory at his time - that guilt is indispensable to wrongfulness, his theory of guilt is understood to have facilitated the later formulation of a notion of guilt separate from unlawfulness.

The theoretical distinction between wrongfulness/unlawfulness and guilt/blameworthiness is associated with the development of the so called "tripartite" system in German criminal theory. Crime was defined as an act which a) meets the statutory requirements of a legal provision (*Tatbestandsmassigkeit*), b) is objectively unlawful (*Rechtswidrig*) and c) can be subjectively attributed to the actor (*Schuldhaft*).[7] In this respect, guilt was viewed as the subjective or internal relationship between the actor and the prescribed harm and was demarcated from the objective or external unlawfulness of the act. The subjective link between the actor and the harm captured in the notion of guilt referred to the elements of intention, recklessness and negligence. This approach is known as the "psychological" theory of guilt. [8]

Nevertheless, this clear-cut dichotomy between objective (relevant to wrongfulness/unlawfulness) and subjective (relevant to guilt) elements of crime was finally abandoned in the light of further developments in German criminal theory. It was

accepted that wrongfulness/unlawfulness cannot be adequately canvassed without including a subjective element and, by the same token, that the notion of guilt rests on objective as well as subjective preconditions. In connection with this development, the "psychological" theory of guilt was seen as inadequate and was abandoned in favour of the so called "*normative*" theory of guilt. [9] According to the latter, the requirements of guilt are not restricted to intention, recklessness and negligence, but include in addition considerations of capacity and control. Lack or impairment of the actor's ability to comply with the demands of the law would exclude or mitigate blame, notwithstanding his acting intentionally, recklessly or negligently.

This final form of the distinction between wrongfulness/unlawfulness and guilt/blameworthiness provided the keystone for the subsequent demarcation of justification from excuse. James Goldschmidt was the first to elaborate a convincing account of justification and excuse in German criminal theory, and his theory rests on the fundamental differentiation between legal norm (*Rechtsnorm*) and norm of responsibility (*Pflichtnorm*). [10] Goldschmidt demonstrated that a formally expressed legal norm - a legal provision - which stipulates certain external conduct is tacitly complemented by a norm of responsibility which requires one to regulate his

internal stance so that his actions do not conflict with the legal norm. The distinction between justification and excuse is attuned to that between legal norm and norm of responsibility. Justifications dispute the unlawfulness of a prima facie infringement of a legal norm; excuses challenge the violation of a norm of responsibility - i.e. the correspondence between internal stance and external conduct according to the legal norm. In cases of justification the exclusion of punishment is traceable to what Goldschmidt calls a "greater objective interest", whereas in those of excuse it is traceable to what he calls a "stronger subjective motivation". The distinction between justification and excuse, first captured in Goldschmidt's theory, was subjected to further elaboration and refinement, and is now fully recognized in German law and in other continental legal systems.

An act which satisfies the formal requirements of a criminal offence is deemed nonetheless not unlawful if covered by a permissive or justificatory provision. Justifications complement or modify the primary prohibitory rules by allowing for exceptions under certain prescribed circumstances. Thus, to plead a justification defence is to claim that, in the circumstances, an act which appears to violate a prohibitory rule falls under a justificatory provision. Self-defence provides the paradigmatic

defence here. Excuses, by contrast, do not dispute the unlawfulness of the act but call in question the actor's blameworthiness for his unlawful act. German criminal theory recognizes a differentiation between excusing conditions pertinent to the exclusion or reduction of blameworthiness and excusing conditions pertinent to the exclusion of mens rea as a necessary (although not sufficient) element of guilt. Cases where acting contrary to the law comes as a result of the extraordinary psychological pressure to which the actor was subjected are subsumed under the first category of excuses. In such cases the wrongful act is committed with both knowledge and intention - i.e. with mens rea or with a "guilty" mind - but blameworthiness and hence culpability is precluded or diminished by reason of the overwhelming circumstances the actor found himself in (e.g. duress). On the other hand, excusing conditions pertinent to the exclusion of guilt are understood to negate the necessary volitional or cognitive elements of guilt (insanity, mistake of law). The distinction between justification and excuse offers a basic theoretical formula for a general classification of criminal defences. The demarcation of different perspectives of the same defence - or, in a sense, of different defences operating under the same name - can also be explained on these grounds. On this basis one may distinguish, for example, between self-

defence as a justification and duress as an excuse, as well as between justifying and excusing necessity. [11] Nevertheless, although the above distinctions are now widely accepted in German criminal theory, it has been argued - notably with reference to excessive self-defence - that excusing conditions may sometimes overlap with considerations leading to the reduction of the objective wrongfulness of the act (considerations which could be construed as justificatory in character). [12] For example, in excessive self-defence, besides the admission of psychological pressure as grounds for excuse, the fact that the accused was acting in response to an unlawful attack is considered sufficient to diminish the wrongful character of his act (see chapter 5). The reduction of the objective wrongfulness of the act on such a basis is often treated in German theory under the heading of excuse. Examined primarily in relation to the partial defence of provocation, the problem of the possible overlap of justificatory and excusative elements lies at the heart of our analysis throughout the present thesis.

The distinction between justification and excuse has had little influence on the development of Anglo-American criminal law doctrine. Although the distinction was recognized in the early law, [13] its possible role in the formulation of distinct categories of substantive law has been overlooked.

For example, considering the orthodox view in Anglo-American law, pleading a legal excuse is aimed at disputing mens rea as required by the statutory definition of a criminal offence. However, this identification of the wrongful act with the elements of mens rea and actus reus makes it difficult to separate the wrongful act from the question of its attribution to the actor. [14] As H.L.A. Hart explains with reference to the distinction between justifiable and excusable homicide:

To the modern [English] lawyer this distinction [between justification and excuse] has no longer any legal importance: he would simply consider both kinds of homicide to be cases where some element, negative or positive, required in the full definition of criminal homicide (murder or manslaughter) was lacking.

Hart goes on to note, however, that:

...the distinction between these two different ways in which actions may fail to constitute a criminal offence is still of great moral importance.[15]

Nonetheless, the distinction between justification and excuse is not without practical importance in certain cases. Direct reference to the distinction as understood in English law has been made for instance in the modern cases of *Bourne* [16] and *Cogan*. [17] In these cases it was accepted that duress and lack of

mens rea are excuses and not justifications, and that therefore one could be convicted as an accessory to an offence even if the principal is excused on such grounds. By contrast, other things being equal, an accessory would not be liable to punishment in those cases where the principal successfully pleads a justification defence.

George Fletcher has offered an important lead in re-awakening interest in the distinction between justification and excuse in Anglo-American criminal theory. Fletcher traces the decline of the distinction to the prevalence of positivist ideas in Anglo-American law. He argues that the tendency towards abstracting the judicial decision from the individual case in order to formulate general rules governing judges and juries in their decision-making overlooks the moral foundations of criminal law as "an institution of blame and punishment".[18] Fletcher emphasizes that the moral assessment of the offender cannot but be interwoven with the issues of criminal condemnation and punishment. In this respect, excuses allow exceptions in the ascription of blame and punishment because they block the inference from the wrongful act to the actor's character. Such moral assessment of the offender's character is essential to a theory of criminal responsibility that makes the distribution of punishment dependent upon considerations of

desert. [19][20]

Fletcher argues, moreover, that the common law's reliance on reasonableness - or the "reasonable man" - as a single standard in resolving legal disputes tends to camouflage the fundamental distinction between justification and excuse. This approach is characteristic of what he terms "*flat*" legal discourse - a system in which all the criteria pertinent to the resolution of a legal problem revolve around a single norm. In Fletcher's words:

The reasonable person enables us to blur the line between justification and excuse, between wrongfulness and blameworthiness, and thus renders impossible any ordering of the dimensions of liability. The standard "what would a reasonable man do under the circumstances?" sweeps within one inquiry questions that would otherwise be distinguished as bearing on wrongfulness or blameworthiness. Criteria both of justification and excuse are amenable to the same question. [21]

Fletcher contrasts this with what he calls "*structured*" legal discourse, and points to German law as an example. In this context, legal disputes are resolved in two stages. The admission of an absolute norm, at the first stage, is followed by the introduction of qualifications which limit the scope of the norm, at the second. The distinction between justification and excuse is most at home in a system

which adopts a "structured" approach to solving legal disputes. In such a system the question of wrongfulness of the act would logically precede the question of whether the actor should be held blameworthy and culpable. The issue of justification takes precedence over that of excuse. This structured approach to criminal liability, Fletcher argues, is ingrained in the rationale of the retributive theories of punishment.[22] From the viewpoint of retribution, the question of whether the actor deserves punishment, or what degree of punishment he deserves, cannot be considered before detecting the wrongdoing to be punished. As relevant to the issue of punishment, claims of excuse may be taken into account only after a wrongful act has been identified.

Central to Fletcher's analysis of justification and excuse is the differentiation of the primary or prohibitory norm from the norm of attribution. Primary or prohibitory norms are defined as those imposing duties of conformity on the individual members of society who are expected to guide their conduct accordingly if they are to avoid the sanctions provided when these norms are infringed. The prohibitory norms may be complemented by secondary rules - the rules of justification - which allow for exceptions to their application in certain prescribed circumstances. Thus, the prohibitory norm

"Do not kill" is modified by the provision which licenses killing in self-defence. The rationale of the rules of justification pertains to the fact that, in the specified situation, the conduct in question is assessed differently than under ordinary circumstances - i.e. under those in which the original norm would apply. Besides the primary or prohibitory norms, the norms of attribution are specifically addressed to the judges and juries and map out the grounds for legally excusing someone who infringed a prohibitory norm. By contrast with the rules of justification, the norms of attribution do not modify the primary norms - excuses do not purport to guide conduct - but allow exceptions in ascribing culpability for the violation of primary norms. According to Fletcher:

Wrongful conduct may be defined as the violation of the prohibitory norm as modified by all defenses that create a privileged exception to the norm. The analysis of attribution turns our attention to a totally distinct set of norms, which do not provide directives for action, but spell out the criteria for holding persons accountable for their deeds. The distinction as elaborated here corresponds to the more familiar distinction between justification and excuse. [23]

The revival of interest in the distinction between justification and excuse has broken fresh ground in the jurisprudential analysis of criminal

defences in Anglo-American law.[24] Taking the distinction seriously requires one, first of all, to take a closer look at those fundamental theoretical assumptions upon which certain identifiable conditions or sets of conditions operate as legal defences. In the previous paragraphs it was pointed out that questions of legal justification are basically act-orientated. The conditions which give rise to claims of justification are understood to alter the grounds for the legal and/or moral appraisal of the relevant act. An act which in normal circumstances would fall under the legal description of an offence is now considered to be right or, at least, legally permissible.[25] The circumstances of justification, in other words, dictate an approach to the question of wrongfulness of the act different from that embedded in the primary or prohibitory norm. In order to bring to light the rationale of a justification defence, one would have to consider the possible grounds for excluding unlawfulness under the rules of justification. Three moral theories of legal justification have been proposed in this respect. Briefly, the first theory of justification, based on the principle of *lesser evils*, postulates that in a situation of conflict of interests an act which preserves the superior interest is justified, notwithstanding its being in a narrow sense harmful.[26] Secondly, according to the *forfeiture*

theory of justification, the infliction of harm on a wrongdoer is justified on the admission that, other things being equal, acting wrongfully entails the relinquishment of the wrongdoer's rights.[27] The third moral theory of justification draws support from the *rights-enforcement* principle - or the principle of the *vindication of autonomy* - and claims that one is entitled to pursue one's recognized rights even by inflicting harm on the transgressor. [28] Although the above theories are informed by different principles, they are taken to complement rather than contradict each other (see relevant analysis in chapter 2).

Excuses, on the other hand, are actor-orientated. The wrongfulness and unlawfulness of the act in abstracto remains non-contentious; what is called into question is the relationship between the wrongful act and the actor. At this point I would like to draw attention to the important differentiation between three types of conditions which, although often all treated under the heading of excuse, operate in clearly distinct ways. First, there are those conditions which, other things being equal, allow exculpation by excluding the imputation of *authorship-responsibility* for the wrongful act at stake. These conditions provide the grounds of a legal defence by negating the necessary mental element of the relevant act. Criminal defences

expressed in the form "I did not know what I was doing", or "I was not in control of my bodily movements", dispute authorship-responsibility and thus, in a sense, question the wrongful act as a matter of fact. Automatism and mistake of fact offer the typical examples of this kind of conditions. The second type of excusing conditions (excuses proper) operate on the basis that, although the wrongful act was done with both knowledge and intention, the actor had no freedom of choice, or acted involuntarily. These excuses take the form "I did commit the wrongful act, but I could not have done otherwise because I was under irresistible coercion". Duress and excusing - as opposed to justifying - necessity exemplify this category of excuses. As we shall later consider, this is the kind of excusative claim that most accords with the defence of provocation. Finally, the third class of excuses which includes insanity and, arguably, mistake of law, challenges the actor's being amenable to the generally applicable criteria of criminal responsibility. [29] This sort of excuse often appears to share characteristics of the first two categories. Nevertheless, it is argued that one should draw a distinction between excuses proper - i.e. those operating on the admission of an unlawful act - and those conditions that negate some element of the definition of a criminal offence. [30]

2. Justification and Excuse in the Theory of Provocation

Although the theory of justification and excuse offers a firm basis for bringing to light the rationale of the various defences in law, attempts at clarification along these lines come up against a number of problems. These problems have much to do with the fact that often elements both of justification and of excuse appear to interlink in the conceptual substructure of a legal defence.[31] The omnipresent tendency in Anglo-American law to sweep questions of justification and excuse under the objective standard of reasonableness adds to the confusion. Nowhere are those problems more evident than in the legal doctrine of provocation. First of all, the function of provocation as only a "partial" defence makes it necessary for us to examine how justification and excuse in this context could be conceptualized in partial terms. Provocation, when pleaded as a "partial" defence to murder in English law, is not aimed at complete exoneration but only at the reduction of homicide to the lower criminal category of voluntary or intentional manslaughter. Conceptually, the defence is understood to depend equally upon two interrelated elements, namely, a) the wrongful act of provocation and b) impaired volition or loss of self-control. The question

therefore is which of these elements may be seen as providing the theoretical basis of the defence. Is it the wrongfulness of the victim's provocative conduct - which would entitle the actor to some sort of retaliation - that underpins the nature of provocation as a partial defence? If this were true, provocation would be viewed as a justification-based defence. Considering that the role of provocation is to reduce murder to manslaughter, such an approach does seem well attuned to the general assumption that justifying conditions alter the grounds for the legal appraisal of the relevant act at stake. Or is it rather in the admission that the actor was not in control of himself at the time of his retaliation that the rationale of the defence lies? If this were accepted, provocation should be treated as an excuse-based defence pertinent to those excuses operating on the admission of a wrongful act (excuses proper). Given, however, that as a partial defence to murder, provocation is aimed at reducing the criminal category of homicide - and as such it has to do with the determination of the criminal offence - the leading view that these excuses are identifiable on the level of attribution might perhaps appear at odds with the interpretation of the defence as an excuse. I would agree with J. Dressler when, considering the position in Anglo-American law, he asserts that:

Confusion surrounds the provocation defence. On the one hand, the defence is a concession to human weakness; the requirement that the defendant act in sudden heat of passion finds its roots in excuse theory. On the other hand the wrongful conduct requirement may be, and certainly some decisions based on that element are, justificatory in character. It is likely that some of the confusion surrounding the defence is inherent to the situation, but it is also probably true that English and American courts were insufficiently concerned about the justification-excuse distinctions while the law developed. [32]

In the following chapters I shall attempt to offer a fuller account of these divergent theoretical approaches to provocation as a partial justification and as a partial excuse, and highlight the implications of either approach in a number of related issues. I shall be arguing that, notwithstanding that both provocation and loss of self-control are indispensable elements of the defence, the excusative element should be given the priority. In this respect, one should point out, the fact that the plea of provocation is essentially aimed at the reappraisal of homicide does not contradict its conception as an excuse.

Chapter 1 examines different descriptions of provocation and offers an overview of the defence in English law. Moreover, this chapter maps the

justification-excuse distinction onto provocation and pinpoints certain problematic areas to be developed in later chapters. Following an outline of the distinction between murder and manslaughter, the main problems surrounding the law of provocation are highlighted as they emerge from the discussion of leading cases. Chapter 2 examines more closely how provocation can be conceptualised as a partial justification or as a partial excuse and attempts a critical survey of the partial justification doctrine and its implications in comparison with the partial excuse doctrine. Chapter 3 sets out the excusative element in provocation and discusses the interpretation of the defence as a concession to human weakness. The agenda for chapter 4 includes a comparative analysis of the objective standard of "reasonable man" as it figures in the doctrine of provocation and that of mistake of fact. The role of provocation in reducing the legal category of homicide and the principle of proportionality are further examined thereafter. Chapter 5 takes up problems of possible overlap between provocation and excessive self-defence, and explores a number of theoretical issues on the basis of a comparative analysis of self-defence and provocation. Finally, chapter 6 focuses on the problem of cumulative provocation and examines how the ensuing plea might be dealt with in law in the light of the theoretical

propositions put forward in the thesis.

NOTES

1. See, e.g.: G. Fletcher, *Rethinking Criminal Law*, (1978), esp. chapter 10; Fletcher, "The Right and the Reasonable", *Harvard Law Review* (1985), 949; Fletcher, "The Individualization of Excusing Conditions", *Southern California Law Review* 47 (1974), 1269; Fletcher, "Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?", *U.C.L.A. Law Review* 26 (1979), 1355.

See also: H. Fingarette, "Rethinking Criminal Law Excuses", *Yale Law Journal* 89 (1980), 1002; J. Dressler, "New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking", *U.C.L.A. Law Review* 32 (1984), 61; Dressler, *Understanding Criminal Law*, New York (1987), 179-190; Dressler, "Justifications and Excuses: A Brief Review of the Concepts and the Literature", *Wayne Law Review* 33 (1987), 1155. A. Eser, "Justification and Excuse", *American Journal of Comparative Law* 24 (1976), 621; K. Greenawalt, "The Perplexing Borders of Justification and Excuse", *Columbia Law Review* 84 (1984), 1897; F. McAuley, "The Theory of Justification and Excuse: Some Italian Lessons", *American Journal of Comparative Law* 35 (1987), 359; P. Robinson, "Criminal Law Defenses: A Systematic Analysis", *Columbia Law Review* 82 (1982), 199 at 291; "A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability", *U.C.L.A. Law Review* 23 (1975), 266; P. Alldridge, "The Coherence of Defences", *Criminal Law Review* [1983], 665; L. Heintz, "The Logic of Defenses", *American Philosophical Quarterly* 18 (July 1981), 243; I.H. Dennis, "Duress, Murder and Criminal Responsibility",

2. The distinction between justification and excuse is now fully recognized for example in Italian, Spanish and Greek criminal law doctrine.

3. As Jhering first explained, the negation of the subjective blameworthiness of the actor does not necessarily preclude the wrongful act from having certain legal consequences.

R. Jhering, *Das Schuldmoment im Romischen Privatrecht* 4, (1867); quoted in A. Eser, "Justification and Excuse", *American Journal of Comparative Law* 24 (1976), p.625.

4. I. Kant, *The Metaphysical Elements of Justice*; quoted in G. Fletcher, "The Right and the Reasonable", *Harvard Law Review* (1985), p.965.

5. K. Binding, 1 *Die Normen und ihre Ubertretung* 135 (1872); quoted in A. Eser, *supra* note 3, p. 625.

6. K. Binding, *supra* note 5, p. 625.

7. As elaborated by E. Beling and v. Liszt; see A. Eser, *supra* note 3, pp.625-627.

Nevertheless, the "tripartite" approach to crime has been met with scepticism by some authors who argue that the satisfaction of the formal requirements of a criminal law provision is but an element of the unlawfulness/wrongfulness of the act. They propose, instead, a twofold approach to criminal liability based solely on the distinction between wrongfulness and guilt. See, e.g.: Schmidhauser, *Strafrecht, Allgemeiner Teil* 141 ff. (2nd ed. 1975); see Eser, *supra* note 3, p.627.

8. See A. Eser, *supra* note 3, p. 626-627.

9. As articulated by R. Frank and J. Goldschmidt; see A. Eser, *supra* note 3, p. 627.

10. J. Goldschmidt, "Der Notstand, ein Schuldproblem", 4 *Osterr. Zeitschrift für Strafrecht* 144 ff. (1913); quoted in A. Eser, *supra* note 3, p. 628.

11. As P. Robinson points out:

Nor is there necessarily any problem even with recognizing two different categories of defense under the same label at the same time and in the same jurisdiction. A jurisdiction may properly provide a "self-defense" justification and a "self-defense" excuse. Such multiple defenses may even occur in the same provision...

He argues, however, that "when this is done, the potential for misunderstanding and confusion increases significantly". *Criminal Law Defenses: A Systematic Analysis*, 82 *Columbia L. R.* (1982) 199 at p.240. And see: M. Gur-Ayre, "Should the Criminal Law Distinguish Between Necessity as a Justification and Necessity as an Excuse?", *Law Quarterly Review* 102 (1986), 71.

12. See A. Eser, *supra* note 3, p. 636.

13. See e.g. Blackstone, *Commentaries on the Law of England*, vol.4, ch.14, pp.180-186.

Blackstone distinguishes between justifiable homicide "as it is committed for the prevention of any forcible and atrocious crime" (p.180), and excusable homicide which could be of two sorts: "either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation" (*ibid.*, p.182).

14. See e.g. Stephen, 3 *History of the Criminal Law of England* (1883) 11; J. Hall, *General Principles of*

Criminal Law (1960) 233; see also: J. Hall, "Comment on Justification and Excuse", *American Journal of Comparative Law* (1976), 638.

15. H.L.A. Hart, "Prolegomenon to the Principles of Punishment", in *Punishment and Responsibility*, (1968) p.13. J.L. Austin distinguishes between justification and excuse as follows:

In the one defence, briefly, we accept responsibility but deny that it [the act] was bad; in the other, we admit that it was bad but don't accept full, or even any, responsibility.

"A Plea for Excuses", in *The Philosophy of Action*, (1968), 19 at 20.

According to Robinson:

Justifications and excuses may seem similar in that both are general defenses which exculpate an actor because of his blamelessness...The conceptual distinction remains an important one, however. Justified conduct is correct behaviour which is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the act, not the actor. An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him. Excuses do not destroy blame ... rather, they shift it from the actor to the excusing conditions. The focus in excuses is on the actor. Acts are justified; actors are excused.

Supra note 11, p.229.

16. Bourne (152), 36 Cr.App.R. 125.

17. Cogan (1976), Q.B. 217.

For an account of the justification-excuse distinction as it relates to English criminal law and procedure, see: J.C. Smith, *Justification and Excuse in the Criminal Law, The Hamlyn Lectures*, (1989).

18. Fletcher, *Rethinking Criminal Law*, (1978), p.467. And see "The Individualization of Excusing Conditions", *Southern California Law Review* 47, (1974), 1269.

19. See Fletcher, *supra* note 18, p.800.

20. Excusing conditions are treated under four theories of criminal responsibility. The first such theory holds that the attribution of blame and punishment presupposes a negative moral judgement of the actor's character as manifested by his voluntarily committing a wrongful act (the desert/voluntariness thesis). Because excusing conditions block the inference from the wrongful act to a flawed character, they render blame and punishment inappropriate. See, e.g.: G. Fletcher, *supra* note 18; M. Bayles, "Character, Purpose and Criminal Responsibility", *Law and Philosophy* 1 (1982) 5-20; J. Feinberg, *Doing and Deserving*, (1970).

The second theory of criminal responsibility centres on the idea that the attribution of blame and punishment is appropriate only if the actor was "given a fair opportunity to choose between keeping the law required for society's protection or paying the penalty" (the fairness/voluntariness thesis) (H.L.A. Hart, "Prolegomenon to the Principles of Punishment" in *Punishment and Responsibility*, (1968), pp. 22-23). This theory hinges also on the assumption that blame and punishment presuppose moral responsibility, but it places the emphasis on a contractarian thesis rather than a desert thesis. From this viewpoint, Hart explains the rationale of excuses as follows:

One necessary condition of the just application of a punishment is normally expressed by saying that the agent "could

have helped" doing what he did, and hence the need to inquire into the "inner facts" is dictated not by the moral principle that only the doing of an immoral act may be legally punished, but by the moral principle that no one should be punished who could not help doing what he did. This is a necessary condition (unless strict liability is admitted) for the moral propriety of legal punishment and no doubt also for moral censure; in this respect law and morals are similar. But this similarity as to the one essential condition that there must be a "voluntary" action if legal punishment or moral censure is to be morally permissible does not mean that legal punishment is morally permissible only where the agent has done something morally wrong.

Hart, "Legal Responsibility and Excuses", in *Punishment and Responsibility*, (1968), pp. 39-40. See also: Hart, *The Concept of Law*, (1961), p.173; H. Morris, "Persons and Punishment", *The Monist* 52 (1968), 475-501.

According to the third - utilitarian - theory of criminal responsibility, moral responsibility is not a necessary condition for criminal responsibility. Admitting excuses is seen as a further requirement of a criminal justice system orientated towards the promotion of the greater net benefit for society. In other words, excuses are regarded as cases where the exemption from punishment outbalances the advantages of punishing. Criminal punishment, as pertinent to the "failure to be motivated to avoid a forbidden consequence or to be indifferent to a substantial risk that it occur", presupposes a voluntary act. In this respect, excuses exclude punishment for an otherwise unjustified and unlawful act because, by negating voluntariness, they block the manifestation of "any defect of standing motivation or character" See: R. Brandt, "A Motivational Theory of Excuses in the Criminal Law", *Criminal Justice Nomos XXVII*, (1985), 165; "A Utilitarian Theory of Excuses", *Philosophical Review* 78, (1969), 337.

Finally, the so called "objective" theory of criminal responsibility is the only one which refuses a place to the voluntariness thesis. This theory holds that one should not be liable to criminal punishment if he acted as a reasonable person with "ordinary intelligence and reasonable prudence" would have acted in the circumstances. The objective theory rejects the idea of individualizing excusing conditions, arguing that one cannot have a full picture of a person's capacities and limitations (the problem of proof). The individualization of the criteria of liability is, moreover, incompatible with a system of criminal law whose main aim is "to induce external conformity to rule". See: O. Holmes, *The Common Law*, (1964), 42,43,87.

For a critical approach to the above theories see: J.R. Lindgren, "Criminal Responsibility Reconsidered", *Law and Philosophy* 6 (1987), 89.

21. G. Fletcher, "The Right and the Reasonable", *Harvard Law Review* (1985), 949 at pp. 962-963.

22. Fletcher, *supra* note 20, p.961.

For another view on the relationship between excuses and retribution, see: J. Dressler, "Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code", *Rutgers Law Journal* 19 (1988) 671.

23. Fletcher, *supra* note 18, p.458.

24. I would agree with the view that:

The criminal theory concerning justification and excuse can no longer be ignored by the courts. Its primary contribution is consistency in the development of the law, a goal which the courts themselves proclaim as most desirable. Without the theory to guide the courts, aspects of the law of self-defence, duress, necessity and, until only

recently, provocation, have developed in an inconsistent fashion.

Stanley Meng Heong Yeo, "Proportionality in Criminal Defences", *Criminal Law Journal* 12 (1988), p.227.

25. According to G. Williams:

A defence is justificatory (for the purpose of the criminal law) whenever it denies the objective wrongness of the act... Normally a justification is any defence affirming that the act, state of affairs or consequences are, on balance, to be socially approved, or are matters about which society is neutral.

"The Theory of Excuses", *Criminal Law Review* [1982] 732, at p.735. See also, G. Williams, "Offences and Defences", *Legal Studies* 2,3, (Nov. 1982), p.238.

26. In Robinson's words:

The harm caused by the justified behaviour remains a legally recognised harm which is to be avoided whenever possible. Under the special justifying circumstances, however, that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest...

Supra note 11, p.213.

And as G. Williams argues by reference to the justification of self-defence:

Self-defence is classified as a justification on the basis that the interests of the person attacked are greater than those of the attacker. The aggressor's culpability in starting the fight tips the scales in favour of the defendant.

"The Theory of Excuses", supra note 24, p.739.

Fletcher points out that "All justificatory arguments can be reduced to a balancing of competing interests and a judgment in favour of the superior interest". Fletcher, supra note 18, p.769.

27. See S.H. Kadish, "Respect for Life and Regard for Rights in the Criminal Law", *California Law Review* 64

(1976), p.871, at pp.883-884.

28. Kadish, *supra* note 26, pp. 884-886.

From this point of view, the justification e.g. of self-defence pertains to the right of a person, whose sphere of autonomy is threatened, to repel the aggression and restore the integrity of his domain. As Fletcher points out:

...in contrast to the necessary defence as a variation of lesser evils, the aggressor's culpability appears to be irrelevant; what counts is the objective nature of the aggressor's intrusion.

Supra note 1, p.862.

According to D. Hoekema:

To have a right is to have the moral authority or permission - i.e., to have the right - to prevent violation of one's right. I shall refer to the right to prevent violations of one's rights as a second-order right...Every right, in other words, includes a second-order right. This thesis draws its support from the way in which rights enter into the moral evaluation of actions. Force and coercion are *prima facie* wrong, because they take from their victims the freedom to choose their actions in the usual way. The assertion of the need to protect a right, however, is a defence for the use of force and coercion. The moral basis of this defense is the second-order right each person has to protect the exercise of his rights.

Rights and Wrongs, (1986), p.113.

29. For an interesting account of the grounds for distinguishing between different types of excusing conditions, see J. Hruschka, "Imputation", *Brigham Young Univ. Law Review* (1986), p. 669.

30. According to G. Williams:

...a defence is an excuse when (1) it amounts to a denial of the proscribed state of mind or negligence, or when (2) it affirms that the defendant was not fully free and responsible agent so as to be held accountable...

In contrast with the above approach, Fletcher and Robinson reject that mens rea or negligence raise questions of excuse, arguing that those issues pertain only to the definition of a criminal offence. And see Hruschka, *supra* note 28, p. 701.

31 K. Greenawalt traces the distinction between justification and excuse to the distinction between "warranted action and unwarranted action for which the actor is not to blame", and asserts that:

The difficulty in distinguishing rests on the conceptual fuzziness of the terms "justification" and "excuse" in ordinary usage and on the uneasy quality of many of the moral judgments that underlie decisions that behavior should not be treated as criminal. Beyond these conceptual difficulties, there are features of the criminal process, notably the general verdict rendered by lay jurors in criminal trials, that would impede implementation in individual cases of any system that distinguishes between justification and excuse.

Greenawalt argues against the systematization of criminal defences on the basis of the justification-excuse distinction in Anglo-American law, but he does not dispute the merits of this sort of analysis for both the moral and legal discourse. "The Perplexing Borders of Justification and Excuse", *Columbia Law Review* 84 (1984), 1897, pp. 1898, 1927.

32. Dressler, "Provocation: Partial Justification or Partial Excuse?", *Modern Law Review* 51 (1988), 467 at 480. As Dressler points out elsewhere:

...careful analysis of the language and of the results of common law heat of passion cases demonstrates that there is an uncertainty whether the defence is a sub-species of justification or of excuse.

"Rethinking Heat of Passion: A Defence in Search of a Rationale", 73 *Journal of Criminal Law and Criminology* (1982), 421 at p. 428.

CHAPTER 1: PROVOCATION AND CRIMINAL LIABILITY

1. Prefatory Note

In English law, provocation is treated as a separate *partial* defence aimed only at the reduction of murder to *voluntary* manslaughter. Further, as a factor in mitigation, provocation is taken into account at the sentencing stage to reduce the degree of punishment, following conviction of a criminal offence other than murder. The appropriate amount of punishment is determined according to the discretionary power allocated by the law to the sentencer-judge. Mitigation presupposes, among other things, that different degrees of culpability can be established within the purview of the same criminal offence. The correspondence of punishment to culpability represents a fundamental principle of justice, reflected in the admission of discretion at the sentencing stage. Equally fundamental is the principle that a verdict of guilty would not be warranted, unless the conditions of the criminal offence one is charged with are fully met. Partial defences operate in this direction. Although they do not relieve the actor of all criminal responsibility, as total defences do, they reduce the criminal category in which the wrongful act is subsumed.

In English law, these defences - provocation, diminished responsibility and the rule relating to suicide pacts - are traditionally confined to the law of homicide. Two interrelated questions have thus arisen thereby: first, are partial defences dependent exclusively upon the fact that in English law a conviction of murder entails a mandatory penalty (life imprisonment)? A positive answer to this question could mean that partial defences as a distinct category would be superfluous, if discretion as to the punishment for murder were recognized. Second, if it is accepted that partial defences are endowed with a substantial status, that is, independent of the fixed penalty provided for murder, then why not extend their scope to offences other than murder, possibly by creating new offence categories? To answer these questions would require one to trace the relationship of partial defences to the criteria of criminal liability as embedded in the demarcation of legal categories of homicide. By focusing primarily on provocation, this is the main task of the present work.

Following a general illustration of the distinction between murder and manslaughter, this chapter maps out the main problems besetting the defence of provocation as it operates in English law. These problems will subsequently be revisited in the light of the theoretical analysis of provocation as a

partial justification or partial excuse in chapters 2 and 3.

2. On the Distinction Between Murder and Manslaughter in English Law: Problems of Classification

The traditional common law distinction of unlawful homicide into murder and manslaughter has been established on the basis of important differences pertinent to the so called "internal" elements of crime. [1] Those differences are reflected in the moral and legal weight attached to the relevant crimes. Whereas both types of homicide share the same external elements - i.e. the unlawful killing of a human being within the Queen's Peace and where the death occurred within a year and a day of the last act done by the actor to the victim - they differ significantly as regards the actor's state of mind at the time of his act. Those mental states determine the gravity of homicide and, accordingly, its legal categorization. However, the exact identification of the relevant mental states has been a matter of dispute both in practice and in theory; in practice because the required state of mind often appears inaccessible to the legal methods of proof and in theory the major problem has been to articulate comprehensive criteria in order to conceptualize

those states and how they relate to different categories of homicide. For this purpose the notion of "*malice aforethought*" has traditionally played the decisive part. Thus, unlawful homicide is to be categorized as murder only if it is accompanied by malice aforethought. [2] Anything less than that is to be subsumed under the wider category of manslaughter.

Questions have arisen, nonetheless, about what the precise meaning of malice aforethought should be. In early law, the term was taken to denote deliberation or premeditation. However, according to the currently preponderant view, malice aforethought does not necessarily involve premeditation. [3]

Malice aforethought exists where a person intentionally commits an act resulting in the death of any person, knowing that such act would necessarily cause death or grievous bodily harm to some person, whether such person is the person actually killed or not. [4]

Thus, an intention to kill or cause grievous bodily harm is deemed sufficient for conviction of murder, if death results. Nevertheless, in order to encompass within the category of murder those homicides due to gross negligence, attempts have been made to expand the meaning of malice aforethought. The question of whether gross negligence or recklessness could

buttress a conviction of murder has been a source of controversy in English law.

Briefly, in *Smith* [5], the House of Lords expounded the requirement of intention in murder in terms broad enough to engulf cases of extreme recklessness. In *Hyam* [6], the majority of the House of Lords adopted the view that malice aforethought should be deemed present whenever the defendant foresaw death or serious bodily harm as being "highly probable". Following strong criticisms, the House of Lords in *Moloney* [7] reinstated the position that malice aforethought requires proof either of an intention to kill or of an intention to cause grievous bodily harm. Recklessness in the above sense has thereby been excluded from the mens rea of murder. Although the currently dominant view appears thus to identify malice aforethought with an intention to kill, the foresight of consequences is considered as relevant to the question of whether the killing was in fact intentional. [8] However, this approach to the requirement of malice aforethought has not done enough to remove the ambiguity that has long dogged the analysis of homicide.

Moreover, English law's sub-distinction of manslaughter to "voluntary" and "involuntary" has added to the confusion. Considering the current approach to malice aforethought as denoting

intentionality, the term "voluntary" might perhaps be misleading if taken as synonymous to "intentional". As we shall later consider, however, one may argue that the two terms cannot be used interchangeably.

The category of involuntary manslaughter embraces those killings where the actor did not possess the malice aforethought required for murder. Nevertheless, the actor is still to blame to a lesser degree on the presumption that he foresaw - although he did not intend - or should have foreseen death or serious bodily harm as a result of his action. Involuntary manslaughter may be established in three ways: first, by showing that the accused was "grossly negligent" as to the occurrence of death or serious bodily harm. This would obtain whenever the accused failed to realize what the consequences of his action may be - consequences which a "reasonable person" is expected to anticipate and forestall. The reasonable man test is applied here to determine whether, other things being equal, the actor did not meet the required standards of care. [9] However, only death or grievous bodily harm, when they are considered foreseeable according to the standard, would suffice to establish gross negligence. Problems arise about the determination of the point beyond which the negligence should be regarded as "gross" and, in relation to this, about singling out those of the accused's characteristics that may be taken into

account. Second, involuntary manslaughter may be established whenever death occurred as a result of some other unlawful activity, if such an activity was likely to cause some physical harm (*constructive manslaughter*). In the past, killings that took place while the agent was committing a violent felony were automatically classified as murder. Nevertheless, this does not represent the present law which treats such a killing as manslaughter irrespective of the seriousness of the "original" crime. The seriousness of the initial crime may perhaps be treated as an aggravating factor at the sentencing level. In *Church*, Davies L.J. stated the doctrine of constructive manslaughter as follows:

The unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm. [10]

It is not required thereby, under the present law, to prove that the actor really anticipated the occurrence of any harm to the victim as a consequence of his unlawful activity. This position has been reaffirmed by the House of Lords in *Newbury*. [11] Third, involuntary manslaughter may also be established in some cases where the accused foresaw death or grievous bodily harm as a possible result of his actions, even though he did not believe it was

"highly" likely to follow (subjective recklessness as defined in *Cunningham*). [12]

Finally, the category of voluntary manslaughter - to which murder is reduced following a successful plea of provocation - includes those killings which, intentional though they may be, are taken to fall short of murder. The following analysis is meant to be a first step towards clarifying the role of provocation to delineating the scope of this category.

3. Provocation and Gradation of Liability for Homicide

According to the preponderant view in English law, the reduction of murder to voluntary manslaughter on the ground of provocation does not call in question the element of malice aforethought. [13] On the assumption that both murder and voluntary manslaughter involve an intentional killing, such an approach makes it easier to accept the reduction of the offence category without questioning liability for the lesser offence. This sort of analysis, in other words, allows one to circumvent the puzzling question of why provocation does not undercut the lesser crime, as it does for the more serious one. [14] The construction of provocation as operating outside the mens rea of murder is examined below

under the heading of *offence modification*.

The operation of provocation as a partial defence to murder has been described on the basis of two theoretical models. First, the formulation of provocation as a "*failure-of-proof*" defence entails that a successful plea of provocation in fact negates the element of malice aforethought required for murder, without affecting the mental element pertinent to the lesser offence. According to Robinson:

General defenses differ conceptually from failure of proof defenses in that the former bar conviction even if all elements of the offense are satisfied, whereas the latter prevent conviction by negating a required element of the offense....[the failure of proof defense of provocation] is said to negate the required malice element of murder, and thereby reduces the defendant's liability to manslaughter. [15]

On the other hand, the formulation "*offence modification*" portrays provocation as a *sui generis* defence which operates outside the mens rea and actus reus of murder, by virtue of impaired volition or, in Robinson's words, "extreme emotional disturbance". [16] In order to make out which of the two interpretations befits provocation better, one would have to fathom the rationale of the distinction between murder and voluntary manslaughter in law and

circumscribe the purported scope of each category.

The interpretation of provocation as a *failure-of-proof* defence does not accord with the tradition of identifying the internal element - or the subjective condition - in murder with knowledge, intention and foresight of consequences. From this viewpoint, in other words, defining the internal element in these terms is inadequate to capture all its latent dimensions. If knowledge, intention and foresight were the only requirements of the subjective condition of murder, one could claim that provocation should rather provide a complete defence- i.e. on the assumption that it negates these elements - or be counted out as a legal defence altogether. [17] The monolithic analysis of the internal element in crime in narrowly mentalistic terms accounts for arguments in this direction. It becomes evident, therefore, that understanding provocation as a *failure-of-proof* defence would presuppose a broader interpretation of the subjective condition of murder, incorporating considerations of both cognition and control. [18]

The formulation of provocation as an *offence modification* transposes the ambit of the defence outside the confines of the traditional - cognitive - definition of the internal element in murder. As an *offence modification*, provocation operates outside the mens rea of murder - arguably, on the basis of

impaired volition - and as such it does not dispute the intentional character of the killing. [19] Nevertheless, in so far as murder and voluntary manslaughter are viewed as separate offence categories, the import of the formula "*offence modification*" is bound to be difficult to conceive. At first glance, such a formula seems to suggest that voluntary manslaughter is but a form of mitigated murder. However, considering that in English law murder, as a distinct category of intentional homicide, is not open to gradation - something which accounts for the fixed penalty provided - the idea of "murder modification" would appear misplaced. That is to say, no logical distinction could be drawn between modifying and negating murder, in so far as the actor's culpability for murder is not considered to be a matter of degree.

The formulation of provocation as an *offence modification* seems most at home in a system which subsumes all intentional homicides under the heading of murder. If the borderline between murder - as a specific form of intentional homicide - and intentional homicide - as a more general category that encloses murder - were disposed of, speaking of degrees of murder would not be illogical. [20] This would entail widening out the scope of murder in law so as to make room for different degrees of culpability. The restricted interpretation of the

internal element of murder in terms of knowledge, intention and foresight may then be sufficient to capture the minimum subjective requirements of this category. Nevertheless, the formula "*offence modification*" could make sense only if provocation is treated as an independent partial defence. This, in turn, presupposes the demarcation of formal sub-categories of murder in law, corresponding to different degrees of culpability. "Murder" would thus be viewed as an overarching offence category embracing a number of independent murder offences. Although each of these offences would be treated under the general rubric of murder, the actor's degree of culpability would account for their formal differentiation in law. In this respect, the provocation defence - as an *offence modification* - would be aimed at the reduction of the category of murder by diminishing the actor's degree of culpability. In such a case, however, provocation could also be perceived as a *failure-of-proof* defence by reference to a specific offence sub-category of murder. On the other hand, if murder were to be treated as a single offence category, provocation could only operate as a factor in the mitigation of sentence - something which would entail discretion as to the degree of punishment for murder.

Hart adopts the distinction between "*informal*" and "*formal*" mitigation. He speaks of informal

mitigation in those cases where it is left to the judge to impose a penalty below the maximum level provided by the law, by taking into account, among others, certain mitigating factors. Formal mitigation, on the other hand, refers to those cases where, according to law, certain mitigating considerations should always remove the wrongful act into a lower criminal category. Provocation, when pleaded as a partial defence to murder, offers the typical example of formal mitigation. [21] Hart's treatment of provocation as a case of formal mitigation appears to accord best with the formulation of the partial defence as an *offence modification*.

The approaches to provocation as a *failure-of-proof* defence or as an *offence modification* may satisfactorily illustrate the function of the legal defence from different angles. What remains to be considered further, nonetheless, are the grounds upon which provocation cuts down the level of criminal liability for an intentional killing. Indeed, if one does not confine oneself to the view that the only good reason for treating provocation as a partial defence is the (technical) issue of the fixed penalty provided for murder in English law, [22] one has to offer an account of how provocation affects the legal assessment of homicide. One is invited, in other words, to examine how provocation disallows

conviction of murder, if it does not negate the actor's intention to kill or cause grievous bodily harm.

In order to bring to light the rationale of the partial defence, one has to ponder the grounds upon which provocation reduces the gravity of intentional homicide. Depending upon which element of provocation is given priority, those grounds may be justificatory or excusative in nature. The first pertain to considerations that "externally" or "objectively" - i.e., irrespective of the actor's state of mind - curtail the wrongful character of the act in question. The second pertain to considerations that render the level of wrongdoing dependent upon the actor's state of mind at the time of his act. Because provocation allows room for both sorts of considerations, the rationale of the legal defence has been difficult to detect. As P. Alldridge remarks:

The defence [of provocation] must be either a partial excuse (in which case the centre of inquiry will be whether or not the defendant lost his/her self-control) or a partial justification (in which case the centre of the inquiry will be what was actually done by the deceased to the defendant - to what extent the deceased "asked for it") ...It is interesting to note that both these conditions obtained at common law. [23]

If provocation is taken as a partial excuse, its role in reducing the criminal category of homicide might perhaps seem at odds with the idea that excuses are aimed at disputing the attribution of blame to the actor rather than at determining the wrongfulness of the act. As Fletcher points out, nonetheless, although the gradation of most criminal offences turns on the degree of wrong, the gradation of homicide hinges on the actor's degree of culpability.

We are not likely to have learned the principle of graduated culpability from any other offense [than homicide]. It is true that many contemporary statutes recognise degrees of larceny and robbery. But the differentiation in these offenses turns on the scale of wrong, rather than the degree of culpability. [24]

Fletcher argues that, with homicide, considerations of human interaction between the actor and the victim are taken into account to make out the actor's degree of control and hence his degree of culpability.[25] It still remains ambiguous, however, whether the reduction of the actor's degree of culpability in provocation pertains to his loss of self-control or, rather, to the victim's wrongful contribution to his own demise. [26] The analysis of provocation on the basis of justification and excuse follows a general account of the doctrine of provocation in English law in the remaining subdivisions of this chapter.

4. The Defence of Provocation in English Law

English law recognizes provocation as a partial defence to murder reducing this crime to voluntary manslaughter. [27] Pleading provocation would presuppose that the prosecution has provided sufficient evidence to justify the jury's returning a verdict of murder. Only on that basis need the partial defence be considered. This, as pointed out previously, may seem problematic if it is accepted that provocation in fact negates the malice aforethought element of murder. Devlin J. defined provocation as follows:

Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind. [28]

Lord Devlin's definition admits the application of an objective test aimed at establishing whether the provocation offered was serious enough to overcome the capacity for self-control of a reasonable person. This is not sufficient, however. In parallel, the plea must also satisfy what is termed the "*subjective test*", in other words, the requirement that the accused himself did in fact lose his self-control as

a result of the provocation received.

According to Lord Devlin's definition, for the defence to be accepted, the provocation should have rendered the accused "so subject to passion as to make him or her for the moment not master of his mind". At first glance, this might seem to suggest that the subsequent killing, intentional though it may be, is not accompanied with the necessary malice aforethought for murder. [29] In this respect, however, it would be contradictory to insist that the plea of provocation becomes necessary only when malice aforethought for murder has been established, for it is exactly malice aforethought that the defence calls in question. On the other hand, taking malice aforethought merely to denote intention, requires one to offer a cogent account of the grounds upon which provocation reduces murder to voluntary manslaughter - that is, if both offences involve a killing committed intentionally or with malice aforethought.

There have been cases in the early law where provocation was accepted as a defence to attempted murder. [30] This position does not represent the present law, however, which takes provocation as a defence to murder only. [31] This approach has been criticized on the ground that, in so far as murder and attempted murder share the same internal

elements, it is difficult to conceive how the defence could affect the one but not the other. In this respect, it seems morally questionable to let the actor be stigmatized the same way as someone who was in fact disposed to murder. [32]

The position of the provocation defence in English law is further illustrated by cases and legislation. Section 3 of the Homicide Act 1957 provides that:

Where on a charge of murder there is evidence on which a jury can find that the person charged was provoked (whether by things done or by things said or both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

The provision adopts an approach wider than had previously been accepted to the question of what may constitute provocation in law for it includes not only "things done" but also "things said". In common law, the general position was that verbal assaults do not amount to provocation sufficient to reduce murder to manslaughter.[33] Some form of physical aggression was necessary, with one notable exception, namely,

the case where the actor found his or her spouse in an act of adultery and killed either or both parties on the spot. [34] As regards this latter case, it is not clear, however, whether a lawful marriage was required. [35] It was accepted, moreover, that an unexpected confession of adultery may constitute sufficient provocation, although in *Holmes* the House of Lords ruled explicitly the opposite. [36] Under s.3 of the Homicide Act, there is no restriction as to what may constitute provocation in law. [37] As Lord Diplock said in *Camplin*:

[s.3] abolishes all previous rules of law as to what can or cannot amount to provocation... The judge is entitled, if he thinks it helpful, to suggest considerations which may influence the jury in forming their own opinion as to whether the test is satisfied; but he should make it clear that these are not instructions which they are required to follow; it is for them and no one else to decide what weight, if any, ought to be given to them. [38]

After the Homicide Act 1957, the fact that the victim's act was lawful does not exclude the possibility of its being considered as amounting to provocation. As G. Williams explains:

The Homicide Act, in allowing insults as provocation, inevitably alters the position, because an insult uttered in private is neither a crime nor even a tort. Section 3 contains no restriction to unlawful acts, and the courts

seem to be ready to allow any provocative conduct to be taken into consideration, even though that conduct was itself provoked by the defendant. [39]

As we shall later examine, this approach is taken to indicate a shift towards the approach to provocation as a partial excuse.

In the past, a mistaken belief as to provocation, unreasonable though it may have been, did not have to exclude the defence. The current position seems to be, nonetheless, that the courts would be reluctant to accept a mistake regarding the conditions of a defence, unless the mistake is held to be reasonable. Similar considerations apply to those cases where the accused's reaction to provocation is put down to self-induced intoxication. [40]

After the 1957 legislation, the judge must put the issue of provocation to the jury whenever there is *some* evidence that the accused was provoked to lose his self-control. It is not required, as was the case previously, that the judge should first be satisfied that the defendant lost his self-control, or that the provocation was sufficient to lead a "reasonable man" to respond in the same manner. Nevertheless, once the question of provocation is introduced, the judge can still direct the jury in their deliberation on whether the victim's conduct

amounted to provocation or on whether a "reasonable person" would have responded to the provocation offered the way the accused did. Thus, the judge's direction may still affect the final outcome, although not in the same way as before the introduction of the Homicide Act 1957. [41] For the defence to be accepted, the provocation must be deemed sufficient to lead a reasonable person to react as the accused did. It was seen as problematic whether the phrase "do as he did" implies losing self-control or, rather, acting the same way as the accused did. [42]

Determining the nature and limitations of the objective standard in provocation has been a source of difficulty both in legal doctrine and in practice. Indeed, there has been some concern that allowing certain personal idiosyncrasies to be considered as relevant to provocation may undercut the purported objectivity of the standard. The two pre-1957 authorities to be discussed below illustrate the problems surrounding the "reasonable man" in provocation. The remaining subdivisions of this chapter take up certain leading provocation cases. The discussion of those cases will allow us to identify different aspects of the disputes besetting the defence and pinpoint the issues around which the subsequent analysis of

provocation in terms of justification and excuse will revolve.

a. D.P.P. v. Mancini (1942)

In this case [43] the accused, a manager of a club, stabbed to death the victim in a course of a fist fight. He claimed that he was attacked by the victim who had an open pocket-knife in his hand, and that he killed the victim while trying to defend himself. The original basis of his defence to murder was self-defence which, if it were accepted, would have resulted in his full acquittal. At first, the issue of provocation was not raised. Nevertheless, the accused was found guilty of murder against which he appealed to the Court of Criminal Appeal and thence to the House of Lords. He maintained that, although he did not plead provocation, the judge should have directed the jury to the defence, given that there was sufficient evidence as to this matter. The House of Lords finally dismissed his appeal on the basis that the judge was under a duty to direct the jury to provocation only if he had reason to believe that a "reasonable person" would have reacted to the provocation the way the accused did. The requirement that the mode of retaliation must correspond to the gravity of the provocation offered has become known as the "*reasonable relationship*"

rule" or "*rule of proportionality*". According to Lord Simon:

The test to be applied is that of the effect of the provocation on a reasonable man... so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter. [44]

The reasonable relationship rule invites one to consider how a reasonable person would respond when confronted with different sorts of provocative conduct. In this respect, the acceptability of the accused's plea would depend upon whether his retaliation measures up to the nature and degree of the victim's provocation, for this is how a reasonable person is assumed to react. It is pointed out that in determining whether the accused's response was, in the above sense, "reasonable", one has to consider the provocation offered in the light

of the circumstances. This requires one to consider, among other things, whether enough time elapsed between provocation and retaliation to allow a reasonable person to regain his composure. If this were the case, the accused would not be able to rely on the defence. It is thus implied that an act of retaliation which, in the heat of the moment, may be regarded as "reasonable", would not be viewed as such when committed "in cold blood". The reasonable relationship rule suggests, moreover, that some degree of action-control is still possible, notwithstanding one's acting, due to provocation, in the heat of passion.

This approach has been rightly criticized in many respects. First, it seems contradictory to require the provoked actor to respond as a "reasonable person" - that is, in proportion to the victim's affront - and yet to hold him liable on the assumption that a "reasonable person", when provoked, does not lose control. The association of the "reasonable man" with the proportionality requirement could be misleading if one relates the standard with a judgement on the accused's mode of retaliation rather than with the accused's giving way to passion in the first place. Fletcher is correct when he asserts that:

...in the context of provocation, the

reasonable person is hardly at home. First, as everyone is prepared to admit, the reasonable person does not kill at all, even under provocation. Therefore it is difficult to assess whether his or her killing should be classified as manslaughter rather than murder....The underlying question is whether the accused should be able to control the particular impulse or emotion that issues in the killing. Yet the intrusion of this mythical standard sometimes induces judges and legislative draftsmen to think that the issue is whether if the average person would have killed under the circumstances, the killing should be partially excused. The test cannot be whether the average person would have killed under the circumstances, for that test should more plausibly generate a total excuse. [45]

Indeed, considering that provocation is pleaded as a partial defence to murder, the rule of proportionality should imply that only an attack that endangers the actor's life may count as adequate provocation. Such an approach, however, blurs the line between provocation and self-defence and, in so far as a degree of liability remains, provocation may be viewed as a variation of excessive self-defence rather than as a separate defence on its own right. (see chapter 5). [46] The Homicide Act 1957 provides that the jury - in determining the issue of provocation - should be invited to consider "whether the provocation was enough to make a reasonable man *do as he* [the accused] *did*". This wording has been

taken to suggest that the question for the jury is not whether a reasonable person might have lost his self-control under the provocation received but, rather, whether a reasonable person would have responded to the provocation the way the accused did.[47] Such an approach to the matter seems again to imply that acting "in the heat of the moment" does not exclude some degree of action-control; it makes room, in this respect, for the reasonable relationship requirement to apply. In *Phillips*, Lord Diplock argued as follows:

Counsel contended, not as a matter of construction but as one of logic, that once a reasonable man had lost his self-control his actions ceased to be those of a reasonable man and that accordingly he was no longer fully responsible in law for them whatever he did. This argument was based on the premise that loss of self-control is not a matter of degree but is absolute; there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordship's view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon. [48]

One might read the above as a re-statement of the reasonable relationship rule, the only difference

to the pre-1957 position being that the issue should now be decided by the jury. As pointed out before, the requirement of proportionality, if interpreted as relating to the actor's mode of retaliation, should militate against any provocation that does not involve a threat to life. Where the actor's life is not endangered, this requirement might perhaps indicate that the provoker's killing was not intended - something that would suggest a conviction of involuntary rather than voluntary manslaughter. As we shall later consider, one could not but accept that loss of self-control in general is a matter of degree; losing one's self-control to the degree that one commits an intentional killing, however, allows no room for the above interpretation of the proportionality requirement. In provocation, proportionality may have a role to play, but certainly not in relation to the actor's mode of retaliation.

Mancini has now been overruled by s.3 of the Homicide Act 1957 which, as has been said, provides that the judge is under the duty to leave the issue of provocation to the jury whenever there is some evidence that the accused was provoked to lose his self-control. The judge should do so even if, in his view, the accused's reaction was not that expected from a reasonable person in the circumstances.[49] This has been an important change in the law of

provocation. Nevertheless, the judge is still entitled to draw the jury's attention to those matters that, in his opinion, should be taken into account in their consideration of whether the accused reacted as a reasonable person would. The relationship of the accused's response to the nature and degree of the provocation offered is considered in this respect. In *Brown*, Talbot J. expounded the issue as follows:

...when considering whether the provocation was enough to make a reasonable man do as the accused did, it is relevant for the jury to compare the words or acts or both of these things which are put forward as provocation with the nature of the act committed by the accused. It may be, for instance, that a jury might find that the accused's act was so disproportionate to the provocation alleged that no reasonable man would have so acted. We think therefore that a jury should be instructed to consider the relationship of the accused's acts to the provocation when asking themselves the question: "Was it enough to make a reasonable man do as he did?" [50]

The problems surrounding the issue of proportionality in provocation, as we shall later consider, might prove more tractable if the defence is examined in the light of the justification-excuse distinction.

b. D.P.P. v. Bedder (1954)

In this case, [51] the accused, who was suffering from sexual impotence, attempted to have intercourse with a prostitute to see whether he could overcome his condition. He failed, however, and the woman taunted him and kicked him so that he lost his self-control and stabbed her to death. Charged with murder, he claimed that, because the insult was directed at his impotence about which he was particularly sensitive, it constituted sufficient provocation to support the reduction of the offence to manslaughter. He was convicted of murder, nonetheless, and appealed to the Court of Criminal Appeal and thereafter to the House of Lords which finally upheld his conviction. The House of Lords adopted the view that considerations regarding any physical peculiarities of the accused lie outside the scope of the objective test and that therefore they should not be taken into account in deciding the issue of provocation. The "reasonable man" standard, it was pointed out, does not make any room for the personal idiosyncrasies of the accused, for this would contradict its intended role as an objective standard in law. Lord Simonds, in dismissing the appeal, reasoned as follows:

It was urged on your Lordships that the hypothetical reasonable man must be confronted

with all the same circumstances as the accused, and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the "reasonable" or the "average" or the "normal" man is invoked. If the reasonable man is then deprived in the whole or in part of his reason, or the normal man endowed with abnormal characteristics, the term ceases to have any value. [52]

The decision in *Bedder* was subjected to strong criticisms as being based on a misinterpretation of the role of the objective standard in relation to excusing conditions. Indeed, the above reasoning manifests a difficulty in distinguishing those individual characteristics of the actor that may bear upon the ascription of blameworthiness from those that do not. [53] Losing sight of this distinction, however, is liable to lead to morally contestable decisions. The approach adopted in *Bedder* is not unrelated to treating the "reasonable man" as a criterion upon which the judicial decision can be abstracted from the individual case to formulate rules of general application. Fletcher, criticizing such an approach to the objective standard in provocation, remarks:

Once we forget that the problem is the analysis of those impulses that we are fairly expected to control, it follows that judges would have difficulty distinguishing between a head injury and a bad temper. Once the moral perspective on provocation is lost, the concern develops that the individuation of the standard might lead to its total collapse. Not knowing where to draw the line, judges would prefer not to include any unusual physical feature of the defendant.

[54]

The role of the "reasonable man" in provocation is an issue to be examined - from different angles - throughout the present thesis.

c. R. v. Davies (1975)

In this case [55] the accused shot and killed his wife who had left him for another man. Armed with a gun, the accused went to the place of her work to discuss a reconciliation, as he said, and there he saw the other man shortly before his wife appeared. He claimed that he became so enraged to see him there that when she appeared he lost his self-control and shot her. His plea of provocation was rejected, however, and he was convicted of murder. He thereafter appealed unsuccessfully to the Court of Criminal Appeal. In this case, the changes brought about by the Homicide Act 1957 to the law of provocation were delineated by Lord Widgery as

follows:

It seems tolerably clear that it makes two amendments at any rate. First of all it allows words as opposed to acts to be considered as provocative for present purposes, and secondly it seems to provide in the plainest terms that any reference to the reaction of a reasonable man to the provocation supplied is something which must be determined by the jury and cannot be determined by the judge....Reading s.3 of the Act, it is quite apparent that a different test is applied because there one has to consider whether a reasonable man would act as he did, that is to say would act as the accused had done. ...whatever the position at common law, the situation since 1957 has been that acts or words otherwise to be treated as provocative for present purposes are not excluded from such consideration merely because they emanate from someone other than the victim.

The basis of the appellant's argument was that the trial judge directed the jury to the issue of provocation only as regarded his wife's conduct since the time she left the appellant. The appellant claimed that the judge omitted to do the same as to the presence of her paramour when the killing took place. The appeal was dismissed, nonetheless, because it was held that directing the jury to the issue of provocation on the latter basis would not have altered their final decision, because the paramour's conduct was seen as inseparable from that of the

accused's wife. [56]

As Lord Widgery pointed out, the question of whether the accused reacted to the provocation as a reasonable person is now to be determined by the jury. And in *Camplin* (see *infra*), Lord Morris asserted that "All questions are for the jury... The courts are no longer entitled to tell juries that a reasonable man has certain stated and defined feature". [57] Shifting this question to the jury, however, did not make the function of the "reasonable man" standard in provocation any clearer. Indeed, considering the discrepancies as regards the way in which provocation cases have been decided, it seems difficult to offer a comprehensive account of how the objective standard operates in this context. The analysis of provocation on the basis of the justification-excuse distinction in the following chapters would allow us to envisage different perspectives on the standard and to demonstrate its possible role in relation to the defence.

d. D.P.P. v. Camplin (1978)

In the case [58] at issue the accused, a fifteen year old boy, went to the victim's house after having a few drinks. The accused was blackmailing the victim over a homosexual relationship the latter had with one of the accused's friends. The accused claimed

that he was beaten and was sexually assaulted by the victim. Overpowered by shame and resentment while the victim was taunting him, the accused killed the victim hitting him twice over the head with a heavy object. At trial he pleaded provocation as his defence to murder, but the plea was rejected. Nevertheless, his conviction was quashed by the Court of Appeal which accepted the reduction of murder to manslaughter. The latter decision was subsequently confirmed by the House of Lords. This case raised the controversial question of whether the jury should be directed to take into account the accused's age as relevant to the issue of provocation. Should the accused's reaction be assessed according to a reasonable adult or, rather, according to a reasonable person of the accused's age? Lord Diplock stated the applicable test as follows:

The judge should state what the question is, using the terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of the person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him, and that the question is not merely whether such a person in like circumstances would be provoked to lose his self-control, but also would react to the provocation as the accused did.

In the later case of *Newell*, the Court of Appeal made clear that the jury should be directed to consider as relevant to provocation only those characteristics of the accused that are permanent enough to be regarded as "part of his personality". [59] It was pointed out, moreover, that the provocation must have been directed at the particular characteristic which, according to the defendant, should be taken into account as relevant to the question of provocation.

The opening up of the objective test in provocation to some degree of individualization was deemed necessary in order to avoid the morally controversial decisions to which the rigid application of the test has led in the past. Nonetheless, this re-interpretation of the objective test, significant though it may be, is not without difficulties. Problems arise, for example, about how one is to distinguish those individual characteristics that may bear on the gravity of provocation from those character traits relating, rather, to the actor's general capacity for self-control. Although it is admitted that the second are not relevant to the defence, drawing the line between the two can be a matter of dispute. In this respect, considering that provocation constitutes a defence for "normal" people, it might be questionable whether certain characteristics should be seen as, in a sense, modifying the applicable standard or, rather,

as rendering the relevant standard inapplicable. In the latter case, however, provocation could not furnish the grounds for the accused's defence to murder. If the provocation defence cannot be admitted for this reason, the accused might perhaps rely on the partial defence of diminished responsibility on the ground that, due to an abnormality of mind, his was unable to exercise self-control. [60] In some cases, moreover, the accused might be able to plead provocation and diminished responsibility together. This issue is further discussed under the heading of cumulative provocation in chapter 6 of this thesis.

Arguably, the attempt to widen the scope of the objective test in provocation shows a departure from understanding the "reasonable man" as a legal standard of liability. Provocation, formerly viewed as a matter of law to be decided by the judge, is now considered to be a matter of fact to be decided by the jury. In *Smith*, it was pointed out that:

No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable man, or an average man. That must be left to the collective good sense of the jury.

[61]

The role of the "reasonable man" in the context of the provocation defence may best be understood by reference to the norms of attribution. The issue, in this respect, is not how a reasonable person

would have reacted to the provocation received; it is, rather, whether the accused - given certain of his personal characteristics - could have fairly been expected to retain control in the face of the provocation received. As Fletcher emphasizes:

The basic moral question in the law of homicide is distinguishing between those impulses to kill as to which we as a society demand self-control, and those as to which we relax our inhibitions. [62]

Besides its potential role as regards the attribution of responsibility/blameworthiness, the "reasonable man" standard has also been considered as relevant to the question of whether the defendant's claim that he was provoked to lose self-control can be accepted as a matter of fact. From this viewpoint, in other words, the "reasonable man", as well as the related issue of proportionality, are understood as relating to the assessment of evidence by the jury. Indeed, this is how Lord Diplock's re-statement of the proportionality requirement in *Camplin* may be viewed - that is, if the reference to the accused's mode of retaliation was not intended to prescribe a "standard" of conduct (see p.33 supra). [63] Nevertheless, there is still some doubt as to whether s. 3 in fact requires a certain form of correspondence between provocation and the mode of retaliation. [64]

e. Edwards v. R. (1973)

In the case [65] in question, the accused stabbed the victim to death during a struggle in the victim's hotel room. The accused claimed that he went to the victim's room in order to blackmail him and that, during a dispute over the blackmail, the victim attacked him with a knife. Charged with murder, the accused pleaded self-defence and provocation. The Full Court of Hong Kong dismissed the accused's appeal against his conviction of murder. It recognised, however, that the trial judge should have directed the jury to the issue of provocation. Thence the accused appealed to the Judicial Committee of the Privy Council which finally accepted the reduction of murder to manslaughter. In this case, Lord Pearson explained the position adopted as follows:

On principle it seems reasonable to say that (1) a blackmailer cannot rely on the predictable results of his own blackmailing conduct as constituting provocation sufficient to reduce his killing from murder to manslaughter, and the predictable results may include a considerable degree of hostile reaction by the person sought to be blackmailed, for instance vituperative words and even some hostile action such as blows with fists; (2) but if the hostile reaction by the person sought to be blackmailed goes to extreme lengths it might constitute sufficient provocation even for the blackmailer; (3) there

would in many cases be a question of degree to be decided by the jury.

The position in English law prior to the Homicide Act 1957 was that the judge could withdraw the question of provocation from the jury if he believed that the victim's affront was - in face of the accused's conduct - predictable. Nevertheless, if there was any doubt as to whether the way in which the victim reacted was predictable, the issue was left to the jury to decide under proper direction on the relevant rules of law. The accused would not be able to rely on provocation if it was accepted that, although he did not foresee the victim's attack, a reasonable person would have foreseen such a possibility. In sum, in common law the judge was entitled to exclude the defence if the provocation was self-induced. The same obtained with respect to those cases where the victim's conduct was deemed legally justified. After the 1957 legislation, the judge cannot withdraw the defence from the jury, even if he has good reason to believe that the provocation was self-induced. [66] All the judge can do is to draw the jury's attention to those matters that, in his view, militate against accepting the defence in law. [67] It is for the jury to decide, however, whether the accused's plea of provocation should be accepted or not. As regards the issue of whether legally justified conduct could amount to provocation

in law, one might distinguish between conduct which is legally justified on the basis of a specific legal right - i.e. a police officer attempting a lawful arrest - and conduct which is merely legally permissible. Patently, conduct which is deemed legally justified in the first sense is most unlikely to be accepted as adequate provocation. One might envisage a case, nonetheless, where morally offensive conduct which takes place in the course of a legally justified action constitutes provocation sufficient to reduce murder to voluntary manslaughter.

The rule against self-induced provocation, as pointed out by Lord Pearson in *Edwards*, does not exclude the defence in all cases where some sort of reaction by the victim was predictable. However, it seems problematic how one is to determine the threshold beyond which the victim's conduct, predictable though it may have been, could still buttress a plea of provocation. Indeed, if the accused could rely on the defence only where the victim's reaction is taken to involve a threat to life or limb, it might be difficult to distinguish provocation from self-defence. It would be misleading, however, to treat under provocation those cases of self-defence where the accused would not be entitled to a complete defence as being partly responsible for the victim's attack. If such cases

were seen as pertinent to some sort of "culpable" self-defence, establishing loss of self-control - a basic element of provocation - would not be necessary. The problem of self-induced provocation invites one to perceive the question of culpability for homicide as presupposing a wider assessment of the accused's actions. One should fathom, in this respect, how the actor's culpability in causing the conditions of his defence may affect the judgement on whether such a defence should be accepted. [68] It seems proper to say that the acceptability of the proposed defence, and hence the classification of the killing as murder or manslaughter, relates to the accused's *degree* of culpability in bringing about the conditions of his own defence. Thus, to offer an example, someone who deliberately triggers an attack in order to kill the aggressor with immunity could rely neither on self-defence nor on provocation as his defence (*actio libera in causa*). Nonetheless, this would not obtain in a case where the victim's attack or provocation, was the - predictable or not - result of a minor affront by the accused. The acceptability of the proposed defence in cases of self-induced provocation seems to depend, among other things, on the nature of the wrongful action on the part of the accused which incited the victim's provocation.

The theoretical analysis of provocation on the

basis of the justification-excuse distinction in the following chapters will allow us to look at some of the questions besetting the legal defence from different angles. A deeper understanding of the grounds upon which the rationale of provocation as a partial defence may rest could facilitate the elaboration of more comprehensible approaches to resolving these questions.

NOTES

1. For a historical approach to the issue, see e.g.: J.M. Kaye, "The Early History of Murder and Manslaughter", *Law Quarterly Review* 83 (1967), 365-395 & 569-601 (parts 1 & 2).

2. For a fuller account of the development of the notion of *malice aforethought* see: Kaye, *supra* note 1; Fitzjames Stephen, *A History of the Criminal Law of England* (1883), vol.3, pp.41-46; Perkins, "A Re-examination of Malice Aforethought", 43 *Yale Law Journal* (1934), 537; G. Fletcher, *Rethinking Criminal Law* (1978), pp.276-285; T.A. Green, "The Jury and the English Law of Homicide", *Michigan Law Review* 74 (1976), 414. And see: R. Goff, "The Mental Element in Murder", *Law Quarterly Review* 104 (1988), 30.

3. See: *Kenny's Outlines of Criminal Law*, 19th ed. by J.W.C. Turner, Cambridge (1966), p.172; R. Perkins, *Criminal Law* (1957), p.40: "Malice aforethought is an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind". And see: *Russell on Crime*, 12th edition (1964), v 1, p.466: "If, as has been suggested, *mens rea* is now a realisation of the consequences which one's conduct may bring about, then we can say that the *malice aforethought* is the realisation that one's conduct may cause the death of a human being."

As Fletcher explains:

In the tortuous history of homicide, planning and calculating the death of another have always stood out as a particularly heinous form

of killing. Lying-in-wait and ambushing stood out even in early English law as paradigmatic forms of murder. Though this element of planning beforehand withered in the concept of malice, it was eventually to bloom again in the formula of "premeditation and deliberation". Yet the problem that has beset this formula is that while planning and calculating represent one form of heinous or cold-blooded murder, premeditation is not the only feature that makes intentional killings wicked. Wanton killings are generally regarded as among the most wicked, and the feature that makes a killing wanton is precisely the absence of detached reflection before the deed.

Rethinking Criminal Law, (1978), pp.253-254.

4. J.T. Lowe, "Murder and the Reasonable Man", *Criminal Law Review* [1958], p.289 at 298. And see: *R. v. Vickers* [1957] 2 Q.B. 664.

Criminal Law Revision Committee, 14th report (1980): "We therefore conclude that it should be murder: (a) if a person, with intent to kill, causes death and (b) if a person causes death by an unlawful act intended to cause serious injury and known by him to involve a risk of causing death."

5. *D.P.P. v. Smith* [1961] A.C. 290.

6. *R. v. Hyam* [1975] A.C. 55.

7. *R. v. Moloney* [1985] A.C. 905.

In this case Lord Bridge of Harwich said:

Whatever his state of mind, the appellant was undoubtedly guilty of a high degree of recklessness. But, so far as I know, no one has yet suggested that recklessness can furnish the necessary element in the crime of murder...Foresight of consequences, as an element bearing on the issue of intention in murder, or indeed any other crime of specific intent, belongs, not to the substantive law, but to the law of evidence. (at 927-928)

See also: R. v. Hancock and Shankland [1986] A.C.455.

8. As Goff explains:

After the journey through *Smith, Hyam, Moloney* and *Hancock*, the law is really back where it was in *Vickers* [[1957] 2 Q.B. 664]. The mental element in the crime of murder is either (1) an intent to kill or (2) an intent to cause grievous bodily harm. Foresight of the consequences is not the same as intent, but is material from which the jury may, having regard to all the circumstances of the case, infer that the defendant actually had the relevant intent.

R. Goff, "The Mental Element in Murder", *Law Quarterly Review* 104 (1988), 30 at p.48.

9. According to Hart:

...difficulties of proof may cause a legal system to limit its inquiry into the agent's "subjective condition" by asking what a "reasonable man" would in the circumstances have known or foreseen, or by asking whether a "reasonable man" in the circumstances would have been deprived (say, by provocation) of self-control; and the system may then impute to the agent such knowledge or foresight or control.

H.L.A. Hart, "Legal Responsibility and Excuses" in *Punishment and Responsibility* (1968), p.33.

10. Church (1966), 1 Q.B. 59.

11. D.P.P. v. Newbury (1976), 2 All E.R. 365.

12. Cunningham (1957), 2 Q.B. 396.

13. "...it was only in the ancient period, when *malice aforethought* was an expression used to denote a calmly premeditated killing, that it would be true to say that provocation negatived *malice aforethought*." *Kenny's Outlines of Criminal Law*,

supra note 3, p.172. See also: *Russell on Crime*, supra note 3, pp. 522-523. And see: F. McAuley, "Anticipating the Past: The Defence of Provocation in Irish Law", *Modern Law Review* 50 (1987), pp.134-135.

14. See: M. Wasik, "Partial Excuses in Criminal Law", *Modern Law Review* 45 (1982), 516 at pp. 528-529.

15. P. Robinson, "Criminal Law Defences: A Systematic Analysis", *Columbia Law Review* 82 (1982), pp. 205-206.

16. According to Robinson:

Provocation was traditionally drafted as negating the malice required for murder. In this form it is a failure of proof defense. The same concept may be formulated as an offense modification, an independent defense to murder - independent in the sense that it does not negate any element of the offense. Usually, this formulation is slightly broader in scope and is called "extreme emotional disturbance".

Supra note 15, p.233.

17. Considering the dominant view - i.e. that provocation operates outside the *mens rea* of murder - one might envisage a case where the accused was provoked to lose his self-control to the degree that he was no longer aware of what he was doing. In such a case the actor might be able to rely on a lack of *mens rea* defence. However, such a "failure-of-proof" defence should be kept clearly distinct from provocation. See: A. Ashworth, "Reason, Logic and Criminal Liability", *Law Quarterly Review* 91 (1975), 102 at pp. 128-129.

18. In the earlier case of *Welsh*, the judge argued as follows:

Malice aforethought means intention to kill.
Whenever one person kills another

intentionally, he does it with *malice aforethought*. In point of law, the intention signifies the malice. It is for him to show that it was not so by showing sufficient provocation, which only reduces the crime to manslaughter, because it tends to negative the malice. But when that provocation does not appear, the *malice aforethought* implied in the intention remains.

R. v. Welsh [1869] 11 Cox 336.

And in *Holmes*, it was asserted that:

The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intent to kill or to inflict grievous bodily harm, is negated. Consequently, where the provocation inspires an actual intention to kill (such as *Holmes* admitted in the present case) or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies.

Holmes v. D.P.P. [1946] A.C. 588 at 598.

If *malice aforethought* meant narrowly an intention to kill, provocation - as a failure of proof defence - could only operate as a complete defence or, perhaps, as a partial defence reducing murder to involuntary manslaughter. However, the reduction of murder to voluntary - or intentional manslaughter - would presuppose that provocation negates malice without negating the intent to kill.

19. As T. Archibald explains:

Although many defences apply because they are a denial of either the *actus reus* or the *mens rea*, provocation is not alone in operating outside these requirements. Duress and necessity are based, like provocation, on the ground that they are concessions to human frailty in circumstances of great stress and do not correspond with the positive requirements of criminal liability.

"The Interrelationship Between Provocation and *Mens Rea*: A Defence of Loss of Self-Control", *Criminal Law Quarterly* 28 (1985-1986), 454 at pp. 456-457.

20. According to Fletcher:

First degree murder is the extreme case of self-actuated killing, minimally influenced by interaction with the victim. This element of self-actuation is expressed in the formula of "premeditation and deliberation". The second point on the spectrum of intentional killings is marked by second degree murder. These killings lie between the point of total self-actuation and the partial dependency on circumstances that we note in the third and fourth stations of diminished capacity. The third station is the familiar case of killing under provocation; and the fourth is killing where there is no practical alternative but to kill as an act of self-preservation...It seems appropriate to identify a fifth point in the spectrum, which would represent a case in total dependence on the circumstances.

Rethinking Criminal Law (1978), p.352.

21. H.L.A. Hart, "Prolegomenon to the Principles of Punishment" in *Punishment and Responsibility*, supra note 9, p.15.

22. See relevant discussion in Wasik's "Partial Excuses in Criminal Law", supra note 14, p.521.

23. P. Alldridge, "The Coherence of Defences", *Criminal Law Review* [1983], 665 at p. 669.

24. Fletcher, supra note 20, p.353.

25. In Fletcher's words:

That homicide typically grows out of human interaction accounts for the tendency in the law of homicide to recognize degrees of culpability and, on the basis of these judgments of degree, to grade killings as manslaughter or murder. The slayer's interaction with the victim bred the notion of qualified or mitigated culpability. So far as the killing was the product of human interaction, it was to that extent not fully attributable to the slayer's initiative. ...This process of refinement has led to a sophisticated notion of culpability that treats

the slayer's guilt for his killing as a matter of relative dependency on the circumstances of the crime.

Supra note 20, pp. 351-352.

26. According to Fletcher:

In the normal case, the victim of the killing is the party accountable for the provocation of the accused. Yet the fact that it is the victim who typically strikes the accused before he is killed can mislead one to think that the rationale of provocation is the victim's contribution to his own death. It might be thought, particularly in the case of adultery, that the victim in some measure deserves to die and that therefore the accused's crime should be treated leniently. This view of provocation can lead to some controversial interpretations of the law.

Supra note 20, p.245.

27. For a historical approach to provocation see: Hale, 1 *Pleas of the Crown* (1736), 453; Blackstone, 4 *Commentaries on the Laws of England* (1769, 1966), 184; Coke, 3 *Institutes* (1797), 55; East, 1 *Pleas of the Crown* (1803) 232; Foster, *Crown Cases and Discourses on the Crown Law* (1792), 290.

Coke distinguished between intentional killings committed in hot blood and intentional killings committed "*sedato animo*". The latter included those cases where "one killeth another without any provocation on the part of him that is slain" (p.51). *Malice aforethought* was understood as pertinent to killings committed "*sedato animo*". In Coke's words: "Malice prepensed is, when one compasseth to kill, wound, or beat another, and doth it *sedato animo*. This is said in law to be malice aforethought, prepensed, *malitia praecogitata*." (p.50) East deals with homicides "from transport of passion, or heat of blood" as follows: "Herein it is to be considered under what circumstances it may be

presumed that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone." (p.232)

28. R. v. Duffy (1949), 1 All E.R. 932.

29. In earlier law, "...apart from the right of self-defence, it came to be considered that the term malice aforethought, regarded as a manifestation of a "wicked, depraved, malignant spirit" was hardly appropriate to describe the mental state of a man who had lost control of himself under the sting of such attack as would inflame any ordinary person".

Russell on Crime, supra note 3, p.518.

And see: F. McAuley, "Anticipating the Past: The Defence of Provocation in Irish Law", supra note 13.

30. See, e.g.: Thompson (1825) 1 Mood. 80, 168 ER 1193; Bourne (1831) 5 C&P 129, 172 ER 903; Beeson (1835) 7 C&P 142, 173 ER 63; Hagan (1837) 8 C&P 167, 173 ER 445.

31. See, e.g.: Bruzas [1972] Crim.L.R. 367; Campbell (1977) 38 CCC (2d) 6 (Can); Jack (1970) 17 CRNS 38 (Br. Col.)

32. See, e.g.: P. English, "Provocation and Attempted Murder", *Criminal Law Review* [1973], 727; P. Fairall, "Provocation, Attempted Murder and Wounding with Intent to Murder", *Criminal Law Journal* 7 (1983), 44.

33. See, e.g.: Holmes v. D.P.P. [1946] A.C. 588. Viscount Simon asserted in this case that "as society advances, it ought to call for a higher measure of self-control in all cases."

Fletcher explains the issue as follows:

Though it is generally recognized that proof of a serious physical blow is sufficient to submit the issue of provocation to the jury, the general rule is that insults and abusive language are insufficient. The premise obviously is that though "sticks and stones may break our bones", we are all expected to maintain a stiff upper lip in the face of verbal aggression.

Supra note 20, p.244.

34. A lawful marriage necessary for provocation to be accepted. See, e.g.: R. v. Palmer [1913] 2 K.B. 29; R. v. Greening [1913] 3 K.B. 846.

35. Provocation may be admitted notwithstanding the absence of a lawful marriage. See e.g.: R. v. Kelly (1848) 2 C.&K. 814; R. v. Alexander (1913) 9 Cr. App. R. 139; R. v. Gauthier (1943) 29 Cr. App. R. 113; R. v. Larkin [1943] K.B. 174.

36. Holmes v. D.P.P. [1946] A.C. 588.

37. As Fletcher points out: "The standard of adequate provocation is obviously shaped by social convention." Supra note 20, p.243.

38. D.P.P. v. Camplin (1978) A.C. 705 at 716.

39. G. Williams, *Textbook of Criminal Law* (1983), pp.534-535.

40. There have been cases where the fact that the accused was, due to intoxication, more susceptible to provocation was taken into account in the assessment of the defence. See, e.g.: R. v. Hopper [1915] 2 K.B. 431; R. v. Letenock [1917] 12 Cr.App.R. 221; R. v. Carroll (1835) 7 C&P 145; R. v. Mason (1912) 8 Cr.App.R. 121. However, this approach to the issue

was rejected in latter cases. See, e.g.: R. v. McCarthy [1954] 2 Q.B. 105; R. v. Wardrope [1960] *Crim.L.R.* 770. In this latter case the court adopted the following position:

We see no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication. It may be that an excitable, pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely upon his excitable state of mind if the violence used is beyond that which a reasonable, or perhaps we should say an average, person would use to repel an act which can in law be regarded as provocation.

And see: A. Ashworth, "Reason Logic and Criminal Liability", *supra* note 17, p.126.

41. A. Samuels argues as follows:

...although in principle it is preferable that all substantive issues of fact and opinion in a criminal case should be determined by the jury, the accused is in one respect in a worse position than before 1957, for now the judge cannot direct the jury that on evidence, if accepted, a reasonable man would have been provoked, although there is no appeal for the prosecution against the judge who is over-indulgent towards the defence.

"Excusable Loss of Self-control in Homicide", *Modern Law Review* 34 (1971), p.163.

42. See: *Russell on Crime*, (1964), p.540. And see: Phillips [1969] 2 W.L.R. 581 at 585.

43. *D.P.P. v. Mancini* [1942] A.C. 1.

44. *Supra* note 43, at p.9.

45. Fletcher, *supra* note 20, pp. 247-248.

46. See: *Russell on Crime*, supra note 42, pp. 549-550.

47. A. Samuels remarks:

A lot of significance has been attached by some of the commentators to the statutory phrase "do as he did". Does the phrase mean "enough to make a reasonable man lose his self-control?" Or "to form the intent to kill or cause grievous bodily harm?" Or "to act in every detail in exactly the way the accused did?" It is submitted that the phrase is really meaningless and no more than an artless and inelegant piece of statutory drafting. Alternatively, if the phrase has any meaning it is submitted that it involves a combination of factors, i.e., a loss of self-control so as to cause the formation of an intent to kill or cause grievous bodily harm so as to cause the death. It would be quite impossible, or extremely severe, to interpret the phrase to mean that the reasonable man would have behaved exactly as the accused did down to the last detail.

Supra note 41, p.168.

48. Phillips (1969) 2 A.C. 130 at 137. And see: Brown [1972] 2 Q.B. 229; *Lee Chun Chuen v. The Queen* [1963] A.C.220.

See: S. Meng Heong Yeo, "Proportionality in Criminal Defences", *Criminal Law Journal* 12 (1988), 211.

49. As Samuels points out:

The trial judge can still withdraw the issue of provocation from the jury if he is satisfied that as a matter of law there is no evidence of loss of self-control by the accused sufficient to lay the foundation of such a defence so as to require the prosecution to dispose of it, but he cannot withdraw the issue from the jury on the ground that there is evidence of loss of self-control but not such as would affect a reasonable man.

Supra note 41, p.165.

50. *R. v. Brown* (1972) 2 All E.R. 1328.

51. D.P.P. v. Bedder [1954] 2 All E.R. 801; 38 Cr. App.R. 133.

52. Lord Simonds pointed out that:

It would be plainly illogical not to recognise an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognise for that purpose some unusual physical characteristic, be it impotence or another...It is too subtle a refinement for my mind or, I think, for that of a jury to grasp that the temper may be ignored but the physical defect taken into account.

38 Cr.App.R. at p.141.

53. See: A. Ashworth, "The Doctrine of Provocation", *Criminal Law Journal* 35 (1976), 292 at pp. 307-314; J. Edwards, "Provocation and the Reasonable Man: Another View", *Crim. L.R.* [1954], 898.

54. Fletcher, *supra* note 20, p.249.

Fletcher traces the problems besetting the legal doctrine of provocation to "the failure of the courts and commentators to face the underlying normative issue whether the accused may be fairly expected to control an impulse to kill under the circumstances". (p. 247)

The Royal Commission on Capital punishment adopted the following view:

We think that the test of provocation should be reformulated so that the accused is judged with due regard to any disability, physical or mental, from which he suffered. In our view, in place of the reasonable man test there should be a requirement that provocation is sufficient if, on the facts as they appeared to the accused, it constitutes a reasonable excuse for the loss of self-control on his part. Such a test would be more liberal than the present law. In particular it would enable any physical

characteristics of the accused to be taken into account. In a case such as *Bedder* the jury would be able to have regard to his sexual impotence in deciding whether he had a reasonable excuse for losing his self-control.

Working Paper on Offences against the Person, August 1976, H.M.S.O., para. 54, p.21.

The Model Penal Code similarly provides that a plea of provocation should be assessed "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be. It adds, however, that there must be a "reasonable explanation or excuse" for the accused's loss of self-control. (M.P.C. para.210 3 1b)

55. *R. v. Davies* (1975) 1 All E.R. 890.

56. Proviso to sec.2 of the Criminal Appeal Act 1968.

57. *Camplin* (1978) A.C. 705 at p.720D.

58. *D.P.P. v. Camplin* [1978] 2 All E.R. 168; A.C. 705.

59. *R. v. Newell* (1980) 71 Cr.App.R. 331; [1980] *Crim.L.R.* 576.

60. Sec. 2 of the Homicide Act 1957.

61. *D.P.P. v. Smith* [1961] A.C. 290.

And see *Ellis v. Johnstone* [1963] 1 All E.R. 286. In this case, Pearson L.J. adopted the view that "judicial observations on questions of fact have been treated as propositions of law, with the result that the field, which should have been left clear for the operation of the common sense of the jury on the facts of the particular case, has been encroached on

and encumbered by legal doctrine".

62. Fletcher, *supra* note 20, p.247.

63. See: *Kenny's Outlines of Criminal Law*, *supra* note 3, p.174-177.

64. Alldridge points out, in this respect, that "a requirement of proportionality is only consistent with provocation as partial justification, and loss of self-control is only consistent with provocation as partial excuse". *Supra* note 23, p. 670.

The issue is further explored in the following chapters of this thesis.

65. *Edwards v. R.* (1973) 1 All E.R. 152.

66. See: A. Ashworth, "Self-Induced Provocation and the Homicide Act", *Criminal Law Review* [1973], 483.

67. Ashworth criticises the current approach as being "an awkward and almost self-contradictory exercise, which calls into question the wisdom of section 3's mandatory terms. ...To refer to propositions of law as "mere considerations" it has rightly been criticised; it is almost tantamount to an admission that the law cannot make its mind up on a question of legal policy." *Supra* note 66, p.491.

68. See: P. Robinson, "Causing the Conditions of One's Own Defence: A Study in the Limits of Theory in Criminal Law Doctrine", *Virginia Law Review* 71 (1985), 1.

PROVOCATION

1. How does Justification or Excuse Relate to Provocation?

A successful plea of provocation alters the grounds for the legal classification of homicide. This formulation conveys in a nutshell the principal function of the defence in law. But one might argue that provocation, as pertinent to determining the offence category in which a killing is to be subsumed, is a matter neither of excuse nor of justification. As said before, justifications call in question the unlawfulness of the act; excuses challenge the attribution of responsibility for an unlawful act. It may seem, therefore, that such defences could only result in complete exculpation of crime. At first glance, the purported role of provocation as re-establishing rather than precluding criminal liability for homicide might appear to remove the plea from the scope of criminal defences that could be accounted for as justifications or excuses.

By the same token, one might claim that, but for the fixed penalty provided for murder in English law, provocation would merely operate as a factor in the

mitigation of sentence. Again, if it were assumed that justification and excuse are associated only with those defences whose acceptance leads to complete exoneration, one may question the application of this sort of analysis to provocation. According to Hart:

Provocation is not a matter of Justification or Excuse for it does not exclude conviction or punishment; but "reduces" the charges from murder to manslaughter and the possible maximum penalty from death to life imprisonment. [1]

It was explained in chapter 1 that provocation can be depicted either as a "*failure of proof*" defence, or as an "*offence modification*". [2] As Robinson points out, provocation was traditionally drafted as a defence negating the element of *malice aforethought* of murder and, in this sense, it operates as a failure of proof defence. On the other hand, provocation is also perceived as an offence modification, operating outside the *mens rea* and *actus reus* of the crime. This latter interpretation of provocation captures better the present position of the defence in English law. Nevertheless, treating provocation as a failure of proof defence or as an offence modification does not preclude canvassing the defence in terms of justification or excuse. According to Robinson:

Failure of proof defences are conceptually indistinguishable from elements of the offense; offense modifications often differ only in form; justifications are admittedly independent of the offense definition but may be viewed as serving to redefine the criminal conduct of the offense in the light of special justifying circumstances; and excuses, while admitting the commission of the harm or evil prescribed by the offense definition, raise issues of responsibility which are often allied to the culpability requirement contained in offense definitions. [3]

One would infer from the above that the interpretation of provocation as a failure of proof defence or an offence modification could be informed by considerations that may be either justificatory or excusative in nature. Indeed, as regards the possibility to perceive provocation as an excuse-based defence, Robinson remarks that:

One could argue that the provocation and extreme emotional disturbance defences merit treatment as a general excuse. The defenses appear to operate in an excuse-like manner, shifting the blame from the actor to the circumstances. [4]

Given that the plea of provocation is aimed at the *reduction* of criminal liability, justification and excuse - taken here in a broad sense - can still furnish the grounds upon which the rationale of

partial defence may be sought. [5] In this respect, provocation is viewed as an excuse-based defence in so far as its role in extenuation is set down to the element of impaired volition or loss of control. Here, the lack of self-control, although it is not taken to negate the attribution of responsibility/ blameworthiness altogether, can still challenge the attribution of responsibility pertinent to the major criminal offence. A.Von Hirsch and N. Jareborg explain the relation of the excuse doctrine to provocation as follows:

Conduct is excused in certain situations where
- although the outcome is not deemed desirable
- the actor should be exempted from blame for acting as she or he did. Textbook examples are situations of duress and necessity, where the defendant injures an innocent victim, in order to avert a threat to his own life or safety from another source, human or natural. But the provoked actor faces no immediate threat from any such source if he refrains from retaliating. He is also claiming extenuation only, not complete exoneration. Theories of excuse in the substantive criminal law could thus be applicable only by analogy - to suggest why provocation constitutes a partial excuse, warranting reduction of punishment. [6]

By the same token, canvassing provocation as a partial justification should not mislead one to think that legal justification - in a strict sense - can be propounded in partial terms. Claims of legal

justification dispute the unlawful character of an act in the circumstances and, in this respect, an act may be either legally justified or not justified at all. An analogy may be drawn, nonetheless, in so far as partial justification is understood to diminish the wrongfulness of the act by virtue of considerations independent of the actor's state of mind. In this respect, the reason for reducing the level of criminal liability in provocation pertains not to the actor's loss of self-control but, rather, to the victim's misdeed that prompts the actor to retaliate. Provocation operates as a partial justification on the assumption that the actor is to some degree morally justified to inflict punishment on the provoker. Ashworth explains the question of partial justification in provocation as follows:

...the term [partial justification] does not necessarily imply a connection with the legal concept of justifiable force (i.e. in self-defence); its closest relationship is with the moral notion that the punishment of wrongdoers is justifiable. This is not to argue that it is ever morally right to kill a person who does wrong. Rather, the claim implicit in partial justification is that an individual is to some extent morally justified in making a punitive return against someone who intentionally causes him serious offence, and that this serves to differentiate someone who is provoked to lose his self-control and kill from the unprovoked killer. [7]

Moral judgements of justification most commonly benefit acts wilfully chosen for their own merits. In this respect, the possible parallel between moral and legal justification would lose ground in so far as it is accepted that legal justification is primarily concerned with the "external" manifestation of an act. If an act is deemed legally justified, the question of whether it was chosen as such - a question relevant to moral justification - is to be laid aside. By the same token, one might say that if the reduction of criminal liability in provocation were exclusively connected with the victim's misdeed, the question of whether the actor was in control of himself need not be considered. The issue of loss of self-control might perhaps be taken into account in determining the appropriate degree of punishment for the lesser offence. This understanding implies the application by analogy of the basic assumption that questions of legal justification must logically precede those of excuse (see chapter 1). As Fletcher points out:

A justification negates an assertion of wrongful conduct. An excuse negates a charge that the particular defendant is personally to blame for the wrongful conduct...The structure that is implicit in this way of stating the analysis of liability ("excuses for unjustified violations") is that the concept of wrongful conduct logically precedes the concept of personal culpability. The analysis of

justification must precede the analysis of excuse. [8]

Besides its position as a partial defence to murder, provocation is also considered as a factor taken into account in the mitigation of sentence, following conviction of a criminal offence other than murder. One might suggest that, as a matter of mitigation too, the rationale of provocation could be sought in either the excusative or the justificatory element. According to Hart, mitigation rests on the assumption that, in the circumstances, compliance with the law would require the actor to exert much greater mental or psychological effort as compared to "normal people normally placed". [9] In this respect, the rationale of mitigation bears closer on excuse, for our primary focus is upon the actor's state of mind that makes it extraordinarily difficult for him to exercise control over his actions. On the other hand, mitigation may also rest on considerations that are taken to reduce directly the degree of wrong rather than the degree to which the actor is held blameworthy. Thus, a claim of mitigation might perhaps arise in a case where, for example, the actor intentionally broke the law in the course of a legally justifiable action. In this respect, mitigation can be explained by reference to the conditions of justification. Although, in theory, distinguishing between justificatory and excusative

considerations at different levels of analysis may seem quite straightforward, in practice it is often difficult to make out the precise nature of the proposed plea. As Hart explains:

Though the central cases are distinct enough the borderlines between Justification, Excuse and Mitigation are not. There are many features of conduct which can be and are thought of in more than one of these ways. [10]

One possible way to deal with these problems of demarcation between justification and excuse may be to look for the rationale of provocation by reference to the particular offence against which - as a partial defence - or in the context of which - as a factor in mitigation - provocation is raised. Thus, by taking into account the hierarchy of criminal offences in law and the moral weight these offences are associated with, one might say that, in general, provocation should rather operate on excuse basis with respect to more serious offences. The assumption here is that, in the face of a serious crime, only the excuse of loss of self-control may furnish morally acceptable grounds for extenuation. On the other hand, justificatory considerations may be given the priority when provocation is pleaded as a factor in the mitigation of sentence with respect to minor offences. [11]

Problems arise as to whether one may still speak of the proposed plea as one of provocation, if the element of loss of self-control were dispensed with - i.e. in a case where provocation is taken as justification-based. What distinguishes provocation from mere challenge is that the former, in a sense, "causes" rather than invites the actor to react. In this respect, the victim's affront constitutes provocation precisely because it leads the actor to retaliate in a state of mind that precludes him from being totally in control of his actions. Thus, it seems that both the victim's insult and - in relation to this - the actor's impaired capacity for self-control should be considered as necessary conceptual elements of provocation. Therefore, one might envisage the exclusion of either of these elements only as regards its assumed role in extenuation, but not as regards its position as a constituent element of provocation. It seems correct to say that if either of these elements were excluded in the latter sense, one would not be able to speak of the accused's plea as one of provocation. In the absence of impaired volition, the case might perhaps bear closer on excessive self-defence - when the latter is viewed as a partial justification - provided that the victim's wrongdoing constitutes a legal offence. On the other hand, in the absence of conduct that is seen as wrongful enough to amount to provocation, the

actor's loss of self-control - if accepted as a matter of fact - might be treated under another legal excuse or, arguably, it might be considered as an independent excuse on its own.

2. The Partial Justification Doctrine

The conception of provocation as a form of partial justification is said to have deep roots in the common law tradition. [12] This, one may argue, explains the law's predilection for an independent plea of provocation rather than subsuming these cases under a general "heat of passion" or "loss of self-control" defence. [13] Despite the important changes brought about in the English law of provocation by the Homicide Act 1957 - which, arguably, marks a shift towards treating the defence as a partial excuse - the overtones of the idea that provocation constitutes a partial justification are still ubiquitous in the case law. [14] According to F. McAuley:

...while the defence of provocation may well be a concession to the natural human failings that are the lot of every defendant, it is submitted that its true basis is to be found in the contribution of the victim, in the fact that his wrongful conduct was the cause of the defendant's outburst. [15]

The aim of this section is to offer a critical

account of of the partial justification doctrine and examine its theoretical implications for the analysis of provocation as a partial defence to murder. It will be argued that treating provocation as a partial justification is inconsistent with basic principles of a criminal justice system, as well as morally contestable. Although there are cases on provocation which cast the issue in terms of justification, it is more appropriate to take the defence as being excusative in character.

The partial justification doctrine lays emphasis on the assumption that it is the provoker who by his untoward conduct triggers the actor's fatal response. Provocation implies conduct objectively wrongful and as such capable of raising justified anger, culminating perhaps in some sort of violent reaction. In this respect, the actor's response to provocation constitutes, in a broad sense, an act of revenge. [16] Although killing under provocation cannot be totally justified - as, for example, in self-defence - it is argued that the law should make allowances for the victim's culpable contribution to his own demise. In McAuley's words:

...the defence of provocation functions as a partial justification rather than a partial excuse. If it were merely a partial excuse, the defence would be limited to a denial that the defendant was entirely to blame for his

actions, i.e. for wrongfully killing another intentionally, by reason of the impairment of his powers of self-control. As we have seen, however, the defence entails a denial that the defendant's actions were entirely wrongful in the first place, in the sense that it implies that the defendant was partially justified in reacting as he did because of the untoward conduct of his victim. [17]

The above approach consorts with the basic assumption that, in general, justification pertains to the question of whether an act should "externally" be held wrongful/unlawful or not. Nonetheless, in the present case, the question of justification refers, rather, to the degree of wrongfulness/unlawfulness of the act. From this viewpoint, as said before, the requirement of impaired volition in provocation would be redundant - at least as relevant to the rationale of the partial defence. Notwithstanding that the actor cannot here plead total justification, the victim's provocative conduct furnishes the preponderant reason for reducing the degree of wrongfulness/unlawfulness of the killing. Arguably, understanding provocation as a partial justification presupposes that the victim is culpable for his misdeed. It might be said that the degree to which the actor's retaliation is justified depends both on the wrongfulness of the provocation and on the victim's culpability in this respect. [18] Nonetheless, the identification of the proper level

of liability logically precedes the possible assessment of actor's degree of culpability on this level. Whereas, in other words, for the reduction of the criminal category of homicide a culpable act of provocation should be established, the gravity of provocation may be taken into account, among other things, in determining the degree of punishment for the lesser offence. However, in so far as the partial justification doctrine presupposes a culpable provocation, this doctrine could not apply where the victim's culpability cannot be clearly shown. The latter might obtain, for example, in a case where the accused's fatal reaction was in fact preceded by an exchange of provocative acts between the parties. If the instigator of the situation cannot be identified, the plea of provocation could not be accepted, at least on the grounds of the partial justification doctrine. [19] Arguably, the same would be the case where the provoker is excusable, or where the actor is mistaken about the real character of the victim's acts.

Although the actor's life is not in danger, provocation resembles self-defence in that in both cases it is the deceased who triggers the fatal incident. The aggressor's culpability is given an important role as regards the legal justification of killing in self-defence. Similarly, the provoker's culpability is deemed relevant to the partial

justification of his killing in retaliation. It is asserted that an act of provocation may be seen as weakening the provoker's right to life, although it does not completely negate it. This position emanates from the moral theory of justification which postulates that one can forfeit his right to life if he acts wrongfully against another (the "*forfeiture*" theory). [20] As it applies to self-defence, this theory suggests that the wrongfulness of killing the aggressor is negated on the ground that the aggressor's right to life is suspended. With respect to provocation, such an approach might lead to the conclusion that any wrongful conduct, regardless of its degree, would suffice to render the wrongdoer's right to life less worthy of protection, provided that is deemed serious enough to constitute legal provocation. Moreover, if the provoker's right to life is downgraded, not only the addressee of the provocation but anyone could take the provoker's life and plead partial justification. [21]

Several objections could be raised against the "*forfeiture*" theory as it applies to provocation. If one accepts that the wrongdoer forgoes his right to life according to the degree of his culpable wrongdoing, it seems hard to envisage where to draw the line as regards the sort of wrongful acts that might be taken to undermine this right. Thus, one might claim that even a minor wrongdoing can be

seen as somehow "weakening" the actor's right to life. Such an approach appears to contravene fundamental moral principles regarding the sanctity and inviolability of human life. On the other hand, if only very serious wrongdoings were held to be capable of undermining the wrongdoer's right to life, for example, wrongdoings involving some sort of threat to life or limb, the scope of the provocation defence could get extremely narrow. Further, one might argue that applying the "forfeiture" theory to provocation leads to contradiction in so far as it is admitted that the actor's response to provocation remains seriously wrongful. Indeed, on the hypothesis that a culpable wrongdoing weakens the wrongdoer's right to life, both the actor's and the provoker's lives should be viewed as being "downgraded". For these reasons, the "forfeiture" theory seems not to provide sufficient grounds of support for the partial justification doctrine in provocation. The victim's wrongdoing, culpable though it may be, cannot unconditionally lead to the justification of any act of retaliation, still less to the "partial" justification of the provoker's killing. J. Dressler, by drawing an analogy between self-defence and provocation, argues as follows:

...it might be claimed that a provoker who does not threaten the accused's life does not wholly forfeit his right to life but that,

nonetheless, from society's perspective his life is entitled to less protection because of his wrongful behaviour. We value his life less than that of an innocent human being. Or, perhaps, we might say that our interest in protecting people from aggression is less intense when the defendant's own wrongful acts contributed to the attack. Such a claim has superficial appeal, but how strongly do we believe it? Do we really believe that a person's life should be less valued in the law because he slapped the face of the killer, uttered some opprobrium, blew smoke in his face, or committed a sexual impropriety with a member of the defendant's family? Is human life so easily alienated? It is one thing to proclaim that the provoker should be punished for his wrongdoing; it is another to suggest that his life can be taken with "partial impunity". [22]

Let us now examine whether provocation as a partial justification might draw some support from the other two main moral theories of justification, namely, the theory of the *lesser evil* and the *rights-based* theory of justification. Briefly, the application of the lesser evil variation of the justification theories presupposes, first, a situation of conflict of interests wherein only one interest can possibly be preserved at the expense of the other; second, that the interests at stake can be evaluated and compared according to certain objective criteria; and, third, a rational agent who is called upon to make a reasonable choice, that is, a choice

in accordance with those objective criteria of evaluation. Notwithstanding its *prima facie* wrongful character, an act which preserves or promotes the superior interest is deemed justified. [23] With regard to legal justification, in particular, it should be pointed out that the relevant judgement is not confined only to the assessment of the competing interests at stake, but it is informed also by the requirement to protect the legal order in general. It seems clear that this theory of justification cannot furnish any grounds for considering provocation as a partial justification. In fact, the conditions of provocation do not seem at all to meet the basic prerequisites of this theory of justification, and the very idea of partial justification seems out of place here. Indeed, if the killing of the provoker were regarded as less evil than taking the provocation, something which is hardly the case, the actor should rather be entitled to complete exoneration. First of all, however, in provocation it cannot be said that the actor is confronted with an inescapable conflict of interests, as required for the application of the present theory. Depending upon the nature of the provocation, the actor may seek redress in an appropriate - i.e. fully justifiable - manner. As Dressler explains:

The lesser evil theory is also difficult to comprehend in partial terms. If the taking of a

human life in response to nondeadly provocation is less evil or harmful than countenancing the provocation (an unlikely conclusion at that), the defendant should be acquitted of all homicide charges; if the defendant's actions are more evil, he should be punished fully for taking a human life. [24]

The third moral theory of justification to be considered rests upon the *rights-enforcement* principle, or the principle of the *vindication of autonomy*. According to this theory, one is entitled to pursue and protect one's rights even, *in extremis*, by taking the life of the transgressor. The partial justification doctrine cannot claim any support on this basis either. The enforcement of moral or legal rights is not unconditional. On the contrary, those rights would remain in force only when pursued within certain limitations. Beyond these limitations, the right would fall in abeyance - what remains being a mere pretext of a right - and thus it could not warrant moral or legal justification. [25] As Dressler argues:

The rights theory of justification is the least convincing basis in these circumstances [of provocation]. What right would we want to say the defendant is properly exercising when he kills a provoker? It cannot be the right to life, since the provoker does not jeopardise the defendant's (or anyone else's) right to life. If it is a dignitary right that the defendant seeks to exercise, it should

certainly come as a surprise to us that such a right entitles the actor to take a human life in order to enforce it. [26]

It seems, therefore, that none of the above theories of justification is capable of buttressing the approach to provocation as a partial justification defence. Rather, considering the entrenched understanding of provocation as a concession to natural human frailty, the excuse theory seems to be a more appropriate basis for the defence. Although for the plea of provocation to be sustained the actor has to show that he was somehow wronged by his victim, the rationale of the defence should be traced to the actor's loss of self-control. In this respect, the victim's provocation furnishes an acceptable reason for the actor's loss of control rather than a reason for directly diminishing the wrongfulness of his killing the provoker. The formulation of provocation as a partial excuse will be explored further in the following chapter.

One might claim that some support for the partial justification doctrine may at any rate be drawn in those cases where provocation appears to verge on self-defence. This could obtain, in particular, where the act of provocation entails some threat to the actor's life or limb. [27] It is accepted that in these cases the actor may rely on provocation only if the plea of self-defence cannot be sustained. This

would be the case, for example, if the actor exceeds the limits of necessary force in self-defence. Nevertheless, in such cases one may envisage an important shift as regards the grounds of the actor's defence - in one word, a shift from justification to excuse. In English law, the position that in excessive self-defence cases the admission of an unlawful attack does not on its own entitle the actor to a partial justification defence militates against connecting the rationale of provocation with that of self-defence (see chapter 5). Some further objections can be raised against treating the two defences on a common basis. The legal justification of self-defence rests on the assumption that the act of defence vindicates not only the actor's life but, in addition, the legal order in general. Besides the fact that in provocation the actor is not confronted with an immediate danger, it would seem paradoxical to associate the act of retaliation - an act by definition unlawful - with the protection of legal order. [28] Moreover, for the defence of provocation to be accepted, it is not required that the victim's conduct should constitute a legal offence. By the same token, it is accepted that the victim's conduct, unlawful though it may be, could not support a plea of provocation if it had no impact on the actor's capacity for self-control. [29]

One might perhaps pursue another approach to the question of wrongfulness concerning a provoked killing by considering the matter with respect to a variation of the doctrine of "double effect". This doctrine has been associated with attempts to elucidate the grounds upon which killing in self-defence is justified. [30] The doctrine of double effect postulates a distinction between two effects of an act: the one effect pertains to what the actor in fact intends in itself, or as a means to an end; the other refers to what the actor may foresee as a probable or inevitable consequence of his action but he does not intend as such. In this respect, one is invited to assess the act first by viewing it in the abstract - i.e., without its unintended consequences. This, in turn, may be followed by a second assessment of the act in the light of its unintended consequences. In a case of a provoked killing, the double effect doctrine might perhaps suggest to view the provoker's death as an unintended consequence of an otherwise intentional act of retaliation. From this viewpoint it might be said that, taking into account the actor's intention, the response to provocation would be justified in so far as it pays the provoker his due. If the provoker's killing was a foreseen or foreseeable result of such a response, the actor may be held accountable to a lesser degree. The

actor would have no justification, however, if his original intention was to kill the provoker. Nevertheless, in so far as provocation is taken to provide a defence for intentional killings, such an approach to the matter is difficult to accept. The doctrine of double effect has been criticised on several grounds. It is argued, in particular, that no distinction could possibly be drawn between intending to do X and intending to kill, if the latter is foreseen as an inescapable consequence of the former. According to S. Kadish:

The doctrine of double effect does not provide that knowing killings may not be serious crimes and wrongs, but only that this weaker sense of the sanctity-of-life principle is not necessarily violated when they occur. This weaker version, then, still leaves us uninformed of the theory on which killings are justifiable or acceptable when they are not intentional in the strict sense. Beyond that, however, the distinction is so alien to our intuitive common sense as to be sophisticated. For if I shoot a man between the eyes because he is assailing me with upraised dagger, it seems strange to allow me to say I did not choose to take his life, but that I chose only to prevent the attack. Although the former was not a logically necessary condition of the latter, it was actually necessary in the circumstances or I, at least, acted on that assumption. Only the ghost of an absolute ban on intended killing is left if it excepts such a killing as this. The double-effect doctrine

seems to me like a fiction in the law, serving to preserve appearances for a principle that has lost its sufficiency. [31]

Thus far, it was asserted that the idea of treating provocation as a partial justification defence, notwithstanding its moral connotations, seems difficult to reconcile with fundamental principles of legal justification. This is not to argue, however, that this approach to provocation is irrelevant to the development of legal doctrine, or that it cannot be met in the current decisions on the matter. One could cite various examples wherein provocation has been considered - implicitly or explicitly - as a justification-based defence. [32] Nevertheless, in so far as the trend in the law - as relating to society's moral attitudes - is towards placing more emphasis on the sanctity of human life, taking provocation as a partial justification should lose ground. [33] However, to the degree that such an approach to the defence remains part of a system of criminal law, provocation is bound to be a source of controversy. [34] The reason for this is that, as it operates in this context, the idea of partial justification conflicts with basic requirements of criminal law, such as those relating to due process and proportional punishment. In particular, the availability of lawful means of protection against illegal acts of provocation generally precludes

"taking the law into one's hands". [35] Nonetheless, treating provocation in terms of justification may gain acceptance in those cases where provocation is taken as a mitigating consideration in the face of minor offences. This would depend, among other things, on the nature of the criminal offence in question, as well as the seriousness of the provocation. [36] The remaining subdivisions of this chapter explore how central problems in the law of provocation may be conceptualized and dealt with from the viewpoint of the partial justification doctrine. In the course of this analysis, partial justification will be contrasted with partial excuse.

3. Provocation, Misdirected Retaliation and Mistake of Fact

The keystone of the partial justification doctrine as it applies to provocation is that the victim is partly responsible for his own death. The actor's claim for extenuation rests here on the victim's culpable contribution to his own killing. With regard to this, it is asserted that in those cases where the act of retaliation was accidentally directed at an innocent third party the actor should still be entitled to the defence, provided that his intended victim was the author of the provocation. [37] If the latter cannot be shown, however, the

actor should be found guilty of murder. [38] Nevertheless, in some cases of misdirected retaliation, namely, those involving a mistake about the identity of the provoker, one might raise the question of whether the real basis of the actor's defence to murder pertains to the conditions of provocation or, rather, to those of mistake. Considering the current position in English law, it is accepted that in such cases the actor could still rely on provocation, notwithstanding that his retaliation was directed at the party other than the provoker. By the same token, the actor would be entitled to the defence if he was mistaken about the real nature of the victim's conduct. In both cases, the defence of provocation may be accepted only if the actor's mistake is held to be reasonable. Nevertheless, the overlap of provocation and mistake in such cases has led some authors to envisage the relevant plea as a specific variation of the defence of mistake of fact.

...if the slayer is told of such great harm which he had not heard before, this may be sufficient for adequate provocation...even if the statement is untrue - provided it is made under circumstances calculated to cause it to be believed and it is actually believed by the slayer. This is merely a particular application of the reasonable mistake of fact doctrine.

[39]

Under the partial justification doctrine, it is asserted that the issue of provocation in such cases of mistake should be assessed on the basis of the circumstances *as the actor believed them to be*. For those cases of mistake where no act of provocation took place one may use the term "*putative provocation*". These may be distinguished from the cases where an act of provocation did in fact occur, but its author was someone else than the victim - i.e. cases of misdirected retaliation due to mistake. Both sorts of cases may be subsumed - in the context of the present doctrine - under the heading of *putative partial justification*. According to McAuley:

...the non-occurrence of the provocative event would seem, at least at first sight, to be fatal to [the accused's] plea [of provocation] from the point of view of the theory of justification, as there would then be no prior wrong on which he could rely as a basis for his own retaliatory action. Yet this conclusion seems counter-intuitive, as it removes the defence from a defendant who would have been entitled to it had the facts been as he reasonably supposed them to be. ...For while the paradigm case of a plea of partial justification will, in the nature of things, rest on evidence of wrongful conduct on the part of the victim, it does not follow that retaliatory violence is always unjustified in the absence of such evidence. [40]

As the above analysis suggests, in cases of mistaken provocation the accused should still rely on a partial justification defence, notwithstanding that the victim's conduct did not objectively amount to provocation. A similar position is put forward with regard to putative justification (e.g. putative self-defence), with the difference that the actor would here be entitled to full acquittal. Nonetheless, it seems questionable whether in such cases the grounds of the actor's defence should be traced in the theory of justification. Indeed, as was said before, one may envisage two different approaches to dealing with problems of putative justification: first, to consider the issue in the light of the circumstances as they really were and hence to treat the actor's plea under the excuse of mistake; second, to consider the issue on the basis of the circumstances as the actor believed them to be and thus to treat the actor's plea as a matter of justification or - with respect to provocation - partial justification. Nevertheless, if putative partial justification cases were subsumed under the excuse of mistake, such an excuse should operate only in part, that is, only to the extent to which the actor's response would be justified. In so far as the act of retaliation remains wrongful, the actor could not rely on a complete excuse. The same would obtain with respect to excessive self-defence, if a claim of partial

justification is recognised on such a basis (see chapter 5).

On the other hand, if the issue of putative justification is dealt with as relating to justification rather than excuse (i.e. on the basis of the circumstances as the actor believed them to be), provocation - as a partial justification - should furnish the grounds for the actor's defence in such cases. In this respect, one may draw an analogy between putative provocation (putative partial justification) and putative self-defence (putative justification) by considering how the latter is treated in common law. In common law the dominant position seems to be that the right of self-defence arises in any case where the actor *believes* that he is under an unlawful attack. This is taken to denote that the right of self-defence would arise even in those cases where the actor's belief is mistaken, in so far as such a mistake is deemed reasonable. As we shall later consider, this approach is contested on the grounds that it confuses justification with excuse and hence it misrepresents the rationale of legal justification (see chapter 5).

Having examined the problem of mistake in provocation from the viewpoint of the partial justification doctrine, we may now come to discuss how the same problem may be dealt with if the defence is treated as a partial excuse. Taking provocation as an

excuse-based defence, the focus of enquiry is on the actor's loss of self-control as a result of the provocation rather than on the victim's untoward conduct as such. In this respect one might say that, when the act of retaliation was directed at a third party, the admission of loss of control would entitle the actor to the defence, irrespective of whether his intended victim was the author of the provocation or not. [41] As R.S. O'Regan remarks:

To avail himself of the defence of provocation the accused must have actually lost control of himself and retaliated while in the heat of passion. Once an accused loses his self-control it is unreal to insist that his retaliatory acts be directed only against his provoker. When his reason has been dethroned a man cannot be expected, in the words of a Queensland judge, "to guide his anger with judgment". In fact an attack on an innocent third party may suggest very strongly that the accused did lose his self-control. [42]

Under the excuse theory it seems correct to say merely that, in so far as the actor was led to lose his self-control by an act of provocation, he should not be denied the defence even though his response was directed against a person other than the provoker. Nevertheless, it might still seem questionable to assert that, in such cases, the actor should be able to rely on the defence, even if his *intended* victim was not the author of the provocation. As has been

said, with regard to the partial justification doctrine, should the latter be the case the actor could not rely on provocation, for only if intended at the provoker the act of retaliation would be partially justified. In the context of the excuse doctrine, although the focus is on the issue of loss of self-control, a retaliation not intended at the provoker may also exclude the defence, but on different grounds. First, because it might indicate absence of an intention to kill on the part of the actor. The latter, as we have seen, is a necessary prerequisite for the defence of provocation to be admitted. This may obtain, for example, in a case where the actor reacted to provocation in "blind rage". Here the actor may be entitled to a *lack of mens rea* defence rather than provocation (see chapter 3). Second, an intention to kill a person unrelated to the provoker might perhaps indicate that the actor was suffering from an abnormality of mind. If this were the case, the basis of the actor's excuse of loss of self-control may shift from provocation to some other defence, notably, diminished responsibility (see chapter 6). Finally, the question of who the actor's intended victim was may be relevant to whether loss of self-control can be accepted as a matter of fact. One may say, in one word, that if the actor's retaliation is not intended at the author of the provocation, it is questionable whether provocation can provide the

basis for the excuse of loss of control. These points will be laboured further in the course of our analysis of provocation as a partial excuse later.

In those cases where the actor was led to lose his self-control by a mistaken belief of provocation (putative provocation), it is argued that he should still be able to rely on an excuse. According to Fletcher:

With regard to mistaken belief in excusing facts, the subjective experience of pressure is just as great, whether the danger [here the provocation] is real or imaginary. This mistake must be taken into account in some manner. [43]

Nevertheless, although the emphasis is now upon the actor's loss of self-control, the question of provocation should somehow still be answered. Notwithstanding that the victim's conduct did not in fact amount to provocation, one would have to consider whether what the actor mistakenly perceived could constitute provocation sufficient to buttress an excuse of loss of control. In other words, the question of provocation turns here on the actor's misrepresentation of the victim's conduct. Nonetheless, this question should be distinguished from the issue of whether the actor's mistake can be regarded as reasonable. One may argue that in such cases for the actor's excuse of loss of self-control to be accepted, a strong case of mistake needs to be

made in the first place. In this respect, the actor's plea could be seen as double-based, for it rests on considerations of both mistake and provocation.

It might be argued, on the other hand, that loss of control by reason of putative provocation should in some cases entitle the actor to a partial excuse, irrespective of whether his mistake was reasonable or not. All that is required, in this respect, is to show that what the actor perceived as provocation would be sufficient to support an excuse of loss of self-control. Unless the actor can put forward a lack of mens rea defence in such cases, it may seem contradictory, however, to require the "provocation" but not the mistake to be reasonable. [44] Some further aspects of the theory of mistake will be examined in relation to provocation in chapter 4.

4. Proportionality and the "Reasonable Man": a First Approach

The partial justification doctrine postulates that the actor should be unable to rely on provocation unless the victim's transgression is sufficiently serious. It is argued that the traditional requirement of proportionality in the law of provocation is most at home under this doctrine. Indeed, the old rule in common law that words alone cannot constitute legal provocation has been taken to mirror the conception

of the defence as justification- rather than excuse-based. [45] As has been said in chapter 1, the requirement of proportionality indicates that, for the defence to be accepted, there must be a reasonable relationship between the act of provocation and that of retaliation. This requirement is embedded in the assumption that a reasonable person reacts to provocation according to its degree. The more outrageous and savage the provocation is the more violently the actor should be expected to react. McAuley explains the role of the proportionality requirement under the partial justification doctrine as follows:

Admittedly, the principle of proportionality is generally invoked to deny the defence of provocation to a defendant who has fatally shot or stabbed an unarmed victim, or who has beaten his victim to death in an orgy of violence. But there is no reason in principle why it should not also be invoked to deny the defence to a defendant who kills his victim with a single blow of the fist if there is evidence that the latter's conduct did not warrant retaliatory violence of this order, in a word, in cases in which the victim's behaviour was insufficiently serious to justify a killing of any kind. The principle of proportionality can, therefore, quite properly be regarded as an alternative way of stating the classical requirement that provocation must be serious to afford a defence to a charge of murder. Indeed, given that it emphasizes the justificatory component in the

plea of provocation - the fact that the violence used by an accused must be reasonably related to his victim's wrongdoing, it is perhaps the best way of stating this requirement. [46]

A recurrent problem in the theory of provocation has been whether it is correct to speak of the requirement of proportionality as relevant to the mode of the actor's retaliation. In the context of the present doctrine, it is argued that the question of partial justification focuses on the mode of the actor's retaliation as the cause of the provoker's death. In this respect, only in those cases where the provocation is deemed serious enough to "warrant" a deadly response, should the killing be partially justified. In so far as it is accepted that provocation presupposes loss of self-control, the partial justification doctrine does not exclude the defence even if the actor retains some control over his actions. According to McAuley:

It makes perfect sense for the law to assume that an enraged defendant is capable of some measure of rational control. Perhaps for this reason it has traditionally been true that the critical question in a case of provocation is not whether the defendant has temporarily lost control in some absolute, irretrievable sense, but whether he was partially justified in killing his victim in the circumstances. [47]

One may argue that, with regard to the justification theory, the element of impaired volition or loss of

self-control in provocation is hardly relevant to the partial justification of the provoker's killing. In the last analysis, what here really matters is whether the provocation was serious enough to "objectively" diminish the wrongfulness of the provoker's killing. As pointed out before, speaking of an act intended to kill but not of the ensuing killing as being partially justified seems too sophisticated - unless it indicates that the actor had in fact no intention to kill (see the discussion of the doctrine of double effect, p.21 supra). The issue of loss of control, relevant to establishing provocation though it may be, has little to do with the requirements of justification. Indeed, with regard to the latter, it would be fallacious to make the actor's plea of partial justification dependent upon the requirement of loss of self-control. The proposition that killing the provoker is to some degree justified a) because of provoker's transgression *and* b) because the actor lacks self-control seems, as to its second premise, doubly wrong. First, as has been mentioned before, moral judgements of justification presuppose that the actor is in control of his actions, for moral justification focuses on the act as a product of the actor's determination. In this respect, although an act may be desirable, the actor could not claim moral justification if he did not intend such an act in itself (e.g., due to lack of self-control). Morally

speaking, if the author of the provocation is culpable, it might perhaps be said that "he got what he deserved"; but this does not entail the moral justification of the actor's response, unless it is admitted that the actor was somehow in control of himself. [48] Second, it was said that the focus of legal judgements of justification is primarily on the act and not on the actor. In this respect, if a culpable provocation is taken to render the provoker's killing less wrongful, one need not consider whether or not the actor was in control of himself when retaliated. Such considerations could only be relevant to the actor's claim if provocation is treated as an excuse. In so far as in the context of the defence of provocation moral and legal justification would seem to intersect, making the plea of partial justification dependent upon the actor's loss of self-control is contestable on both fronts. Thus McAuley seems to contradict himself when he says that:

Undoubtedly, a defendant who kills after he has regained his composure, or when the effects of the provocation have more or less worn off, is not entitled to the defence, as he can hardly claim that it was the provocation which caused his violent outburst. A defendant who kills in these circumstances has plainly committed an act of revenge and, consequently, is guilty of murder. But it is submitted that a defendant who can show that he killed in the face of substantial provocation should, on this ground

alone, be entitled to the defence, provided that his conduct can be justified in the sense suggested above. [49]

If the loss of self-control is excluded from the rationale of the defence of provocation, however, one could see no reason why even those who kill out of sheer revenge should not shelter under a partial justification defence, if they could show that they were seriously wronged by the victim (except perhaps that acts of revenge overtly challenge the validity of the legal order). Indeed, as we shall later consider, a similar question has arisen as relevant to the partial justification of killing in excessive self-defence cases (see chapter 5), as well as in certain cases of cumulative provocation (see chapter 6).

If provocation is taken to furnish a partial justification defence, one might perceive proportionality as referring simply to the relationship between the degree of provocation and the degree of justification of the provoker's killing. Thus, one might say that the more serious the provocation, the more justified - or less wrongful an act - the provoker's killing in retaliation would be. Such an approach to the matter entails, first, that if the provocation is deemed sufficiently wrongful, the actor should be entitled to a partial justification defence, whatever the manner of his retaliation may be. [50A] In this respect, proportionality may be

formulated as a "requirement" only in so far as it indicates the threshold of wrongfulness which an act of provocation should meet if it is to buttress a plea of partial justification. Second, beyond this threshold the degree to which the actor's retaliation is justified may vary depending on the gravity of the victim's provocation. In this respect, proportionality is viewed not as a "requirement" but, rather, as an issue relevant - among other things - to determining the degree of punishment for the lesser crime. [50B]

By the same token, one might say that under the justification doctrine the reasonable man standard could only relate to the question of whether the victim's provocation was sufficiently grave to buttress a claim of partial justification. In this respect, the provoker's killing should be considered as partially justified only if a reasonable person would view the provocation as being very serious. Such an approach to the reasonable man standard does not exclude taking into account certain individual characteristics of the actor in so far as they are considered relevant to determining the gravity of the victim's provocation. Ashworth argues that:

Once it is accepted that individual characteristics are relevant to an estimation of the gravity of provocation, it is surely possible to reinstate the principle that people react to provocation according to its degree.[51]

If is read in terms of justification, the above position would imply that a deadly response may be partially justified in so far as, in the face of certain individual characteristics of the actor, the provocation is deemed sufficiently grave (see chp.4).

Finally, one might say that in a case where the author of the provocation is excusable, the actor may not be able to rely on the defence if he was aware of the provoker's excuse. The reason for this is that in such a case, however wrongful the act of provocation may seem, the actor's awareness of the provoker's excuse may be regarded as militating against the basic hypothesis of the partial justification doctrine, namely, that the provoker deserves punishment. If the actor is not cognizant of the provoker's excuse, on the other hand, the case should rather be treated as one of putative partial justification (see section 3, supra).

Let us now consider how the requirement of proportionality in provocation may be interpreted if the defence is taken to operate as a partial excuse. Here the actor's plea centres on the element of loss of self-control. At first, in so far as the loss of control is viewed as a matter of degree, one might say that the more control the actor was capable of exercising the less excusable his fatal reaction to provocation should be. According to R. Cross:

The law must recognize, as common sense does, that thoughts of the consequences of their conscious and deliberate action may well not flash across the minds of those under the influence of such strong emotions as panic or rage. Even if thoughts of the victim's suffering do flash into the mind in these circumstances, they could only produce a moral distinction from a case in which they do not occur if they came at a moment when the agent had sufficient control of the situation to enable him to desist from further action. [52]

Given that the partial excuse in provocation centres on the element of loss of control, it may seem contradictory to connect the requirement of proportionality with the actor's mode of retaliation. Indeed, such a connection may lead one to assume that the actor could not rely on the excuse unless his mode of retaliation roughly measures up to the gravity of the victim's provocation. What is here confusing is that, being put like that, the requirement of proportionality seems to imply that, for the defence to be accepted, the actor's capacity for self-control need not be excluded. In other words, such an approach is misleading because it tends to shift the focus from the question of whether the actor lost his self-control to that of whether he retaliated in kind. Nevertheless, in so far as provocation provides a partial excuse for an intentional killing, the admission of control should be fatal to the actor's defence. The question here is not whether the manner

of retaliation was dissimilar to the provocation received but, rather, whether the provocation was such as to render the loss of control an acceptable excuse for killing. Thus, one should distinguish between a provocation that renders the actor's failure to exercise control excusable, and a provocation that the actor is always expected to resist. Failing to exercise control and refrain from killing in the face of a trivial provocation cannot be excused. Similarly, serious though the provocation may have been, the actor's defence would collapse if he did not in fact lose his self-control as a result. [53] Considering the actor's mode of retaliation may be important in dealing with this latter question. As the above discussion suggests, neither under the partial excuse doctrine the requirement of proportionality could plausibly refer to the fashion of the actor's response to the provocation. In this context, proportionality may only indicate that the excuse of loss of control is dependent upon the degree of the provocation to which the actor was subjected. [54] In addition to this, if the defence is sustained, the gravity of the victim's provocation may be taken into account, among other things, in determining the actor's degree of culpability within the purview of the lesser crime. In this respect, it might be said that a more serious provocation would attach less blame to the actor - for losing his self-control and killing - than a less

serious one, even though both sorts of provocation are sufficient to reduce the legal category of homicide. [55] With respect to the excuse doctrine, the reasonable man may have a part to play in resolving the question of whether the provocation received was such that the actor should be expected to resist. If the latter is the case, provocation could not support an acceptable excuse of loss of self-control - irrespective of whether the actor in fact lost his self-control or not. This may obtain, for example, in a case where the provoker is excusable and the actor is cognizant of the provoker's excuse. The issues considered in this section will further be examined in the course of the discussion of provocation as an excuse in the following chapter. Different approaches to identifying the role of the reasonable man will be the subject matter of the analysis in chapter 4.

5. Concluding Note

This chapter examined how justification and excuse relate to the defence of provocation, and offered a critical account of the partial justification doctrine. With regard to the role of provocation as a partial defence to murder, it was argued that the merits of treating the defence in terms of justification are contestable. Although such an approach to the defence might perhaps claim some moral

grounds of support, it contravenes the rationale and principles of legal justification. The implications of the justification doctrine on the issues of mistaken provocation (putative provocation), proportionality and the reasonable man were explored in contrast with those of the excuse doctrine. It was asserted that neither theory of provocation makes room for treating the issue of proportionality as pertinent - in a narrow sense - to the actor's mode of retaliation. Rather, under the partial justification doctrine the requirement of proportionality indicates that the provoker's killing may be partially justified only in the face of a serious provocation. Under the excuse doctrine, on the other hand, this requirement relates to the question of whether the gravity of the provocation was such as to render the actor's loss of self-control an acceptable basis for excusing. By the same token, if provocation is taken as a justification-based defence, the reasonable man standard pertains to the determining whether the provocation was serious enough to render the provoker's killing partially justified. If provocation is taken as a partial excuse, by contrast, the standard relates to assessing whether the provocation was grave enough to allow an excuse of loss of control. These issues will be clarified further in the subsequent chapters.

NOTES

1. H.L.A. Hart, "Prolegomenon to the Principles of Punishment" in *Punishment and Responsibility*, Oxford (1968), p.15.

2. P. Robinson, "Criminal Law Defences: A Systematic Analysis, *Columbia Law Review* 82 (1982), pp. 232-233.

3. P. Robinson, *supra* note 2, p. 270.

4. P. Robinson, *supra* note 2, p. 233.

5. J.L. Austin remarks:

It is arguable that we do not use the terms justification and excuse as we might; a miscellany of even less clear terms, such as "extenuation", "palliation", "mitigation", hovers uneasily between partial justification and partial excuse; and when we plead, say, provocation, there is genuine uncertainty or ambiguity as to what we mean - is he partly responsible, because he roused a violent passion in me, so that it wasn't truly me acting "of my own accord" (excuse)? Or it is rather that, he having done me such injury, I was entitled to retaliate (justification)?

"A Plea for Excuses" in *The Philosophy of Action*, (1968), p.20.

6. A.V. Hirsch & N. Jareborg, "Provocation and Culpability", in *Responsibility, Character, and the Emotions*, (1987), p.242.

7. A. Ashworth, "The Doctrine of Provocation", 35 *Criminal Law Journal* (1976), p.292 at p.307.

8. G. Fletcher, "The Right and the Reasonable", *Harvard Law Review* (1985), p.949 at p.958.

The author explains the priority of the judgements of justification over those of excuse as follows:

Among human actions, only those that warrant a prima facie negative evaluation require our attention. In the specific case of legal violations, a prima facie negative evaluation follows from the breach of a legal prohibition. This prima facie (negative) evaluation is subject to rebuttal in cases of justification. If the violation is justified, say on grounds of self-defence, lesser evils or consent, the act is, on balance, right and good. It no longer has the negative evaluation necessary to render excuses relevant. There would be no more point in blaming or excusing a justified act than there would be in blaming or excusing a beneficial act. The justification sanctifies the act and renders the excuses irrelevant.
(p.960)

The above analysis might apply to the defence of provocation by analogy. In this respect, one may say that the prima facie negative evaluation of the killing as murder is subject to rebuttal by a valid claim of provocation. Nonetheless, the acceptance of the defence here does not lead to the complete rebuttal of the wrongfulness/unlawfulness of the act, for a degree of responsibility - for voluntary manslaughter - still remains. In so far as the reduction of liability is deemed pertinent to the "external" assessment of the act as less wrongful - i.e. by virtue of the provoker's culpable transgression - the defence is considered as a partial justification. To the degree to which the killing is regarded as partially justified there should be no point in raising an excuse.

9. According to Hart:

The special features of Mitigation are that a good reason for administering a less severe penalty is made out if the situation or mental state of the convicted criminal is such that he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been impaired or

weakened otherwise than by his own action, so that conformity to the law which has broken was a matter of special difficulty for him as compared with normal persons normally placed.

Supra note 1, p.15.

10. H.L.A. Hart, supra note 1, p.16.

11. Art. 308 of the Greek Penal Code offers an example of how mitigation or even complete exoneration may be made contingent upon the gravity of the particular legal offence of which the actor is convicted. In para.3 we read:

The one found guilty of the offence described in para.1 [minor assault] may be absolved from any penalty if his act was a result of justified anger due to an immediately preceding act of the victim, that took place against or before him and which was particularly cruel or brutal.

12. It is pointed out that early law placed special emphasis on the need to establish the wrongful character of the victim's conduct for the defence to be allowed. See, e.g. *Keite* (1697) 1 Ld.Raym.139; *Mawgridge* (1706) 17 St.Tr.57; *Mason* (1756) Frost.132; *Bourne* (1831) 5 C.&P. 129; *Lynch* (1832) 5 C.&P. 324; *Kirkham* (1837) 8 C.&P. 115; *Selten* (1871) 11 Cox 674. Quoted by F. McAuley, infra note 15, p.150.

13. See e.g. *Welsh* (1869) 11 Cox 336. In this case it was said that for the defence to be accepted "it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as for instance, a blow, and a severe blow - something which naturally cause an ordinary man to lose his self-control and commit such an act." (per Keating J. at 336). Quoted by McAuley, infra note 15, p.151.

14. This seems true particularly with regard to

certain cases of cumulative provocation. See e.g. *Jones and Bell*, rep. in *The Guardian*, Oct.29, 1974. See the analysis of cumulative provocation in chapter 6 of this thesis.

15. F. McAuley, "Anticipating the Past: The Defence of Provocation in Irish Law", *Modern Law Review* 50 (1987), 133 at p.137.

16. To the question of whether the actor's response in provocation may be viewed as an act of revenge, G. Williams replies as follows:

Killing in provocation is indeed a kind of killing in revenge, but we refrain from calling it that. The term "revenge" is used for retaliatory action that is planned and cold-blooded. Provocation refers to action in the heat of the moment, or action that is the product of desperation in intolerable circumstances.

Textbook of Criminal Law, (1983), p.527.

Nevertheless, it is precisely the revenge element in provocation that seems taking the priority when the defence operates as a partial justification. G. Bar-Elli and D. Heyd offer an elucidating account of the notion of revenge and its presuppositions. Considering some aspects of their analysis here would help us illustrate the connection of revenge to the justificatory element in provocation.

Revenge is an act of hate, an infliction of harm or pain. But it is not just a blind expression of an emotion; it is based on reasons, and these relate to the badness of a past action. Revenge is thus reactive in its nature. It is a response to some kind of injury or to an act which is conceived as wrong or unjust. It is always propelled by the offensive act of some other person. And this necessary link between revenge and past offence endows it with a rational and moral status. Note that the action which gives rise to revenge and rationalizes it can either be a morally and legally wrong action (which deserves

punishment) or just an action which inflicted some pain or harm regardless of its objective moral status... Taking revenge is a mode of reaction that specifically doubly involves intention: the wrong is conceived as being done intentionally and the reaction of the victim is intentional... The act of revenge is an attempt not only to "pay back" the harm by causing another harm, but to convey the reactive attitude of reciprocal hate or malevolence. This explains why we do not avenge ourselves for involuntary, unintentional, negligent, or mistaken acts, even when they substantially harm us.

"Can Revenge be Just or otherwise Justified?", *Theoria* 1 (1986), 68 at pp.70-71.

17. F. McAuley, *supra* note 15, p.139.

18. In Ashworth's words:

An element of "partial justification" thus enters into the moral evaluation of provoked crimes, and this inevitably brings the behaviour of the provoker under scrutiny; the more offensive, persistent and intentional the provocation given by the deceased, the greater the degree to which the offender was partially justified in retaliating.

"Sentencing in Provocation Cases", *Criminal Law Review* [1975], 553 at p.562.

19. A. Ashworth argues as follows:

Thus the significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account of any previous incidents which add colour to the final act... The point is that the significance of the deceased's final act and its effect upon the accused - and indeed the relation of the retaliation to that act - can be neither understood nor evaluated without reference to previous dealings between the two parties.

Supra note 18, p.558.

20. See e.g.: Bedau, "The Right to Life",

52 *Monist* (1968), 550; G. Fletcher, "The Right to Life", *Georgia Law Review* 13 (1979); P. Montague, "Self-Defence and Choosing Between Lives", *Philosophical Studies* 40 (1981), 215; C.C. Ryan, "Self-Defence, Pacifism and the Possibility of Killing", *Ethics* 93 (April 1983), 508; J. Thomson, "Self-Defence and Rights", *The Lindley Lecture* (1976); Wasserman, "Justifying Self-Defence", *Philosophy and Public Affairs* (1985), 356.

21. Fletcher argues that "claims of justification lend themselves to universalisation. That the doing is objectively right (or at least not wrongful) means that anyone is licensed to do it." *Rethinking Criminal Law* (1978), pp. 761-762. The idea that claims of justification are open to universalisation seems most at home under the forfeiture theory of justification. See J. Dressler, *infra* note 22, p.478.

22. J. Dressler, "Provocation: Partial Justification or Partial Excuse?", *Modern Law Review* 51 (1988), 467 at p.478.

23. Robinson, explaining the lesser evils theory of justification, remarks:

In the lesser evils justification, the triggering conditions may be broader, but this is counterbalanced by a stricter proportionality requirement, which permits the justification only if the actor causes a harm which is not merely reasonably proportional to, but actually less than the harm or evil threatened. On the other hand, the less demanding "reasonably proportional" language commonly found in all other justifications seems preferable when the interests to be protected or furthered are so abstract or otherwise difficult to quantify as to make the application of a stricter standard impossible. It is true of all justifications the competing interests can be identified, they can rarely be sufficiently quantified to permit comparison in the proportionality assessment.

"Criminal Law Defences: A Systematic Analysis", supra note 2, p.219.

24. J.Dressler, supra note 22, p.477.

25. According to Robinson:

The triggering conditions of a justification defence do not in themselves give the actor the privilege to act without restriction. To be justified, the response conduct must satisfy two requirements: (1) it must be necessary to protect or further the interest at stake, and (2) it must cause only a harm that is *proportional*, or reasonable in relation to the harm threatened or the interest to be furthered.

Supra note 2, p.217.

26. J.Dressler, supra note 22, p.477.

27. It is pointed out that "When provocation takes the form of physical assault of such a nature as would be expected to arouse overwhelming passion in the person attacked, it would not always be easy to distinguish the victim's immediate retaliation from a resistance by way of self-defence. It is therefore not surprising that the early authorities did not always keep homicide under provocation separate from homicide in self-defence."

Kenny's Outlines of Criminal Law, (1966), p.172.

28. Prof. N.K. Androulakis expounds the relation of legal justification in self-defence with legal order considerations as follows:

The superior interest which is protected by the act of self-defence does not pertain only to the immediately defended interest which may be [quantitatively] superior but also inferior to the interest of the aggressor, but it primarily pertains to the protection of the authority of the legal order which is violated by the

act of aggression.

Penal Law, vol.1, Athens (1978), p.422.

29. As was put by Devlin J. in *Duffy*:

Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control, which is of the essence of provocation.

[1949] 1 All ER 932n.

30. For a general account and critique of the doctrine of double effect see e.g.: G.E.M. Anscombe, "War and Murder" in *Nuclear Weapons, a Catholic Response*, London (1961); R.G. Frey, "Some Aspects to the Doctrine of Double Effect", *Canadian Journal of Philosophy*, (October 1975); N. Davis, "The Doctrine of Double Effect: Problems of Interpretation", *Pacific Philosophical Quarterly* 65 (1984), 108; R.A. Duff, "Intention, Responsibility and Double Effect", *Philosophical Quarterly* 32 (1982), 1; N. Richards, "Double Effect and Moral Character", *Mind* 93 (1984), 381; H.L.A. Hart, "Intention and Punishment" in *Punishment and Responsibility*, Oxford (1968), pp.122-125; J. Glover, *Causing Death and Saving Lives*, (1977), ch.6, pp.86-91; H.J. McCloskey, "Respect for Human Moral Rights versus Maximizing Good", in *Utility and Rights*, ed. R.G. Fray, (1984) pp.129-130.

31. S.H. Kadish, "Respect for Life and Regard for Rights in the Criminal Law", *California Law Review* 64 (1976), pp.879-880.

In Salmond's *Jurisprudence* (1937), we read:

It may be suggested that although an act must be taken to include some of its consequences, it does not include all of them, but only those which are direct or immediate. Any such distinction, however, between direct and indirect, proximate and remote consequences, is nothing more than an indeterminate difference of degree, and cannot be made the basis of any logical definition. The distinction between an act and its consequences, between doing a thing and causing a thing, is a merely verbal one; it is a matter of convenience of speech, and not the product of any scientific analysis of the conception involved. There is no logical distinction between the act of killing a man and the act of doing something which results (however remotely) in his death.

Nonetheless, the proximity between an act and its consequence may be considered, among other things, in determining whether the latter was within the actor's intentions.

32. An example of such an approach to provocation is offered by the previous Texas Penal Code (Art. 1220), which treats the killing by the husband of his wife's paramour as "justifiable homicide".

Homicide is justifiable when committed by the husband upon one taken in the act of adultery with his wife, provided that killing takes place before the parties to the act have separated. Such circumstances cannot justify a homicide when it appears that there has been on the part of the husband any connivance in or assent to the adulterous connection.

(New Mexico and Utah Penal Codes have included provisions similar to the above.)

33. McAuley criticises the departure of the modern law from the justification doctrine in provocation in these words:

Yet the modern tendency is to treat the issue

of loss of control as central to the defence of provocation... The sanguine view of this way of looking at the defence is that it merely gives a false impression of how the courts actually deal with the issue of provocation. But it is submitted that it also points to a trend which may eventually lead to the complete assimilation of the plea of provocation with the defence of diminished responsibility. Should this happen, the justificatory elements in the plea, already neglected, would become otiose, and an aspect of human behaviour with which the ordinary common law of provocation is already equipped to deal, unnecessarily pathologised. However, this process is not inevitable and, it is submitted, should be resisted.

"Anticipating the Past: The Defence of Provocation in Irish Law", supra note 15, p.157. To this argument Dressler replies as follows:

Now that scholars have demonstrated that the defense [of provocation] is in need of a more coherent rationale the question that remains is whether the defense should be framed as an excuse or as a justification. To provide an answer, we must scrutinise moral theories of justification and excuse far more carefully than McAuley does in his article. If we do, I submit that the defense is more easily and satisfactorily explained in terms of excuse, on the ground that an actor's (partial) loss of self-control (partially) excuses his homicidal action. The modern tendency in England and the United States of America, therefore, to treat the defense as an excuse is laudatory.

"Provocation: Partial Justification or Partial Excuse?", supra note 22, p.480.

34. The reason for this controversy is that as a partial justification provocation hinges predominantly on the element of revenge. As Bar-Elli and Heyd explain, this element is "logically incompatible with any system of norms which by its very nature must be rule governed. For the point of such a system is the elimination of this personal dimension, by shifting the authority and moral basis of actions from the realm of subjective attitudes to

impersonal rules and norms... The desire to take revenge may be justified by the incapacity of the legal system of justice to fully restore the previous situation; but we cannot appeal to justice for help; only for condonation. Revenge can never be part of the system of justice; nor can it be justified as "just". This does not mean however that revenge cannot be morally justified."

"Can Revenge be Just or otherwise Justified?", supra note 16, p.83.

35. As V. Hirsch and Jareborg point out, "Although the victim might deserve punishment, the actor lacks authority to inflict it. Penalizing malefactors is not a legitimate role for an individual; it is a state function, to be undertaken with appropriate due process safeguards".

36. According to Ashworth:

Similar principles are relevant when considering the effect of provocation on sentences for crimes other than manslaughter upon provocation. The less the intrinsic gravity of the crime committed, however, the less serious need be the provocation if it is to have mitigating effect. This is exemplified by cases in which a verdict of manslaughter is based upon the "unlawful act" doctrine: Where the offence is relatively grave the degree of provocation must be fairly high in order to mitigate the sentence, whereas in those cases in which an intended assault resulted unforeseeably in death a much less serious provocation will have mitigating effect.

"Sentencing in Provocation Cases", supra note 18, p.561.

37. "...the firing at a person intended to be hit would be manslaughter, then, if the bullet strikes a third person not intended to be hit, the killing of that person equally would be manslaughter and not murder."

Per Darling J. in *Gross*, (1913) 23 Cox CC 456.

38. And see McAuley, *supra* note 15, p.140.

39. R. Perkins, *Criminal Law*, (1957), pp.50-51.

40. McAuley, *supra* note 15, pp. 140-141.

41. And see Smith and Hogan, *Criminal Law*, (1988).
"Whatever the position in common law, however, it is now clear that if there is evidence that D was in fact provoked to lose his self-control, the defence must be left to the jury even though the provocative act was directed against another."
(p.331)

42. R.S. O'Regan, "Indirect Provocation and Misdirected Retaliation", *Criminal Law Review* [1968], p.323.

43. G. Fletcher, *Rethinking Criminal Law*, (1978), p.752.

44. According to G. Williams:

The reasonable man test does not necessitate saying that the defendant's mistake must be reasonable. It would be perfectly possible to apply the test to the facts as the defendant believed them to be (reasonably or not). What the evaluative test is concerned to exclude is unusual deficiency of self-control, not the making of an error of observation, or of inference on a point of fact... But the present determination of the courts not to recognise mistakes relating to defences unless they are reasonable probably means that the law is now otherwise.

Textbook of Criminal Law, *supra* note 16, p.543.

And see: Ashworth, "Reason, Logic and Criminal Liability", *Law Quarterly Review* 91 (1975), 102.
Explaining the position in English law, the author

points out that, with regard to crimes requiring "specific intent", where the accused lacked mens rea "the courts ensure that the accused is convicted of a lesser offence. Where, however, there is no such alternative verdict, the courts have not hesitated to cut across the logic of mens rea and to convict the accused..." (p.116)

[In English law] "Proof of "no mens rea" or "no voluntary act" is insufficient: the courts will investigate the reasons for the absence of mens rea or voluntariness, and if the accused was at fault in causing the incapacitating condition the defence should not succeed." (p.126)

See also: P.Robinson, "Causing the Conditions of One's Own Defence: A Study in the Limits of Theory in Criminal Law Doctrine", *Virginia Law Review* 71 (1985).

45. "Cases of intentional killing in hot blood under the sting of some sudden physical provocation had long been treated as the less heinous homicide of manslaughter, but provocation by insulting words or gestures alone was not accepted by the law as enough."

Russell on Crime, (1964), p.519.

46. McAuley, *supra* note 15, pp.154-155.

47. McAuley, *supra* note 15, p.155.

48. See: W.D. Lamont, *Law and the Moral Order* (1981). "Responsibility in Positive law is essentially the same as moral responsibility in the sense that responsibility implies rationality." (p.93)

49. McAuley, *supra* note 15, p.156.

50A. Indeed, the reasonable relationship requirement,

in so far as it is associated with the actor's mode of retaliation, seems hardly at home under the justification doctrine - a doctrine that places the emphasis on the element of justified revenge in provocation cases. As G. Bar-Elli and D. Heyd assert:

The fact that revenge is based on the subjective interpretation and beliefs of the victim rather than on publicly verifiable procedure of judgement makes it even more difficult to criticise an act of revenge as out of proportion. We should also add that as revenge is on the whole taken for acts which are not always morally or legally wrong, the criterion of just deserts is hard to apply to it. No rules govern the practice of revenge and hence no criteria of proportion can be formulated. Desert consists of the satisfaction of the conditions of successful revenge and nothing beyond that.

"Can Revenge be Just or otherwise Justified?", *supra* note 16, p.74.

50B. As Ashworth explains:

The forms of provocation which operate to reduce murder to manslaughter vary from those which are rather trivial to those which are clearly very serious. Some of the cases may be "nearly murder", others may be described as "nearly self-defence". Where the degree of provocation is low, this indicates a sentence at the upper end of the range.

"Sentencing in Provocation Cases", *supra* note 18, p.555.

Indeed, considering the gravity of the victim's provocation is important in making out whether in a particular case the defence operates as justification- or excuse-based.

51. Ashworth, *supra* note 7, p.305.

52. R. Cross, "The Mental Element in Crime", *Law Quarterly Review* 83, (1967), p.215 at pp.225-226.

53. "It may happen that a man is abnormally cool under gross provocation but none the less extremely resentful of any kind of personal affront; if he were to kill at once, but in cold blood, he cannot be excused by the fact that the acts of provocation would have been expected to cause an ordinary man to lose his self-control."

Kenny's Outlines of Criminal Law, (1966), p.179.

54. Dressler asserts that:

The proportionality doctrine is understandable in excuse terms: a person whose anger is excusable, but whose violent response is disproportional to the provocation, is to blame for not exercising his limited capacity for self-control to respond nonviolently.

"Provocation: Partial Justification or Partial Excuse?", supra note 22, p.479 n.59.

Speaking of the actor's anger as "excusable" may be confusing, however. In fact, the actor may be partially excused on the ground of loss of control only if his anger is deemed fully justified. In other words, excusing here refers to the actor's retaliation and not merely to his emotional state that led him to lose control. Thus, a minor provocation cannot buttress an excuse because is not expected to raise anger to the degree that may temporality overwhelm one's capacity for self-control.

55. According to Cross:

When dealing with incidents which occupy a split second, the question "did the accused contemplate certain results?" is apt to be a little unreal. The factors such as rage and panic which lead to the loss of control on the part of sane men can usually be provided for in the assessment of punishment, but it might be right to allow them to alter the grade of the offence.

"The Mental Element in Crime", supra note 52, p.226.

CHAPTER 3: THE EXCUSATIVE ELEMENT IN

PROVOCATION

1. Prefatory Note

The traditional rendering of provocation as a concession to the failings of human nature resounds the conception of the defence as a partial excuse. [1] This theoretical approach to provocation hinges on the notion of impaired volition or loss of self-control. Its governing assumption is that provocative conduct is capable of inflaming anger or indignation, possibly culminating in the formation of an intent to kill. [2] Although such killings are not totally excusable, the agent's degree of culpability falls short of that required to convict for murder. According to Hart, the rationale of excusing in provocation lies in the assumption that in such cases compliance with the law would require the agent to exert far greater effort than would be expected from normal people in normal circumstances. [3] Another approach to the issue of excusing here is to say that the admission of loss of control blocks the inference from the act of killing to the "character flaw" associated with murder. [4] The present analysis centres primarily on this latter approach to the question of excuse in provocation.

Admittedly, not any wrongful conduct would be sufficient to support an acceptable plea of provocation in law. Although every untoward act is apt to incur anger or elicit some sort of response, only serious wrongdoings are deemed capable of vitiating a normal person's capacity for self-control, and hence of amounting to legal provocation. From the viewpoint of excuse theory, the gravity of the provocation received is at issue as relating to the actor's claim that he was temporarily bereft of his self-control; there is no question here of whether the wrongful and culpable character of provocation should render the provoker's killing less wrongful or partially justified. It is, rather, the actor's lack of self-control *by virtue of provocation* that accounts for the reduction of culpability and, in English law, for the relegation of homicide from murder to manslaughter.

The loss of control element in provocation upon which the actor's excuse rests has long bewildered legal practitioners and commentators, for it seems to defy precise interpretation. As a first approach to the issue, it might be said that loss of self-control denotes a temporary impairment of voluntariness for an otherwise intentional act. It was pointed out above that, because the excusing condition in provocation disputes the voluntary character of the provoker's killing, the designation of a homicide

committed under provocation as "voluntary" manslaughter may seem confusing, that is, if the notion of "voluntary" here is not further elucidated. As the "hot anger" requirement or the requirement of acting "on the spur of the moment" manifests, the *temporary* nature of the actor's loss of control is a basic precondition for allowing an excuse on grounds of provocation. Nonetheless, a broader interpretation of the notion of loss of control has also been argued for, particularly with regard to certain cases of cumulative provocation (see chapter 6).

The excusative element in provocation centres on the connection between self-control and voluntary action. In fact, the notion of self-control might be understood to denote either the actor's ability to direct his external conduct - in other words, to act in a strict sense - or the actor's capacity to determine his choice of action. In the former sense, self-control refers to intentional action primarily as a prerequisite for ascribing *authorship-responsibility*; in the latter sense - the one most relevant to the defence of provocation - self-control pertains to an action which is both intentional and voluntary as required, *inter alia*, for the attribution of *accountability-responsibility*. [5] In the theory of provocation, questions arise about how the interrelation between a temporary loss of self-control and the actor's general capacity for

control can be understood on the assumption that the defence constitutes a concession to the failings of human nature. Further, as has been demonstrated in the previous chapters, a longstanding debate revolves around the question of whether the loss of control should be perceived as a matter of degree, and if so, how the degree of loss of control could be related with the degree of the provocation. Indeed, some authors argue that the requirement of acting in the "heat of passion" or "on the spur of the moment" does not entail that the actor should lack control in an absolute sense, nor that the admission of a certain degree of control should necessarily exclude the defence of provocation. The problems besetting the issue of proportionality in provocation have to do, among other things, with the difficulty of conceptualizing the connection between loss of self-control and partial excuse. In order to work out a cogent basis for resolving or, perhaps, re-defining these questions one has to explore further the grounds of the excuse in provocation and, more precisely, the interrelation between human weakness, provocation and loss of control. A closer scrutiny of these issues from first principles might help pierce the veil of confusion that has long surrounded this area of legal doctrine and facilitate a more comprehensible approach to the question of excusing in law.

The main task of the present chapter is to look more closely at the nature of the excusative claim in provocation and explore its relation to the question of culpability for homicide. Sections 2, 3 and 4 circumscribe the moral grounds of excusing in provocation. The discussion centres on the relationship between human weakness, provocation and loss of control or impaired volition and examines different aspects of the issue in the context of the excuse theory. Section 5 explores the characteristic role of the, so called, "justificatory element" in provocation as a prerequisite for allowing a partial excuse. In this respect, this section examines how the defence of provocation may be informed by the "*principle of resentment*", an idea elaborated by A. v. Hirsch and N. Jareborg.[6] Finally, section 6 sets out the possibility of re-interpreting the subjective element in murder in the light of the preceding analysis of the excusative claim in provocation.

2. Human Weakness and Impaired Volition:

Building upon the Aristotelian Approach

To attain a complete perspective on the moral basis of excusing in provocation, one would have to take account of the key role the notion of human weakness is endowed with in the philosophical analysis of responsibility. Indeed, understanding

the defence of provocation as a concession to the failings or "realities" of human nature invites one to consider how the element of human weakness permeates and informs the excusative claim in provocation. In the following sections we shall take up this question, albeit avoiding getting caught up in some of the perpetual enigmas that beset philosophical investigation. As a starting point, the present section examines how the notions of human weakness and impaired volition are treated in Aristotle's ethics and points out the subtle moral distinctions that emerge. [7]

Aristotle adopts a differentiation between what he calls as the "*self-indulgent*" man, that is, the man whose choices and actions are guided by the wrong principle, and the "*incontinent*" man. This differentiation proceeds from the basic idea that *incontinence* - otherwise expressed as *akrasia* - inhibits the agent's acting according to a fully fledged voluntary choice, in other words, a choice which for the most part reflects the agent's moral convictions. [8] The possibility of a discordance between external conduct and moral belief is manifested, among other things, by the fact that the incontinent man is more apt to repent of what he has done; by contrast, the self-indulgent man generally persists in his choices. [9] Further, Aristotle draws a distinction between two general kinds of

incontinence, namely, *impetuosity* (*propeteia*) and *weakness* (*astheneia*). [10] Impetuosity pertains to cases where the incontinent agent, carried away by his passions, acts upon impulse and without deliberation. Weakness, on the other hand, relates to those cases where the incontinent agent, although he reaches the right choice after deliberation, fails to conform his action to it. [11]

Moreover, Aristotle distinguishes the "*continent*" man - as contrasted with the incontinent man - from what he calls as the "*temperate*" man. He explains that both the continent and the temperate man may comply with the same rule, or may act according to the right principle. The temperate man, however, has no bad inclinations or urges to control, that is, inclinations to act contrary to the rule because, as Aristotle puts it, he does not feel any pleasure in doing so. One might say that for the temperate man the merits of observing the rule outweigh the possible gains that might perhaps ensue from its violation. The continent man, on the other hand, although he may be tempted or predisposed to act against the rule, does not allow himself to be carried away by his inclinations. Patently, one may speak of the continent but not the temperate man as exercising self-control. By the same token, the incontinent and the self-indulgent man resemble each other in that they both are inclined to act contrary

to the rule; they differ, however, in that the self-indulgent man tends to act so primarily as a matter of conviction, whereas for the incontinent man this only evinces weakness of character. [12] In this respect, it seems clear that speaking of loss of self-control presupposes an incontinent rather than a self-indulgent man.

Aristotle professes that people of keen and excitable nature are in general more prone to the impetuous form of incontinence because, being subjected to passion, they tend to act without taking time for deliberation. He calls one's attention to the important moral distinction between the above and those incontinent agents who, although they are aware of the right choice after deliberation, fail to regulate their actions accordingly. Aristotle expresses the moral differentiation between the two kinds of incontinence - i.e., impetuosity and weakness - as follows:

...of incontinent men themselves, those who become temporarily beside themselves are better than those who have the rational principle but do not abide by it, since the latter are defeated by a weaker passion, and do not act without previous deliberation like the others... [13]

Nonetheless, it should be pointed out that, according to Aristotle, speaking of an impetuous act does not

benefit any case of acting upon impulse; such an act, in addition, should be at odds with the actor's *genuine* choice. An act is deemed not to consort with the actor's genuine choice not only when it does not reflect the choice the actor has already made; it should also go against the choice the actor would have made as a responsible moral agent, had he the opportunity to deliberate. In this respect, one envisages a moral distinction between the agent who, due to his loss of self-control, fails to align his action with what in normal circumstances would think proper, and the agent whose action on the spur of the moment does not in fact misrepresent his real attitudes.

Aristotle recognizes that in both kinds of incontinence - i.e. impetuosity and weakness - the agent acts knowingly and intentionally, notwithstanding that his action cannot be traced to a fully-fledged voluntary choice. Other things being equal, it is precisely the absence of a voluntary choice that accounts for the incontinent agent's not being morally assessed on a par with a choosing agent who acts voluntarily. In Aristotle's words:

[The incontinent man] acts willingly (for he acts in a sense with knowledge both of what he does and of the end to which he does it), but is not wicked, since his purpose is good; so that he is half-wicked. And he is not a

criminal; for he does not act of malice aforethought; of the two types of incontinent man the one does not abide by the conclusions of his deliberation, while the excitable man does not deliberate at all. [14]

Aristotle remarks that of the incontinent men some may act as they do in pursuit of things which are often good and noble in themselves, that is, worthy of being chosen as such. What these men are to be blamed for is not for pursuing these things but, rather, for doing so in an inappropriate fashion. Thus, one might speak of the incontinent agent as, for example, "incontinent in respect of honour", or "incontinent in respect of gain", or "*incontinent in respect of anger*". By reference to those incontinent in respect of anger, Aristotle says that they are less to blame because their actions stem from some sort of negative moral judgement that triggers off and, in a sense, justifies anger.[15] For this reason, the incontinent agent in respect of anger is less blameworthy than the incontinent agent who succumbs to a wanton impulse or appetite. In Aristotle's words:

Anger seems to listen to argument to some extent, but to mishear it...so anger by reason of the warmth and hastiness of its nature, though it hears, does not hear an order, and springs to take revenge. For argument or imagination informs us that we have been insulted or slighted, and anger, reasoning as

it were that anything like this must be fought against, boils up straightway; while appetite, if argument or perception merely says that an object is pleasant, springs to the enjoyment of it. Therefore anger obeys the argument in a sense, but appetite does not. It is therefore more disgraceful; for the man who is incontinent in respect of anger is in a sense conquered by argument, while the other is conquered by appetite and not by argument. [16]

As Aristotle seems to suggest, excusing those who succumb to anger and lose control of their actions constitutes a concession to natural human attributes, and it becomes possible precisely because these attributes are deemed common to all men. The moral distinction between the incontinent agent who acts violently in a fit of (justified) anger and the one who acts so as a result of wanton appetite is expressed as follows:

...no one commits wanton outrage with a feeling of pain, but every one who acts in anger acts with pain, while the man who commits outrage acts with pleasure. If, then, those acts at which it is most just to be angry are more criminal than others, the incontinence which is due to appetite is the more criminal; for there is no wanton outrage involved in anger. [17]

The reverberations of the Aristotelian position, as delineated in the previous paragraphs, in our enquiry for the character of the excusative claim in the defence of provocation are noticeable. Patently,

both kinds of incontinence - impetuosity and weakness - can be taken to evince a reprehensible state of character. As has been said, weakness refers to the agent's failure to align his action with his best judgement, whereas impetuosity pertains to the agent's failure to subdue his passion and act according to a considered judgement. With regard to the question of excuse in provocation we are interested most in the impetuous form of incontinence, particularly in its relation to "justified" anger. Indeed, Aristotle's account of the connection between anger - as a result of a moral judgement - and acting impetuously is of particular importance in understanding the nature of the excusative claim in provocation.

According to Aristotle, of the two kinds of incontinent men those who act upon impulse and without deliberation are in general less to blame because their action in a way precedes the formation of a fully informed choice. The underlying assumption is that the impulsive agent, blameworthy though he may be, often acts against his own all-things-considered judgement. The above furnishes the grounds upon which the requirement of acting "in the heat of passion" or "on the spur of the moment" in provocation may be understood. Furthermore, Aristotle's explanation of why those who act impetuously due to anger are less to blame captures

well the excuse in provocation as a concession to human weakness. Indeed, the connection between the victim's untoward conduct and the actor's anger as the cause of his loss of self-control is the keystone of the excuse in provocation. Nevertheless, the actor would be entitled to an excuse only if his anger at the victim is deemed justified. In other words, it is the moral justification of the actor's anger at the victim that furnishes the "good reason" for allowing an excuse of loss of control as a concession to the common failings of human nature. This is precisely what distinguishes the actor who excusably loses control as a result of serious provocation from the so called "bad tempered" man. [18] Patently, provocation cannot provide a complete excuse. Considering Aristotle's position, one might say that the actor is still to blame not for expressing his anger or indignation but rather for doing so in an unacceptable manner. [19]

3. Provocation and Impaired Volition

As has been pointed out earlier, in provocation the actor does not lose control to the extent that he does not know what he is doing, or what his action is aimed at - an assumption not overlooked in Aristotle's treatment of impetuosity. [20] Indeed, it is a fundamental prerequisite for pleading

provocation as a partial defence to murder in English law that an intention to kill or cause grievous bodily harm has been established. One might say that the admission of the defence of provocation presupposes to demonstrate the "cognitive" element - as a requirement of authorship-responsibility with regard to the act of killing - of the subjective condition of murder. If the actor's retaliation is not accompanied with an intention to kill or cause grievous bodily harm, provocation might perhaps come into play as a mitigating consideration following conviction of involuntary manslaughter. Further, in a case of provocation where the actor is led to lose control to such an extent as to be unaware of what he is doing, or unable to exercise control over his bodily movements, the actor might be entitled to complete acquittal on the basis of a "lack of mens rea" defence. [21] Nevertheless, in such a case one cannot rule out the possibility of establishing liability on a separate basis (for example, on grounds of criminal negligence). [22] Other things being equal, if the actor suffers a total loss of self-control, automatism may provide the appropriate basis of the actor's (complete) defence to murder. As Todd Archibald explains:

...for automatism to be applicable, there must be a complete loss of self-control and a concomitant involuntary and unconscious state

on the part of the accused. In provocation, a loss of partial control is presupposed but only to the extent that the accused gives way to his inflamed passions. His cognitive processes are not impaired nor is his physical ability to control his conduct. [23]

Nevertheless, in those cases of provocation where the actor suffers a complete loss of control, one might perhaps view the victim's conduct as a triggering factor of the excusing condition (i.e., automatism) upon which the actor's defence to murder rests. Thus, one might say that, although another excuse takes the priority over provocation here, the latter might be granted a role peripheral to or supportive of the proposed defence.

In so far as complete loss of control implies the exclusion of authorship-responsibility, one might plausibly say that in provocation the actor does not entirely lose control. The analysis of the notion of loss of control in the theory of defences is informed by the fundamental distinction between *involuntariness* and *nonvoluntariness*. [24] Involuntariness denotes total incapacity of directing one's action or of exercising control over one's bodily movements, as in cases of genuine inability to do otherwise. [25] One might say that in such cases the agent acts only in appearance because his ability to command his external conduct is totally defeated. [26] Nonvoluntariness, on the other hand, pertains

to those cases where the agent, although he is able to act in a strict sense, cannot determine the character or course of his action due to external or internal constraints on his freedom to choose (cases of "overpowered will").[27]Patently, the excuse of loss of control in provocation bears upon the conditions of nonvoluntariness.[28]Fletcher, adopting the term "*normative involuntariness*" or "*moral involuntariness*" as synonymous to nonvoluntariness, describes the role of excuses as follows:

Excuses arise in cases in which the actor's freedom of choice is constricted. His conduct is not strictly involuntary as if he suffered a seizure or if someone pushed his knife-holding hand down on the victim's throat. In these cases there is no act at all, no wrongdoing and therefore no need for an excuse. The notion of involuntariness at play is what we should call moral or normative involuntariness. Where it not for the external pressure, the actor would have not performed the deed. In Aristotle's words, he "would not choose any such act in itself". [29]

The distinction between involuntariness and nonvoluntariness is allied to that between *compulsion* and *coercion*. The victim of compulsion lacks physical control over his bodily movements, in other words, he is not free to act. The victim of coercion, on the other hand, although he is free to act in a strict sense, is not free to determine or choose the course

of his action. [30] Exculpatory claims growing out of the conditions of compulsion primarily contest authorship-responsibility. Exculpatory claims emerging from the conditions of coercion call in question accountability responsibility. From this point of view, the classification of the various exculpatory claims in law turns on the source and nature of the relevant external or internal constraints. H. Gross sets out the issue of nonvoluntary action in the following way:

Instead of denying a *prima facie* imputation of conduct to some occurrence, we admit that the occurrence is an act - that is, an occurrence for which someone might be held responsible. But because the actor could choose only with inordinate difficulty to do otherwise - or could not choose to do otherwise at all - we deny that he is in fact fully responsible, or responsible at all. In this sense the following are not (or are not fully) voluntary acts: (1) acts done only because coerced by others; (2) acts done only because of one's own uncontrollable urges; (3) acts done only because circumstances left no choice; (4) acts done when one is in an abnormal mental state that leaves one unable to appreciate what he is doing. [31]

As has been pointed out, the excusative claim in provocation is cognate with those grounded on nonvoluntariness or, in Fletcher's words, "moral involuntariness". Although the provoked agent acts

knowingly and intentionally, he is less to blame because, being overcome by his inflamed passions, is unable to choose freely. Freedom of choice as a requirement of moral/legal responsibility is held therefore to presuppose, among other things, the actor's being "master of his mind", or his acting in a "normal" frame of mind. Considering Gross' classification of nonvoluntary acts, one might say that provocation shares characteristics from both categories 2 and 4. Heat of passion and loss of self-control import an sudden emotional disturbance so that the contribution of reflection and moral judgement in the psychological process towards the formation of the will is precluded or substantially diminished. [32] In the so called "*impetuous acts*" the urge does not circumvent the conscious "self" but, in a sense, passes through it. Because of its intensity, however, the urge defeats the actor's "moral resistance". [33] One might also consider as relevant here the so called "*short-circuited reactions*". These pertain to cases where an intense psychological urge is activated so abruptly that in a way "circumvents" the conscious "self" and affects directly the agent's *motivational* system. One might say that in such cases the actor's moral inhibitions are totally precluded rather than overcome. Nonetheless, both "impetuous acts" and "short-circuited reactions" should be distinguished

from the so called "*reflex-actions*". The latter lack a concrete psychological basis and therefore pertain to involuntariness rather than nonvoluntariness. [34] The "impetuous acts" and, arguably, the "short-circuited reactions" are not irrelevant to the issue of moral and legal responsibility, for both are taken to constitute "external manifestations" of the actor's character. [35]

What do we mean then when we say that the provoked agent who acts "in the heat of the moment" is not free to choose? To answer this question one would need to look more closely at the interrelation between free agency and self-control. It is asserted that freedom of choice presupposes that what motivates the agent to act in a certain way accords with his all-things-considered evaluations. G. Watson distinguishes between the agent's "*valuational*" and "*motivational*" systems and offers the following definition of the former:

[The actor's valuatinal system is] that set of considerations which, when combined with his factual beliefs, yields judgements of the form: the thing for me to do in these circumstances, all things considered, is a. To ascribe free agency to a being presupposes it to be a being that makes judgements of this sort. To be this sort of being, one must assign values to alternative states of affairs, that is, rank them in terms of worth. [36]

Moreover, Watson defines the motivational system of an agent as that set of considerations which moves the agent to action. In this respect, an action is held not to be free if the agent's motivational system is not aligned with his valuational system. In Watson's words:

The possibility of unfree action consists in the fact that the agent's valuational and motivational system may not completely coincide. Those systems harmonize to the extent that what determines the agent's all-things-considered judgements also determines his actions. ...The free agent has the capacity to translate his values into action; his actions flow from his evaluational system. [37]

As has been pointed out earlier, a claim of provocation may be accepted only if the victim's conduct is considered to be sufficiently wrongful, that is, capable of raising legitimate anger or indignation. [38] At first glance, to consider the actor's reaction to provocation as not being free in the above sense might perhaps appear at odds with the basic assumption that in such cases the actor's response is preceded and precipitated by a negative evaluation of the victim's conduct. One might say, in other words, that what motivates the agent's response to the provocation is precisely his disapproval of the victim's untoward behaviour. Thus, in provocation the actor appears making a choice to retaliate as a

result of his negative assessment of the victim's conduct. Nevertheless, although acute anger or indignation does not preclude the agent's making a choice (in a strict sense), it may seriously undermine his capacity to weigh up or evaluate the significance of his choice of action in the light of its (intended) consequences. [39] With regard to this, one might say that freedom of action as a requirement of responsibility presupposes not simply that what motivates the agent to act concurs with his evaluations; it presupposes, in addition, that the agent's evaluations that move him to action take place in a "normal" frame of mind. As A. Mele points out:

A self-controlled person is disposed to bring his motivations into line with his evaluations and to maintain that alignment. But there is more to being self-controlled than this, for one's evaluations themselves can be warped in various ways by one's wants or motivations. Hence, a self-controlled person must also be disposed to promote and maintain a structure of evaluations or values which is not unduly influenced by his motivations. [40]

In provocation, although the actor's anger at the victim that motivates him to respond results from his disapproval of the victim's conduct, [41] the ensuing urge to retaliate in a sense overrides the actor's "evaluational system", or his ability to assess

properly both the provoker's misdeed and his own response to the provocation. [42] Thus, one might say that the provoked actor is not fully free to choose because his capacity for evaluation is misaffected by the overwhelming emotional pressure to which the actor is subjected. In this respect, the provoked agent who reacts in an outbreak of anger is similar to the victim of coercion who acts nonvoluntarily. Nonetheless, although the admission of loss of self-control in provocation is sufficient to support a claim for extenuation, it falls short of excluding responsibility altogether. Giving way to anger - justified though the anger may be - or allowing one's freedom of choice to be forfeited by one's own adverse motivations, furnishes sufficient grounds for holding the actor responsible for his wrongful reaction to provocation. This pertains to the general rule that one should always hold one's anger in check, even under the most severe provocation. The actor retains responsibility for the lesser crime on the assumption that, as a "normal" person, he was capable of resisting his impulse to kill. [43]

So, to summarize, the excusative element in the defence of provocation rests on the assumption that provocative conduct may give rise to such an emotional state wherein the agent's freedom of choice is temporarily suspended. Thus, provocation is understood as a condition likely to occasion a form

of internal coercion that, although it does not preclude responsibility altogether, curtails the degree of culpability required for the major crime. This kind of coercion may only support a claim for extenuation - not for exoneration - because, contrary to the sort of coercion implicit in total excuses, is not considered as being "irresistible".

4. Provocation, Character and Culpability

It has been suggested that the excuse of loss of control is in a sense interwoven with the so called "justificatory element" in provocation, in other words, with the requirement that the victim's conduct should be sufficiently wrongful to raise justified anger. [44] Thus, it seems correct to assume that neither provocation without loss of control, nor loss of control without provocation sufficient to raise justified anger should entitle the actor to a partial excuse on this basis. It has been pointed out, moreover, that a successful plea of provocation will diminish but not completely rebut the actor's culpability for homicide. One might assume that the actor's giving way to anger and killing "on the spur of the moment" still manifests a reprehensible state of character, albeit short of that associated with murder. This section explores further the idea that in such cases the remaining degree of culpability

turns directly on an undesirable character trait as manifested by the actor's submission to passion. The proposition that provocation does not provide a defence for the so called "*bad tempered man*" - the one who loses control and reacts violently even to the most trivial provocation - is also addressed here. Taking a closer look at the basic hypotheses of the character-orientated theory of criminal responsibility may prove fruitful in deciphering the question of culpability in provocation in its relation to the issue of criminal liability for homicide.

The position that in provocation the remaining degree of culpability is accounted for an undesirable character trait is informed by the theory of responsibility which focuses on the relationship between external conduct and human character. This theory postulates that blame and punishment pertain not directly to acts but, rather, to *character traits*. [45] By character trait is understood any socially desirable or undesirable disposition or attitude that an act may be associated with.[46] Although it is accepted that acts do not always manifest character traits, the actor cannot be held blameworthy and punishable unless his wrongful conduct reflects a socially undesirable attitude.[47] If it does, the degree of blame and punishment to be attributed should be proportionate to the extent to

which the actor's attitude is deemed undesirable. If the actor's conduct is held not to mirror such an attitude, blame and punishment would be inappropriate, although certain (non-punitive) measures preventive of similar conduct in the future might perhaps be taken. Notwithstanding that attitudes may be seen as volatile, the general presumption is that, other things being equal, a wrongful act does manifest an undesirable attitude. In this respect, the role of excuses in law is to block the *normal* inference from the wrongful act to an undesirable attitude or character trait. It is accepted that determining the possible relationship between a wrongful act and a character trait makes it necessary for us to consider, *inter alia*, the actor's state of mind at the time of his act as indicative of his ability to exercise control over his conduct. Hence, one might say that a successful plea for excuse on grounds of provocation blocks the normal inference from the act of killing to the character trait associated with the crime of murder. Nevertheless, the excusing condition here cannot prevent conviction for the lesser offence, for losing self-control and killing is still taken to evince a socially undesirable disposition or character trait.

Under the theory of criminal responsibility at issue, one could satisfactorily explain why losing

self-control and killing in the face of trivial provocations should not entitle the actor to extenuation (that is, if no other excuse can be brought forward). One might say that if the provocation is not regarded as serious enough to raise justified anger to such a degree that may cause a "normal" person to lose his self-control and kill, the actor's response - on the spur of the moment though it may have been - manifests the same undesirable character trait as that ascribed to a fully premeditated killing. The same applies in those cases where the actor is deemed responsible for creating the situation wherein the provocation takes place. The above approach captures well the traditional thesis that the defence of provocation does not provide a shelter to the "bad tempered" man. According to Dressler:

...under excuse theory, we do not (fully) blame a person who (partially) loses self-control if, *but only if*, he is not to blame for his anger and for his homicidal actions which result from it... A person who becomes sufficiently enraged to kill because the decedent acted in a nonwrongful manner arguably does not deserve to be excused. At the least the nonwrongfulness of the decedent's actions is highly pertinent in determining whether the actor's loss of self-control was excusable. Thus the individual who becomes angry and responds violently when another *justifiably* strikes him in self-defence and the person who unjustifiably creates the

situation in which the provocation gives birth
are blameworthy and should not be excused. [48]

The relevance of the character-based theory of criminal responsibility to formulating a coherent approach to the subjective condition in murder is set out in section 6 of this chapter.

It was pointed out that if sufficient provocation cannot be shown, or the actor is found responsible for creating the conditions of provocation, the admission of loss of control cannot on its own entitle the actor to an excuse, that is, on the basis of the provocation defence. One might argue, nonetheless, that if a general loss of self-control defence were recognized, establishing provocation would not be necessary in order to reduce the actor's culpability for homicide. However, where the actor's loss of self-control cannot be attributed to provocation, such a general loss of control defence may hold good only in so far as an acceptable reason for losing control can be brought forward. Patently, "bad temper" or irascibility cannot furnish sufficient grounds for allowing an excuse of loss of control, or, as stressed earlier, for distinguishing in culpability terms a killing committed "in the heat of the moment" from a cold-blooded murder. [49] This issue is discussed further in section 5, below.

5. Provocation and Loss of Control: a Double Test in Law?

In a stimulating article, Andrew von Hirsch and Nils Jareborg advocate the replacement of the traditional objective test in the law of provocation with two tests which, in their view, capture better the conditions of excusing in provocation cases. They argue that the reasonable man-based test seems inadequate, for what is at issue is not the rationality or reasonableness of the actor's choices but, rather, "the choices not being fully the person's own". [50] The first of the proposed tests revolves around the requirement of impaired volition or loss of self-control; the second rests on what they term the "*principle of resentment*". The actor's plea of extenuation would satisfy the first test whenever a strong case of impaired volition or loss of self-control can be made. It is asserted, nonetheless, that the scope of this test should remain narrow, only to cover those clear-cut cases of impaired capacity for self-control. The second test, which is the true one of provocation as ordinarily understood, may come into play if the first test fails. A claim of extenuation will be warranted under the "*principle of resentment*" if the actor can put forward a good reason for feeling angry at the victim. Patently, this would presuppose the actor's

being able to show that he was seriously wronged by his victim. If such a twofold test were adopted, thus the argument runs, one would need not to speculate about the way a "reasonable person" would have reacted to the provocation received. [51] The authors point out that speaking of the actor's anger as being warranted according to the resentment principle does not denote the justification of the ensuing act of retaliation.

What is crucial to [the actor's] claim of extenuation is his having a *good reason* for his anger, stemming from some misdeed committed by the victim against him or someone close to him. Let us emphasize, however: It is only A's anger that is warranted, not the deed that results from it. The criminal act, we should recall, is not justified, but only, perhaps, less culpable because of the nature of the sentiment involved. [52]

As has been said, in order to determine whether a claim of extenuation on grounds of provocation satisfies the resentment principle one would have to consider the wrongfulness of the victim's behaviour toward the actor. It is asserted that:

The most straightforward cases are those where the victim's acts constituted criminal behaviour of a significant nature. ...The next cases comprise those where the victim behaved toward the actor in a manner that is not criminal, but nevertheless infringes

commonly recognized standards of decent behaviour. [53]

The authors argue that the resentment principle need not be invoked in those cases where the actor was deprived of his self-control in a sudden outburst of rage. In such cases, it is pointed out, the actor's plea of extenuation may be dealt with under a general impaired volition or loss of control defence rather than provocation. Nonetheless, for such a defence to succeed the actor would have to put forward a good reason for his loss of control, in other words, a reason that would make it possible to allow an excuse on this basis. It is suggested therefore that one need not have recourse to the resentment principle - as the basis of the test of provocation - unless some form of forethought and deliberation on the part of the actor is admitted. It is precisely in these cases where, in the authors' words:

...the "hot anger" requirement of common law ceases to make sense. Since the claim no longer is that the person had his capacity for choice impaired, the momentary shock of the event is immaterial. What now matters is A's being angry for good reasons - and the sense of grievance may grow. The anger is not just a momentary emotional turbulence, and involves as much cognition as feeling; it may last, reinforced by the sense of having been aggrieved. [54]

It is certainly correct to say that provocation cannot entitle the actor to an excuse unless it is shown that the actor suffered some wrong at his victim's hands. One might argue, however, that speaking of the excuse here as dependent solely upon the satisfaction of the resentment principle may lead to confusion as to the purported basis of the actor's defence to murder. In so far as it is assumed that the wrongfulness of the provocation cannot partially justify the provoker's killing, to demonstrate that the actor's anger at the victim was justified is a prerequisite for excusing rather than the basis of the excuse in provocation. Under the excuse theory the central question is not merely whether the actor was justified to feel angry or resentful; it is, rather, whether those (justified) emotions significantly impaired the actor's capacity to exercise control over his actions. In this respect, one might say that the principle of resentment indicates a *necessary* but not a sufficient condition for excusing in provocation. Although the actor's sense of justified anger furnishes the required link between provocation and impaired volition, it cannot provide any grounds for excusing unless the actor did in some way lose control as a result.

Although the authors are right in placing emphasis on the, so called, "justificatory element" as a condition for excusing, they fail to shed

enough light on how the resentment principle relates to the excusative element in provocation. Indeed, if the test of provocation is taken to rest on the principle of resentment alone, it would seem difficult to distinguish between a voluntary act of revenge and an excusable reaction to provocation if in both cases the actor's anger at the victim were deemed warranted or justified. [55] Certainly, speaking of the actor's having a good reason for feeling angry does not necessarily entail absence of self-control. [56] In other words, to say that the actor's choice of action was *made in anger* does not always imply that the actor was, in some way, *carried away by anger*. Nonetheless, it is only in the latter case where the actor may be able to rely on an excuse. In this respect, separating the test of provocation from the requirement of impaired volition would appear to undercut the very basis of the excusative claim in the defence of provocation. Provocation - in so far as it is taken to furnish an excuse - cannot operate without the element of impaired volition even in those cases which do not seem to satisfy the requirement of acting "in the heat of passion" or "on the spur of the moment". Nevertheless, in the latter cases the grounds for excusing might shift from provocation to diminished responsibility if the actor's impaired capacity for self-control is attributed to some sort

of abnormality of mind - possibly precipitated by the victim's wrongdoing - rather than to provocation. Indeed, one might argue that the admission of forethought and deliberation is incompatible with the general assumption that only "normal" people can shelter under the defence of provocation. This issue is addressed further in our analysis of cumulative provocation in chapter 6.

As has been said, a successful plea of excuse on grounds of provocation presupposes, *inter alia*, that the actor's anger at the victim is deemed justified. In the article at issue it is argued that the actor cannot have recourse to the resentment principle unless the wrongful act was directed at him or somebody closely related to him. Thus, it is suggested that if the act of provocation was directed at a third party not related to the actor, the latter should not be able to rely on provocation.

Where the wronged individual is someone having no particular connection to the actor, however, the principle [of resentment] would not apply. The actor might still be indignant - but the notion of justified personal resentment no longer holds. Having in no fashion been wronged by the victim, the actor has no good reason for responding with such anger that the normal moral restraints are understandably compromised. The actor cannot claim the principle of resentment when he "punishes" someone for wrongdoing directed at third

persons. [57]

However, one may argue, the position that the resentment principle could not warrant a plea for extenuation when the victim's wrongdoing is directed at a third party unduly restricts the scope of the excuse in provocation. On the contrary, depending on the gravity of the victim's wrongdoing, the actor may be perfectly entitled to the defence of provocation even though no particular relationship between him and the injured party obtains. It seems correct to say, nonetheless, that in such cases the standard of provocation should be expected to be considerably higher than in those cases where the wrongful act is directed at the actor or somebody closely connected with him. One might say, in this respect, that only a very serious wrongdoing may be deemed capable of transcending the bounds of a narrow interpersonal incident to constitute provocation sufficient to buttress a partial excuse here. Consider, for example, the case where A witnesses a severe physical assault on a child. Although the wrongful act is not directed at A, nor is he somehow related to the child, one could see no reason why he should not be able to rely on provocation if he killed the assailant in a fit of anger. A's claim for extenuation would be even stronger if he could offer an additional, personal reason for his rage - for example, if his own child was injured or killed

under similar circumstances. It seems evident, therefore, that the resentment principle - as the test of provocation - may be applicable to cases both of direct and of indirect provocation, irrespective of whether there has been a special connection between the actor and the injured party.

[58] As O'Regan remarks:

An ordinary man who witnesses a brutal attack on a small child, an elderly woman or a dear friend may well lose his self-control whether the person attacked be a relative or not. Once this is conceded the limitation of provocation to acts done to a relative seems arbitrary and inconsistent with fundamental doctrine. It is submitted that in all cases of indirect provocation the correct approach is to ask not whether the person attacked is a relative of the accused but whether an ordinary man, seeing what the accused saw, would have been provoked in the same manner. [59]

Let us now consider a little further the idea that the actor might be able to shelter under a general loss of control defence in some cases where the test of provocation is not met. In such cases, as pointed out earlier, a plea of extenuation on grounds of impaired volition should not gain acceptance unless is supported by an appropriate excusing condition. Thus, one might say that granting an excuse turns on the requirement of impaired volition in conjunction with the particular condition which is

put forward as its "cause". Although certain such conditions may be singled out to formulate general defence categories, one might perhaps encounter an excuse that may seem difficult to subsume under a specific category. Thus, the introduction of a general loss of control defence could be aimed at accommodating excusative claims that would seem to lie outside the scope of those "entrenched" excusing conditions. One might envisage such a general excuse as being open-ended, in the sense that, although it rests on the requirement of impaired volition, it does not lay down a specific condition that causes the actor's loss of control. Allowing an excuse here would depend, among other things, on whether the actor can bring forward an acceptable condition, or set of conditions, that would account for his loss of control. One might say that such a general excuse may be introduced either to complement or even replace - i.e. as engulfing - the existing categories. For example, the Model Penal Code provides the reduction of murder to manslaughter in those cases where the accused acted "...under the influence of extreme ...emotional distress for which there is reasonable explanation...". [60] One might argue that a defence of this kind would be most appropriate in some cases of cumulative provocation where the excusative claim appears to lie on the borderline between provocation and diminished

responsibility. In these cases, nonetheless, neither provocation nor diminished responsibility may seem to furnish the grounds for allowing an excuse. The lapse of time between provocation and retaliation, or the admission of forethought and deliberation, militates against the "hot anger" requirement of provocation. On the other hand, the assumption that the actor is a "normal" person, or the relatively temporary nature of his psychological impediment, seems at variance with the conditions of diminished responsibility. Here, the actor might perhaps rely on a loss of control defence on the ground that his long-term mistreatment at his victim's hands led him to retaliate while being in a state of, one might perhaps say, "transitory diminished responsibility" (see chapter 6, *infra*).

Finally, one should note, the suggested departure from the traditional objective test in provocation may gain acceptance only in so far as the "reasonable man" is understood as a standard of justification. Indeed, it is this latter interpretation of the standard which the authors seem to have in mind when they argue that in provocation the plea of extenuation pertains not to the rationality of the actor's choices but, rather, to his impaired capacity for self-control. It is acknowledged that the "reasonable man" may be relevant to resolving the question of whether the actor's anger at the victim

was - under the principle of resentment - justified.

In the authors' own words:

[In provocation, the reasonable man] serves as a proxy - although a clumsy and imprecise one - for something that is essential to the resentment principle: namely, that the actor should have a good reason for his anger. [61]

It seems correct to say that the "reasonable man" may have a role to play in answering the question of whether the victim's conduct was wrongful enough to raise justified anger - in other words, to amount to legal provocation. As pointed out, however, establishing an act of provocation - necessary for allowing an excuse though it may be - would not suffice unless the requirement of impaired volition or loss of control is met.

So, to conclude, it was argued here that in the context of the excuse theory one cannot make out a case for the suggestion that the resentment principle - as furnishing the true test of provocation - may entitle the actor to an excuse even if the requirement of impaired volition is not met. In so far as the defence of provocation operates as a partial excuse, the resentment principle could only be relevant to establishing provocation as a good reason for excusing the actor on grounds of loss of control. In this respect, it seems correct to say that, for the actor's plea of extenuation to be

accepted, the "tests" of provocation and impaired volition should both be satisfied. If a case does not meet the "hot anger" requirement, considering the wrong the actor suffered at his victim's hands may be relevant to bringing forward another excusing condition - notably diminished responsibility - that may reasonably explain the actor's loss of control. Further, the assertion that the test of provocation - as informed by the resentment principle - would not apply to cases where the wrongful act was directed at a third party bearing no particular relation to the actor does not carry much conviction. Such an approach, if accepted, would exclude from the defence cases of provocation where the actor's anger at the victim seems to be perfectly justified.

6. Concluding Note: Provocation as a Partial Defence to Murder

As has been asserted before, the excusative element in the defence of provocation is accounted for an assumption of nonvoluntary or, according to Fletcher, morally involuntary action. In so far as the actor's anger at the victim is justified on account of the latter's provocation, an intentional killing committed in the "heat of the moment" does not reflect the disposition or character trait which is normally associated with murder. On this basis,

the concluding paragraphs of this chapter are aimed at illustrating how the element of intent to kill could be perceived as a necessary but not sufficient prerequisite for establishing the malice aforethought required for murder.

It was pointed out in chapter 1 that provocation has been described as a defence which operates outside the mens rea and actus reus of murder, i.e. as an offence modification. [62] It was argued that this approach to the defence, although it may seem to accord with the basic assumption that provocation presupposes rather than negates the element of intent to kill, does not take us far. Rather, given that provocation does not disprove the actor's intent to kill or cause grievous bodily harm, one need to look more closely at the question of how precisely a successful plea of provocation rebuts a conviction of murder. Having set out the rationale of provocation as it relates to the excuse theory, we may now come to reconsider the idea that provocation disproves the malice aforethought for murder - and, in this sense, operates as a failure-of-proof defence - without denying the actor's intention to kill.

One might say that, for provocation to be treated as a failure-of-proof defence, we would have to return to the early law's interpretation of malice aforethought as denoting premeditation or

deliberation. A different - and perhaps more comprehensive - approach might be to ascribe *malice aforethought* to all killings committed in *cold blood*, both wanton and premeditated (i.e. in the absence of a justification defence). Nonetheless, neither of the above approaches seems capable of explaining satisfactorily how the excusative element in provocation undercuts the requirement of *malice aforethought* for murder. Indeed, it has been stressed, even a killing committed in *hot blood*, or on the spur of the moment, could not be excluded from murder, unless the actor can show that he was led to lose control by reason of justified - due to the victim's provocation - anger. The rejection of the defence where the actor's furious reaction is attributed to "bad temper" rather than to provocation indicates that the killing reflects the same disposition or character trait as if it was deliberate or premeditated or committed in cold blood.

In the light of the previous analysis, we may say that provocation operates as a failure-of-proof defence to murder in so far as *malice aforethought* is held to signify a *freely formed intention to kill*. And speaking of a freely formed intention to kill in this context denotes nothing else than the absence of a condition that may be taken to preclude the act of killing from manifesting the actor's character or,

more precisely, the undesirable disposition or character trait connected with the crime of murder. [63] In this respect, a successful plea of loss of control on grounds of provocation will defeat a *prima facie* case of murder - and hence the presumption of malice aforethought - which is made out where an intention to kill or cause grievous bodily harm has been demonstrated.

NOTES

1. As Lord Simon said in *Holmes*, "...the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty." ([1946] A.C.588 at 601)

And see R.S.O'Regan, "Indirect Provocation and Misdirected Retaliation", *Criminal Law Review* [1968], p.319: "The doctrine of provocation is a concession to human frailty, a recognition that a lower standard of criminal responsibility should apply to one who kills when he is "for the moment not master of his mind". (at p.320)

See also R. Perkins, *Criminal Law*, (1957): "It is not the purpose of the law to unbridle the passions of men. On the contrary, one very important aim of the criminal law is to induce men to keep their passions under proper control. At the same time the law does not ignore the weakness of human nature. Hence, as a matter of common law, an unlawful killing may even be intentional and yet of a lower grade than murder." (at p.42)

2. See e.g., 3 Coke 55 ("upon some sudden falling out"); 1 Hale 453 ("sudden fallin out"); 4 Blackstone 184 ("heat of blood or passion").

3. Hart - who argues that criminal responsibility presupposes the actor's having a "fair choice" to comply with the law - explains that in determining what "normality" means one should be guided by "a stock of common knowledge". (*Punishment and Responsibility* (1968), 261)

From a different theoretical viewpoint Brandt argues that the notion of "normality" is informed by "commonsense familiarity with how people behave in

certain circumstances, and why they do the things they do". See: "A Motivational Theory of Excuses in the Criminal Law" (1985), 176.

4. Such an approach resounds the theory of criminal responsibility according to which blame and punishment presuppose passing a negative moral judgement on the actor's character. In this respect, S. Meng Heong Yeo sets out the rationale of the provocation defence as follows:

The underlying rationale of the defence [of provocation] is that the law ought, within certain prescribed limits, to allow some concession for human weakness. While the accused's act of killing is frowned upon by society, it is willing to regard the accused's character as being not as bad as that of a murderer since he committed the act in the heat of passion. The focus is accordingly on the actor rather than his act. This is clearly evidenced of late by the increasing array of personal characteristics of the accused which the law allows to be attributed to the "ordinary person". All this goes to show that the defence of provocation is excusatory in nature.

"Proportionality in Criminal Defences", *Criminal Law Journal* 12 (1988), 211 at p.214.

5. Other things being equal, establishing *authorship-responsibility* is a necessary but not sufficient prerequisite for *accountability-responsibility*. For the latter to be attributed, it is required, in addition, that the wrongful act in question reflects an undesirable character trait. In this respect, excusing conditions block the inference from the act of the character trait with which the wrongful act is normally being associated.

6. A.V.Hirsch & N. Jareborg, "Provocation and Culpability" in *Responsibility, Character, and the Emotions*, (1987), 241.

7. See, e.g.: T. Scaltsas, "Weakness of Will in Aristotle's Ethics", *Southern Journal of Philosophy* (1986), 375; L.A. Kosman, "Being Properly Affected: Virtues and Feelings in Aristotle's Ethics", in *Essays on Aristotle's Ethics*, (1980); G. Mattheus, "Weakness of Will", *Mind* 75 (1966), 405; A.O. Rorty, "Plato and Aristotle on Belief, Habit, and Akrasia", *American Philosophical Quarterly* 7, (1970), 50.

8. In Aristotle's words:

But there is a sort of man who is carried away as a result of passion and contrary to the right rule - a man whom passion masters so that he does not act according to the right rule, but does not master to the extent of making him ready to believe that he ought to pursue such pleasures without reserve; this is the incontinent man, who is better than the self-indulgent man, and not bad without qualification; for the best thing in him, the first principle is preserved. And contrary to him is another kind of man, he who abides by his convictions and is not carried away, at least as a result of passion. It is evident from these considerations that the latter is a good state and the former a bad one.

Nicomachean Ethics, 1151a 20-25.

And see: *Nicom. Ethics*, Book V, 8: "Of voluntary acts we do some by choice, others not by choice; by choice those which we do after deliberation, not by choice those which we do without previous deliberation."

9. Nicomachean Ethics, supra note 8, 1146a 31-b2.

Alf Ross argues that "a person who has violated a system whose validity he himself recognises (i.e. experience as binding) in calm reflection, once the heat of the moment of action has subsided, must disapprove of his own conduct and become angry with himself. He must harbour with regard to himself the

same feelings of anger, astonishment, sorrow or indignation that he would feel for another were he to have acted in the same way."

On Guilt, Responsibility and Punishment, London (1975), p.7.

10. *Nicomachean Ethics*, supra note 8, 1150b 19.

11. "Of incontinence one kind is impetuosity, another weakness. For some men after deliberating fail, owing to their emotion, to stand by the conclusions of their deliberation, others because they have not deliberated are led by their emotion..."

Nicomachean Ethics, supra note 8, 1150b, 20-25.

According to D. Davidson: "An agent's will is weak if he acts, and acts intentionally, counter to his own best judgement; in such cases we sometimes say he lacks the willpower to do what he knows, or at any rate believes, would, everything considered, be better. It will be convenient to call actions of this kind incontinent actions, or to say that in doing them the agent acts incontinently."

"How is Weakness of the Will Possible?", in *Essays on Actions and Events*, Oxford (1980), p.21.

12. "Since many names are applied analogically, it is by analogy that we have come to speak of the "contenance" of the temperate man; for both the continent and the temperate man are such as to do nothing contrary to the rule for the sake of bodily pleasures, but the former has and the latter has not bad appetites, and the latter is such as not to feel pleasure contrary to the rule, while the former is such as to feel pleasure but not to be led by it. And the incontinent and the self-indulgent man are

also like each other; they are different, but both pursue bodily pleasures - the latter, however, also thinking that he ought to do so, while the former does not think this."

Nicomachean Ethics, supra note 8, 1151b 35, 1152a 5.

13. Nicomachean Ethics, supra note 8, 1150b 30-35, 1151a 5-10.

14. The moral distinction between the incontinent and the self-indulgent man is illustrated by Aristotle as follows:

...the incontinent man is like the city which passes all the right decrees and has good laws, but makes no use of them,...but the wicked man is like a city that uses its laws, but has wicked laws to use.

Nicomachean Ethics, supra note 8, 1152a 15-20.

15. Aristotle expresses this as follows:

When [a man] acts with knowledge but not after deliberation, it is an act of injustice - e.g. the acts due to anger or to passions necessary or natural to man; for when men do such harmful and mistaken acts they act unjustly, and the acts are acts of injustice, but this does not imply that the doers are unjust or wicked; for the injury is not due to vice. But when a man acts from choice, he is an unjust and a vicious man. Hence acts proceeding from anger are rightly judged not to be done of malice aforethought; for it is not the man who acts in anger but he who enraged him that starts the the mischief. Again, the matter in dispute is not whether the thing happened or not, but its justice; for it is apparent injustice which occasions rage.

Nicomachean Ethics, Book V, 8.

16. Nicomachean Ethics, supra note 8, 1149a 25-35.

17. Nicomachean Ethics, supra note 8, 1149b 20-25.

18. According to J. Feinberg: "Provocations are essentially causal mechanisms. They exploit the known tendency of a certain class of words [or actions] to evoke emotional responses, and the presumed tendency of certain classes of persons (nearly all persons in some circumstances or other) to respond passionately to them." "Offense to Others", in *The Moral Limits of the Criminal Law*, (1985), p.226.

And as V. Hirsch and Jareborg remark, the provoked agent is less to blame because he "was moved to transgress in part because of, rather than despite, his sense of right and wrong".

"Provocation and Culpability", *supra* note 6, p.251.

19. According to W. Lyons:

While one might not be able or not want to stifle an emotion, one might be able and think it important to stifle the behaviour stemming from it. One might find oneself in a fit of temper and have an urge to hit someone nearby but one might see good reasons for controlling his urge. Often this control will take the form of recognising overriding reasons for not acting on the wants and desires which arise in emotional states.

Emotion, Cambridge U.P. (1980), pp.200-201.

20. See e.g. R. Perkins: "To constitute *heat of passion* included in this requirement it is not necessary for the passion to be so extreme that the slayer does not know what he is doing at the time, but it must be so extreme that for the moment his action is being directed by passion rather than by reason."

Criminal Law, (1957), p.52.

21. Todd Archibald explains the issue as follows:

...it may be possible to argue in extremely exceptional cases where there is some evidence

pointing towards the inference that the accused suffered a total loss of control, that his conduct was involuntary and unconscious; therefore, the actus reus of the crime might be negated and the accused could be acquitted on the basis that his automatic conduct gives rise to the defence of automatism.

"The Interrelationship Between Provocation and Mens Rea: A Defence of Loss of Self-Control", *Criminal Law Quarterly* 28 (1985-1986), 454 at pp.454-455.

And see A. Ashworth, "Reason, Logic and Criminal Liability", *Law Quarterly Review* 91 (1975) 102 at pp.128-129.

22. As Ashworth points out, [in English law] "Proof of "no mens rea" or "no voluntary act" is insufficient: the courts will investigate the reasons for the absence of mens rea or voluntariness, and if the accused was at fault in causing the incapacitating condition the defence should not succeed."

It seems questionable, nonetheless, whether in such cases the actor should be convicted of the original offence or, rather, of a lesser offence. See e.g. P. Robinson, "Causing the Conditions of One's Own Defence: A Study in the Limits of Theory in Criminal Law Doctrine", *Virginia Law Review* 71 (1985).

23. T. Archibald, *supra* note 21, p.470.

24. See e.g. C.T. Sistare, *Responsibility and Criminal Liability*, (1989), p.77.

25. And see: S.C. Coval & J.S. Smith, *Law and its Presuppositions: Actions, Agents and Rules*, (1986) esp. chapters 1&2.

26. J. Hall points out that "as regards behaviour

where the cause is entirely outside the person, where his "self" does not participate in the slightest degree, the legal rules represent the traditional judgement that the defendant has not acted at all, i.e. "act" implies volition."

General Principles of Criminal Law, (1960), p.422.

27. "If a movement is caused by physical compulsion, "vis absoluta", as when the hand of a person is forcibly guided in making a signature, there is no act, since will is absent. But the will itself, being amenable to motives, may be coerced by threats, "metus", "vis compulsiva", "duress per minas". Here there is indeed an act but one which produces none or few of the legal consequences which it would have produced had it been the result of free volition."

Holland, *Jurisprudence*, p.103.

28. See e.g. Sistaré: "Duress and provocation... are classified only under nonvoluntariness. Yet "paralyzing" fear or blind rage could so thoroughly impair an actor's ability to choose as to make her conduct appear involuntary rather than nonvoluntary."

Supra note 24, p.78.

And see: R. Berger, "Provocation and the Involuntary Act", *McGill Law Journal* 12 (1967), p.202.

29. G. Fletcher, *Rethinking Criminal Law*, (1978), p. 803.

30. D. Hoekema sets out the issue as follows:

What the victim of coercion is able to do despite the threat is to control his actions in the usual way. His control over the

movements of his own body has not been taken from him, as it is in cases of compulsion. He is *free to act*. What has been taken from the victim of coercion is the ability to determine his future condition by his actions, to bring about future conditions which he desires by his present acts. Of course, his acts still determine in part what his future condition will be; but the normal control that we have and expect over what happens to us as a result of our actions has been disrupted by the threat. The victim of coercion, then, is subjected to extraordinary constraints on his choice; in short, he is not *free to choose*.

Rights and Wrongs, (1986), p.75. And see: J. Edwards, "Compulsion, Coercion, and Criminal Responsibility", *Modern Law Review* 14 (1951), 297; H.G. Frankfurt, "Coercion and Moral Responsibility", in *Essays on Freedom of Action*, (1973), p.63.

31. H. Gross, *A Theory of Criminal Justice*, Oxford (1979), p.69.

32. See: G.A. Magakis, *Penal Law*, Athens (1981), pp.287-288.

According to Kant, in those cases where reason succumbs to appetite or desire the will is directed by something external to it, a relation which he calls as the "*heteronomy of the will*". A person's reasons for action pertain only to what he desires independently of his moral beliefs. On the other hand, when the person's will is determined by reason, the will is regarded as "self-ruled", for reason is viewed as something "internal" to the will. A will which is determined by reason is at one with itself. Such a will, says Kant, can override passion and desire.

33. And see: N.R.F. Maier, "Frustration Theory: Restatement and Extension", *Psychological Review* 63 (1956), 370 at p.382. The author asserts that there are intermediate states between being totally

emotional and totally rational, wherein emotion and reason may conflict with each other. See also: P.Brett, "The Physiology of Provocation", *Criminal Law Review* [1970], 634.

34. See: N. Androulakis, *Penal Law*, Athens (1978), pp.222-223.

35. With regard to this, S. Kadish argues as follows:

...volitional incapacity is a morally relevant element of a concept of legal insanity. I should want to distinguish it, however, from a different sense of volitional incapacity that is not grounded on the standard of general capacity to be a moral agent, but on the moral literal notion of a "psychic" compulsion, a desire so strong and urgent that a person is unable to resist it. Here is where the greatest difficulties lie in determining whether a person was unable to resist or simply did not resist, and, indeed, in even knowing what the distinction could mean. A jury can judge whether a person was physically compelled by another or psychologically compelled by a reflex. But (putting drug addiction aside for the moment) how can a jury distinguish between a psychic compulsion and a strong desire that the person lacks the character to resist?

Blame and Punishment, (1987), pp.101-102.

36. G. Watson, "Free Agency" in *Free Will*, Oxford (1982), p.105.

37. Watson, *supra* note 36, p.106.

38. In provocation the admission that only *justified* anger may render the actor excusable on the basis of loss of control might be taken to imply, in a way, passing a judgement on the actor's evaluation of the victim's conduct. According to C. Taylor: "Naturally we think of the agent as

responsible, in part, for what he does; and since he is an evaluator, we think of him as responsible in part for the degree to which he acts in line with his evaluations. But we are also inclined to think of him as responsible in some sense for these evaluations themselves."

"Responsibility for Self", in *Free Will*, Oxford (1982), p.118.

39. According to Sistare:

It is clear that in many cases the agent acting without full voluntariness makes choices. This is obvious in cases of duress when an actor elects one alternative over another deemed too dreadful to accept. Debilitating fear may sometimes preclude choosing, but more often the coerced actor claims to have been unable to choose differently rather than to have been unable to choose at all. In neither instance is the claim simply that no choice was made, in fact. So too, the person acting under an "irresistible impulse" makes choices but cannot control the choosing process or resist the choices she makes. Perhaps ideas seem to "come into" her head so that she cannot assess them or rid herself of them. Or perhaps she finds these ideas foreign and repugnant but is unable to resist acting on them. Either way, a choice is made, yet the conduct chosen is not voluntary.

Supra note 24, p.73.

40. A. Mele, "Self-control, Action, and Belief", *American Philosophical Quart.* 22, 2, (April 1985), 171. And see: A. Mele, "Akratic Feelings", *Philosophy and Phenomenological Research* (1989); D. Pears, "Motivated Irrationality", *Proceedings of the Aristotelian Society* 56 (1982), 157.

W.D. Lamont explains that "the ability to bring a hitherto irresistible impulse under control is dependent on the power of reason to view that potential response in the light of a system of values and an assessed set of circumstances. Where

that power of reason is lacking, it will be impossible to control the impulse, since its rejection cannot be made the objective of an act of voluntary choice. ...The point is simply that, if a person is subject to impulses that are irresistible, this can only be due to a defect of reason, namely the inability to foresee the impulsive action as a possibility and view it in the context of a given system of values and assessment of circumstances. Should there be such an inability, there could be no act of choice either to release or to inhibit the impulse."

Law and the Moral Order, (1981), pp.98-99.

41. As W. Lyons points out, "The emotions presuppose certain judgments, correct or incorrect, cursory or well-considered, irrational or rational, as to what properties something possesses."

Supra note 19, p.71.

According to J. Feinberg: "Provocations are essentially causal mechanisms. They exploit the known tendency of a certain class of words [or actions] to evoke emotional responses, and the presumed tendency of certain classes of persons (nearly all persons in some circumstances or other) to respond passionately to them."

"Offense to Others", in *The Moral Limits of the Criminal Law*, Oxford (1985), p.226.

42. According to T. Aquinas:

He that has knowledge of the universal is hindered, because of passion, from reasoning in the light of that universal, so as to draw the conclusion; but he reasons in the light of another universal proposition suggested by the inclination of the passion, and draws his conclusion accordingly. ...Hence passion fetters the reason, and hinders it from thinking and concluding under the first proposition; so that while passion lasts, the reason argues and concludes under the second.

And see R.B. Brandt: "Strong emotional disturbance is known to primitivize thinking (much as does alcohol). A state of anger notoriously enhances one's aggressive tendencies, and reduces one's empathetic or sympathetic concern about injuring its target."

"A Motivational Theory of Excuses in the Criminal Law", *Criminal Justice Nomos XXVII*, (1985), 165 at p.183-184.

43. P. Alexander offers the following account of a "normal" person:

...a normal person is one who has, as a minimum, sufficient contact with his fellows to be able to work with them, or against them, and to react to the murmurs of praise and shouts of defiance. ...This means that a good deal of his behaviour, but not all, must be intelligible to others; that is, it must be such that, however unlike ours his actions and reactions and his reasons in various situations, we should at least be able to see that, given his beliefs, these actions, reactions and reasons are somehow appropriate to these situations.

"Normality", *Philosophy* 48 (1973), 137 at pp. 150-151.

44. See e.g. Ashworth: "...the offender's responsibility for a provoked killing may be said to be reduced by the fact that the victim's wrongful action was the original cause of the offender's loss of self-control." "The Doctrine of Provocation", *Criminal Law Journal* (1976), 308. And see: J. Bentham, *Theory of Legislation*, (1931): "The offence does not originate in the will of the delinquent. The primary cause is the act of another, the will of another..." (at p.262)

And as R.M. Adams points out: "Exaggerated or senseless anger, an anger that is not justified by a proportionate provocation, is morally offensive; and one who is guilty is liable to blame."

"Involuntary Sins", *Philosophical Review* (Jan. 1985), 3.

45. See: D. Hume, *An Enquiry Concerning Human Understanding*, Oxford (1902), s.8, p.2; A. Smith, *Theory of Moral Sentiments*, (1966), p.153. Smith like Hume hold that people are praised and blamed for their characters as manifested by their external conduct.

And see: M.D. Bayles, "Character, Purpose, and Criminal Responsibility", *Law and Philosophy* 1 (1982), 5; "Hume on Blame and Excuse", *Hume Studies* 2, 1 (1976), 17. See also: R.B. Brandt, "Traits of Character: a Conceptual Analysis", *American Philosophical Quarterly* 7 (1970); "Blameworthiness and Obligation", in *Essays in Moral Philosophy*, (1958). And see: E.L. Pincoffs, "Legal Responsibility and Moral Character", *Wayne Law Review* 19 (1973), 905.

46. See, e.g., W. Lyons: "I think that we are blamed for character traits and their expression only in so far as it is considered that a character trait has given rise to actions which have had an undesirable upshot. If character traits did not ever do anything, they could never do harm."

Supra note 19, p.194.

47. From the viewpoint of the *utilitarian* theory of excuses, Brandt argues that "a rational and informed person, if he were to be given a choice among possible systems of criminal justice for the society in which he expects to live, would opt for a system exempting from punishment those persons

who have committed an unjustified unlawful act, but did not thereby manifest any defect of standing motivation or character."

"A Motivational Theory of Excuses in the Criminal Law", *supra* note 42, p.193.

48. J.Dressler, "Provocation: Partial Justification or Partial Excuse?", *Modern Law Review* (1988), 475.

49. See: G. Fletcher, *Rethinking Criminal Law*, (1978), pp.513-514.

50. A.V. Hirsch & N. Jareborg, *supra* note 6, p.252.

51. *Supra* note 6, pp. 253-254.

52. *Supra* note 6, pp. 248-249.

53. *Supra* note 6, p. 254.

54. *Supra* note 6, p. 252.

55. See, e.g., Ashworth: "It is the elements of suddenness and impulsivity which serve to distinguish provocation as a mitigating factor from revenge, which may be treated as an aggravating factor because it is usually accompanied by planning and premeditation."

Sentencing and Penal Policy, London (1983), p.169.

And see: Bar-Elli and David Heyd, "Can Revenge be Just or Otherwise Justified?", *Theoria* 1 (1986), 70.

56. "It may happen that a man is abnormally cool under gross provocation but none the less extremely resentful of any kind of personal affront; if he were to kill at once, but in cold blood, he cannot

be excused by the fact that the acts of provocation would have been expected to cause an ordinary man to lose his self-control."

Kenny's Outlines of Criminal Law, (1966), p.179.

57. A.V.Hirsch & N. Jareborg, *supra* note 6, p.254.

58. See, e.g., *Terry* ([1964] V.R. 248): "[Indirect provocation] did not prevent the operation of the principle that provocation will reduce murder to manslaughter provided that the provocation was offered in the presence of the accused and provided that all the other elements of provocation are present. ...I do not see any reason why the doctrine should be confined to relatives, for the relationship between the person attacked and the accused must be a relevant factor when the question whether an ordinary man would be likely to lose his self-control is being considered by the jury." (Per Pape J., at pp. 250-251)

And see: *Mouers*, (1921) 57 D.L.R. 569.

59. R.S.O'Regan, *supra* note 1, p.321.

60. American Law Institute, Model Penal Code, Proposed Official Draft (1962), section 210.3 (1) (b).

61. A.V.Hirsch & N. Jareborg, *supra* note 6, p. 252.

62. See, e.g., Wasik: "The generally accepted view in English criminal law is that both provocation and diminished responsibility are seen as operating outside mens rea and actus reus. Thus it makes it easier to accept a reduction in offence category without questioning liability for that lesser offence, given that if the partial excuse negates mens rea for the most serious crime it would also

affect the mens rea required for the lesser offence."

"Partial Excuses in Criminal Law", 45 *Modern Law Review* (1982), 516 at pp. 528-529.

This approach represents the so called "cognitive" model of criminal responsibility, which centres on the issues of knowledge, intention and foresight of consequences as reflecting the actor's subjective mental state. Conscious choice is the keystone element of this model. See, e.g.: Hughes, (1964), p.470; Urowsky, (1972). On the other hand, the so called "capacities" model of criminal responsibility focuses on the actor's capacity to exercise control of his conduct and on whether the actor has the opportunity to exercise such control. The advocates of the capacities model propose the broadening up of the meaning of mens rea in law to accommodate the capacities-based conception of criminal responsibility. (P. Brett (1963), H.L.A. Hart (1968), J. Brady (1972), J. Feinberg (1974), G. Fletcher (1978), See: C.T. Sistare, *supra* note 24, pp. 18-19.

According to Fletcher:

The spectrum of culpability teaches us that culpability is not only a matter of cognitive foresight, but of self-control. The issue of self-control, we learn, requires subtle judgments of degree. In some cases of intentional homicide the actor exercises greater control, and in others, lesser. The grading of homicide disabuses us of the view that voluntariness and freedom of the will are black-and-white issues. Rather the shading develops by perceptible degrees from total dependence on circumstances to total independence of external influence."

Rethinking Criminal Law, (1978), p.353.

63. Consider e.g. Perkins' definition of *malice aforethought* as "an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind."

Criminal Law, supra note 20, p. 40.

See also: R.N. Bronaugh, "Freedom as the Absence of an Excuse", *Ethics* 74 (April 1964), 163.

CHAPTER 4: ON THE OBJECTIVE TEST IN PROVOCATION:

ASSESSING THE ROLE OF THE "REASONABLE MAN"

1. Two Faces of the "Reasonable Man"

In English law, the defence of provocation is understood to hinge upon satisfying both a "subjective" and an "objective" condition. The subjective condition involves the factual question of whether the actor was provoked to lose his self-control; the objective condition pertains to the evaluative question of whether the provocation was sufficient to lead a reasonable person to react "as the the actor did". It has been pointed out earlier that, if there is some evidence that the actor was provoked to lose his self-control, the question of whether he reacted as a reasonable person is to be determined by the jury. It is also for the jury to decide whether certain individual characteristics of the actor should be taken into account in applying the test (see chapter 1).

The problems concerning the nature and function of the "reasonable man" standard are not unrelated to the ambiguity that besets the theoretical basis of provocation. Indeed, one major source of difficulty in deciphering the rationale of the defence lies in the equivocal role of the "reasonable man" as a

universal standard aimed at resolving questions of both justification and excuse. [1] This first section illustrates the double role of the reasonable person with respect to justification and excuse and sets out the possible interpretations of the standard as it operates in the context of the partial defence of provocation.

The figure of the "reasonable man" maintains a tenacious hold on Anglo-American criminal law doctrine. According to Fletcher, the recourse to the reasonable person in resolving legal disputes permits "the ongoing infusion of moral values into the law" and, as such, constitutes an effort "to transcend the sources of positive law and to reach for a higher, enduring, normative plane". [2] Such an approach to the "reasonable man", one may add, would seem to gain acceptance particularly in the face of the ever-increasing tendency towards enhancing the role of the jury in determining questions of reasonableness. Nonetheless, one could not readily predict those considerations which inform the "reasonable man" as the keystone of a universally applicable test, nor could one prescribe the nature of the disputes to be resolved on such a basis. The reasonable person camouflages heterogeneous requirements of justification and excuse - of wrongfulness and blameworthiness - under the same inquiry and for this reason makes it difficult to demarcate

between fundamentally different perspectives of liability.

With regard to the conditions of justification, the "reasonable man" may be thought of as indicating the course of action that should be, in the circumstances, legally acceptable. In this respect, the reasonable person embodies the principles that inform and support judgements of legal justification, recognising exceptions to the primary or prohibitory rules. Thus, in a situation wherein a conflict of values or interests becomes inevitable - as in a case of necessity - the actor is called on to act as a reasonable person, that is, to preserve the value or interest which is considered as being objectively superior. According to the lesser evil variation of the justification theories, such an act, harmful though it may be, should nonetheless be legally permissible (see chapter 2.2). Further, acting in pursuance of a legal right - e.g. the right of self-defence - would not be legally warranted unless the actor observes certain limitations or, one might say, does not act "in abuse" of the right. In this context, the reasonable person is referred to as relevant to circumscribing the bounds within which a justificatory legal right is regarded as being properly exercised.

In the domain of excuse, on the other hand, the

central question is whether the actor is fairly expected to stand up to the stress of the circumstances and refrain from acting wrongfully. The reasonable person provides a yardstick in resolving this question. Under the excuse theory, the interpretation of an objective standard is for the most part informed by considerations having to do with what is referred to as the "realities" or "failings" of human nature. One might say that the slide from the notion of "reasonable" to that of "ordinary" or "average" or "normal" person is suggestive of a shift from justification to excuse, for the latter notions seem more apposite to accommodate the element of human frailty. Although legal excuses are thought of as concessions to the failings of human nature because it is assumed that these failings are common to all people, the confluence of factors that occasions the actor's surrender to pressure - i.e., as a manifestation of human frailty - could only be detected by reference to the idiosyncrasies of the particular case. This makes it necessary to endow the reasonable person with certain individual characteristics of the actor, namely, those that are deemed relevant to determining - in an "objective" way - the degree of pressure to which the actor was subjected. Only on such a basis may it properly be asked whether the actor should fairly be expected to resist the pressure and abstain

from wrongdoing. Of the idiosyncrasies that may bear upon the actor's capacity to withstand the compelling situation only those for which he cannot be blamed may be considered relevant to describing the ambit of the applicable test. One might say that singling out those characteristics that are material to the assessment of the proposed excusing condition could itself be perceived as a matter of objective moral judgement. In this respect, it seems correct to say that taking account of certain personal characteristics of the actor does not in fact militate against the basically objective orientation of the test. Nonetheless, one should not lose sight of the important distinction between individual peculiarities that may be considered in the application of the objective test and those that would render such a test inapplicable. The latter concern conditions which are taken to remove the actor from the category of "reasonable" or "normal" people. These conditions are pertinent to a different class of criminal defences, namely, those that revolve around the notion of *abnormality of mind* rather than a general assumption of human frailty. [3]

It has been noted in Chapter 2 that the rationale of the partial defence in provocation may be informed by either the justification or the excuse theory. Under the justification theory, provocation furnishes

the grounds for a partial justification defence on the assumption that a severely wrongful act of provocation reduces the degree to which the act of killing the provoker is deemed morally undesirable. Patently, given the all-or-nothing character of judgements of legal justification, the reasonable person in provocation does not indicate that the course of action is legally acceptable. Rather, the role of the reasonable person in this context lies in the assessment of the gravity of the provocation. Thus, one might say that only provocations that are deemed serious enough to enrage or exasperate a reasonable person may furnish the moral basis upon which the actor would be entitled to a partial justification defence. Indeed, one might argue, it is from the viewpoint of the justification theory that the so called "*resentment principle*" may best be conceptualized (see Chapter 3.5). As has been said, to the question of what sort of wrongdoings would be most likely to satisfy this principle, a twofold answer is being put forward: "The most straightforward cases are those where the victim's acts constituted criminal behavior of a significant nature. ...The next cases comprise those where the victim behaved toward the actor in a manner that is not criminal, but nevertheless infringes commonly recognized standards of decent behavior." [4] In this respect, it seems correct to say that the

reasonable person (as represented by the ordinary member of the jury) epitomizes those commonly accepted standards of decent conduct the violation of which could support a plea of provocation according to the resentment principle. It must be noted that such an approach to the "reasonable man" does not preclude taking into account certain personal idiosyncrasies of the actor that are considered relevant to determining the degree to which the act of provocation should be deemed morally wrongful. Nonetheless, it is important to note that, under the justification theory, any reference to individual peculiarities of the accused should have to do with the moral assessment of the victim's conduct - i.e. as it was directed at the accused - in relation to the question of whether the act of killing should be deemed partially justified. Arguably, the element of impaired volition or loss of control is immaterial in this respect (and see chapter 2.4).

Under the excuse theory, on the other hand, provocation furnishes the necessary condition for allowing a partial excuse on the ground of impaired volition or loss of control. It has been asserted in the previous chapter that from this viewpoint a plea of extenuation cannot be accepted unless the requirements of provocation and loss of control are both met. The reasonable person provides a gauge in resolving the question of whether the provocation

offered was capable of arousing justified anger to such a degree as to be likely to overcome - partly by reason of human frailty - the actor's capacity for self-control. In other words, only provocations that are deemed serious enough to be expected to inflame passion as a result of justified anger should render the actor less to blame for losing his self-control and killing. In this respect, the reasonable person may be endowed with those individual characteristics of the actor that are deemed relevant to determining the gravity of the provocation and hence to making out the degree of pressure to which the actor was subjected. According to Ashworth:

To be meaningful, the "gravity" of provocation must be expressed in relation to persons in a particular situation or group. For this reason it is essential and inevitable that the accused's personal characteristics should be considered by the court. The proper distinction, it is submitted, is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual characteristics bearing on the accused's level of self-control should not. [5]

Thus, under the excuse theory, one might envisage the reasonable person both as the embodiment of those generally recognized standards of proper behaviour and, at the same time, as the vehicle of the common failings of human nature. [6] This portrayal of the

reasonable person in provocation fits with the basic assumption that, for a partial excuse to be granted, the actor's anger at the victim should be morally justified. Arguably, if the latter condition does not obtain, allowing an excuse as a concession to natural human frailty would appear to be morally contestable.

The following sections of this chapter centre on the role of the reasonable person under the partial excuse doctrine. In particular, the discussion focuses on the possibility of treating the factual and the evaluative questions in provocation as being, in a sense, interrelated or interdependent. Indeed, one might say that resolving the factual question "did the actor lose his self-control?" may often seem to depend on the answer to the evaluative question of whether the provocation received was sufficient to lead a reasonable person to lose control. In discussing this issue, certain perspectives of the "reasonable man" standard as it relates to the doctrine of provocation and that of mistake will be comparatively examined. [7]

2. Proportionality and the "Reasonable Man" Revisited

As was said in chapter 1, the dominant position in English law after the 1957 legislation is that

the issues concerning a plea of provocation, both factual and evaluative, are to be determined by the jury. In resolving the question of whether the actor did in fact lose his self-control as a result of provocation the jurors will most often ask themselves whether they, as normal people, may have given way to anger in the face of the victim's conduct. On the assumption that the actor is a reasonable or normal person, the jurors will usually take into account those of the actor's peculiarities that, in their opinion, should bear upon the degree of wrongfulness of the victim's conduct (i.e. as such a conduct was directed at the actor). [8] Their final judgement may also be informed by considerations which are not directly related to the "external" wrongfulness of the victim's act. Those considerations include, among other things, the possible lapse of time between the provocative act and the actor's retaliation. The jurors may take the view that, under the circumstances of the case, they themselves would not have lost control either because the victim's conduct was not sufficiently wrongful or because, wrongful though such a conduct may have been, enough cooling time elapsed after the provocation was offered. If this were the case, they may arrive at the conclusion that, as a matter of fact, the actor did not lose his self-control - i.e. as a result of provocation - at the critical time

when the killing took place.

Much debate has revolved around the problem of distinguishing between the important role of the "reasonable man" (as being represented by the ordinary member of the jury) in answering questions of fact and its assumed position as a legal standard of liability. [9] With regard to this problem, it has been argued that the role of the "reasonable man" in the doctrine of provocation provides "one more illustration of the way in which a point of evidence has been allowed to slide into a point of law, and of the inevitable mischief which thereby results". [10] According to Gordon:

Instead of being used as a way of testing the truth of the accused's statement that he lost self-control, the reasonable man has been turned into an objective standard of self-control. Even if the jury believe that the accused, in fact, lost control to an extreme degree, and that he killed because of this, they must convict him of murder unless they think that the reasonable man would have lost control to that degree, a result which, it is submitted, is clearly unjust, especially when what is in question is not the objective rightness of what was done but the degree of punishment which should be inflicted on the particular accused. If the accused's alleged loss of self-control was something which the jury feel was quite unusual and unexpected in the circumstances this may properly lead them to refuse to believe that he did lose control,

but if they do believe it, its unexpectedness seems unimportant - even the law must recognise that the unexpected can happen. [11]

When a plea of partial excuse is at stake, the role of the reasonable person pertains not simply to the question of whether the actor did lose his self-control but, rather, to whether he did so as a result of (legal) provocation. Indeed, according to sec.3 of the Homicide Act 1957, the judge should put the issue of provocation to the jury if there is some evidence "on which a jury can find that the person charged was provoked ...to lose his self-control". Although evidence of any sort of wrongful conduct on the victim's part would suffice for the plea of provocation to be raised, only those wrongdoings that meet the conditions of provocation - as embedded in the evaluative question - may support a partial excuse on the basis of impaired volition or loss of control. One might say that the factual question, in so far as it focuses on the actor's loss of control as a result of legal provocation, in a sense presupposes answering the evaluative question of whether the victim's wrongdoing amounted to such a provocation. Patently, if the victim's wrongdoing meets the requirements of legal provocation (as those requirements are embedded in the "reasonable man" test) and yet there is evidence suggesting that the actor did not in fact lose his self-control, the

actor should not be entitled to a partial excuse. [12] Further, even if there is evidence upon which it can be found that the actor did in fact lose control, a partial excuse on the ground of provocation should not be granted unless the victim's conduct satisfies the conditions of provocation. As has been pointed out in the previous chapter, under the excuse theory one could not give credit to a claim of loss of control or impaired volition, unless an acceptable excusing condition is demonstrated as its cause. In this respect, one might say that, in so far as the "reasonable man" standard relates to establishing a good reason or a basis for excusing, it would also seem to be determinative of the factual question of loss of control on that basis.

As noted in chapter 1, the doctrine of provocation in English law has been perplexed by problems concerning the interrelation of the "reasonable man" and the requirement or principle of proportionality. Since the introduction of the Homicide Act 1957 the requirement of proportionality is not treated as a rule of law but rather as a consideration for the jury in applying the test of provocation. This does not seem to have resolved the problems surrounding the issue, however. In the heart of the controversy lies the question of whether the "reasonable man" test should be construed as pertinent to assessing the actor's mode of

retaliation in addition to his claim of loss of self-control. In the cases e.g. of *Wardrope* (1960) [13], *Church* (1965) [14], and the report in *Adams* (1961) [15] it was stated that the requirement of proportionality, as expressed in *Mancini* (1942) [16], has not been abolished after the 1957 legislation. And in *Walker* (1969), it was clearly pointed out that "one vital element for the jury's consideration in all these cases [of provocation] is the proportion between the provocation and the retaliation." [17] Exceptionally, in *Southgate* (1963) [18] it was recognized that the role of the "reasonable man" is not to assess the way in which the actor responded to the provocation, that is, in so far as it is accepted that the actor was in fact bereft of his self-control. Nonetheless, in *Phillips* (1969) it was pointed out that:

The test of provocation in the law of homicide is two-fold. The first, which has always been a question of fact for the jury assuming that there is any evidence upon which they can so find, is "Was the defendant provoked into losing his self-control?" The second, which is not of fact but of opinion, "Would a reasonable man have reacted to the same provocation in the same way as the defendant did?" In their Lordships' view section 3 ...in referring to the question to be left to be determined by the jury as being "whether the provocation was enough to make a reasonable man do as he (sc. the person charged) did" explicitly recognises

that what the jury have to consider, once they have reached the conclusion that the person charged was in fact provoked to lose his self-control is not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but also whether, having lost his self-control, he would have retaliated in the same way as the person charged in fact did. [19]

As the above position seems to suggest, the "reasonable man" test should focus not simply on the question of whether the actor did lose his self-control as a result of the provocation but also on the way in which the actor retaliated. [20] Further, it is indicated that, even if it is accepted that the actor did lose his self-control, his plea of extenuation should not succeed unless the actor responded to the provocation in the same manner as a reasonable person would be expected to respond. [21] Nevertheless, in so far as the excuse in provocation rests on the element of loss of control, the "reasonable man" test may take account of the actor's mode of retaliation only as relevant to establishing this element. In other words, if the jury take the view that the actor's response to the provocation is markedly at variance with that expected from a reasonable person, they might give no credit to the actor's claim of loss of control (i.e. as a prerequisite for allowing a partial excuse). [22] Nonetheless, speaking of the requirement of

proportionality - or the "reasonable man" test in general - as applying on the actor's response even after it has been admitted that he lost his self-control seems confusing. [23] The interpretation of the proportionality requirement as pertinent to the actor's mode of retaliation has been taken to consort most with the approach to provocation as a partial justification defence. In this respect, however, establishing the loss of control element seems hardly relevant to allowing a partial defence. According to Alldridge:

It will be seen that a requirement of proportionality is only consistent with provocation as partial justification, and loss of self-control is only consistent with provocation as partial excuse. [24]

Nonetheless, as was explained earlier, even under the justification theory, the proportionality requirement in provocation could not plausibly refer to the actor's mode of retaliation (see chapter 2.4).

In the face of these difficulties, the Criminal Law Revision Committee has proposed that the "reasonable man" test in provocation should be reformulated. It has been suggested that the jury should be invited to consider whether, as seen from the viewpoint of the accused, the provocation received can reasonably be regarded as a sufficient

reason for the loss of self-control. In resolving this question the jury should take into account those individual characteristics of the actor, including any physical or mental disability from which he suffered, which, in their view, bear upon the gravity of the provocation offered. [25] G. Williams asserts that, "[this] rewording [of the "reasonable man" test] would not solve the problem for the jury, but the committee thought it might express the question in slightly clearer words". He remarks, nonetheless, that "It is a logical improvement to make the word "reasonably" refer to the jury's reasoning faculty instead of attaching to what the defendant did". [26] This approach to the issue consorts with the idea that, under the excuse theory, any reference to reasonableness or proportionality can only be relevant to the question of whether - in view of common human weakness - the provocation was such as to render the actor's giving way to anger or losing his self-control seem as a likely or not unexpected reaction.

So, to summarize, it has been said that, in assessing a plea of provocation, the jury should imagine themselves in the position of the actor and ask themselves whether they, as reasonable or normal people, may have lost control in the face of the victim's conduct. If their answer is in the affirmative, all that remains to be tested is whether

the actor was in fact deprived of his self-control at the time of his fatal response. With regard to answering this latter question, the possible lapse of time between provocation and retaliation, as well as the manner in which the actor retaliated are among those considerations that may furnish important evidence. [27] Thus, under the excuse theory one may speak of interrelated considerations that have to do with establishing provocation as a good reason for losing control and with the question of whether the actor did in fact lose control as a result. From this viewpoint it seems clear that what is at issue is not whether the actor responded to the provocation in kind but, rather, whether the provocation offered provides a reasonable explanation - i.e. in view of human frailty - for the actor's losing his self-control and killing. Even if the latter were accepted, however, the actor should not be entitled to a partial excuse if the mode of his retaliation or other evidence suggests that he killed his victim in cold blood.

Admittedly, in provocation giving way to anger or losing one's self-control is but a matter of probability. [28] Notwithstanding that the provoked killer is less to blame, the general assumption in the law is that losing control and killing could have been averted on a higher feasible standard of self-restraint. [29] This is precisely what makes the

attribution of responsibility and punishment here possible. As Ashworth points out:

It is one of the fundamental postulates of English criminal law that individuals ought at all times to control their actions and to conduct themselves in accordance with rational judgment. Loss of self-control is therefore never capable of amounting to a defence to criminal liability. [30]

The likelihood of losing one's self-control and killing can be perceived as, in a sense, commensurate or proportionate to the degree to which the provocation is deemed wrongful. Admittedly, a more severe provocation should require a reasonable or normal person to step up his psychological effort in order to maintain control over his actions. Although every wrongful conduct that would pass the test of provocation may be capable of supporting a partial excuse if the actor's loss of control is not disproved as a matter of fact, different degrees of provocation should entail different degrees of culpability. [31] This is certainly an important consideration that the sentencer cannot ignore in designating the appropriate degree of punishment for the lesser offence. Moreover, the form and gravity of the provocation can be determinative of the weight certain considerations may have in establishing whether the actor did in fact lose his self-control. Thus, issues such as the actor's mode of retaliation,

or the time which may have elapsed after the provocation was offered are to be assessed as relevant to the question of loss of control by reference to the wrongfulness of the provocation. For example, whereas in a case of a less serious provocation the lapse of some time should militate against the actor's claim of loss of control - i.e. on the assumption that the time elapsed was sufficient for a normal person to cool down - the opposite may obtain in a case of a more serious provocation.

3. Reasonableness as a Prerequisite for Excusing in Provocation and Mistake of Fact: a Comparative Examination

The problems concerning the interpretation of the requirement of reasonableness in the context of the doctrine of mistake are, to some extent, of similar nature to those that face us in provocation. One might say that in the same way as an unreasonable mistake of fact should not absolve the actor from criminal responsibility, a plea of provocation that does not satisfy the "reasonable man" test should not entitle the actor to a partial excuse. With regard to both mistake and provocation it may seem problematic, nonetheless, how one could separate the so called "evaluative" from the "factual" aspects of the relevant inquiry.

Turning down a plea of mistake on the ground that the mistake was "unreasonable" - i.e. a mistake that, all things considered, a reasonable person would not have made - may indicate the rejection of the actor's claim as a matter of fact; it might also denote that, even if such a mistake did in fact occur, the defence cannot be accepted, for an unreasonable mistake may be taken to manifest an extraordinary deficiency in the actor's character (see chapter 3.4). One may argue that an actual or "honest" mistake, unreasonable though it may be, could nonetheless still militate against the mens rea element of the offence. Thus, for example, if the actor shot and killed another actually believing that he was shooting at a wild animal, the necessary mens rea of murder could not be established, that is, even if the mistake is not regarded as a reasonable one. On the other hand, if the offence at issue is one of those based on criminal negligence, the mistake should be reasonable if it is to support a legal defence. Indeed, in English law, although the current position is yet to be clarified, it is asserted that in general an "honest" mistake would suffice as a defence to those offences which are contingent upon establishing intention or "subjective" recklessness (*Cunningham*). [32] It is argued, nonetheless, that, notwithstanding the absence of intent, the courts will often not hesitate to circumvent the logic of

mens rea and convict of such an offence if the actor's mistake is deemed unreasonable. [33] With regard to those offences requiring negligence or "objective" recklessness it is accepted that the defence of mistake should fail unless the actor's mistaken belief is considered to be reasonable. The distinction between "reasonable" and "honest" mistakes has been a source of confusion in the law. This confusion is manifested by the inconsistency of the judges' directions to juries in cases of mistake.

One may say that, in so far as the accused is assumed to be a normal or reasonable person, the jury should assess the truth of his claim of mistake by considering whether they themselves, as reasonable people, may have fallen victims to such a mistaken belief in the circumstances. If the jury take the view that they could not have made such a mistake, then they would most likely infer that neither the actor was in fact mistaken. J. Hall explains the role of the "reasonable man" as a test of facts in the following way:

Given certain facts, we must, on the basis of our experience in a given culture, introspection, and the instant facts, conclude that any and every rational human being in those circumstances did or did not intend the results. Consequently, on the level of the elementary mental processes embodied in the

adaptation of ordinary means to attain common ends, all rational human beings, and thus the defendant - barring mental or physical defects - may properly be said to have acted intentionally under the circumstances where any normal one of them could be said to have acted intentionally. That is the rationale of the "reasonable man" test as a method of inquiry. ...the inevitable limitations of such knowledge do not support the dogmatic view that in the vast majority of findings, based on rational methods of investigation, there is no accurate correspondence. [34]

In so far as the question of reasonableness is to be answered in view of the circumstances of the particular case as these are made out in the light of the existing evidence, one might say that the introduction of new evidence should normally alter the "factual" basis upon which the the "reasonable man" test would apply. In this respect, one might say that of those factors that make up the the ground upon which a claim of mistake would be assessed as a matter of fact, only some, including certain personal characteristics of the actor, may be singled out as relevant also to the evaluative question of whether such a mistake was reasonable. Nevertheless, as has been said before, although in theory the distinction between the factual and the evaluative aspects of the inquiry - or between "honest" and "reasonable" mistakes - might seem feasible, in practice this distinction is not always easy to draw. The

interrelationship between the factual and evaluative perspectives of the "reasonable man" test might seem less difficult to canvass if one places emphasis on the assumption that unreasonableness is a matter of degree. Thus, one might say that, all things considered, the more unreasonable the alleged mistake is deemed, the less grounds there should be for such a mistake to have actually occurred. On the other hand, a mistake that may have been prevented on a higher standard of care might still be admitted as a matter of fact ("honest" mistake) if, in view of the existing evidence, it could not be excluded as likely to happen. Hall argues that:

The presumption should, of course, be that in the absence of a plea of insanity, the defendant is a "reasonable man". But just as is now the practice in many jurisdictions in cases of fraud, receiving stolen property and so on, the defendant would, under the suggested policy, be permitted to introduce evidence showing that in fact he did not know or realize, etc. As suggested, this will not eradicate the objective test entirely so far as factual questions are concerned, not only because the jury will be influenced by irrational factors but also because, in appraising the evidence of the defendant's actual state of mind, they will read into their own experience of normal conduct and understanding. Yet, it can hardly be doubted that in many cases, the instructions given the jury, concerning the test they are to apply,

have considerable influence. [35]

Making out a distinction between the factual and the evaluative perspectives of the "reasonable man" standard in the context of provocation may seem more problematical than in the defence of mistake, for what is now at issue is not the intentional character of the accused's act (i.e. as it relates to establishing mens rea) but, rather, the actor's lack of self-control with respect to an intentional killing. As has been said, in cases of mistake the reasonable person may be invoked both as a method of inquiry in order to resolve the question of whether the accused was in fact acting under a mistaken belief (and hence he lacked mens rea), and as a standard upon which the accused's mistake (once it has been admitted as a matter of fact) is to be assessed. In some cases in which the alleged mistake is considered not to be reasonable the accused might nonetheless still be able to rely on a lack of mens rea defence or, one might add, to have his crime "reduced" to one of criminal negligence, if it is accepted that he was in fact acting under a mistaken belief ("honest" mistake). By contrast, a plea of provocation should fail unless the "reasonable man" test is satisfied. Indeed, in provocation, it seems correct to say that it should make no difference whatsoever whether the actor did or did not in fact lose his self-control - in the sense of acting in

hot blood - if the provocation offered was not such as to be likely to lead a reasonable person (as the test applies to the particular case) to lose control over his actions; other things being equal, in both cases the actor should not be able to rely on a partial excuse.

The established position that the defence of provocation should not provide shelter to the so called "bad tempered man" invites one to make out a distinction between acting in hot blood and losing self-control (as required for allowing a partial excuse). As has been explained in chapter 3, acting "in the heat of the moment" may be regarded as a necessary but not sufficient prerequisite for allowing a partial excuse by reason of loss of control in provocation. One might say that acting in hot blood should not indeed be confused with loss of self-control or impaired volition, that is, in so far as the latter notion is understood to denote a significant discrepancy between external conduct and the actor's character. [36] From this point of view it seems difficult to visualise how the "reasonable man" in provocation might be called upon as relevant to resolving the factual question (i.e. did the actor lose his self-control?) without at the same time to answer the evaluative question. This approach seems correct in so far as the latter question is expressed in the following way: was the provocation sufficient

to lead the actor, as a reasonable or normal person, to lose his self-control? In this respect it sounds plausible to say that in provocation the reasonable person is called upon as pertinent to both the evaluative and factual perspectives of the inquiry. In other words, in order to show that the actor did in fact lose his self-control (not merely that he acted in hot blood) as required for granting a partial excuse it should be recognized that, in view of the circumstances of the case, the provocation was sufficient to lead a reasonable or normal person to lose control. Nevertheless, as was pointed out earlier, the satisfaction of the "reasonable man" test cannot by itself indicate impaired volition or loss of self-control as a matter of fact unless it is accepted that the actor responded to the provocation in "hot blood" or "on the spur of the moment".

Further, in the context of the defence of mistake the reasonable person is referred to as indicative of a general standard of care that, if met, the actor should be exempted from blame and culpability altogether. In provocation, on the other hand, the "reasonable man" is called upon as a standard of self-control with regard to reducing rather than excluding the actor's blameworthiness and culpability. As has been indicated, both as a standard of care and as one of self-control the "reasonable man" test should apply in view of the

circumstances of the particular case. These include, among other things, those of the actor's characteristics that are, in a sense, "objectively" selected as relevant to determining the degree of care or self-control that could fairly be expected from the actor as a reasonable or normal person. In this respect, one might say that falling victim to a reasonable mistake of fact would normally preclude any inference to a flawed character as required for holding the actor blameworthy. On the other hand, giving way to provocation that is deemed sufficient according to the "reasonable man test and losing control does not totally debar such an inference. One might perhaps envisage some sort of analogy between provocation and those cases of mistake where the actor should not be entitled to complete exculpation, i.e. where the mistake is deemed unreasonable and yet true as a matter of fact. As has been said, in these cases the admission of a mistaken belief may debar conviction of an offence requiring mens rea (e.g. murder) but it should not preclude liability for a lesser offence (e.g. manslaughter). Some further aspects of the analogy or, possibly, the interrelation between provocation and unreasonable mistake will be explored in the context of the discussion of the problem of excessive self-defence in the following chapter.

4. Concluding Note

Conduct that cannot be regarded as sufficiently wrongful according to the "reasonable man" test should not be capable of supporting a partial excuse on the ground of provocation. What sort of untoward behaviour should be seen as crossing the threshold of legal provocation is primarily a matter of moral judgement and in this sense it cannot be determined without getting an insight into the moral code that is current in society. In this respect, the judgement on provocation is informed by the demerit or wrongfulness attached to certain conduct by looking at it not in the abstract but, rather, in the light of the circumstances of the particular case. As has been pointed out, the fact that some of those considerations that determine the gravity of the provocation can be peculiar to the individual case does not render them irrelevant to the "objective" moral assessment of the relevant conduct.

It is recognized that of those wrongdoings that may qualify as legal provocations according to the "reasonable man" test some might constitute legal offences as well. Nonetheless, it is accepted that the criminal character of the victim's wrongdoing does not necessarily warrant a successful plea of provocation. [37] In some cases where the victim's unlawful conduct entails a threat to life or limb one

may be confronted with theoretical problems which have to do with the overlap of elements of different criminal defences. The following chapter takes up these problems in the context of a comparative examination of self-defence and provocation. In particular, the analysis focuses on the issue of excessive self-defence and explores the rationale of the defence that might arise in such cases.

NOTES

1. See: G. Fletcher, "The Right and the Reasonable", *Harvard Law Review* (1985), 949 at pp.962-963.
2. See: G. Fletcher, *supra* note 1, p.980.
3. The Court of Appeal in *Ward* described the "reasonable man" as "a person who cannot set up a plea of insanity". *R. v. Ward* [1956] 1 Q.B. 351 at 356.
4. A. Von Hirsch & N. Jareborg, "Provocation and Culpability", in *Responsibility, Character, and the Emotions*, (1987), p.254.
5. A. Ashworth, "The Doctrine of Provocation", 35 *Criminal Law Journal* (1976), 292 at p.300.

And see, e.g.: American Law Institute, Model Penal Code, Tentative Draft No 9, (1959), Comments pp.47-48: "Though it is difficult to state a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause, we think that such a statement is essential...We submit that the formulation in the draft affords sufficient flexibility to differentiate between those special features in the actor's situation which should be deemed material for purposes of sentence and those which properly should be ignored... There will be room, of course, for interpretation of the breadth of meaning carried by the word "situation", precisely the room needed in our view. There will be room for argument as to the reasonableness of the explanations or excuses

offered; we think again that argument is needed in these terms. The question in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced."

See: American Law Institute, Model Penal Code, Proposed Official Draft (1962), Section 210.3.

In England, the Criminal Law Revision Committee in the light of cases such as *Camplin* and *Newell* has recommended changes that resound a position similar to that adopted in the Model Penal Code. See: C.L.R.C., Offences Against the Person, 14th Report, Cmnd 7844. And see: S. Prevezer, "Criminal Homicides other than Murder", *Crim.L.R.* [1980], 530.

6. As J. Feinberg explains with regard to verbal provocations:

Typical human responses to insults are sufficiently predictable, however, to permit us to speak of "causal tendencies", "verbal instruments", "manipulation", and "goading". Even the ideal legal construction, "the reasonable man", will sometimes boil up with anger that overwhelms his usual self-control when confronted with causally potent insulting language. In such a case the insult "provokes" him into violent language or action in return.

"Offense to Others" in *The Moral Limits of the Criminal Law*, (1985), p.227.

7. According to Hart:

...difficulties of proof may cause a legal system to limit its inquiry into the agent's "subjective condition" by asking what a "reasonable man" would in the circumstances have known or foreseen, or by asking whether a "reasonable man" in the circumstances would have been deprived (say, by provocation) of self-control; and the system may then impute to the agent such knowledge or foresight or control.

"Legal Responsibility and Excuses" in *Punishment and Responsibility*, (1968), p.33.

Hart argues that: "The most important compromise which legal systems make over the subjective element consists in its adoption of what has been unhappily termed the "objective standard". This may lead to an individual being treated for purposes of conviction and punishment as if he possessed capacities for control of his conduct which he did not possess, but which an ordinary or reasonable man possesses and would have exercised."

"Negligence, Mens Rea, and Criminal Responsibility", in *Punishment and Responsibility*, (1968), p.153.

And see Ashworth: "The doctrine of provocation is thus reproached with a cruel inconsistency: it sets out to provide a concession to human weakness and yet it applies the same standard to persons of unequal capacities, with a result that what operates as a concession to "normal" individuals comes to others as the opposite of a concession." "The Doctrine of Provocation", *supra* note 5, p.311.

Nonetheless, of the factors that are viewed as determinative of the actor's (subjective) capacity of control only some, namely, those for which the actor cannot (objectively) be blamed, should be considered as relevant to allowing an excuse on grounds of human weakness. In this respect one need not draw a clear-cut distinction between a totally subjective and a totally objective approach to criminal responsibility. According to C. Simester:

Neither objective nor subjective standards appears satisfactory. The first guarantees crime control by effectively excising the defense; the second ensures exculpation of irresponsible persons through exculpation of any one who can make a showing of duress. But this is a spurious dilemma. While there are genuine obstacles to the evaluation of individual responsibility... these do not include a choice between objectivity and subjectivity.... It is the temptation to

formulate simple tests of responsibility (for even the most encumbered cases) which produces the apparent dichotomy of public standards and individual appraisal. Every honest judgment accounts for both affective facts and ordinary standards of reasonableness with reference to the data of the case. Those charged with evaluation must resist inventing fanciful standards which they, themselves, could not meet in a like situation. They also ought to consider relevant features which characterize the defendant as an individual rather than as an instantiation of the average person.

Responsibility and Criminal Liability, (1989), p.85.

8. For an analysis of the "reasonable man" in the law of provocation after the Homicide Act 1957 see: W.J. Brookbanks, "Provocation - Defining the Limits of Characteristics", *Criminal Law Journal* 10 (1986), 411.

9. See e.g.: *Kenny's Outlines of Criminal Law*, (1966): "As a practical method of assessing the truth of the prisoner's assertion that was overwhelmed by the provocation, a comparison of his reaction with that which each of the twelve jurymen would himself expect from an ordinary person, such as he considers himself to be, is a sensible approach to the question, and its vagueness can do no harm since it leaves it to the defence to point to any special circumstances affecting his own case, with a benefit of any reasonable doubt in his favour. But applied as a rule of law it can yield results which are not only inconsistent with the basic justification for allowing provocation to be taken into account at all, but also seem unfair to many who themselves claim to be "reasonable" or "average" people in their sense of what is true equality of treatment." (p.177)

And see: *Russell on Crime*, (1964), p.535. See also: A. Samuels, "Excusable Loss of Self-Control in Homicide", 34 *Modern Law Review*, (1971), 163 at p.167; T.B. Smith, "Malice in Murderland", [1957], S.L.R.

10. *Russell on Crime*, (1964), p.534.

As said by Pearson L.J. in *Ellis v. Johnstone* ([1963] 1 All E.R. 286): "I think that...judicial observations on questions of fact have been treated as propositions of law, with the result that the field, which should have been left clear for the operation of the common sense of the jury on the facts of the particular case, has been encroached on and encumbered by legal doctrine." (at pp. 295-296)

11. G. Gordon, *Criminal Law*, (1978), p.783.

12. See e.g.: Smith and Hogan, *Criminal Law*, (1988), p.331.

13. Wardrope, [1960] Crim.L.R. 770.

14. Church, [1965] 49 Cr.App.R. 206.

15. Adams, [1961] C.L.Y. 1954.

16. *Mancini v. D.P.P.*, [1942] A.C.1.

17. *R. v. Walker*, [1969] 1 W.L.R. 311.

18. Southgate, [1963] Crim.L.R. 570.

19. *Phillips v. The Queen*, [1969] 2 A.C. 130, 2 W.L.R. 581.

20. According to Lord Diplock, the reasonable relationship rule, as expressed by Viscount Simon in *Mancini*, is "an elliptic way of saying that the reaction of the defendant to the provocation must not exceed what would have been the reaction of a reasonable man". In *Phillips*, supra note 19, at p.137. See also: *R v. Brown*, [1972] 2 Q.B. 229; 2 All

E.R. 1328; Lee Chun Chuen v. The Queen, [1963] A.C. 220.

The reasonable relationship rule, previously being regarded as a rule of law, is now an issue of fact to be considered by the jury in applying the reasonable man test. See e.g. commentary to R. v. Walker, Crim.L.R. [1969]: "...it is now for the jury to say whether in their opinion a reasonable man would have answered the attack by fists or with a deadly weapon; and while their answer would probably be in the negative, it does not have to be. ...The Privy Council seems to have taken the view in Phillips v. R. that the reasonable relationship rule survives; yet it seems implicit in the judgment in that case that it cannot survive as a rule of law." (at pp.147-148)

21. As Talbot J. pointed out in *Brown*:

When considering whether the provocation was enough to make a reasonable man do as the accused did, it is relevant for the jury to compare the words or acts or both of these things which are put forward as provocation with the nature of the act committed by the accused. It may be, for instance, that a jury might find that the accused's act was so disproportionate to the provocation alleged that no reasonable man would have so acted. We think therefore that a jury should be instructed to consider the relationship of the accused's acts to the provocation when asking themselves the question; "Was it enough to make a reasonable man do as he did?"

Supra note 20.

In the commentary to *Walker* it is pointed out that "If the test for the reasonable man had been loss of self-control (as appears to have been the case at common law), then the case for the reasonable relationship rule's having been abolished would be stronger; because the reasonable man could not both lose his self-control and achieve a nice proportion between provocation and his reaction to it. But the

phrase "do as he did" [in sec.3] suggests that the jury do not merely have to consider whether the reasonable man would have lost his self-control; they have to look at the particular act which the accused did and ask whether the provocation would have caused the reasonable man to do that particular act; and that the reasonable man's reaction varies according to the nature of the provocation. (supra note 20)

But see G. Williams, *Textbook of Criminal Law*, (1983): "The reasonable man test is paradoxical and gives little guidance to the jury. It would be an improvement to ask not what a reasonable man would do but what he *might* do." (at p.548)

22. In the Australian case of *Johnson v. The Queen* ([1976] 136 C.L.R. 619) Barwick C.J. explained that "...the proportion of the fatal act to the provocation is part of the material on which the jury should consider whether the provocation offered the accused was such as would have caused an ordinary man, placed in all the circumstances in which the accused stood, to have lost his self-control to the point of doing the act of the kind and degree of that by which the accused killed the deceased." (at 636; and see also at pp. 657-658)

See: S. Meng Heong Yeo, "Proportionality in Criminal Defences", *12 Criminal Law Journal*, (1988), 211.

23. See: *Russell on Crime*, (1964), pp. 494-95, 540-543.

24. P. Alldridge, "The Coherence of Defences", *Criminal Law Rev.* [1983], 665 at p.670.

25. See: Criminal Law Revision Committee, *Offences Against the Person*, 14th Report, Cmnd 7844, paras. 81, 82, 83:

81. Our principle recommendation is that the law of provocation should be reformulated and in the place of the reasonable man test should be that provocation is a defence to a charge of murder if, on the facts as they appeared to the defendant, it can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with a murderous intent. This formulation has some advantage over the present law in that it avoids reference to the entirely notional "reasonable man" directing the jury's attention to what they themselves consider reasonable - which has always been the real question.

82. A number of commentators queried one detail of the suggestions made in the Working Paper, namely that the provocation would be sufficient if, on the facts as they appeared to the accused, it constituted a reasonable excuse for the loss of self-control on his part. They did not like the phrase "a reasonable excuse" because there could never be a reasonable excuse for taking another's life. We found this rather difficult to resolve. We accepted the criticisms made of the word "excuse" but remained of the opinion that "explanation" was not a suitable word either. We finally decided that "a sufficient ground for the loss of self-control" would be an easier phrase for juries to understand and apply.

83. ...[we] recommend that the defendant should be judged with due regard to all the circumstances, including any disability, physical or mental, from which he suffered...

And see: Smith and Hogan, *Criminal Law*, (1988), p.342.

26. G. Williams, *Textbook of Criminal Law*, (1983), pp. 537-538.

27. And see: S. Meng Heong Yeo, "Proportionality in Criminal Defences", *supra* note 22 , p.225.

28. See, e.g., G. Williams, *supra* note 21.

29. And as G. Gordon emphasises:

In considering the conflict between the plea of provocation and the deterrent purpose of the law it is also important to remember a fact so obvious that it is sometimes forgotten - the accused who succeeds in a plea of provocation is not acquitted, he is convicted of culpable homicide, a crime for which he can receive a very severe sentence.

Supra note 11, p.774.

30. A. Ashworth, "The Doctrine of Provocation", supra note 5, p.317. And see, e.g.: R. Perkins, *Criminal Law*, (1957), p.42.

31. See e.g.: Wechsler and Michael, "A Rationale of the Law of Homicide", 37 *Columbia Law Review* (1937), 701: "Other things being equal, the greater the provocation, measured in that way [i.e. objectively], the more ground there is for attributing the intensity of the actor's passions and his lack of self-control on the homicidal occasion to the extraordinary character of the situation in which he was placed rather than to an extraordinary deficiency in his own character." (pp.1251, 1281)

32. R. v. Cunningham, [1957] 2 Q.B. 396.

33. See: A.Ashworth, "Reason, Logic and Criminal Liability", *Law Quarterly Review* 91 (1975), 102 at pp. 118-119.

34. J. Hall, *General Principles of Criminal Law*, (1960), pp.155-156.

35. J. Hall, supra note 34, p.169.

36. P. Brett maintains that loss of self-control is not a matter of degree. He takes the view that "The existence of what is called a "fight-or-flight reaction" has been established beyond doubt, though

the precise details of some aspects of the psychological functioning are still undergoing investigation and elucidation..." With regard to this he argues that "we cannot sensibly talk of the ordinary man in any meaningful way. There is a whole range of types of men, and it would be pointless or cruel to penalise a particular man merely because his type occurs nearer to one or the other end of the range than to the centre of it. The all-or-none quality of the reaction makes it alike pointless to draw distinctions of nicety between different types of provocative act. So, too, it demonstrates the folly of demanding a reasonable proportion between the provocative act and the reaction."

"The Physiology of Provocation", *Criminal L.R.* [1970], 634 at pp.637-638.

Brett's argument seems correct in so far as the "reasonable man" is treated as a "legal standard" of loss of control in provocation on the basis of a formula that would take no account of the idiosyncrasies of the particular case. Nevertheless, one should note, speaking of a "fight-or-flight reaction" does not necessarily indicate impaired volition, that is, as required for allowing a partial excuse on the ground of provocation. Although no clear distinctions between different types of provocation could be anticipated, the partial excuse depends both on the nature and degree of the victim's provocation and on the "hot anger" requirement. In other words, the admission of a "fight-or-flight" reaction cannot on its own warrant a partial excuse of impaired volition unless provocation (or, perhaps, some other excusing condition) is accepted.

37. See e.g.: Smith and Hogan, *Criminal Law*, (1988), p.333.

CHAPTER 5: PROVOCATION AND SELF-DEFENCE:

NEIGHBOURING PERSPECTIVES

1. Comparative Notes

The present chapter draws together and develops up questions of possible overlap between provocation and self-defence and explores the matter on different levels of analysis. First, attention is drawn to theoretical issues arising out of a comparative examination of the defences of self-defence and provocation. Second, the analysis takes up specific problems of demarcation in some cases lying on the borderline between self-defence and provocation, focusing in particular on the problem of excessive self-defence. Following an examination of the treatment of excessive self-defence cases in different jurisdictions, the relevant issues are discussed further in the light of the theory of justification and excuse.

As has been said earlier in this thesis, the partial defence of provocation rests on the assumption that the actor suffered a serious wrong at the victim's hands. Designating the threshold of legal provocation postulates commonsense familiarity about what sort of transgressions are capable of

arousing such a degree of anger or indignation that might expectedly defeat the actor's capacity for self-control. [1] The resolution of the question of provocation in law turns on the moral assessment of the victim's conduct as it was directed at the actor - an assessment that may be viewed as based on both "objective" and "subjective" considerations (see relevant discussion in chapter 4). Thus, although legal wrongdoings of a significant nature should for the most part pass the threshold of legal provocation, non-legal/moral wrongdoings may also amount to provocation sufficient to support a partial defence. [2] Over this threshold, provocations may vary from the relatively trivial ones to those involving very serious wrongdoings. Patently, legal provocations involving different degrees of wrongfulness would equally support a partial defence to murder, provided that the requirement of loss of self-control is satisfied. The gravity of the provocation received is taken into account in determining the appropriate degree of punishment for the lesser offence. [3]

One might encounter cases where, depending on the nature and degree of the victim's wrongdoing, provocation may appear to verge on self-defence. [4] In both provocation and self-defence the situation giving rise to the conditions of the legal defence is initiated - most often culpably - by the victim.[5]

It is accepted that the aggressor's culpability in endangering the defender's life holds a principal role as regards the legal justification of using lethal force in self-defence. [6] As has been indicated in chapter 2, one might argue on a similar basis that the provoker's culpability should also account for the partial justification of his killing in retaliation. [7] It has been pointed out that such an approach to provocation implies that a provoked killing attaches less blame to the actor than an unprovoked one, irrespective of the actor's frame of mind - or his capacity to exercise self-control - at the time of his retaliation. The partial justification doctrine might appear to gain acceptance particularly in cases of provocation involving a serious threat to the life or limb of the actor - in other words, in those cases where provocation borders on self-defence.

When provocation takes the form of physical assault of such nature as would be expected to arouse overwhelming passion in the person attacked, it will not always be easy to distinguish the victim's immediate retaliation from a resistance by way of self-defence. It is therefore not surprising that the early authorities did not always keep homicide under provocation separate from homicide in self-defence. [8]

In chapter 2 it was argued that, notwithstanding

the possible moral grounds of the partial justification doctrine, the theoretical approach to provocation as a partial justification defence is incompatible with the rationale of legal justification. Moreover, such an approach may seem to offend fundamental moral principles concerning the sanctity and inviolability of human life. Neither of the three dominant moral theories of legal justification - the "forfeiture" theory, the rights theory, the lesser evil theory - seems capable of providing enough support for the partial justification doctrine. Nonetheless, although the trend in the modern law is admittedly toward treating provocation as a partial excuse, there is still some backing - both in theory and in practice - for the idea that provocation can operate as a partial justification defence. [9]

As has been pointed out, any endeavour to elicit support for the partial justification doctrine by drawing an analogy between provocation and self-defence runs into contradictions. Indeed, it is accepted that resorting to lethal force in self-defence can be justified not merely as an act aimed at the protection of the defender's life, but primarily as an act which vindicates the legal order in general. [10] Although the vindication of legal order pervades the rationale of self-defence as a justification, this is not the case as regards

provocation. It is recognised that any morally wrongful act may be sufficient to buttress a valid plea of provocation, even if such an act does not constitute an offence in law. Indeed, it would be paradoxical to correlate the provoker's killing in retaliation - an act by definition unlawful - with the vindication of legal order. The assumption of a serious wrongdoing - legal and/or moral - on the victim's part does not suffice by itself to support the actor's plea of extenuation. For the defence of provocation to be sustained it is necessary that the act of provocation have had a negative effect on the actor's capacity to exercise self-control at the time of his response.

Clearly, in cases where the conditions of provocation completely overlap with those of self-defence, the latter defence - as a justification - should normally take priority. [11] Indeed, the issue of provocation need not be raised here. Nonetheless, provocation may sometimes be a fallback to self-defence where the conditions for the latter defence to be accepted are not fully met. This might be the case if the use of lethal force in self-defence is deemed unnecessary or excessive in view of the threat posed by the attack, or if the defender disregarded his duty to retreat. In such cases, although some of the conditions of self-defence may be satisfied, the actor could not successfully claim justification.

The actor might be able to rely on provocation instead if there is sufficient evidence that the attack caused him to lose his self-control and kill in an outbreak of passion.

Besides its traditional understanding as a justification defence, self-defence can also be perceived as a form of excusing necessity on the assumption that the imminent threat on the actor's life vitiates his freedom to choose. [12] From this viewpoint, the term "necessary defence" seems to capture better the excusative element in the defence. Treating self-defence as an excuse may gain acceptance particularly in cases of non-culpable aggression. [13] Such an approach to self-defence should hold good in so far as the legal justification of the act of defence is dependent upon the aggressor's being culpable for the wrongful attack. Thus, one might say that the use of lethal force in self-defence should not be justified - it may only be excused - when the actor has to defend himself against non-imputable aggressors. [14] From this point of view, self-defence would appear to share common grounds with provocation as a partial excuse. As has been explained in chapter 3, these excuses operate on the assumption that the actor is not free to choose, notwithstanding his being able to act. Patently, what distinguishes self-defence as a total excuse from provocation as a partial excuse is

that in provocation the actor succumbs to a form of coercion which is not regarded as being irresistible.

The agenda for the remaining subdivisions of this chapter includes the examination of questions which emerge in cases lying on the borderline between provocation and self-defence. For the most part, the discussion revolves around the issue of excessive self-defence and its relation to provocation. Although all the questions concerning excessive self-defence cases cannot adequately be dealt with in the present work, we shall outline the contours of the problem in law and search for answers on the basis of the theory of justification and excuse.

2. Criminal Liability in Excessive Self-Defence

Cases

The problem of excessive self-defence arises in cases where the actor employs more force than is reasonably necessary in order to ward off an unlawful attack. It is recognized that exceeding the limits of necessary force in self-defence militates against the actor's plea of justification. With regard to the legal doctrine of justified defence, the principle of proportionality delimits the degree of force to be used in order to protect one's interests against unlawful transgressions. This principle precludes justification when the defender inflicts harm which,

although necessary, is deemed too grave in relation to the value or interest threatened by the attack. [15] Nonetheless, determining the grounds of liability in such cases raises a number of perplexing theoretical and practical problems. [16]

In English law, the reasonableness of the force used in self-defence is held to be an issue of fact to be determined by the jury. More precisely, it is left to the jury to decide whether the prosecution has proven beyond reasonable doubt that the defendant exceeded the degree of force necessary to thwart the aggression. It is recognised that this issue should be decided on account of the circumstances as the actor believed them to be. [17] If the prosecution succeeds in establishing that the actor overstepped the limits of necessary force, the plea of self-defence will collapse, notwithstanding the admission that the actor was actually subjected to an unjustified attack. With respect to criminal offences other than murder, if the plea of self-defence fails by reason of the actor's excessive use of force, evidence of an unlawful attack on the victim's part may be taken into account in the mitigation of sentence. Nonetheless, where the actor is charged with murder, the dismissal of the defence on such a basis would necessarily entail a sentence of life imprisonment. In the leading case of *Palmer*, Lord Morris of Borth-y-Gest opined as follows:

The defence of self-defence either succeeds so as to result in an acquittal or is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue whether there was provocation... [18] [19]

It has been argued that treating self-defence as an all-or-nothing defence might sometimes lead to morally controversial decisions, especially in those cases where the actor is charged with murder. Nonetheless, in English law it is recognised that the question of whether the degree of defensive force was reasonable or not should be answered in the light of the circumstances in which the decision to use force was made. In other words, the jury should be directed to take into account that, under the stress of the situation, the defender - acting as a reasonable person - might not have been able to make out the appropriate degree of defensive force needed to ward off the attack. In Lord Morris's words:

If there has been an attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. [20]

As the above position suggests, a claim of legal justification should be accepted if the degree of force employed in self-defence is deemed reasonable in view of the circumstances as the actor believed them to be. In this respect, one may say that the act of defence should be justified even where the actor used more force than was in fact necessary. From this point of view, one might envisage a distinction between two types of cases where the accused should normally be able to rely on a justification defence: first, cases where the defensive force is deemed reasonable on the admission that, in the face of the actual threat posed by the attack, such a degree of force was objectively necessary (i.e. in the circumstances as they really were). Second, cases where the force used in defence, although objectively excessive or disproportionate to the aggression, is deemed reasonable only because under the circumstances the actor was unable to foresee the objectively most appropriate response. The latter would be the case, for example, where the actor mistakenly believes that the attack poses an immediate danger to his life and uses lethal force against the attacker.

One might say that, in so far as the reasonableness of the defensive force is assessed by reference to the actor's state of mind in the circumstances, the legal justification of

self-defence would appear to hinge on certain considerations which are clearly excusative in nature. In this respect, it might perhaps be said that, although the force used in self-defence is regarded as objectively excessive, the defensive act should be legally justified if the accused has fallen victim to, e.g., an excusable mistake of fact. The case of *Shannon* offers an example of how the legal justification of self-defence may be contingent upon excusative considerations. In this case it has been pointed out that:

...if the jury concluded that the stabbing was the act of a desperate man in extreme difficulties, with his assailant dragging him down by the hair, they should consider very carefully before concluding that the stabbing was an offensive and not a defensive act, albeit it went beyond what an onlooker would regard as reasonably necessary. [21]

One might envisage an analogy between the cases of self-defence where the justification plea is accepted on the ground that the accused could not make out the exact degree of force required to fend off the attack and those of putative self-defence. Putative self-defence pertains to cases where the actor resorts to force due to the mistaken belief that he is under an unjustified attack. Because this sort of mistake has to do with to the legal justification of the act, one might say that

it resembles mistake of law. It cannot be treated as such, however, because it has to do not merely with a different appraisal of the act in the circumstances, but rather with the circumstances surrounding the act. Moreover, because the mistake involved in putative justification has to do with facts, it may appear similar to mistake of fact. It is not the same, nonetheless, because it pertains not to facts material to the actus reus of the offence but, rather, to facts in the presence of which the wrongful act would be legally justified. From the viewpoint of the justification-excuse distinction, the approach to putative justification as an actual justification in Anglo-American law has been argued against as confusing. According to Fletcher:

The Common law and now the Model Penal Code and its progeny interweave criteria of justification and excuse in cases in which the defending actor reasonably, but mistakenly, believes that he is being attacked. Those situations, which we shall call putative self-defence, are regularly called cases of justification. Assimilating a putative justification to an actual justification undermines the matrix of legal relationships affected by a claim of justification. [22]

Fletcher goes on to argue that:

Mistakes as to justificatory elements, however, do not affect either the violation of the norm or the wrongful nature of acting in ignorance.

If an actor believes that he is being attacked and responds with force, his injuring the putative aggressor is a wrongful but excused battery. [23]

By the same token, one might argue, treating the excessive use of force in self-defence as reasonable and hence legally justified in a case where the actor was mistaken as to the degree of force which was actually necessary to stifle the attack contravenes the logic of justification. Indeed, one might say that such an approach to the matter constitutes a further example of the tendency to collapse the distinction between justification and excuse under the requirement of reasonableness. [24] If it is accepted that a lesser degree of force would have been sufficient to stop the aggressor, the actor's response should remain wrongful; the actor may well be excused, however, if it is admitted that he was unable to form a better judgement in the circumstances. As has been pointed out, assessing a claim for excuse involves a moral judgement about what can be expected from normal people in certain trying situations. From this viewpoint, the panic or trepidation leading the actor to exceed (often by reason of mistake) the actually necessary force in self-defence should be regarded as relevant to negating the imputation of the wrongful act to the actor (excuse) rather than to negating the wrongfulness of the act (justification).

In self-defence, the psychological pressure that expectedly arises when someone is confronted with an immediate danger to his life or limb should be taken into account in considering whether the actor's mistake as to the degree of necessary force was reasonable. This, obviously, does not render the degree of force used under the mistaken belief reasonable - that is, reasonable as normally understood in relation to judgements of justification (see chapter 4.1). In other words, reasonableness here pertains to the question of whether the mistake was such as to render the actor excusable for exceeding the limits of necessary force in self-defence. One might say that, other things being equal, a mistake held to be reasonable in a trying situation - such as that of self-defence - should not be considered as such if made under "normal" circumstances. It is debateable, nonetheless, whether an unreasonable - in the circumstances of self-defence - mistake would be sufficient to support a plea for extenuation in some cases of excessive self-defence. To answer this question one would have to consider whether the actor's mistake, unreasonable in the circumstances though it may have been, can still be regarded as capable of negating the degree of culpability required for murder (see relevant analysis in sections 3 & 4 below).

In English law it is recognised that the plea of self-defence will fail if the prosecution succeeds in establishing that actor intentionally exceeded the degree of force that was required to stop the aggressor. The same would be the case, one might add, if the actor's excessive use of force is not excused on the ground of a reasonable-in-the-circumstances mistake of fact. In some cases of homicide where the plea of self-defence is rejected, the defendant might be able to rely on provocation to reduce his offence from murder to voluntary manslaughter. [25] As has been said in the leading case of *McInnes*:

...the facts upon which the plea of self-defence is unsuccessfully sought to be based may nevertheless...go to show that [the accused] acted under provocation. [26]

According to G. Williams:

...in every case in which the defendant believes that he has to defend himself against a serious attack, but for some reason oversteps the limits of self-defence (because the attack he fears is not sufficiently serious to justify killing in self-defence, or because it is held that he is unreasonable in fearing an attack, or in fearing an attack of that degree of seriousness, or in not realising that he has some other escape) the circumstances can still amount to provocation. [27]

It is recognized, moreover, that the mere

apprehension of an attack might also be sufficient to support a plea of provocation in such cases, even if the attack did not actually occur. [28]

One might say that a serious physical assault that involves a threat to life or limb seems the most likely to support a partial excuse on the ground of provocation, provided that the actor's loss of self-control is not disproved as a matter of fact (see chapter 4.2). When provocation is pleaded as a partial excuse following an unsuccessful plea of self-defence the actor in a sense admits that he intentionally killed the attacker, but he claims that this was a result of his being carried away by justified - due to the victim's attack - anger. With regard to criminal offences other than murder, the rejection of the plea of self-defence on the ground that the force used was excessive would entail the actor's conviction of the relevant offence, although provocation may be considered in the mitigation of sentence.

So, to summarize, it has been pointed out that Anglo-American criminal law doctrine often appears to intertwine criteria of justification and excuse in its treatment of self-defence. This becomes obvious in cases of putative self-defence as well as in those cases of excessive self-defence where the actor was mistaken about the degree of defensive force needed

to fend off the attack. Given that self-defence operates as an all-or-nothing defence, if excessive or unreasonable force was used, the actor's claim of justification will be rejected. Nonetheless, in so far as the question of reasonableness is resolved on the basis of the circumstances as the actor believed them to be, an actually excessive defence may be regarded as reasonable and hence legally justified in cases where the defender was in fact acting under a mistaken belief. This implies that accepting the actor's plea of justification in such cases would in a way presuppose that the actor can put forward an acceptable claim of mistake. From this viewpoint, one might say that the reasonableness of the actor's mistake (excuse) should in a sense be considered before the question of whether the actor's response to the attack was reasonable and therefore justified. Nonetheless, a more coherent approach to the matter would be to treat under the legal justification of self-defence only those cases where the degree of defensive force was actually necessary or proportionate to the threat posed by the attack. Cases of putative self-defence as well as those where the actor by mistake exceeds the degree of necessary force in self-defence should rather be dealt with under the excuse theory. Finally, it has been said that if the plea of self-defence fails by reason of the actor's excessive use of force, the actor might

perhaps be able to rely upon provocation to reduce murder to manslaughter if the conditions of the latter defence are satisfied.

3. Excessive Self-defence as the Basis of a Partial Defence to Murder

As has been noted before, in English criminal law doctrine it is accepted that the use of unreasonable or excessive force in self-defence will normally defeat the actor's plea of justification. Nonetheless, the all-or-nothing character of the defence of self-defence has been regarded as likely to result in morally controversial convictions, particularly in certain cases where the actor is charged with murder. Indeed, in the past a different approach to dealing with the problem of excessive defence in such cases had been put forward, notably in the Australian common law jurisdictions. It was recognised that, if the actor were entitled to defend himself against an unjustified attack and intentionally killed the aggressor by using more force than was reasonably necessary, his offence should be reduced from murder to manslaughter. [29] Arguably, the reduction of the offence on such grounds would presuppose that the accused was unaware of the fact that the defensive force was excessive. Although some older English authorities allowed for

a similar view, English law did not finally adopt this approach. [30] The position that in some cases of excessive self-defence the accused may be entitled to a partial defence to murder was until recently particularly influential in Australian law. [31] This position has been expressed by Menzies J. in *Howe* as follows:

The law is that it is manslaughter and not murder if the accused would have been entitled to acquittal on the ground of self-defence except for the fact that in honestly defending himself he used greater force than was reasonably necessary for his self-protection and in doing so killed his assailant. [32]

However, the above position has now been reversed by the decision of the High Court of Australia in *Zecevic* [33] which is said to have harmonized Australian law with the law of England as the latter has been expressed in *Palmer*. It has been argued, however, that this change was necessary in order to facilitate the jury's comprehension of the law and not because the previous approach was in principle wrong. [34] One of the problems with formulating excessive self-defence as a partial defence to murder has to do with the difficulty in applying here an objective test such as the one pertinent to provocation. Nonetheless, although there is no currently accepted rule postulating the reduction of murder to manslaughter in excessive self-defence

cases, the jury is still entitled to return a compromise verdict of manslaughter in such cases. [35] Moreover, the fact that murder no longer entails a fixed penalty of life imprisonment in Australian law is seen as mitigating further the possible negative effects of *Zecevic*.

One should note, nonetheless, that in England the Criminal Law Revision Committee has recommended the introduction of a partial defence to murder in excessive self-defence cases - a defence similar to that previously adopted in Australian law. [36] Indeed, the CLRC's recommendation seems to go along with the position expressed in *Howe*. It has been proposed that:

Where a person kills in a situation in which it is reasonable for some force to be used in self-defence or in the prevention of crime but the defendant uses excessive force, he should be liable to be convicted of manslaughter not murder if at the time of the act he honestly believed that the force he used was reasonable in the circumstances. [37]

In Scots law, the possibility of pleading mitigation in cases of excessive self-defence led in the past to terminological confusion between self-defence and provocation. [38] In *Crawford* [39] it was made clear, nonetheless, that self-defence can only operate as a complete defence. However, Scots law

does not rule out the possibility of reducing murder to culpable homicide in excessive self-defence cases. The reduction of the level of liability for homicide in such cases may be accepted on the ground of either provocation or non-murderous recklessness. [40]

According to Gordon:

There are, after all, no formal restrictions on the type of circumstances which may operate to reduce murder to culpable homicide; anything which shows an absence of the mens rea of murder will do... It is, of course, possible to figure a case in which it was clearly proved that the accused acted excessively and in cold blood, and in that case he would be guilty of murder, but such a case is likely to be found only rarely. [41]

With regard to the above position, one might say that murder will be reduced to culpable homicide on the ground of provocation if it is accepted that the aggression drove the actor to lose his self-control and kill; this may be true, even if the attack did not endanger the actor's life. [42] In the case that it did, the general assumption should be that the defendant acted under provocation. As Gordon points out, such cases need not be treated separately from those involving a serious physical assault albeit short of threatening the actor's life.

4. Provocation and Excessive Self-Defence: Doctrinal Problems of Demarcation

Commentators have long been trying to work out a cogent account of the nature of the partial defence which might perhaps emerge in excessive self-defence cases. A primary question has been whether excessive self-defence should indeed be canvassed as furnishing the grounds for an independent partial defence to murder or not. As has been indicated, the conception of self-defence as an all-or-nothing defence in English law seems to militate against the formulation of such a partial defence here (see *Palmer*, section 2 supra). If, nonetheless, excessive self-defence were to operate as a partial defence - the previous position in Australian law provides such an example - it seems highly problematical what the character and rationale of such a defence should be. Should excessive self-defence be described as a partial excuse based on considerations pertinent to the actor's frame of mind at the time of his response? Or, rather, should it be depicted as a partial justification on the ground that the original situation is set down to the victim's fault, in other words, by laying the emphasis on the fact that the actor was defending himself against an unlawful attack? P. Smith argues as follows:

The defence of excessive force is only connected with the defence of self-defence in that the first requirement of the former defence is that there should initially have been a situation in which the accused would have been justified in defending himself in some way. Once that has been established the defence of excessive force ought to be tested on its own terms, i.e. did the accused believe that the degree of force he used was necessary?
[43]

Further, it seems questionable what sort of criminal liability should be ascribed to those who kill by exceeding the necessary force in self-defence, that is, if it were accepted that they are entitled to a partial defence to murder. Should they be convicted of voluntary manslaughter on the assumption that the killing is intentional? Or, rather, should they be convicted of involuntary manslaughter on grounds of recklessness or criminal negligence? Moreover, if excessive self-defence were taken to reduce murder to voluntary manslaughter how could one distinguish the partial defence here from provocation? Drawing a line between the two might indeed seem abstruse given that, in practice, provocation often appears alongside excessive self-defence. In other words, if both excessive self-defence and provocation led to the reduction of murder to voluntary manslaughter, one may ask, on what basis treating excessive defence as an

independent partial defence to murder may be justified? [44] With regard to this latter question one might perhaps say that the possible interpretation of excessive self-defence as a partial justification would render pleading provocation as a partial excuse in such cases irrelevant.

One may argue that, at first glance, treating excessive self-defence as an independent partial defence to murder might best be conceptualised from the viewpoint of the partial justification doctrine. The reason for this is that speaking of a defence of excessive self-defence invites one to view the element of "defence" as taking the priority over any excusative considerations, notably provocation or mistake. To put it otherwise, portraying excessive self-defence as a "defence" may seem to imply that the mere fact that the accused was acting in defence is sufficient to entitle him to extenuation, regardless of the reason for his exceeding the limits of necessary force. On the other hand, if the grounds for extenuation in such cases were exclusively associated with excusative considerations, such as mistake or provocation, speaking of excessive self-defence as a partial defence in its own right might be confusing. If the idea of partial justification in such cases is set aside, excessive self-defence should rather be understood as a consideration always militating against the plea of self-defence

as a justification. On the assumption thus that killing due to excessive use of force in defence can never be justified - either partially or totally - the actor may be entitled to extenuation or, possibly, exoneration only on the basis of a partial or total excuse respectively. One may say that such an excuse should normally be raised following an unsuccessful plea of self-defence, and it would be aimed at rebutting that the actor's killing of the aggressor by using excessive force manifests the malice aforethought for murder. As has been suggested above, the fact that the accused was acting in self-defence has little to do with the rationale of the partial excuse here. This seems true, notwithstanding that the conditions of the relevant excuse germinate in and are assessed under the circumstances of self-defence. Further, one might argue that, under the excuse theory, the problem of excessive self-defence cannot be dealt with in a uniform way. That is to say, the actor's killing of the aggressor by using excessive force in self-defence may be excused - either totally or partially - on a number of different grounds.

The possibility of confusing excuse and justification as well as between different excuses that may be relevant here seems responsible for the difficulty of distinguishing provocation from a partial defence of excessive self-defence.

It has been asserted that if a partial defence of excessive self-defence were taken to reduce murder to *voluntary* manslaughter it would be difficult to distinguish it from provocation. According to C. Howard:

Provocation has the effect of reducing a *prima facie* case of murder to manslaughter because it is in substance a confession and avoidance. The defendant who pleads provocation is in effect admitting that he intentionally killed V but asking that provocation be allowed as a partial excuse. Excessive defence would be a true head of *voluntary* manslaughter if the defendant were similarly admitting an intentional killing and asking that some element in the situation should partly excuse his actions. The obvious excuse would be that he was not the original attacker. [45]

Howard remarks, nonetheless, that it is not inconceivable to treat the victim's attack as the real basis of the actor's plea for extenuation, connecting thus excessive self-defence with provocation. He claims that, if this were the case, it would not sound implausible to say that excessive self-defence should reduce murder to *voluntary* manslaughter. Howard notes that the connection of excessive defence with provocation would considerably simplify the jury's task in such cases.

If the basis of both defences were the same, exposition to the jury would be relatively

straightforward. As long as they proceed on different bases, the task of directing the jury will remain...unnecessarily complicated. Another advantage of producing a close parallel between excessive defence and provocation would be to facilitate the introduction of the idea of excessive defence into the common law jurisdictions to avoid distortion of the law of provocation to meet cases more properly classified as excessive defence. [46]

Howard goes on to argue, however, that drawing a parallel between provocation and excessive self-defence would be inaccurate if the partial defence of excessive self-defence were connected with the claim that the actor was mistaken as to the necessity of using lethal force in the circumstances. If the latter were the case, he claims, the reason for extenuation would have little to do with the assumption that the actor is not to blame for the situation wherein defensive force had to be used. In so far as no analogy between provocation and excessive self-defence is recognised, thus the argument runs, it would seem more sensible to treat excessive self-defence as reducing murder to involuntary rather than to voluntary manslaughter. [47]

Although the association of excessive self-defence with provocation on the ground that the situation is set down to the victim's aggression might seem correct, it is not clear why one should

speak of the ensuing defence as a partial excuse. Indeed, treating the victim's aggression as the basis of the partial defence in both excessive self-defence and provocation cases may seem to suggest that the actor's response is partially justified rather than partially excused. For the latter to be the case it is required, moreover, that the victim's attack led the actor to respond in such a state of mind that precluded him from exercising proper control over his actions. It has been argued earlier that the excuse theory furnishes the most appropriate basis for conceptualising the rationale of provocation as a partial defence to murder (see chapters 2 & 3). One might say that, under the excuse theory the partial excuse of excessive self-defence may match that of provocation only in those cases of excessive defence where it is accepted that the attack led the actor to lose his self-control. Here the actor admits that he acted with an intention to kill, but pleads a partial excuse on the ground of loss of self-control by reason of provocation. In other words, if the actor was provoked by the victim's attack to lose his self-control and kill, he may be entitled to a partial excuse on the assumption that the attack amounted to legal provocation. The same may obtain, e.g., in a case where it is accepted that the actor could have escaped the need of using lethal force in self-defence by taking an opportunity to retreat.

Patently, if the accused's plea of provocation succeeds, he should be convicted of voluntary manslaughter.

On the other hand, cases where excessive self-defence is set down to a mistaken belief about the necessity of using lethal force in the situation should for the most part be dealt with under the defence of mistake. If the actor's mistake is held to be reasonable in the circumstances, the actor should be entitled to full acquittal. It has been asserted, nonetheless, that there may be cases of excessive self-defence where the actor's mistake, unreasonable though it may be, should at least support a partial defence. One might envisage such an approach to the issue of mistake in self-defence only where the actor is charged with murder and on the assumption that even unreasonable mistakes can militate against the requirement of malice aforethought. If the actor is charged with a criminal offence other than murder, such a mistake could not prevent conviction, but it may be taken into account in the mitigation of sentence. According to P. Smith:

The moral culpability of the man who honestly believes that he needs to use lethal force to defend himself - no matter how mistaken his belief - is surely very much less than that of a man who kills deliberately and in cold blood. It is submitted that society ought to reserve its major condemnation for the cold-blooded

killer, and to have the mistaken victim of an attack convicted of the same crime tends to weaken this condemnation. [48]

Once it has been recognised that in excessive self-defence cases unreasonable mistakes may be capable of negating malice aforethought and thus of supporting a partial defence to murder, it seems questionable whether such a defence should reduce murder to voluntary or rather to involuntary manslaughter. According to Howard, an intentional killing committed under an unreasonable and yet honest mistake should be treated under the heading of involuntary manslaughter. Howard claims that the association of excessive self-defence with voluntary manslaughter would be inappropriate in so far as no parallel is drawn between excessive self-defence and provocation. He explains the issue in the following way:

The argument is that the question whether the defendant was criminally negligent should be regarded as arising at the point of time when he formed a judgment on the measures necessary to defend himself from the danger threatened... There appears to be no good reason why these two separate aspects of the matter should not be brought together...and test the whole composite situation by asking whether in all the circumstances D was criminally negligent in adopting the course of action which he did. If D were charged with manslaughter by excessive defence, his liability would then be tested by

reference to the question whether he was criminally negligent in his over-assessment of the measures necessary for his own defence. If he was, then he would be guilty of [involuntary] manslaughter. [49]

According to Howard, the admission that the actor's killing of the aggressor was intentional presents no problem in treating the case as one of involuntary manslaughter. In his own words:

In regarding the situation as being one of manslaughter by criminal negligence there is no real difficulty in the circumstances that the defendant acted intentionally. Much conduct classified by the law as negligent is necessarily in most of its aspects perfectly intentional. The negligent driving of a motor-car is in most respects the entirely intentional driving of a motor-car. [50]

Treating an intentional killing due to the actor's unreasonable mistake about the degree of necessary force in self-defence under the heading of criminal negligence is, no doubt, correct. [51] What seems confusing in Howard's analysis, however, is the assumption that this approach to the matter should necessarily militate against regarding such a killing as voluntary manslaughter. One might say that Howard fails to distinguish the issue of negligence from that of intentionality here. His reference to the negligent driving of a motor-car as an example of a negligent and yet intentional action does not seem

to lend support to his argument against voluntary manslaughter. It demonstrates, rather, that criminal negligence can be associated with intentional as well as unintentional wrongdoings. To illustrate this point further, one might refer to the typical case where the negligent driving of a motor-car results in the (unintentional) killing of a pedestrian. Patently, such a killing should be classified as involuntary (unintentional) manslaughter. On the other hand, it seems difficult to see why an intentional killing due to the actor's being negligent in defending himself should not be categorized as voluntary manslaughter.

One may therefore say that, if a partial defence to murder is recognised in those cases of excessive self-defence involving an unreasonable mistake, the actor may well be convicted of voluntary manslaughter. This seems correct in so far as it is accepted that the actor's killing of the aggressor was intentional. Admittedly, this would presuppose a broader understanding of the category of voluntary manslaughter in law as covering also those intentional killings committed by reason of an unreasonable and yet "honest" mistake. In this respect, what would distinguish such a partial defence from provocation is that in the former case the basis of the partial excuse is the actor's mistaken belief about the need to use lethal force

in the circumstances. Loss of self-control in the sense of acting in "hot blood" is not here in issue. In provocation, on the other hand, the plea for extenuation focuses on the actor's loss of self-control as a result of the victim's assault rather than on a mistaken belief about the need to use lethal force in the situation. Patently, although both defences may be similar in rationale, they hinge upon clearly distinct preconditions. [52]

As noted earlier in this chapter, excessive self-defence cannot be dealt with in a uniform manner. Thus, one may also envisage excessive self-defence cases where the actor should be liable on the basis of involuntary rather than voluntary manslaughter. In such cases the assumption is that the actor's killing of the attacker by exceeding the limits of necessary force did not involve an intention to kill. Where the aggressor's killing, although unintended, is regarded as a foreseeable or foreseen consequence of the actor's response to the attack, a conviction of involuntary manslaughter by reason of negligence or non-murderous recklessness seems most appropriate. Patently, in those cases of excessive defence where the aggressor's killing was not intentional - hence the conviction of involuntary manslaughter - one cannot speak of a partial defence to murder as understood e.g. in provocation. In this respect Howard is correct when he says that:

...by reason of the existence of an initial case of self-defence D should be acquitted of murder, and that if the consequence is that he is guilty of manslaughter this should be because he is guilty of manslaughter in any event and not merely because his offence is reduced from murder. [53]

5. Excessive Self-Defence and Partial Justification

Let us now examine more closely how excessive self-defence might perhaps furnish the grounds for a partial defence under the justification theory. To begin with, one might say that excessive self-defence may give rise to a claim of partial justification, provided that the actor's response were aimed at the prevention of an unlawful attack against which the use of some force would be fully justified. From this viewpoint, the use of excessive force in defence may be taken not to annul completely the actor's claim of justification. [54] In addition, one might say that, under the justification theory, it would make no difference whether or not the actor was aware of the fact that the defensive force used was excessive, or whether or not he was in control of himself at the time of his response. All that matters is that the excessive force was used against an unlawful attack, and this would be sufficient to diminish the wrongfulness of the actor's response. As G. Gordon points out:

It would be feasible to make unjustifiable self-defence a valid plea in mitigation whether or not the accused lost control as a result of the attack made on him. A man can stand his ground and fight instead of taking advantage of an opportunity to escape whether or not he is so provoked by the attack as to have lost his self-control. If escape were impossible, he would be acquitted, and would not have to show that he lost control; and it may be said that if escape were possible he should be convicted only of culpable homicide, even if he did not lose self-control. [55]

From this viewpoint, the basis of the actor's plea of extenuation pertains to the assumption that, in so far as the use of defensive force is initially justified, the aggressor's killing should be regarded as less wrongful. If excessive self-defence were taken to provide a partial justification defence, pleading a partial excuse such as provocation in these cases would not be necessary. This ensues from the general idea that in cases where the conditions of excuse and justification concur the justification defence should take the priority.

As has been said before, a basic assumption behind the approach to excessive self-defence as a partial justification is that the actor's response is aimed at preventing a wrongful attack. One might perhaps distinguish between a strong and a weak version of the partial justification doctrine.

According to the strong version, any wrongful attack that would entitle one to resort to some degree of defensive force would be sufficient to buttress a claim of partial justification if the actor kills the aggressor by using excessive force. According to the weak version, on the other hand, the actor's killing of the aggressor in self-defence may be partially justified only in if the attack represents a grave wrongdoing, e.g. if it endangers the actor's life. In this respect, one might say that where the victim's attack threatens a minor interest it would be more appropriate to treat excessive defence under a partial excuse - if the conditions of such an excuse are present - rather than as a partial justification. To offer an example, exceeding the limits of necessary force and killing in defence of property cannot be partially justified, although the actor might perhaps be entitled to a partial excuse on grounds e.g. of provocation. One should note that if excessive self-defence is taken to provide a partial justification defence to murder, provocation as a partial excuse could be pleaded only in the mitigation of sentence with respect to the lesser offence.

Nevertheless, neither version of the partial justification doctrine seems capable of providing an acceptable basis for treating excessive self-defence as a partial justification in law. The

partial justification approach to excessive self-defence seems unsatisfactory for reasons similar to those that militate against regarding provocation as a partial justification defence (see chapter 2). Other things being equal, the intentional use of excessive force in self-defence should always tell against the actor's plea of legal justification, notwithstanding the seriousness of the victim's aggression. As Robinson points out:

The triggering conditions of a justification defense do not in themselves give the actor the privilege to act without restriction. To be justified, the response conduct must satisfy two requirements: (1) it must be necessary to protect or further the interest at stake, and (2) it must cause only a harm that is proportional, or reasonable in relation to the harm threatened or the interest to be furthered. [56]

6. Summary

So, to conclude, it has been argued that excessive self-defence where it involves the intentional killing of the aggressor may best be treated under a partial excuse. Such a partial excuse may be provocation or, possibly, a qualified excuse of excessive self-defence, although the two must be kept clearly distinct. With regard to the latter defence, the basic assumption is that a mistaken

belief, unreasonable though it may be, may still negate the malice aforethought required for murder. It has been asserted, moreover, that in excessive self-defence - as in provocation - the admission that the actor's killing of the aggressor was intentional invites one to consider the relevant partial defence as reducing murder to voluntary rather than to involuntary manslaughter. Nevertheless, one should add, the question of whether the actor was in fact mistaken as well as whether his (unreasonable) mistake should be sufficient to negate malice aforethought can only be decided in the light of the circumstances of the particular case.

NOTES

1. In Fletcher's words:

Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations. A valuable aid in making that judgment is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action. It is important to remember, however, that the balancing of interests is but a vehicle for making judgment about the culpability of the actor's surrendering to external pressure.

Rethinking Criminal Law, (1978), p.804.

2. See Andrew Von Hirsch & Nils Jareborg, "Provocation and Culpability", in *Responsibility, Character and the Emotions*, Cambridge (1987), 241 at pp.253-254.

3. A. Ashworth, "Sentencing in Provocation Cases", *Crim.L.R.* (1975), 555. See, e.g.: Marryshaw, March 26 (1965) 2893/64); Kennedy [1968] *Crim.L.R.* 566; Jones (1972) reported in *The Daily Telegraph*, July 18, 1972; Bell (1974) reported in *The Guardian*, Oct. 29, 1974.

4. Briefly, in self-defence and prevention of crime the accused claims that his prima facie unlawful conduct does not represent an actual violation of the law because, under the circumstances, such conduct is legally permissible. A justificatory defence may be pleaded on the basis that the accused acted in order to prevent the commission of an offence, to ward off an unlawful attack against himself or another, to effect a lawful arrest or to protect his or

another's property. In English law, the Criminal Law Act 1967 regulates these defences, until then covered by common law rules. Section 3(1) of the Act provides that a person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. Arguably, as regards self-defence, defence of others and defence of property, the common law defence survives together with the statutory one. See e.g. Cousins [1982] QB 526, [1982] 2 All ER 115; Devlin v Armstrong [1971] NI 13. Nevertheless, in cases of putative self-defence or where the aggressor is excusable only the common law defence will apply, on the assumption that the accused does not act in the prevention of crime in such cases. See: A.W. Mewett, "Murder and Intent: Self-Defence and Provocation", *Criminal L.Q.* 27 (1984-1985), 433.

5. According to Wasserman: "Self-defence owes its peculiar force as a justification to the fact that the aggressor is forcing a choice between lives at the moment he is killed."

"Justifying Self-Defence", *Philosophy and Public Affairs* (1985), 378.

6. As a justification, the defence of self-defence focuses on the societal approval of the act rather than on the blameworthiness of the actor. In G. Williams' words:

Self-defence is classified as a justification on the basis that the interests of the person attacked are greater than those of the attacker. The aggressor's culpability in starting the fight tips the scales in favour of the defendant.

"The Theory of Excuses", *Crim.L.R.* [1982], 739 at p.739.

According to Fletcher:

Necessary defence is founded on the principle that it is right and proper to use force, even deadly force, in certain situations. The source of the right is a comparison of the competing interests of the aggressor and the defender, as modified by the important fact that the aggressor is the only party responsible for the fight. This theory of the defence appears to be a straightforward application of the principle of lesser evils...

Supra note 1, pp.857-858; see also pp.557, 762, 769. And see: P. Robinson, "Criminal Law Defences: A Systematic Analysis", 82 *Columbia L.R.* (1982), 199.

7. See Finbarr McAuley: "Anticipating the Past: The Defence of Provocation in Irish Law", *Modern L.R.* 50 (1987), 137.

8. *Kenny's Outlines of Criminal Law*, (1966), p.172. See e.g.: *R v. Letenock* (1917) 12 *Cr.App.R.* 221; *R v. Cobbett* (1940) 28 *Cr.App.R.* II.

Nevertheless, although the conditions of self-defence and provocation may concur, the theoretical bases of these defences are clearly different - at least in so far as provocation is perceived as a partial excuse. As P.A. Fairall points out:

It is true that provocation and self-defence may overlap. However, provocation and self-defence are quite distinct and separate. Provocation presupposes conduct by the deceased depriving the accused of self-control. The deceased's conduct is crucial to deciding whether D was deprived of self-control, and whether an ordinary person in the position of the accused could have lost self-control. Anger is a primary feature of provocation. Self-defence is based not upon anger or loss of self-control, but upon the moral imperative of self-preservation. In self-defence, D has a worthy motive, in provocation he has none. The defences are quite different in rationale.

"The Demise of Excessive Self-Defence Manslaughter in Australia: A Final Obituary?", *Crim.L.J.* 12, (1988), 41.

9. G. Gordon points out that: "The tendency of the modern law is in theory to allow the plea of provocation only where the accused has lost control, but the idea that provocation is a form of unjustifiable self-defence is not altogether dead." *Criminal Law*, (1978), p.769.

10. The superior interest which is protected by the act of defence does not pertain only to the immediately defended interest, which may be superior but also inferior to the interest of the attacker, but it pertains primarily to the vindication of the legal order.

And see: N. Androulakis, *Penal Law*, vol.1, (1978), p.422.

11. The general assumption in the law is that, since justified action is not considered wrongful, there is no need for pleading an excuse. As J. Hall points out: "Justifiable action taken in states of necessity is not regarded as coerced."

General Principles of Criminal Law, (1960), p.436.

12. For a historical approach to the theory of self-defence as an excuse see: 3 Coke 55; 1 Hale 479-87; Blackstone 184; Foster 275; 1 Hawkins 113. And see: *Constitutio Criminalis Carolina* 139,140 (1532).

According to Robinson:

Nor is there necessarily any problem even with recognizing two different categories of defense under the same label at the same time and in the same jurisdiction. A jurisdiction may properly provide a "self-defense" justification and a "self-defence" excuse. Such multiple defenses may even occur in the same provision... But when this is done, the

potential for misunderstanding and confusion increases significantly.

"Criminal Law Defences: A Systematic Analysis", 82 *Columbia L.R.* (1982), 240. See also: G. Fletcher, "Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory", *Israel Law Review* 8 (1973), 367.

13. See N. Androulakis, *supra* note 10, pp.426-427.

14. Nevertheless, taking into account that an act of aggression in such cases does not represent a threat to the legal order, the accused may be entitled to exculpation under a general excuse of necessity rather than self-defence taken as an excuse. From this viewpoint, patently, self-defence could only be pleaded as a justification defence.

15. According to Fletcher:

The required balancing of interests of the defender against those of the aggressor is expressed in the unquestioned assumption that defensive force must be reasonable and proportionate to the threat. Though deadly force might be necessary to avert a minor assault...it is clearly disproportionate to the threat and therefore impermissible."

Supra note 1, pp.859-860.

And as Robinson explains:

In the lesser evils justification, the triggering conditions may be broader, but this is counterbalanced by a stricter proportionality requirement, which permits the justification only if the actor causes a harm which is not merely reasonably proportional to, but actually less than the harm or evil threatened. On the other hand, the less demanding "reasonably proportional" language commonly found in all other jurisdictions seems preferable when the interests to be protected or furthered are so abstract or otherwise difficult to quantify as to make the application of a stricter standard impossible. It is true of all justifications that while the

competing interests can be identified, they can rarely be sufficiently quantified to permit comparison in the proportionality assessment.

Supra note 12, p.219.

16. P. Smith, "Excessive Defence - a Rejection of an Australian Initiative?", *Crim.L.R.* (1972), 529.

17. In English law a plea of self-defence can be accepted even when the accused was in fact acting under the mistaken belief that he was under attack. See, e.g. *Williams* [1984], 78 Cr.App.R. 276, at 281: "If the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent crime, then the prosecution have not proven their case."

18. *Palmer v. R*, [1971] AC 814, [1971] 1 All ER 1077. See also *McInnes*, [1971] 3 All ER 295, [1971] 1 WLR 1600.

19. "Where D, being under no mistake of fact, uses force in public or private defence, he either has a complete defence or if he uses excessive force, no defence. If the charge is murder, he is guilty of murder or not guilty of anything...He may have believed the force was reasonable but if, even by the relaxed standard applied in this context, it was not, he was making a mistake of law, which is not a defence, and he is guilty of murder."

Smith and Hogan, Criminal Law, (1988), pp.247-248.

20. *Palmer*, supra note 18, per Lord Morris, p.832. And see: *Shannon*, [1980] 71 Cr. App. Rep. 192, [1980] *Crim.L.R.* 410; *Whyte* [1987] 3 All ER 416.

21. Shannon, *supra* note 20, at p. 196.

22. Fletcher, *supra* note 1, pp.762-763.

According to the Model Penal Code, the right of self-defence arises when "the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force..." (Para 3.04)

In para 3.09 (2), it is provided that, for the plea of self-defence to be accepted, the mistake must be reasonable.

As Robinson explains:

Under such provisions, the actor who mistakenly believes that his conduct meets the requirements of a justification defence will be justified, when it seems clear that such an actor is properly only excused. His conduct has not, in fact, avoided a greater harm or furthered a greater good; it has not caused a net benefit, but rather a net harm. On the other hand, he may well be blameless, especially if his mistake is reasonable."

Supra note 12, p.239.

23. Fletcher, *supra* note 1, p.696.

24. On this point see: G. Fletcher, "The Right and the Reasonable", *Harvard L.R.* (1985).

25. See e.g.: *De Freitas v. The Queen* [1960] 2 W.L.R. 533; Shannon [1980] Cr.App.R. 192.

26. *McInnes*, [1971] 1 WLR 1600, 3 All ER 295.

27. G. Williams, *Textbook of Criminal Law*, (1983), pp.545-546

28. See e.g.: *Kessal* (1824) 1 C & P 437, 171 ER 1263; *Greening* (1913) 9 CAR at 106; *Letenock* (1917) 12 CAR 221; *Semini* [1949] 1 KB at 409; *Cornyn*, *The*

Times, March 4, 1964.

29. As expressed by Lowe J.: "if the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon but the person taking action acts beyond the necessity of the occasion and kills the offender the crime is manslaughter - not murder."

McKay (1957) ALR 648 at 649. In this case Barry J. directed the jury as follows:

"If you think that (the accused) was honestly exercising his legal right to prevent the escape of a man who had committed a felony...but that the means the prisoner used were far in excess of what was proper in the circumstances, then you should find him guilty of manslaughter."

The full Court accepted the judge's direction. [1957] V.R. 560. See also: Howe (1958) 100 C.L.R. 448; Buffalo [1958] V.R. 363; Haley (1959) 76 W.N. (N.S.W.) 550; Enright [1961] V.R. 663; Turner [1962] V.R. 30; McNamara [1963] V.R. 32, [1963] V.R. 402; Tikos (No.1) [1963] V.R. 285; Tikos (No.2) [1963] V.R. 306.

In *Viro* (1978, 141 C.L.R. 88) Mason J. offered the following account of the procedure toward a decision in excessive defence cases: "1) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him. By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself. 2) If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises. 3) If the jury is not satisfied beyond reasonable doubt that there was no such

reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced. 4) If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit. 5) If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury - did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced? 6) If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter." (pp.146-147)

The Australian law doctrine was followed in some Canadian cases (see e.g.: *Gee* (1983) 139 DLR 587; *Brisson* (1983) 139 DLR 685) but was finally rejected by the Supreme Court.

A similar position has been adopted in Irish law (see *People (A-G) v. Dwyer* [1972] IR 416).

30. See: *Cook* (1639) Cro. Car. 537; *Whalley* (1835) 7 C.& P. 245; *Patience* (1837) 7 C.& P. 775; *Weston* (1879) 14 Cox C.C. 346. In the cases of *Whalley* and *Patience* lethal force was used in order to resist an unlawful arrest, and in both the accused was convicted of manslaughter. And see: *Biggin* [1918-19] All ER, R.501. In all these cases the fact that the accused used more force than that which would be necessary has led to the reduction of the conviction to manslaughter. The Judicial Committee rejected the above cases, however. It has been asserted that: "If in any of the above cases there is a suggestion that a measure of dispensation or tolerance, where a

death is intentionally and unnecessarily caused, is to be found in the circumstances that someone is acting on an illegal warrant or is executing process unlawfully (Cook) it is not one that commended itself to their Lordships."

Palmer, [1971] 1 All E.R. 1077, 1083D.

And see e.g.: Cascoe [1970] 2 All E.R. 833; Emelogue, May 2, 1971, No. 7044/69 (unreported); McInnes [1971] 3 All E.R. 295, [1971] 1 W.L.R. 1600; Edwards [1973] 1 All E.R. 152; Attorney-General for Northern Ireland's Reference, [1977] A.C. 105 at 148.

31. On excessive defence as a partial defence to murder see: Morris and Howard, *Studies in Criminal Law* (O.U.P.), chapter IV; Howard, *Australian Criminal Law*, (1965), pp.80-83; Howard, "An Australian Letter: Excessive Defence" *Crim.L.R.* [1964], 448; Morris, "A New Qualified Defence to Murder", 1 *Adelaide L.R.* 23 (1960).

32. The defence of excessive self-defence was confirmed by the High Court of Australia in *R. v. Howe* (1958) 100 C.L.R. 448. See also: *Viro v. The Queen* (1978) 141 C.L.R. 88; Lawson and Forsythe (1985) 18 A.Crim.R. 360.

The doctrine of excessive defence as has been formulated in *Howe* applied mainly to cases of self-defence. It is asserted, nonetheless, that the doctrine should logically apply to any case where the defendant is legally entitled to use force (i.e. in the light of *McKay* [1957] V.R. 560; supra note 29). And see: Smith and Hogan, *Criminal Law*, (1988), p.248.

In *Howe* it has been pointed out that the right of the defendant to use force would presuppose that he is the victim of an attack "of a violent and felonious nature...so that [the defendant] reasonably feared for his life or the safety of his person from

injury, violation or indecent or insulting usage." (at p.460) See also: L.H. Leigh, "Manslaughter and the Limits of Self-Defence", *Modern L.R.* 34 (1971), 685.

33. Zecevic, 1987, 71 A.L.R. 641. In this case it was said that: "[In self-defence] The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide. Where homicide is involved some elaboration may be necessary." (per Wilson, Dawson and Toohey J.J., at p.652)

And see P.A. Fairall: "A mistaken belief as to the degree of force required to repel an attack, real or imaginary, actualised or imminent, will not excuse the use of excessive force in self-defence, whether or not the mistaken belief was honestly (or reasonably) held."

"The Demise of Excessive Self-Defence Manslaughter in Australia: A Final Obituary?", *Crim.L.J.* 12 (1988), 35.

One of the problems associated with the defence of excessive self-defence as has been formulated in *Viro* (1978 141 C.L.R. 88) was this: a qualified defence was open only to the accused who acted under an "honest" mistake as to the necessary degree of defensive force; on the other hand, such a partial defence was not recognized in cases of putative self-defence, that is, where the accused honestly believed that he was under attack (putative self-defence). In the latter cases the accused may be entitled to a complete defence only if his mistake were deemed

reasonable. In *Zecevic*, Deane J. referred to this as a "basic and complicating conceptual anomaly." (at p.666)

34. See Smith and Hogan, *Criminal Law*, (1988), p.249.

As Gaudron J. pointed out in *Zecevic* (supra note 33): "The proposition that it is manslaughter, not murder, where self-defence in relation to homicide fails by reason only that disproportionate force was used, is consonant with the formulation of the law of self-defence as contained in the judgment of Wilson, Dawson and Toohey JJ. and with the definitional difference between murder and voluntary manslaughter involving the presence or absence of malice aforethought." (at p.669) And see supra note 33.

Similarly, Mason C.J. said that: "The doctrine enunciated in *Howe* and *Viro* expressed a concept of self-defence which best accords with acceptable standards of culpability, so that the accused whose only error is that he lacks reasonable grounds for his belief that the degree of force used was necessary for his self-defence is guilty of manslaughter not murder." (at p. 646)

It has been asserted, however, that: "If the High Court [in *Zecevic*] had meant to provide some place for excuse theory in the law of self-defence, it should have endorsed rather than abrogated the doctrine of excessive self-defence. That the doctrine is excusatory in nature is clear from its operation of avoiding the full condemnation of the law on the accused by taking into account his honest belief in the necessity of the force applied by him. In other words, while the accused's use of disproportionate force (his act) is frowned upon by society, he (the actor) is, by virtue of his honest belief, regarded as being less culpable than a murderer."

Stanley Meng Heong Yeo, "Proportionality in Criminal Defences", 12 *Crim. L.J.* (1988), pp. 218-219.

35. "There is no rule which dictates the use which the jury must make of the evidence and the ultimate question is for it alone." In *Zecevic* (supra note 33) at p. 653. And see: Tajbor, (1986) 23 A.Cr.R. 189 at 201.

36. See: The Law Commission: Codification of the Criminal Law, Law Comm. No. 143 (1985); Draft Criminal Code Bill, s.s. 56,57,61.

37. Offences Against the Person, 14th report, Cmnd.7844 (1980), para. 288.

The CLRC recommended the introduction of a qualified defence in relation to private defence of person and property and the prevention of crime. Such a position was put forward in the light of the Committee's proposal that murder should be retained as a distinct offence category pertinent to the most heinous homicides. See: Smith and Hogan, *Criminal Law*, (1988), p.249.

38. In *HM Advocate v. Kizileviczius* (1938 J.C. 60), where evidence of excessive defence was brought forward, Lord Jamieson distinguished between self-defence leading to full acquittal, self-defence leading to the reduction of murder to culpable homicide and provocation leading to a reduction of murder to culpable homicide. He explained that the second category constitutes a plea of unjustifiable self-defence requiring both that the accused's life was in danger and that the accused acted in the heat of the moment. See: Gordon, *Criminal Law* (1978), p.769.

39. *Crawford v. H.M. Advocate*, 1950, J.C. 67.

40. According to Gordon: "Recklessness is ...not so much a question of gross negligence as of wickedness.

Wicked recklessness is recklessness so gross that it indicates a state of mind which is as wicked and depraved as the state of mind of a deliberate killer."

Supra note 38, pp. 735-736.

41. Gordon, supra note 38, p.769.

42. In *H.M. Advocate v. Byfield and Ors* (Glasgow High Court, Jan. 1976, unrep. at 16-17) the current position has been expressed by Lord Thomson in his direction to the jury as follows:

...if you took the view that the defence of self-defence was not established either because, for instance, the force used in retaliation was excessive or because although the man was pertified, as he says, nonetheless, he really ought to have been able to see there was a way of escape and should have taken it, in both those cases the self-defence would fail; but in both those cases it would be open to you to say "well, he shouldn't have done what he did but it is not murder" and in circumstances of that kind the verdict would be culpable homicide. It is sometimes said that this arises from an application of the principles of provocation and you can apply that to this case too. It comes, in a way, to the same thing."

43. P. Smith, "Excessive Defence - a Rejection of Australian Initiative?", *Crim.L.R.* (1972), 533.

44. It has been argued that the doctrine of excessive self-defence "...where it does apply it will often add little more than unnecessary complication to the issues of self-defence and provocation."

I. Elliot, "Excessive Self-Defence in Commonwealth Law: A Comment", 22 *I.C.L.Q.*, (1973), 727.

45. Colin Howard, "Two problems in Excessive Defence", *Law Quart. Rev.* 84 (1968), pp.356-357.

Howard argues that:

...the situation in an excessive defence case is entirely different (than in provocation). The defendant is not urging that his excess of force be excused because V was the original attacker. He is arguing the quite different case that he made a misjudgment as to the necessities of the occasion. The basis of his case is not that this misjudgment should be partly excused because the original situation was not his fault, but that such a misjudgment does not meet the requirements of murder."

46. Howard, *supra* note 45, p. 357.

47. Howard, *supra* note 45, pp. 360-361.

48. P. Smith, *supra* note 43, pp. 533-534.

49. Howard, *supra* note 45, p. 359.

50. Howard, *supra* note 45, p. 359.

51. As M. Bayles points out: "As long as a mistake blocks inference of an undesirable character trait, it makes no difference how unreasonable the mistaken belief may be. However, should the crime be one for which there is a lesser offense of doing the act negligently, then an unreasonable mistake should not prevent conviction for the lesser offense. A mistake is unreasonable if it may be avoided by the exercise of reasonable care, so an unreasonable mistake constitutes negligence."

"Character, Purpose, and Criminal Responsibility", *Law and Philosophy* 1, (1982), 5.

See also: A. Donagan, *The Theory of Morality*, (1977): "Ignorance is culpable if and only if it springs from negligence - from want of due care." (p.134)

52. In *Zecevic* (*supra* note 33) Deane J. reasoned as follows:

The two defences [provocation and excessive

self-defence] are quite distinct. Excessive self-defence may be available in circumstances where there is no basis at all for a defence of provocation. Indeed, in some cases there may be an element of inconsistency between a genuine (albeit unreasonable) belief that what was done was done reasonably in self-defence (or defence of another) and the loss of control which ordinarily lies at the heart of a defence of provocation. (at 664-665)

53. Howard, *supra* note 45, p.357-358.

54. Greek law offers an example of such an approach to the problem of excessive defence. First, self-defence (defence of others, etc) is treated as a justification bearing primarily upon the vindication of the legal order. According to Art. 22 P.C.:

1. An act of defence is not wrongful...

3. The proper measure of the defence is determined according to the degree of dangerousness of the attack, the kind of harm threatened, the manner and intensity of the attack and the rest of the circumstances.

According to N. Androulakis, the superior interests which is protected by the act of defence does not pertain only to the immediately defended interest (e.g. property), which may be quantitatively less important than the interest of the attacker; it pertains, primarily, to the vindication of the legal order against the unlawful act of aggression.

See: *Penal Law*, 1, (1978), pp.426-427.

Moreover, Art.23 P.C. provides that:

The person who exceeds the limits of the defence, if the exceeding was intentional, is punished with a reduced penalty (Art.83); if the exceeding was due to negligence (he is punished) according to the relevant provisions. He is not punished, however, and the exceeding is not imputed to him, had he acted so due to the state fear of confusion in which he found himself as a result of the attack.

With regard to the above article, one might say that the use of excessive force in certain cases of defence may be regarded as partially justified. In so far as the the actor's response exceeds the limits of necessary defence it retains its wrongful character and as such it may lawfully be defended against (e.g. by a third party). According to G. Magakis, however, had the accused inflicted harm far greater than was practically necessary in order to thwart the attack, his act cannot be regarded as as an act of defence in law. It is pointed out that setting a limit to the right of defence ensues from the basic character of the defensive act as an act protecting the legal order in general. See: G.A. Magakis, *Penal Law*, (1981); J. Manoledakis, "Defence in the Greek Penal Code", *Armenopoulos* 1 (1981).

55. Gordon, *supra* note 38, p.768.

56. Robinson, *supra* note 12, p.217.

1. Prefatory Note

There have been difficulties in describing cumulative provocation in law and how it may be connected with a partial defence to murder. In general, one might say that cases treated under the heading of cumulative provocation are assumed to involve a prolonged course of maltreatment of the actor by his victim which culminated in the actor's fatal response. A long course of domestic violence which ends up in the killing of one spouse by the other is held to provide the typical example here. Nonetheless, one should distinguish between the cases where the actor's retaliation was immediately preceded and precipitated by some sort of provocative conduct, and those cases where no such final provocation did in fact occur. The partial defence to murder that may ensue from cumulative provocation is viewed as turning upon the whole of the victim's wrongful behaviour towards the actor; it does not hinge on a single act of provocation that may be deemed sufficient by itself to trigger off a punitive response likely to involve an intent to kill.

Under the excuse theory, however, it often seems problematical whether the circumstances of cumulative provocation furnish sufficient grounds for pleading provocation as a partial defence to murder, particularly where the actor's retaliation cannot readily be connected with a final provocative event. Further, even in cases where a final act of provocation can be demonstrated, it may seem questionable whether the actor's plea of provocation should succeed. Indeed, the assumption that the provocation was in the circumstances foreseeable, or that the actor was in a sense not unused to the victim's untoward conduct, may seem to militate against granting a partial excuse here. In this respect, the actor's claim of provocation would be particularly weak in those cases of cumulative provocation where the hot anger requirement is not met. As G. Gordon points out:

It is doubtful whether a long course of provocative conduct can found a successful plea of provocation, unless there is also some final act of provocation which, albeit because it follows on the earlier provocation and is the last straw, actually provokes a loss of control - it is not sufficient that it should merely provide an occasion for A to exact revenge for the deceased's prior provocation. The fact that the deceased had indulged in a course of provocative conduct may indeed in some circumstances militate against the plea of provocation, as showing that A had become

so used to this type of behaviour that it no longer affected his self-control. [1]

In cumulative provocation, the time that may have elapsed after the final provocation should normally tell against the actor's plea of extenuation, for it suggests that he acted with forethought and deliberation. As has been pointed out earlier in the thesis, other things being equal, the lapse of time between provocation and retaliation weakens the defendant's claim that he was provoked to lose his self-control. One should note, nonetheless, that if the actor finds himself in severe distress or depression as a result of his prolonged ill-treatment at the hands of the victim, his plea of extenuation may be sustained on the basis of a different legal excuse (see section 3 below).

Nonetheless, there have been cases of cumulative provocation where the defendant's plea of provocation was accepted, notwithstanding the absence of an immediate wrongdoing on the victim's part, or the admission of some sort of planning and deliberation prior to the killing (see *infra*). One might argue that those cases should most properly be treated under the justification theory. As has been explained in chapter 2, according to the partial justification doctrine one need not adhere to the requirement of loss of self-control or impaired volition if the victim's wrongdoing - as reflected either in a

particular act of provocation or in a prolonged course of untoward behaviour - is deemed sufficiently grave as to render the wrongdoer's life, in a sense, less worthy of protection.

The following sections of this chapter explore how cumulative provocation might furnish the grounds for pleading an excuse-based partial defence. The discussion proceeds from the position, advocated throughout the present thesis, that partial justification should be avoided as a basis for setting up a partial defence to murder (see chapter 2.2). As has been noted before, of the cases of cumulative provocation the most problematic are those in which the hot anger requirement of provocation is not met. One might say that such cases invite one to consider a broader interpretation of the element of impaired volition in provocation. A better approach might perhaps be to treat cumulative provocation as likely to bring about the conditions of different legal excuses. In this respect, singling out the relevant legal defence would depend upon the nature of the excusative claim growing out of the circumstances of the particular case. Considering the position of cumulative provocation in English criminal law doctrine will provide us with the necessary background against which some of the arguments put forward in the following analysis will be tested.

2. In Search of the Rationale of Excusing in Cumulative Provocation Cases

In cumulative provocation cases the absence of a provocative act immediately prior to the killing and often the admission of forethought on the actor's part may seem to undermine the partial excuse of provocation. More precisely, if a final wrongdoing triggering off the actor's retaliation cannot be identified, his claim of loss of self-control by reason of provocation would appear to be unsupported. Moreover, any evidence of planning and deliberation would normally militate against the requirement of impaired volition as understood in provocation. As has been expressed by Devlin J. in his direction to the jury in *Duffy*:

Severe nervous exasperation or a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation in law. Indeed the further removed an incident is from the crime the less it counts. A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here - the blame attaching to the dead man. You are not standing in judgment on him. Circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are

inconsistent with provocation since the conscious formulation of a desire for revenge means that the person has had time to think.

[2]

Nonetheless, the position of cumulative provocation in English law seems far from clear. [3] In a number of cases where the defence of provocation was raised on such a basis the jury was directed to take into account the previous ill-treatment of the defendant by his victim. [4] [5] However, in many of these cases emphasis was laid on the need to show the connection of the defendant's retaliation with a final provocative event. [6] Questions have arisen as to whether the position expressed by Devlin J. in *Duffy* should now be considered as being overruled by section 3 of the Homicide Act 1957. As was said in the leading case of *Camplin*, section 3 "...abolishes all previous rules of law as to what can or cannot amount to provocation". [7] With regard to this, it may be said that it is now for the jury to decide as a matter of fact if the victim's provocation, whether instant or cumulative, is sufficient to reduce murder to voluntary manslaughter. Little evidence can be brought forward to support this position, however. [8] Indeed, one might argue that such an approach to the matter can be misleading. Although considering the previous mistreatment of the actor at his victim's hands may play an important part in

assessing the gravity of the particular provocation offered, such a consideration cannot on its own support a partial excuse on the ground of provocation. In other words, the circumstances of cumulative provocation may be taken into account as an issue peripheral to or supportive of the actor's plea as focusing on a particular act of provocation. From this point of view, one might say that the defence of provocation should not be considered, unless there is some evidence that the actor was immediately provoked to lose his self-control. Indeed, allowing the defence of provocation to be considered in some cases of cumulative provocation may be questioned on the ground that evidence of forethought and deliberation on the actor's part should normally preclude putting the issue to the jury in the first place. [9] The underlying assumption here is that premeditated killings cannot be dealt with or partially excused on the basis of provocation as this would cut across the very logic of the defence in law. Indeed, section 3 is understood not to have altered the basic requirement of the defence, namely, the sudden and temporary nature of the actor's loss of self-control. In the absence of another excuse, a deliberate killing should therefore be classified as murder, in spite of the admission of serious provocation - whether instant or cumulative - on the victim's part.

Treating a case of cumulative provocation involving a deliberate or premeditated killing under the defence of provocation seems problematic in so far as the hot anger requirement is regarded as being indispensable to the defence. With regard to this, the Criminal Law Revision Committee has recommended:

...no change in the present rule, whereby the defence [of provocation] applies only where the defendant's act is caused by the provocation and is committed suddenly upon the provoking event, not to cases where the defendant's reaction has been delayed, but the jury should continue to be allowed to take into consideration previous provocations before the one which produced the fatal reaction. [10]

The CLRC's proposal seems therefore to conform with the position expressed in *Duffy*, namely, that the defence of provocation is incompatible with the admission of forethought and deliberation. It is pointed out, nonetheless, that in so far as there is evidence of an immediate provocation, cumulative provocation should be taken into account as relevant to determining whether the actor was sufficiently provoked to lose his self-control. In other words, in assessing the actor's plea of provocation the jury should be directed to consider any previous maltreatment of the actor by his victim as likely to bear on the gravity of the particular provocation

offered (i.e. as the latter relates to the question of loss of control). [11]

Nevertheless, this position has been criticized on the basis that the defence of provocation has been circumscribed by the CLRC in too narrow a manner. [12] The CLRC's approach to the defence, it is argued, overlooks the fundamental requirement that a conviction of murder should be avoided, unless the killer fully deserves the social stigma that such a crime entails. Notwithstanding the admission of forethought and deliberation, a conviction of murder in some cases of cumulative provocation might appear to take no account of the contemporary sympathetic attitudes towards the actor in such cases. [13] Indeed, the CLRC's expressed position towards narrowing down the scope of murder only to those killings which deserve to be stigmatized as such may seem to contradict the outright rejection of the defence of provocation here. [14] Thus, according to M. Wasik, strict adherence to the hot anger requirement in some cases of cumulative provocation may lead to convictions of murder that are deemed morally unacceptable. In his own words:

...cases of cumulative provocation should fall outside the scope of "new murder". The law should recognize that there are degrees of culpability even in deliberate killings. Whilst evidence of forethought and premeditation must

always tell against the defendant on sentence, the more lenient approach evident in some sentencing cases, which regards cumulative provocation as mitigating the offence rather than making it more serious, is recommended. The traditional view of provocation as a "concession to human frailty" is clearly important both on liability and on sentence, but in the cases [of cumulative provocation] there must be proper weight given to the justificatory as well as the excusative element. [15]

Admittedly, the tendency in English law is towards treating the defendant in cases of cumulative provocation with leniency. Often the judge is prepared to accept the defendant's plea of not guilty to murder but guilty of manslaughter directly. Thus, one may cite cases where the actor was convicted of manslaughter in spite of evidence suggesting that he did not kill his victim "on the spur of the moment". [16] Considerations of cumulative provocation might lead the jury to acquit the actor altogether or to convict him of manslaughter, if conviction of murder is thought of as being difficult to justify. [17] However, the reduction of murder to manslaughter in cumulative provocation cases may often have to do with the extreme distress or depression in which the actor found himself as a result of his long ill-treatment at the victim's hands. [18] A recurrent problem in this respect pertains to the difficulty

in determining the precise nature of the claim of extenuation which grows out of the conditions of cumulative provocation.

Wasik puts forward three possible ways in which the problem of cumulative provocation might be met in law. First, such cases could be dealt with under the existing partial defence of provocation. This, he argues, would presuppose adopting a broader approach to the matter by taking account not only of the excusative but also of the justificatory element in provocation. From this perspective, cumulative provocation may not require a sudden and temporary loss of self-control - as a result of provocation - as an indispensable requirement of the defence. Here, one might say that the defence of provocation is not incompatible with the admission of some sort of planning or deliberation, particularly where the actor's resentment against his victim is justified because of a long-lasting maltreatment of the actor by the victim (and see chapter 3.5).

A different way of dealing with cumulative provocation cases in law might be by subsuming these cases under the defence of diminished responsibility or, one may add, under a combined defence of provocation and diminished responsibility. However, according to Wasik, such an approach to the issue may result in stretching the defence of diminished

responsibility too far beyond its purpose. Finally, a third alternative might be to lay aside the existing defences altogether and treat cumulative provocation under a separate general defence to murder. Nonetheless, the ambit of such a defence should be drawn wide enough to encompass a variety of extenuating circumstances that may allow the reduction of criminal homicide from murder to manslaughter. From the above three possible solutions to the problem of cumulative provocation, Wasik opts for the first as comparatively the least troublesome. [19]

One may argue, nonetheless, that cumulative provocation should not be labelled as pertinent to any particular legal defence. Rather, it should be considered as a situation likely to give rise to the conditions of different legal defences. Thus, instead of widening the scope of the existing categories in order to accommodate all cumulative provocation cases, it would seem less problematic if one distinguishes between the different claims that may arise in such cases. Those claims might be either extenuation or, possibly, exoneration [20], depending on the nature of the defence raised. One may say that the majority of the claims of extenuation growing out of a situation of cumulative provocation would meet the conditions of the partial defences of provocation and diminished responsibility

or, arguably, of an intermediate legal defence sharing characteristics of both. Nevertheless, neither provocation nor diminished responsibility would on its own be sufficient to provide a uniform basis for dealing with all cases of cumulative provocation in law. Further, there would be too high a price to pay in terms of coherence and clarity if the scope of either defence were unnecessarily stretched in order to cover the variety of claims that may arise from the circumstances of cumulative provocation.

In order to determine whether a claim of cumulative provocation can be relevant to the partial defence of provocation, one has to consider whether the conditions of this defence are satisfied. Under the excuse theory, this would presuppose evidence that the actor retaliated in the heat of the moment and that his reaction was triggered off by some sort of provocative conduct on the victim's part. The gravity of the provocation offered should be considered by reference to the circumstances of cumulative provocation. But in cumulative provocation cases the question of provocation should be resolved on the basis of the objective test as the latter applies to normal people. According to Ashworth:

...the significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased's final act and the accused's retaliation should continue to tell against him. The point is that the significance of the deceased's final act and its effect upon the accused - and indeed the relation of the retaliation to that act - can be neither understood nor evaluated without reference to previous dealings between the parties. [21]

Thus, in such cases, the crucial act of provocation, however trivial it might appear, can be regarded as in a sense epitomizing or reflecting in the actor's eyes all the previous mistreatment he suffered at the victim's hands. From this point of view, such a provocation may be considered as being serious enough to support a partial excuse. Nonetheless, as we shall later consider, pleading provocation is not the only possible course of defence here. Other things being equal, similar conditions might be capable of supporting a plea of diminished responsibility or, possibly, a joint plea of provocation and diminished responsibility (see section 3, *infra*).

Under the excuse theory, the partial defence of provocation rests on the element of loss of control or impaired volition. In this respect it is correct to say that the circumstances of cumulative provocation can be taken into account as relevant to establishing the required connection between the crucial provocative event and the actor's loss of self-control. It seems clear that, in so far as in such cases the actor's plea is that of loss of control by reason of provocation, cumulative provocation does not invite one to treat the partial defence as justification- rather than excuse-based. Speaking of a shift towards the justificatory element in cumulative provocation cases may be misleading here since it would camouflage the important distinction between providing a good reason for partially excusing the actor by virtue of his loss of control and partially justifying the actor's killing of the provoker in retaliation. As argued in chapter 3, the acceptability of the partial excuse of provocation depends upon the actor's being able to show that he was seriously wronged by his victim. With regard to this, giving special weight to the situation of cumulative provocation can be relevant only to determining the wrongfulness of the crucial act of provocation as it was directed at the actor.

Provocation is traditionally regarded as providing a partial excuse only to "reasonable" or "normal" people. [22] With regard to this, establishing impaired volition as a prerequisite for excusing in provocation is contingent upon the satisfaction of the hot anger requirement (see chapter 4.3). Indeed, given that the actor is deemed "reasonable" or "normal", any evidence of forethought and deliberation on his part should normally militate against his claim of impaired volition by reason of provocation. Further, in so far as the actor is held to be "normal", pleading provocation presupposes evidence of loss of self-control - in the sense of acting in the heat of the moment. This seems to exclude from consideration under the provocation defence those cases of cumulative provocation where the actor killed in cold blood. Other things being equal, the actor in such cases might be able to rely on a different legal excuse - notably diminished responsibility - but, arguably, not one that rests on the assumption that he is a "reasonable" or "normal" person. According to G. Williams:

Provocation is traditionally a defence for "normal" people. Abnormal people can shelter under it, but only on the same conditions as apply to normal ones. If they want their abnormality to be taken into account they must raise a defence appropriate to them - insanity or diminished responsibility. [23]

Nonetheless, in some cases of cumulative provocation the actor may be able to set up a combined defence of provocation and diminished responsibility. This possibility is explored further in the remaining subdivisions of this chapter.

3. Cumulative Provocation and Diminished Responsibility

As has been indicated above, there may be cases where the conditions of cumulative provocation would enable the actor to plead diminished responsibility or, possibly, to set up a combined defence of provocation and diminished responsibility. Diminished responsibility may provide the legal basis for excusing in cases where the actor's claim of impaired volition has to do with an abnormality of mind, possibly attributed to the circumstances of cumulative provocation. [24] It is recognised that in such cases the burden of proof would lie on the defence. Having been subjected to a long course of cruel and violent behaviour, the actor might have found himself in such state of grave distress or depression as to have his capacity for self-control substantially diminished. As G. Williams explains: "the defence [of diminished responsibility] can include even a difficulty in controlling one's actions, provided that it is due to an abnormality

of mind." [25]

The partial defence of diminished responsibility centres on the assumption that the actor's impaired capacity for self-control is due to an abnormality of mind. It is asserted that diminished responsibility does not invite one to recognise a third, intermediate level between responsibility and complete lack of responsibility. In other words, speaking of a substantial impairment of the capacity for perception or self-control does not imply that the actor could only "partially" perceive the wrongful character of his act, or that he could only "partially" control his actions, for such an approach seems logically untenable. One might say that diminished responsibility constitutes, rather, a special type of being responsible which presupposes capacity for both perception and self-control. Due to the actor's condition, however, perceiving the character of his actions or exercising self-control is considered to be extraordinarily difficult, that is, "as compared to normal people normally placed". [26] This is precisely what justifies a reduced penalty in such cases. [27]

Pleading diminished responsibility instead of provocation in a cumulative provocation case may seem more appropriate where no final provocative event can be demonstrated, or where planning and deliberation

is not precluded. The same might obtain in a case where the conduct that triggered off the actor's fatal response cannot be regarded as capable of amounting to legal provocation (i.e. on the basis of the "reasonable man" test as it applies in the circumstances of cumulative provocation). In this respect, cumulative provocation may be understood as a consideration capable of supporting the actor's plea of diminished responsibility, something which can also be the case as regards provocation. However, while establishing that the actor was suffering from an abnormality of mind is a basic prerequisite for allowing a partial excuse, the definition of mental abnormality has been the subject of a longstanding debate in legal doctrine. [28] The confusion surrounding the notion of mental abnormality in law has to do, among other things, with the difficulty of drawing distinctions between different mental or psychological states and assessing them in terms of responsibility. [29]

In English law, the question of whether the defendant was suffering from an abnormality of mind is in effect left to the discretion of the jury, the judge asking them to consider whether, in their view, the defendant should be regarded as being normal or not. In the leading case of *Byrne*, [30] evidence suggested that not only did the defendant know what he was doing, but that he was also fully cognizant

of the wrongful character of his act. His plea of diminished responsibility was allowed, nonetheless, on the ground that, due to his condition, it was particularly difficult for him to exercise self-control. It is recognized that, under sec. 2 of the Homicide Act 1957, an abnormality of mind could be associated with a variety of reasons, such as retarded development of mind, disease or injury. Whether the actor's mental responsibility was, due to such an abnormality of mind, *substantially* diminished, is a question of fact to be determined by the jury. Such a wide approach to the matter would seem to render diminished responsibility a suitable defence for covering a number of cases involving a situation of cumulative provocation.

4. Pleading Provocation and Diminished Responsibility Together

Setting up a combined defence of provocation and diminished responsibility might be available to the defendant particularly in those cases of cumulative provocation involving a final provocative event. In such cases the actor might also be able to raise either provocation or diminished responsibility alone. The final section of this chapter takes up the issue of pleading provocation and diminished responsibility together and looks into the logic

and rationale of such a partial defence to murder.

According to the Criminal Law Revision Committee:

It is now possible for a defendant to set up a combined defence of provocation and diminished responsibility, the practical effect being that the jury may return a verdict of manslaughter if they take the view that the defendant suffered from an abnormality of mind and was provoked. In practice this may mean that a conviction of murder will be ruled out although the provocation was not such as would have moved a person of normal mentality to kill.

[31]

Nevertheless, the position that a combined defence of provocation and diminished responsibility may be most relevant if there is evidence suggesting that the actor was both provoked and suffering from an abnormality of mind runs up against a main difficulty. As Morris and Blom-Cooper point out, "a verdict of manslaughter on both grounds is surely illogical, since the defence of provocation presupposes a reasonable man driven to the act of killing, whereas unreasonableness is endemic in the defence of diminished responsibility. [32] In English law, a number of cases may be cited suggesting that the apparently conflicting assumptions upon which provocation and diminished responsibility operate have not prevented juries or judges from recognising such a combined defence.

[33] The Court of Criminal Appeal in *Matheson* adopted the following position on this issue:

It may happen that on an indictment for murder the defence may ask for a verdict of manslaughter on the ground of diminished responsibility and also on some other ground such as provocation. If the jury returns a verdict of manslaughter, the judge may and generally should ask them whether their verdict is based on diminished responsibility or on the other ground or on both. [34]

As a defence strategy, pleading provocation and diminished responsibility together is considered to be to the defendant's advantage. The reduction of murder to manslaughter on the basis of such a combined plea rests on the assumption that the defendant suffered from some sort of abnormality of mind *and* was provoked. This would render admissible medical or psychiatric testimony that the jury would not be allowed to consider if the defendant had chosen to raise provocation alone. [35] Indeed, if the latter were the case, the jury would have to assess the defendant's plea by deliberating upon the question of how a reasonable or normal person might have reacted to the provocation offered; it is accepted that answering this question lies within the sphere of the ordinary juror's experience. [36] As Lord Simon explained in *Camplin*:

...whether the defendant exercised reasonable self-control in the totality of the circumstances...would be entirely a matter for consideration by the jury without further evidence. The jury would, as ever, use their collective common sense to determine whether the provocation was sufficient to make a person of reasonable self-control in the totality of the circumstances (including personal characteristics) act as the defendant did. [37]

And as Lawton L.J. pointed out in the Court of Appeal in *Turner*, "Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life." [38] Nevertheless, in the recent case of *Campbell* [39] the court permitted the defence to introduce psychiatric testimony regarding the defendant's state of mind in order to assist the jury in determining the question of provocation. It has been argued, however, that in this case the issue was restricted to whether the particular defendant and not a reasonable or ordinary person may have lost his self-control due to the provocation offered. Nevertheless, in spite of medical evidence that the defendant was suffering from an abnormality of mind, the defence chose not to raise diminished responsibility but to rely solely on provocation. The plea of provocation was rejected and, following a conviction of murder,

the defendant appealed on the ground that, given the medical evidence, the trial judge should have directed the jury as to the issue of diminished responsibility. The appeal was dismissed, however, on the basis that diminished responsibility can only be raised if the defence accepts the relevant burden of proof. By contrast with provocation, in diminished responsibility the burden of pleading as well as the burden of proof lies with the defence. [40] If the defence opts for pleading provocation and diminished responsibility together, it is recognised that it should bear the burden of proof only as to the latter defence. The combined plea of provocation and diminished responsibility entails a further advantage for the defendant as regards the sentence. As G. Williams points out:

Success in the combined defence of provocation and diminished responsibility has an advantage for the defendant in respect of sentence: it may result in a more lenient outcome than a defence of provocation alone; and it is virtually free from the risk of life sentence that attends a defence of diminished responsibility by itself. [41]

It should be noted that, in most cases where provocation and diminished responsibility are raised together the jury may find it difficult to keep the issues separate. This seems true, particularly with regard to some cases of cumulative provocation in

which the elements of provocation, abnormality of mind and loss of control may be viewed as being interrelated or interdependent. According to A. Samuels:

The Home Office division between "abnormal" (diminished responsibility) murders and "normal" (other) murders is legally logical but may be misleading if the public come to believe that the two categories are readily distinguishable. The provoked killer may not qualify under diminished responsibility, but he is often hardly to be described as normal. [42]

One might say that the reason for pleading provocation and diminished responsibility together is not unrelated to the uncertainty besetting the "reasonable man" test in provocation. For the most part, this uncertainty has to do with the difficulty in differentiating between individual peculiarities of the actor that may, in a sense, be incorporated in the "reasonable man" standard and those peculiarities that lie outside the scope of the standard. [43] Thus, pleading a combined defence of provocation and diminished responsibility seems most likely in those cases where it is unclear whether certain individual characteristics will be taken into account in applying the test of provocation. [44] Although raising provocation and diminished responsibility together - as a defence strategy -

may be explained as pertinent to the uncertainty surrounding the objective test in provocation, upholding the actor's plea on both grounds may be difficult to justify. In such cases the acceptance of the actor's plea of loss of control by reason of provocation might be seen as in a sense conditional upon establishing diminished responsibility. In other words, the actor may be entitled to a partial excuse here if it is accepted that he was provoked to lose control precisely because he suffered from an abnormality of mind. In this respect, the claim of loss of control turns primarily on the conditions of diminished responsibility rather than on the "reasonable man" test as it applies to provocation. Although, under the test, the victim's act cannot amount to legal provocation, the actor's losing his self-control and killing may be partially excused in so far as it can be established that the actor was suffering from an abnormality of mind. A more sensible approach to the matter might be to treat these cases solely under the defence of diminished responsibility, regarding provocation merely as a factor triggering off the act of killing.

A verdict allowing provocation and diminished responsibility together might perhaps seem most appropriate where the conditions of both defences are in a way satisfied. Indeed, one might envisage a case of pleading provocation and diminished

responsibility where it is accepted that the actor was both suffering from an abnormality of mind and was sufficiently provoked (i.e. according to the objective test as it applies to normal people). In such a case it seems clear that if the actor had chosen to rely only on provocation his plea would have been successful on this ground alone. The same would have happened, had the actor chosen to plead only diminished responsibility. A verdict of manslaughter on both grounds would here appear most relevant, unless perhaps the actor's loss of control could somehow be connected with either provocation or diminished responsibility exclusively.

So, to summarize, if there is evidence that the actor suffered from an abnormality of mind and was provoked - something most likely to obtain in a case of cumulative provocation in that the cumulative provocation led to an "abnormal" state of mind - it is accepted that murder may be reduced to manslaughter on the basis of a combined defence of provocation and diminished responsibility. Such a plea would allow the jury to consider medical or psychiatric evidence, inadmissible if provocation alone was raised. Further, it is recognised that such a combined plea of provocation and diminished responsibility might be successful on either basis or on both. It has been asserted that one must distinguish between the cases where accepting the

actor's being provoked to lose control in a sense presupposes establishing diminished responsibility, and those where it is unclear which the exact basis of the partial excuse should be. A verdict of manslaughter on both grounds would seem most appropriate with regard to these latter cases.

NOTES

1. G. Gordon, *Criminal Law*, (1978), p.766.
2. Duffy [1949] 1 All E.R. 932, at p.933.
3. See e.g.: Simpson [1957] Crim.L.R. 815; Fandle [1959] Crim.L.R. 584.

Support for the position adopted in *Duffy* can be found in the Court of Appeal decisions in: Brown [1972] 2 All E.R. 1328; Davies [1975] 1 All E.R. 890; R. v. Thornton, rep. in *The Independent*, 30 July 1991. See also: Ibrams and Gregory (1981) 74 Cr. App. Rep.154; Turner [1975] Q.B. 834, [1975] All E.R. 70; Burke [1978] Crim.L.R. 336; Newell [1980] 71 Cr. App. Rep.331; Raven [1982] Crim.L.R. 51.

For the position in Scots Law, see Gordon, *supra* note 1.

4. Cumulative provocation may also be in issue in cases where the actor was subjected to a long course of maltreatment by a third party. See, e.g.: Davies [1975] All E.R. 890.

5. The traditional approach to the issue has been explained by Cairns L.J. in the Court of Appeal case of *Brown* (Decem. 16, 1971, 2254/C/71):

Where there has been provocation there is a great range between a moderate degree and a severe degree of provocation, and there is also a great difference between an act done absolutely on the spur of the moment and one done with some interval between the occurrence of provocation and the act. Accepting here that there was over the previous weeks and especially on that morning a substantial degree of provocation - it was a domestic situation no doubt giving rise to extreme irritation - there is, however, in the view of

this court less excuse for yielding to provocation of that kind [to] the sort of provocation which consists of some sudden and terrible threat being made."

A different position was adopted in: Carvell (1971) July 26, (1971), 702/C/71; Ditta (1970) July 23, (1970), 1941/B/70; Jones and Bell, rep. in *The Guardian*, Oct. 29, (1974).

In *Owen* ([1972] Crim.L.R.324) it was asserted by Roskill L.J. that voluntarily taking the risk of provocation should normally weaken the accused's defence.

6. See e.g.: Bangert, *The Times*, April 28, (1977).

7. *D.P.P. v. Camplin* [1978] 2 All E.R. 168, at p.173 (per Lord Diplock).

8. See: M. Wasik, "Cumulative Provocation and Domestic Killing", *Criminal L.R.* [1982] 29, pp.31-32.

9. As A. Samuels points out:

The trial judge can still withdraw the issue of provocation from the jury if he is satisfied that as a matter of law there is no evidence of loss of self-control by the accused sufficient to lay the foundation of such a defence so as to require the prosecution to dispose of it, but he cannot withdraw the issue from the jury on the ground that there is evidence of loss of self-control but not such as would affect a reasonable man.

"Excusable loss of Self-control in Homicide", 34 *Modern Law Review* (1971), p.163 at p.165.

10. C.L.R.C., 14th Report (1980) para. 84.

11. See e.g.: *McCarthy* [1954] 2 Q.B. 105; *Bullard* [1957] A.C. 635.

12. See Wasik, *supra* note 8, pp.34-35.

13. In Wasik's words:

...in defining the ambit of the defence [of provocation] a balance has to be struck between the reflection of contemporary attitudes of sympathy towards the defendants in such cases [of cumulative provocation] and the duty of self-control imposed upon every citizen by the law.

Supra note 8, p.35.

14. See: Buxton, "The new murder", *Crim.L.R.* [1980], 521.

15. Wasik, supra note 8, p.37.

And see: C.L.R.C., 14th Report (1980), paras 15, 19, 84.

16. See e.g.: Maw and Maw, *The Times*, August 20, November 18,19,20,21,22, Dec.4,15,16 (1980); Wright, *The Times*, October 14, (1975); Ratcliffe, *The Times*, May 13, (1980); Bangert, *The Times*, April 28, (1977).

17. See e.g.: Pulling, *The Times*, April 27, (1977); Fuller, *The Times*, November 19, (1980).

18. With respect to sentencing, the circumstances of cumulative provocation may be considered as either a mitigating or an aggravating factor, although the former seems more likely.

See: Ashworth, "Sentencing in provocation cases" *Crim. L.R.* [1975] 553 at pp. 556-557.

19. See Wasik, supra note 8, pp. 35-36.

20. Mitchell argues, however, that in some cases of cumulative provocation: "Despite the sympathy one might feel for a woman who suffered years of abuse, the fact remains that she has killed a human being.

If self-defence and insanity are allowed to be stretched beyond their legal limits, justifiable homicide in the individual case cannot really be distinguished from revenge".

"Does Wife Abuse Justify Homicide?, 24 *Wayne L.R.*, (1977-78), p.1705. See also: R.C. Cipparone, "The Defense of Battered Women who kill", *Univ. of Pennsylvania L.R.* 135, (1987), p.427.

21. A. Ashworth, "Sentencing in Provocation Cases", *supra* note 18, pp.558-559.

22. As Ashworth points out: "The defence of provocation is for those who are in a broad sense mentally normal. Those suffering from some form of mental abnormality should be brought within the defence of diminished responsibility."

"The Doctrine of Provocation", 35 *Criminal L.J.* (1976), p.292 at p.312.

In *Ward* ([1956] 1 Q.B. 351) the Court of Appeal described the reasonable person as "a person who cannot set up a plea of insanity".

23. G. Williams, *Textbook of Criminal Law*, (1983), p.544.

24. Section 2 of the Homicide Act 1957 provides that:

(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to

the killing.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder, shall be liable instead to be convicted of manslaughter.

(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.

25. G. Williams, *supra* note 23, p.544,

26. H.L.A. Hart, "Prolegomenon to the Principles of Punishment" in *Punishment and Responsibility*, (1968), p.15.

27. See: G.E. Dix, "Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility and the Like", *Journal of Criminal Law, Criminology and Police Science*, (1971), 313; R.F. Sparks, "Diminished Responsibility in Theory and Practice", 27 *Modern L.R.* (1964), 9.

28. See e.g.: S.L. Morse, "Undiminished Confusion in Diminished Capacity", *Journal of Criminal Law & Criminology* 75 (1984), 1; and see: J. Dressler, "Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse", *Journal of Crim. L. & Criminology* 75 (1984).

29. See: S. Kadish, *Blame and Punishment* (1987),

pp. 101-102.

It is argued that crimes of passion can often be attributed to intense anxiety or depression leading into a psychotic state of morbid jealousy. Such feelings might in fact be totally unjustified, founded on completely unreasonable beliefs.

See e.g.: R.N. Mowat, *Morbid Jealousy and Murder*, London (1965); J.A. Gray, *The Psychology of Fear and Stress*, London (1971). See also: W.L. Neustatter, "Psychiatric Aspects of Diminished Responsibility in Murder", *Medico-Legal Journal* 28 (1960), 92.

30. Byrne (1960) 2 Q.B. 396.

31. C.L.R.C., Working Paper on Offences Against the Person, August (1976), para.53.

32. Morris and Blom-Cooper, *A Calendar of Murder* (1964) p.298, n.4. It is admitted, however, that the defences are not necessarily mutually exclusive.

33. See e.g.: McPherson, *The Times*, June 18, (1963); Holford, *The Times*, March 29, 30, (1963); Whyburd (1979) 143 JPN 492.

34. R. v. Matheson [1958] 2 All E.R. 87, at p.90 (per Lord Goddard C.J.).

See also: Solomon and Triumph (1984) 6 Cr.App.R. (S) 120.

35. According to R.D. MacKay:

...where there is some psychiatric evidence which supports the contention that at the time of the killing the accused may have been suffering from an abnormality of mind, then if this evidence also mentions provocation or some similar term, it will be advantageous for the accused to plead both defences. The pleading of provocation alone will almost certainly mean that the psychiatric evidence

will be inadmissible, at least in so far as the "ordinary man" criterion is concerned.

"Pleading Provocation and Diminished Responsibility Together", *Criminal L.R.* [1988], 411 at p.422.

See in this respect: *R. v. Cambell*, (1987) 84 Cr.App.R. 225.

36. See e.g.: *R. v. Smith (Stanley)* [1979] 3 All E.R. 605, 611.

37. *Camplin*, [1978] 2 All E.R. 168, at pp. 182-183.

38. *R. v. Turner* [1975] 1 Q.B. 834, at pp.841-842. In *Smith (Stanley)* (supra note 36), it was held that automatism, as a form of abnormality of mind, would most often require the jury to consider expert medical testimony.

39. *R. v. Cambell* (1987) 84 Cr.App.R. 255, 257.

40. See: P.H. Robinson, "Criminal Law Defences: A Systematic Analysis", 82 *Columbia L.R.* (1982), 199 pp.250-257.

41. G. Williams, supra note 23, pp. 544-545.

42. A. Samuels, supra note 9, p.169 in note.

43. *Camplin* (supra note 37), marks the departure from the narrow interpretation of the objective standard in provocation as adopted in *Bedder* ([1954] 2 All E.R. 801). It is recognised that, in assessing the plea of provocation, the jury should endow the "reasonable man" with those of the defendant's characteristics they consider relevant. In *Newell* ((1980) 71 Cr.App.R. 331), the scope of the objective standard in provocation has been narrowed

down by accepting that: "A characteristic had to have a sufficient degree of permanence to be regarded as part of the individual's character or personality, not something transitory, to modify the concept of the reasonable man, and there had to be some real connection between the nature of the provocation and the particular characteristic of the offender." (1980 Crim.L.R. 576)

The decision in *Raven*, ([1982] Crim.L.R.), seems to diverge from the above position, however. This case involved a 22-year-old man with a mental age of nine. The judge directed the jury to envisage "a reasonable man who has lived the same type of life as the defendant." No provocation directed at the defendant's idiosyncrasies could clearly be established on the facts.

44. In New Zealand, the Court of Appeal in *Taaka* ([1982] N.Z.L.R. 198) adopted the view that the "obsessively compulsive personality" of the accused could be regarded as a characteristic relevant to the issue of provocation and be taken into account by the jury in applying the objective test. In the latter case of *Leilua* it was held that a post-traumatic stress disorder may similarly be regarded as a characteristic to modify the objective standard in provocation. According to Brookbanks, the above cases suggest "a movement away from the traditional jurisprudence on provocation, concerned as it was with sudden passion, immediacy between the provocative act and the response to it, and the actual loss of self-control, to a position which views mental characteristics as a discrete exculpatory factor in defining legal provocation."

"Provocation - Defining the Limits of Characteristics", 10 *Crim.L.J.*, (1986), 411, p.423.

One should note, nevertheless, that New Zealand law does not provide for a separate defence of

diminished responsibility, and this might explain its more liberal approach to the objective standard in provocation. And see: R.D. Mackay, *supra* note 35, pp. 420-421.

CONCLUDING NOTE

Provocation has been a source of controversy in Anglo-American criminal theory. Different arguments have been put forward, varying from the total elimination of provocation as an independent defence - to be considered only as a factor in the mitigation of sentence - to its expansion by creating new categories of crime. This controversy partly issues from the confusion that has long dogged the law of homicide, with which the defence has traditionally been associated. The characteristic function of provocation as a partial defence to murder has to do with subtle distinctions in the category of homicide - distinctions still waiting for clarification. Besides that, however, there are questions peculiar to the nature of provocation that exacerbate the difficulties in making out its rationale as a defence in law. Both legal practitioners and commentators have been confronted with the problem of elucidating the relation of provocation to the standards of criminal liability on the basis of a comprehensive theory.

The starting point of this thesis was the claim that the questions besetting the legal doctrine of provocation might prove more decipherable if examined in the light to the distinction - long overlooked in

Anglo-American law - between justification and excuse. It was argued that, although the classification of provocation as either justification- or excuse-based is still a matter in dispute, considering the distinction offers fruitful grounds for conceptualising the character of the plea and its relation to criminal liability. The elaboration of a more cogent approach to provocation with regard to the theory of justification and excuse has been the governing task of the present work. Moreover, the thesis highlights - on the basis of provocation - the merits of this sort of analysis towards developing a more coherent system of criminal liability.

The analysis began with distinguishing between when provocation is pleaded as a partial defence to murder, aimed at the relegation of the offence category, and when pleaded to reduce the level of punishment following a conviction of a criminal offence other than murder. Although, in a broad sense, the analysis of justification and excuse may apply to both aspects of provocation, the thesis was focused primarily on its function as a partial defence to murder. The enquiry proceeded from the basic assumption that both a provocation and loss of self-control are equally indispensable elements of the provocation defence. It was asserted that the problems in uncovering the rationale of the defence

arise from the fact that the first element relates to justification, whereas the second to excuse. Does the defence operate as a partial excuse by virtue of the actor's lack of self-control or, rather, as a partial justification on the assumption that provocation reduces the objective wrongfulness of the accused's act? This was the central question throughout the thesis. As pointed out, in English law, the 1957 legislation appears to mark a shift towards the partial excuse doctrine. Nevertheless, considering the discrepancies in the case law, one might say that the defence eludes a uniform description as either partial justification or partial excuse.

Without ignoring the implicit role of the justificatory element in the law of provocation, it was argued that the partial justification doctrine lacks sufficient grounds of support. None of the three moral theories of legal justification considered - the forfeiture theory, the rights theory, the lesser evil theory - seems to lend enough backing to this approach to the defence. Indeed, such an approach appears to be inconsistent with primary principles regarding the sanctity and inviolability of human life. It was pointed out, moreover, that treating provocation as a justification-based defence would amount to granting considerations of revenge a place in the system of criminal law. However, such considerations have no place in a rule-governed

system of norms, for revenge is by its very nature unruly and personal.

The formulation of the provocation defence as a concession to human weakness reflects its understanding as a partial excuse. The defence operates as an excuse on the assumption that provocative conduct is capable of raising such a psychological pressure as to render the actor's compliance with the law extraordinarily difficult. Nevertheless, this sort of coercion can support only a claim for extenuation because - by contrast to the coercion required for a total excuse - it is not regarded as irresistible. It was stressed that, although provocation debars culpability for murder, it cannot prevent conviction for the lesser offence, for the act of killing in retaliation still manifests a socially undesirable character trait.

In order to circumscribe the purview of provocation as a partial defence, one has to shed light on the important differentiation between murder and voluntary manslaughter. It was pointed out that the difficulty in distinguishing between these two categories of homicide issues - among other things - from the narrow interpretation of the subjective condition in murder in purely cognitive terms. Indeed, the fact that both murder and voluntary manslaughter are taken to involve an intentional

killing has led some to consider the fixed penalty provided for murder in English law as the only good reason for retaining provocation as an independent defence.

It was argued that the conception of provocation as an independent - or failure-of-proof - defence requires a wider interpretation of the subjective element in murder, including considerations both of cognition and control. On the other hand, speaking of provocation as an offence modification would require one to view murder and voluntary manslaughter as independent offence sub-categories of intentional homicide. It was asserted that the approach to provocation as an offence modification appears best suited to a system which recognises different degrees of murder.

A plea of provocation is contestable both as to whether the victim's conduct amounted to provocation and as to whether the actor lost his self-control as a result. If an act of provocation is not established, the claim of loss of control cannot be accepted - that is, on the basis of the provocation defence. Notwithstanding that the victim's conduct amounted to provocation, the defence would also collapse if evidence suggests that the actor did not lose his self-control as a result. In other words, upholding the defence presupposes demonstrating the

necessary connection between provocation, loss of self-control and the act of retaliation. It was argued that, if the defence is taken as a partial excuse, the question of whether the victim's conduct amounted to provocation relates to establishing a good reason for the actor's loss of self-control. This pertains to the acceptability of the excuse offered and not to the partial justification of the provoker's killing in retaliation. It is the element of loss of control - or impaired volition - upon which the rationale of provocation as an excuse-based defence rests.

Further, it was suggested that, under the excuse theory the "reasonable man" test pertains to answering the question of whether the provocation offered was such as to render the actor partially excusable by reason of loss of control. This would require one to consider what sort of affronts people are expected to resist, or what sort of offensive conduct is deemed likely to lead one to lose control. This issue should be decided by taking into account those characteristics of the actor that bear upon the gravity of the provocation offered. Nonetheless, in selecting those characteristics one is again bound to apply some sort of objective criteria - criteria that may to some extent vary from one community to another. Emphasis was placed on the position that in assessing a plea of provocation one

need not speculate about how exactly a "reasonable person" would respond but, rather, about whether a "reasonable person" would be likely to lose control when faced with the sort of affront the actor was confronted with. If provocation is established, what remains to be considered is whether the actor was in fact not in control of himself at the time of his response. To answer this question, the actor's mode of retaliation might furnish important evidence.

The comparative analysis of the objective standard as it operates in provocation and mistake of fact indicated that, besides the role of the standard in deciding the acceptability of the proposed excuse, the "reasonable man" may also be understood as relevant to testing the actor's claim as a matter of fact. It was suggested that these different aspects of the "reasonable man" - including its aspect as a criterion of justification - should in theory be kept distinct. In practice, nonetheless, when the accused's plea of provocation is rejected on this ground, it might often be difficult to distinguish e.g. between not excusing the actor for losing his self-control and not giving credit to the actor's claim that he in fact lost control.

With regard to both the partial justification and partial excuse theories of provocation the requirement of proportionality cannot refer to the

actor's mode of retaliation. According to the partial justification theory, this requirement suggests that the act of retaliation may be considered as less wrongful only if the actor was subjected to serious enough provocation. As it relates to the excuse theory, on the other hand, the requirement of proportionality implies that, for the loss of self-control to give the actor a partial excuse, the provocation offered should have been sufficiently grave. It was pointed out that, under the excuse theory, the issue of proportionality has also to do with the assumption that the likelihood of losing one's self-control increases according to the seriousness of the provocative act. This consideration may also be important in deciding whether the loss of control by reason of provocation occurred as a matter of fact, as well as in determining the degree of punishment for the lesser offence, if the partial defence is accepted.

It has been asserted, moreover, that provocation due to a mistaken belief should give the actor a partial excuse - on the ground of loss of self-control - provided that the requirements of both mistake and provocation are met. It was pointed out that, if provocation were taken as a partial justification, the accused's defence should be seen to rest on the excuse of mistake rather than on provocation. Nevertheless, in such a case mistake

would seem to operate only as a partial excuse (putative partial justification).

The propinquity of provocation and self-defence is often commented on. Provocation might be the appropriate defence in some cases where the plea of self-defence fails on the ground that the actor exceeded the degree of force necessary to fend off the attack. It was argued that, in so far as the use of excessive force is not regarded as partially justified, those cases may be treated either under provocation or under a partial defence of excessive self-defence. The latter defence, which is in essence a defence of mistake, hinges on the assumption that a mistaken belief as to the degree of defensive force, unreasonable though it may be, may still militate against the malice aforethought required for murder. Given the intentional character of killing in such cases, it seems more logical that this defence should be deemed to reduce murder to voluntary - or intentional - rather than to involuntary manslaughter.

The apparent absence of the loss of control element in certain cases of cumulative provocation renders such cases difficult to subsume under the excuse doctrine. Indeed, it is in these cases where the interpretation of the provocation defence as a partial justification may seem most at home. It was

argued that, instead of shifting the emphasis to the justification theory, those cases of cumulative provocation which do not satisfy the loss of self-control requirement should be treated under another legal excuse - notably, diminished responsibility. It is recognised that if evidence suggests that the accused suffered from an abnormality of mind and was provoked, provocation and diminished responsibility may be pleaded together. Such a combined defence might be accepted on either basis or, possibly, on both. Nonetheless, one should distinguish between cases of accepting provocation by reason of diminished responsibility, and those where it seems unclear which the ground for granting a partial excuse should be.

Having summarised some of the main themes of this thesis, one must point out that its aim was not to cover all the issues concerning the legal doctrine of provocation, nor to provide an exhaustive account of the case law on the matter. Rather, by using provocation as an example, the ultimate ambition of this investigation into the theory of justification and excuse is that it may contribute towards the elaboration of a more comprehensible approach to problems of criminal liability. In this sense, by drawing upon current legal practices, the thesis lays down possible grounds for reconceptualising or, perhaps, redefining these practices.

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