

REASON, PASSION AND SELF-CONTROL: UNDERSTANDING THE MORAL BASIS OF THE PROVOCATION DEFENCE

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[See table of contents](#)

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Article abstract

This paper discusses the nature of provocation and the proper way to interpret provocation as a defence, particularly in relation to murder charges. Its aim is to explain how provocation can be conceptualized as a partial excuse by examining the traditional understanding of the provocation defence as a concession to human frailty. It is argued that the defence operates as an excuse on the assumption that an act of provocation is capable of raising in a person such a degree of psychological pressure, in the form of angry passion, as to deprive her of her ability to act morally voluntarily, i.e. the ability to act according to an all-things-considered moral choice. The paper aims to explain, moreover, why provocation cannot provide a complete excuse. It is argued that, while the provoked agent may not be able to suppress her anger, she is deemed capable of recognizing that there are overriding reasons for not acting on the desire to kill which may arise in her emotional state. Although a successful plea of provocation negates the degree of moral culpability required for murder, it cannot prevent conviction for the lesser offence of manslaughter for a provoked killing still manifests a socially undesirable disposition or trait of character.

REASON, PASSION AND SELF-CONTROL : UNDERSTANDING THE MORAL BASIS OF THE PROVOCATION DEFENCE

par George MOUSOURAKIS*

Cet article présente la nature de la provocation ainsi que la façon d'interpréter celle-ci en tant que moyen de défense en droit criminel et, plus particulièrement, pour les accusations de meurtre. Il vise à expliquer comment la provocation peut être conceptualisée afin de comprendre l'excuse partielle accordée lorsque cette défense est acceptée comme une concession de la fragilité humaine. L'auteur soutient que la défense de provocation agit comme une excuse fondée sur l'hypothèse qu'un acte de provocation est capable de faire accroître la pression psychologique à un degré tel que celle-ci se transforme en colère passionnelle, assez importante pour priver la personne de sa capacité à agir moralement. La provocation ne peut toutefois pas entraîner une excuse complète. Même s'il était impossible de faire diminuer la colère de la personne, celle-ci devrait être en mesure de reconnaître l'excès et de comprendre qu'il y a de bonnes raisons de ne pas agir par le simple désir de tuer quelqu'un. Bien que la défense de provocation nie l'existence de la mens rea, élément essentiel du crime, elle ne peut toutefois pas empêcher la condamnation pour une infraction moindre d'homicide involontaire.

This paper discusses the nature of provocation and the proper way to interpret provocation as a defence, particularly in relation to murder charges. Its aim is to explain how provocation can be conceptualized as a partial excuse by examining the traditional understanding of the provocation defence as a concession to human frailty. It is argued that the defence operates as an excuse on the assumption that an act of provocation is capable of raising in a person such a degree of psychological pressure, in the form of angry passion, as to deprive her of her ability to act morally voluntarily, i.e. the ability to act according to an all-things-considered moral choice. The paper aims to explain, moreover, why provocation cannot provide a complete excuse. It is argued that, while the provoked agent may not be able to suppress her anger, she is deemed capable of recognizing that there are overriding reasons for not acting on the desire to kill which may arise in her emotional state. Although a successful plea of provocation negates the degree of moral culpability required for murder, it cannot prevent conviction for the lesser offence of manslaughter for a provoked killing still manifests a socially undesirable disposition or trait of character.

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TABLE OF CONTENTS

Introduction	217
Conceptualizing Provocation as a Partial Excuse	219
Loss of Self-Control as a Basis for Excusing	220
The Relevance of Character to Culpability in Provocation Cases	227
A General Loss of Control Defence?	229
Concluding Remarks	231

Introduction

In England and other common law jurisdictions provocation operates as a mitigatory or partial defense to murder aimed at the reduction of that offence to voluntary (or intentional) manslaughter¹. For a plea of provocation to succeed the jury must be satisfied that the accused was deprived of her self-control at the time of the killing (the subjective test) and that this was the result of wrongful conduct serious enough to provoke an ordinary or reasonable person (the objective test). If there is no evidence to support a finding of provocation, the defence will fail, whether the accused lost her self-control or not. Moreover, even if the victim's conduct was such as to amount to provocation in law, the defence cannot be relied upon if evidence shows that the accused did not lose self-control as a result. Determining the threshold of legal provocation presupposes a moral judgment about what sort of offensive conduct is capable of arousing in a person such a degree of justified anger or indignation that might

1 . *The English Homicide Act, 1957* (c.11) section 3. ("Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by 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"); Law Commission Consultation Paper No 177, *A New Homicide Act for England and Wales?*, 2005 at 171-176. (The Law Commission recently published a detailed Consultation Paper reviewing the present law and proposing a series of possible options for reform); Law Commission Report No 290, *Partial Defenses to Murder*, 2004, s. 232. ("(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation. (2) A wrongful act or an insult that is of such nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool. (3) For the purposes of this section, the questions (a) whether a particular wrongful act or insult amounted to provocation, and (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being."); *The New Zealand Crimes Act, 1961*, s. 169. (Treatment of provocation in other common law jurisdictions); *The New South Wales Crimes Act, 1900*, s. 23; *Queensland Criminal Code, 1899*, s. 304; *Criminal Code of Western Australia, 1913*, ss. 281 and 245.

defeat her capacity for self-control. Although legal wrongdoings of a significant nature should for the most part provide a sufficient basis for the defense, non-legal, moral wrongdoings may also be considered serious enough to pass the threshold of provocation in law. Over this threshold, provocations may vary from the less serious ones (e.g. verbal provocations) to those involving very serious wrongdoings (e.g. provocations involving physical violence). Provocations involving different forms and degrees of wrongdoing may equally support a partial defence to murder, provided that the requirement of loss of self-control is also satisfied.

The provocation defence is understood to hinge upon two interrelated elements : the wrongful act of provocation and impaired volition or loss of self-control. The first element is taken to be justificatory in character, for it focuses upon a condition that, on the face of it, is capable of affecting the wrongfulness of the actor's conduct quite independently of her state of mind. The second element, by placing the emphasis on the actor's state of mind and her inability to exercise control over her actions, is clearly excusative in nature. Because provocation rests upon both excusative and justificatory considerations, the rationale of the legal defence has been difficult to locate². As Alldridge has remarked :

The defence [of provocation] must be either a partial excuse (in which case the centre of the 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.³

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- 2 . J. L. Austin, "A Plea for Excuses" (1968) 19 *The Philosophy of Action* at 20. ("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 is it rather that, he having done me such injury, I was entitled to retaliate (justification)?").
- 3 . Peter Alldridge, "The Coherence of Defences" (1983) *Criminal Law Review* 665 at 669. ("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"); Joshua Dressler, "Rethinking Heat of Passion : A Defence in Search of a Rationale" (1982) 73

Although the justificatory element may have played a part in the shaping of the legal doctrine of provocation, its role in modern law is diminished. The idea that an act of revenge may be partially justified conflicts with fundamental presuppositions of the criminal law as a system whose very point is shifting the authority and moral basis of actions from the domain of subjective attitudes to general and impersonal norms of conduct⁴. Although for the defence of provocation to succeed it must be established that the accused was sufficiently wronged by her victim, the rationale of the defence in law is more satisfactorily explained in terms of the excuse theory. The real basis of the provocation defence, traditionally regarded as a concession to human frailty, lies in the actor's loss of self-control in circumstances in which any ordinary person might also have lost control⁵. In this respect, the wrongful act of provocation is seen as providing a morally acceptable explanation for the accused's loss of self-control and killing rather than a reason for directly reducing the wrongfulness of her actions.

Conceptualizing Provocation as a Partial Excuse

The description of provocation as a concession to human frailty reflects the conception of the defence as an excuse⁶. This approach to the defence hinges on the notion of impaired volition or loss of self-

Journal of Criminal Law and Criminology 421 at 428; Joshua Dressler, "Provocation : Partial Justification or Partial Excuse?" (1988) 51 Modern Law Review at 467.

- 4 . A. von Hirsch and N. Jareborg, "Provocation and Culpability", in F. Schoeman (ed), Responsibility, Character and the Emotions, (Cambridge : Cambridge University Press, 1987) at 242. ("Although the [provoker] 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.").
- 5 . *Duffy* [1949] 1 All ER 932. ("Circumstances which include 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 and temporary loss of self-control, which is of the essence of provocation").
- 6 . *Holmes v DPP* [1946] AC 588. ("The law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty"); O'Regan, "Indirect Provocation and Misdirected Retaliation" (1968) 319 Criminal Law Review at 320. ("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'."). See also R. Perkins, *Criminal Law* (Brooklyn : Foundation Press, 1957) at 42.

control. Its governing assumption is that provocative conduct, when it is sufficiently serious, is capable of inflaming anger to such a degree as to be likely to lead the provoked person to lose her self-control and retaliate in violence. When the provoked person loses self-control she is unable to weigh up the consequences of her action according to reason. It is not that the provoked person lacks the *capacity* to reason. Her judgment that there has been a wrongdoing is a reasoned judgment, but the reasoning then breaks down so that her actions that stem from that judgment are no longer the product of reason. As Horder explains :

Action stemming from a loss of self-control...are the product of a judgment (of a certain degree of wrongdoing) and a desire following in the wake of the judgment that controls the will without, for the moment, the restraining or guiding influence of reason.⁷

Although losing self-control and killing as a response to provocation is not totally excusable, the actor's degree of moral culpability falls short of that required to convict her of murder. From the point of view of the excuse theory, the gravity of the provocation is relevant to assessing the accused's claim that she was provoked to lose her self-control. There is no question here of whether the wrongful and culpable character of the provocative conduct should render the killing objectively less wrongful or partially justified. It is, rather, the accused's loss of self-control, *as a result of provocation*, that accounts for and justifies the reduction of culpability and, consequently, the reduction of the offence from murder to manslaughter. To gain some insight into the excusative element in provocation, it is necessary to consider what human frailty means and how it relates to the loss of control requirement that, from the viewpoint of the excuse theory, constitutes the true basis of the provocation defence.

Loss of Self-Control as a Basis for Excusing

In provocation it is not required that the actor loses her self-control to the extent that she does not know what she is doing, or what her action is aimed at; but self-control must be lost to such an

7 . Jeremy Horder, *Provocation and Responsibility* (Oxford : Clarendon Press, 1992) at 164.

extent that for the moment her action is being guided by passion rather than by reason. Indeed, it is an important prerequisite for pleading provocation as a partial defence to murder that the accused have acted with the requisite *mens rea* for murder (in England, an intention to kill or to cause grievous bodily harm). If the provoked agent loses her self-control to such an extent as to be unaware of the nature or quality of her act, or unable to exercise control over her bodily movements, then she may be entitled to full acquittal on the basis of a lack of *actus reus* or *mens rea* defence. Other things being equal, if the provoked agent suffers a total loss of self-control, automatism may provide the appropriate basis for a complete defence to the charge of murder⁸. Nevertheless, in those cases of provocation where the actor is totally deprived of her ability to control her conduct, the victim's provocation might perhaps be regarded as a triggering factor of the excusing condition — i.e. automatism — providing the basis of his defence to murder. Thus, although another excuse takes the priority over provocation here, the latter might be granted a role peripheral to or supportive of the defence relied upon⁹.

In the context of excuse theory, the role of loss of control is understood in the light of the important distinction between involuntariness and moral or normative involuntariness. The term involuntariness is used to denote one's total inability to direct one's conduct or to exercise control over one's bodily movements. It might be said that, in such cases, the agent acts only in appearance because the conduct is no longer subject to conscious determination by the agent¹⁰. Normative or moral involuntariness, on the other

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- 8 . T. Archibald, "The Interrelationship Between Provocation and Mens Rea : A Defence of Loss of Self-Control" (1985-86) 28 *Crim. L.Q.* 454 at 454. ("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 the automatic conduct gives rise to the defense of automatism.").
 - 9 . E. Colvin, *Principles of Criminal Law*, 2d ed. (Toronto : Carswell Pub., 1991) at 253. ("Extreme rage may produce a state of dissociation under which conduct is no longer being directed by a reasoning mind and there is therefore no voluntary *actus reus*. Similarly, provocation may induce a state of impaired cognition which negatives *mens rea*.").
 - 10 . J. Hall, *General Principles of Criminal Law*, 2d ed. (New York : Bobbs-Merrill, 1960) at 422. (With regard to conduct whose cause is "entirely outside the person, where his 'self' does not participate in the slightest degree, the legal rules represent the traditional judgment that the defendant has not acted at

hand, pertains to those cases where the agent, although she is able to direct her external conduct (to 'act', in a strict sense), is unable to act as she chooses — or would have chosen — due to external or internal constraints on her freedom to choose (cases of 'overpowered will'). According to Fletcher :

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. Were it not for the external pressure, the actor would not have performed the deed. In Aristotle's words, he 'would not choose any such act in itself'.¹¹

An action may be contrary to choice not only when it does not reflect a choice the actor has already made, but also when it goes against a choice the actor would have made, had she the time or opportunity to deliberate according to the principles which she would normally employ in making moral decisions. For example, a person who would normally not use violence against another, on a particular occasion does so carried away by anger. For such a person resorting to violence is against her moral principles and she would not have acted so by choice had she kept her temper in check and taken time to deliberate about her response.

The distinction between involuntariness and moral or normative involuntariness is allied to that between compulsion and coercion. A person acting under compulsion is unable to exercise physical control over her bodily movements, in other words, is not free to act. A coerced person, by contrast, although she is free to act in a strict sense, is not free to choose the direction of her action¹².

all, i.e. 'act' implies volition."); S. C. Coval and J. S. Smith, *Law and its Presuppositions : Actions, Agents and Rules* (London : Routledge, 1986).

11 . G. Fletcher, *Rethinking Criminal Law* (Boston and Toronto : Little, Brown & Co, 1978) at 803.

12 . D. Hoekema, *Rights and Wrongs* (Toronto : Assoc. Univ. Presses, 1986) at 75; Edwards, "Compulsion, Coercion, and Criminal Responsibility" (1951) 14 *Modern Law Review* at 297. (For an analysis of the distinction between compulsion and coercion) ; H. G. Frankfurt, "Coercion and Moral Responsibility" in *Essays on Freedom of Action* (London : Routledge, 1973) at 63.

Compulsion provides the basis for claims of exculpation contesting authorship-responsibility and hence, indirectly, moral responsibility. Claims of exculpation (or mitigation) stemming from coercion challenge directly the actor's being morally responsible for a wrongful act. From the point of view of the excuse theory, the classification of the various exculpatory claims in law turns on the source and nature of the relevant external or internal impediments precluding the agent's acting in compliance with the law¹³.

Freedom of choice in action, as a requirement of moral and legal responsibility, presupposes, among other things, that the actor is 'master of his mind', or that she is acting in a 'normal' frame of mind. Heat of passion and loss of self-control imply that the contribution of reason to the psychological process towards the formation of the will is precluded or substantially diminished¹⁴. There are two ways in which passion may affect a person's ability to choose freely. In some impetuous acts the urge does not circumvent the conscious self but, in a sense, passes through it. Because of its intensity, however, the urge overrides the actor's ability to exercise rational judgment; it defeats her moral resistance¹⁵. 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. In such cases the agent's moral inhibitions are bypassed rather than overcome. Depending upon the degree to which self-control is lost, the provoked agent's response may be described as an impetuous act of the first type or as a 'short-circuited reaction'. In the latter case, loss of self-control tends to involve a spontaneous, immediate reaction to the provocation received. The desire to inflict punishment on the provoker triggered

13 . H. Gross, *A Theory of Criminal Justice* (New York : Oxford Univ. Press, 1979) at 69.

14 . In those cases where reason succumbs to passion, the will is determined by something external to it — a relation which Kant terms the '*heteronomy of the will*'. In such cases the person's reasons for acting in a certain way pertain only to what he/she desires, independently of his moral beliefs. On the other hand, when the person's will is determined by reason, the will is said to be 'self-ruled', for reason is viewed as something 'internal' to the will. A will that is determined by reason is at one with itself. According to Kant, such a will can override passion and desire.

15 . N. R. F. Maier, "Frustration Theory : Restatement and Extension" (1956) 63 *Psychological Review* 370 at 382. (The author suggests that there are intermediate states between being totally emotional and totally rational, wherein emotion and reason may conflict with each other).

by the judgment of wrongdoing is translated into action immediately, i.e. without going through any process of deliberation. In this case, the agent reacts almost without thinking, like the person who, when another raises her hand to hit her, instinctively ducks her head or raises her hands to protect herself. In the former case, by contrast, the provoked agent appears to be making a choice in anger to inflict a certain kind of punishment on the provoker. The exercise of choice here, however, does not necessarily require us to draw the inference that the provoked agent is in control of her actions, for the choice she makes, distorted by emotion, involves a misjudgment as to what form and degree of retaliation is appropriate. Depending upon the perceived gravity of the provocation, this misjudgment is to some extent excusable because people are fallible and often leap before they look, especially when they are conquered by passion. Both impetuous acts involving deliberation and short-circuited reactions should be distinguished from what is referred to as 'reflex actions'. The latter lack a concrete psychological basis and therefore relate to the conditions of involuntariness rather than to those of moral or normative involuntariness. The 'impetuous acts' and, arguably, the 'short-circuited reactions' are not irrelevant to the attribution of moral and, possibly, legal responsibility for both may be taken to manifest undesirable character traits or dispositions.

Other things being equal, of the two kinds of provoked persons, those who act upon impulse and without deliberation are in general less to blame than those who give way to a desire after going through a process of deliberation. This is an important consideration that the sentencer cannot ignore in determining the appropriate level of punishment for the lesser offence. Moreover, considering the accused's mode of retaliation in relation to the provocation offered may be important in answering the question of whether the accused was provoked to lose her self-control to such a degree as to commit an intentional killing. This approach consorts with the position that any reference to reasonableness or proportionality in the context of the provocation defence can only be relevant to answering the question of whether the provocation was such as to make the accused's giving way to anger and losing her self-control to such a degree as to lead her to commit an intentional killing appear a likely or not unexpected reaction. Admittedly, the more severe the provocation the more the psychological effort the provoked actor needs to make in order to maintain control over her actions. In other words, the greater the provocation the more ground there is for attributing the intensity of the actor's passions and her lack of self-

control to the extraordinary nature of the situation in which she was placed rather than to an extraordinary deficiency in her character.

What do we mean, then, when we say that the provoked agent who acts 'in the heat of the moment' is not entirely free to choose? To answer this question one would need to look more closely at the interrelation between free agency and self-control. It has been asserted that freedom of choice presupposes that what motivates the agent to act in a certain way accords with her all-things-considered evaluations¹⁶. Watson draws a distinction between the agent's 'valuational' and 'motivational' systems. He defines an agent's valuational system as

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.¹⁷

Moreover, Watson defines the motivational system of an agent as that set of considerations which moves the agent to action. From this point of view, an action is held not to be free if the agent's motivational system is not aligned with, or correspond to, her evaluational 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

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- 16 . Aristotle, *Nicomachean Ethics*, Book 7, H. Rackham ed., 1934. (This approach has a very long pedigree, dating at least to Aristotle. According to Aristotle, the self-controlled or continent person feels the pull of temptation or an emotional urge, but resists acting on it as a result of her judgment that such action would not be the best; the incontinent person, by contrast, does not resist); D. Davidson, "How is Weakness of the Will Possible?" in *Essays on Actions and Events* (Oxford : Clarendon Press, 1980) at 21-43. (It should be noted that the judgment on which the incontinent person fails to act does not need to be a moral judgment; it is rather the broad practical judgment that a certain action is best all things considered).
- 17 . G. Watson, "Free Agency" in *Free Will*. (Oxford : Oxford University Press, 1982) at 105.

the capacity to translate his values into action; his actions flow from his evaluational system.¹⁸

Freedom of action as a requirement of responsibility presupposes not only that what motivates a person to act concurs with her evaluations; it presupposes, in addition, that the person's evaluations that move her to action take place in a 'normal' frame of mind. As Mele has noted :

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 and 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.¹⁹

As elaborated previously, provocation may provide the grounds for a partial excuse only if the victim's conduct is considered to be sufficiently wrongful, i.e., capable of raising legitimate anger or indignation²⁰. It is precisely her disapproval of the victim's conduct that motivates the agent to respond. In provocation, the provoked agent does not merely judge that there has been a wrongdoing, but also, to some extent, deliberates on what retaliatory action is required. But, where there is an overreaction, the agent judges that more retaliation is appropriate than it is in fact justified by the seriousness of the provocation. Although the agent's judgment of wrongdoing motivates her 'choice' to take punitive action, the ensuing urge to retaliate in a sense overrides the agent's own evaluational system, or her ability to assess correctly both the provoker's misdeed

18 . *Ibid* at 106.

19 . A. Mele, "Self-control, Action, and Belief" (1985) 2 *American Philosophical Quarterly* 22 at 171.

20 . C. Taylor, "Responsibility for Self" in *Free Will* (Oxford : Oxford University Press, 1982) at 118. ("[n]aturally 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". In provocation the assumption that only justified anger may render the provoked agent partially excusable on the basis of her loss of self-control implies that not only the provoked agent's response to the provocation but also her assessment of the victim's conduct is subject to judgment.)

and her own response to the provocation. Thus, we might say that the provoked agent is not fully free to choose because her capacity for evaluation is undermined by the overwhelming emotional pressure which she is experiencing²¹. In this respect, the provoked agent who overreacts in an outbreak of anger is similar to the victim of coercion who acts morally involuntarily.

The Relevance of Character to Culpability in Provocation Cases

Unlike other defences based upon the idea of moral or normative involuntariness, loss of self-control as a result of provocation falls short of totally excluding moral and legal culpability. Giving way to anger — justified though such anger may be — or allowing one's reasoning ability (and hence her freedom to choose) to be overcome by passion furnishes sufficient grounds for holding the provoked agent partially responsible for her wrongdoing. The provoked agent who kills is still to blame for violating the general norm requiring that people should always hold their anger in check, even when faced with the most severe provocation. The agent remains morally and legally responsible for the lesser crime of manslaughter because, as a 'normal' person, she is assumed capable of resisting her impulse to kill the provoker. The provoked agent's inability to defeat her urge to kill shows that she lacks the power of reason to view her response to provocation in the context of a system of values and an assessed set of circumstances. Because that power of reason is lacking the provoked agent finds it impossible to control her impulse, since the stifling of the impulse cannot be made the objective of a voluntary choice. As long as the provoked person is regarded as a 'normal' person, giving way to anger can only be due to a 'defect of character' manifested by her inability to view the impulsive action in the light of a given system of norms that proscribes the taking of human life. This is precisely what justifies the provoked killer's being held, to some extent, morally and legally responsible for her actions.

21 . R. Brandt, *A Motivational Theory of Excuses in the Criminal Law* (New York: New York UP, 1985) at 183 and 184. ("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 one's target"); M.L. Corrado, *Justification and Excuse in the Criminal Law* (New York & London : Garland Publishing, 1994) at 114; W. Mischel, "From Good Intentions to Willpower" in *The Psychology of Action* (New York : The Guildford Press, 1996).

In provocation the attribution of responsibility for the lesser offence can be explained on the basis of the theory of responsibility that focuses on the relationship between external conduct and human character. This theory postulates that moral praise or blame pertains not directly to acts but, rather, to the character traits. By character trait is understood any socially desirable or undesirable disposition or attitude that an act may be taken to reflect²². Although not all acts manifest character traits in a way that is morally or legally relevant, an actor cannot be held blameworthy or legally culpable unless her harmful conduct reflects a socially undesirable attitude. If it does, the degree of blame and punishment the actor deserves is to be determined by reference to the extent to which her attitude is deemed undesirable; if it does not, blame and punishment would be inappropriate, although certain non-punitive measures preventive of similar conduct in the future might be taken. Notwithstanding that attitudes may be volatile or unstable, the general assumption of this theory is that, other things being equal, a wrongful and unlawful act does manifest an undesirable character trait or attitude. From the point of view of the character theory of responsibility, the role of excuses is to block the normal inference from a wrongful act to an undesirable trait of character. Determining whether a wrongful act reflects a defect in the actor's character requires consideration of the actor's state of mind at the time of her act and of her ability to exercise control over her conduct. In this respect, the admission of loss of self-control in provocation is taken to block the normal inference from the act of killing to the character fault associated with the crime of murder. Nevertheless, the excusing condition here cannot preclude the actor's conviction for the lesser crime of manslaughter, for losing control and killing is still taken to reflect a defect in the actor's character.

From the viewpoint of the character theory of responsibility, one could also explain why losing control and killing in the face of a trivial provocation, or when no provocation has been offered, should not entitle the actor to a partial excuse. One might say that, if the provocation is not regarded as serious enough to raise justified anger to such a degree as to cause an ordinary person to lose her self-

22 . W. Lyons, *Emotion* (Cambridge : Cambridge Univ. Press, 1980) at 194. ("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").

control and kill, the actor's response, on the spur of the moment though it may have been, manifests the same degree of character fault as that normally ascribed to a premeditated killing. The same may be said about those cases in which the actor is deemed responsible for creating a situation wherein a provocative event is highly likely to occur²³. As Dressler has pointed out :

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.²⁴

If sufficient provocation cannot be shown or where the actor is deemed responsible for creating the conditions of provocation, the fact that the actor killed after she lost her self-control cannot on its own entitle her to an excuse on the grounds of the provocation defence. One might argue, however, that if a general loss of control defence was recognized, establishing provocation would not be necessary in order to reduce the actor's culpability for homicide. Nevertheless, where the actor's loss of self-control cannot be attributed to provocation, such a general loss of control defense may hold good only in so far as another acceptable reason for losing control can be brought forward.

A General Loss of Control Defence?

Let us now consider a little further the idea that an accused might perhaps be able to rely on a general loss of control defense in

23 . One should note that, in English law, provocation may be accepted as a defence even though it was self-induced, provided that the objective and subjective requirements of the defense are met. The fact that the provocation was self-induced, however, may be relevant as an aggravating factor in determining the appropriate sentence imposed for the lesser offence.

24 . Joshua Dressler, "Provocation : Partial Justification or Partial Excuse?" (1988) 51 *Modern Law Review* at 475.

some cases where the test of provocation cannot be met. As was noted before, in such cases the accused's plea for extenuation should not be accepted unless the accused offers a good reason for her losing her self-control in the circumstances. We might say that for an excuse to be allowed the accused's claim of impaired volition must be supported by evidence of a particular condition that is put forward as its triggering factor or 'cause'. Although a number of such conditions have been singled out as providing the grounds for formulating general defence categories, a claim of impaired volition might perhaps be brought forward which may be difficult to subsume under one of the existing categories. In this respect, a general loss of control or impaired volition defence would serve to accommodate claims of excuse based on conditions lying outside the scope of the existing excuse-based legal defenses. An excuse-based defense of this kind would be open-ended, in the sense that, although it would rest upon the requirement of impaired volition, no specific condition or triggering factor would be laid down as the cause of the actor's impairment. It would rest upon the accused to bring forward evidence of an acceptable condition, or set of conditions, accounting for her (partial or total) lack of control over her conduct. Such a general impaired volition defence may be introduced either to complement or even to replace (i.e. as encompassing) an existing defense category.

For example, the American Model Penal Code provided the reduction of homicide from murder to manslaughter in those cases where the accused acted "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse". It is added that "[t]he reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be"²⁵. Under this provision there are no special limitations as to what sort of circumstances may give rise to such an excuse-based defence. It is upon the jury to decide whether the accused in fact acted under the influence of extreme mental or emotional disturbance, and it is upon them to determine whether the disturbance was one for which there is reasonable explanation or excuse. An excuse-based defense similar to the MPC's 'extreme emotional disturbance' defence may be relied upon to deal, for example, with some cases of cumulative provocation lying on the borderline between provocation and diminished responsibility where neither provocation nor diminished

25 . AMERICAN LAW INSTITUTE, Model Penal Code and Commentaries (Official Draft and Revised Comments) (Philadelphia, 1980) art. 210.3(1)(b).

responsibility seem capable of providing the basis of the accused's plea for a partial excuse. In these cases, the lapse of time between the last provocative incident and the accused's response, or the admission of forethought and deliberation, would appear to militate against the 'hot anger' requirement of provocation. On the other hand, the assumption that the accused is a 'normal' person, or the relatively uncertain or temporary nature of his psychological impediment, may render the defence of diminished responsibility (available in England) difficult to accept²⁶. Here, the accused might nevertheless be able to rely on a defense of impaired volition, on the grounds of extreme mental or emotional disturbance, by drawing attention to the psychological effect that continued abuse or violence has had on her and the ensuing difficulties in checking, through rational judgment, the disruptive force of the ensuing emotions.

Concluding Remarks

The defence of provocation operates as an excuse on the assumption that provocative conduct is capable of raising in an ordinary person such a degree of psychological pressure, in the form of angry passion, as to deprive her of her ability to exercise rational control over her actions. Excusing those who succumb to anger in the face of grave provocation and lose control of their actions

26 . *The English Homicide Act, 1957* (c.11) section 2. ("Where a person kills or is 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 arrest or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his actions and omissions in doing or being party to the killing."); *R v Byrne* [1960] 2 QB 396. (Diminished responsibility is classified as an excusatory defence, as it recognizes that, although an illegal act was committed, the accused's moral culpability is reduced due to her mental instability. Canada does not have a diminished responsibility defence similar to that provided for by s. 2 of the English Homicide Act that operates to reduce murder to manslaughter on the basis of an abnormality of mind substantially impairing the accused's responsibility for the offence. There are some decisions, however, that appear to have recognized mental impairment less than that required under the s. 16 mental disorder defence. Such an impairment was held to be relevant to determining whether the accused actually formed the intent for murder.); *Swain* [1991] 1 SCR 933, 987; *Jacquard* [1997] 1 SCR 314, 333. (There also appears to be growing recognition of the combined use of other failed defences (such as provocation, self-defence and intoxication) where the defendant may not be able to rely on any particular defence, but the cumulative effect of the defences is sufficient to raise a doubt as to the existence of the mental state required for the offence.).

constitutes a concession to the 'failings' of human nature and becomes possible because these failings are seen as being common to all people. From this point of view the emphasis is on the element of loss of self-control as a factor reducing the actor's moral responsibility for her actions. In so far as the actor's anger at the author of the provocation is morally justified, an intentional killing committed in the 'heat of passion' does not reflect the moral disposition or trait of character normally associated with murder. Nevertheless, this sort of pressure can only support a claim of extenuation, not exculpation, for the provoked actor has failed to live up to community standards which demand us to exercise self-control even under pressure.

Impaired volition does not mean that the provoked agent must have lost his self-control in an absolute sense, for loss of self-control is a matter of degree and, as such, it does not always preclude some form of deliberation or choice. What must be precluded or, at any rate, seriously affected, however, if provocation is to provide a partial excuse, is the actor's capacity of assessing the moral significance of her actions and of bringing her actions into line with her all-things-considered moral choices. If a case does not meet the requirements of the provocation defense, considering the wrong which the accused may have suffered at her victim's hands and the effect this may have had on the accused's state of mind may be relevant to establishing another excusing condition, such a diminished responsibility or extreme emotional disturbance, as the true basis of the accused's defence to a murder charge.