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PROVOCATION: PROBLEM OF THE MORALLY INNOCENT VICTIM

Submitted for the LLB (Honours) Degree at
Victoria University of Wellington

1 September 1999

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Recently it has been stated that the "provocation doctrine is odd and in a state of chaos."[1] This comment represents the views of many academics at this time who remain frustrated with the doctrine's many contradictions and uncertain rationale. Much of this uncertainty arises over whether the defence is to be properly categorised as a justification or as an excuse. This essay will therefore begin by examining what the provocation defence would look like under either of these two theoretical heads of liability. By exploring the history of the doctrine, it will then be emphasised that while the doctrine initially resembled aspects of justification, recent case law has revealed a move primarily to the basis of excuse. The result of this move has meant a widening of the defence's availability to cases in which the victim is morally innocent of his or her provocative act. This move has however revealed various inconsistencies with the traditional common-law requirements of the defence and with the current statutory provisions. To cure this, what is needed is a defence which partially excuses defendants and reflects the true reasons for why it does so. Various types of reform are thus discussed.

I INTRODUCTION

Provocation is a partial defence to murder. It will therefore prevent a conviction for murder even when all the physical and mental elements of the murder offence have been committed. This is on the basis that other independent factors have operated so as to reduce the actor's blameworthiness. Hence in all cases, Provocation recognises the presence of an unlawful killing and malice aforethought. Yet it's essential claim is that the killing "has been provoked by words or conduct which are sufficient to deprive the ordinary person of self-control, and indeed do deprive the offender of self control, so that the offender has acted under this influence."[2] In these circumstances, the defendant is held to be not as culpable as the more deliberative, cold-blooded murderer.

However, because the defence is partial, the defendant's liability is not totally absolved. Society will still look to punish acts committed in these circumstances and so a successful

[1] Matthew Goode "The Abolition of Provocation" in Stanley Yeo (ed.) *Partial Excuses to Murder* (The Federation Press, Sydney, 1992) 37, 46.

[2] above n 1, 38.

defence will only mean that the offence is reduced from murder to manslaughter. The reason for this, and indeed the reason provocation is a defence only to murder, is that the defence originated from a time in which the offence was punished by the death penalty.[3] This penalty was deemed too severe for provoked killings and thus an express defence emerged. Today, the death penalty no longer exists, yet there is still a need to mitigate the mandatory life sentence and thus distinguish hot-blooded killers from those in murder in cold blood.

The current defence of provocation in New Zealand is contained in section 169 of the Crimes Act 1961.[4] This provides that murder may be reduced to manslaughter if the killing was done under provocation, and that:

Anything done or said may be provocation if –

(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and

(b) It did in fact deprive the offender of the power of self control and thereby induced him to commit the act of homicide.[5]

Thus the three major elements of the defence are firstly, that the offender does lose self-control; secondly, that there have been provocative behaviour; and thirdly, that this loss of control be enough to deprive an ordinary person with the accused's individualising characteristics, of the power of self-control. The question to ask is why do these elements permit the partial excusing of killers? What is the nature of Provocation that makes it a basis for lowering a defendant's culpability for murder? A good way of answering this question is to use the criminal law theory of 'justifications' and 'excuses'.

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[3] Graeme Cross ""God is a righteous judge, strong and patient; and God is provoked every day". A Brief History of the Doctrine of Provocation in England" (1991) 13 SydLR 570, 601.

[4] Crimes Act 1961, s 169.

[5] Crimes Act 1961, s 169(2).

II MATTERS OF JUSTIFICATION AND EXCUSE

These phrases serve as theoretical rationales in the criminal law. Classifying a defence as either 'justification' or 'excuse' is useful for working out the scope of a defence, its proper elements, and the conditions imposed on its availability.[6] They can thus be helpful in explaining the basis of the Provocation defence and way in which it should operate. Firstly though, these rationales must be explained.

'Justifications' are those defences which challenge the wrongfulness of an accused's normally unlawful act. They essentially say "I am responsible for what was done but should not be punished because what I did, although invading an interest of another, was done in circumstances which gave me a legal right to do it."[7] These circumstances which create a legal right will only arise in situations where the occurrence of the unlawful act has achieved some greater social good, or avoided some larger social harm. [8] Inherently then, unlawful acts which fulfil some greater social utility should not be punished because they are rightful, not wrongful, and any penalty is plainly incompatible with the social approval which should be bestowed on the actor.[9] Typical examples of this form of defence would be self-defence and law-enforcement immunities.

Excuses, on the other hand, are those defences which focus on the actor. Like justifications, they recognise that a normally unlawful act has been committed, but unlike justifications, they maintain that in the circumstances the actor is someone whom it is not appropriate to punish.[10] Often this is because some factor has operated which defeats the normal inference that the actor is responsible for his or her unlawful act.[11] A typical example of this form of defence is insanity. The presence of a mental disease will defeat the idea that the actor is responsible for his or her conduct. Punishment in this situation is simply fruitless.

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[6] G Fletcher *Rethinking Criminal Law* (Little, Brown & Company Ltd, Toronto, 1978) 810-813.
[7] P Alldridge "The Coherence of Defences" [1983] Crim.L.R. 665.
[8] Paul Robinson *Criminal Law Defenses Vol. 1* (West Publishing Company, Minnesota, 1984) 83.
[9] *Perka* (1984) 14 CCC (3d) 386, 396 (SCC) per Dickson J.
[10] *Perka* above n 9, 397.
[11] Alldridge above n 7, 665.

For similar reasons, it can be seen why some unlawful acts committed under threat of harm are defended. For example, when a person has stolen food under threat of death, that person is not punished with the offence of theft. This is because excuses often operate as 'concessions to human weakness' and defend actors who commit unlawful acts in circumstances where any ordinary person could have done the same.[12] To punish in these circumstances merely reduces the law's credibility by pitching legal standards above what can be expected of normal human behaviour.[13]

Thus it can be seen that justification and excuse provide wholly different bases for defending people's unlawful actions. The basic difference between the two being that justifications claim the accused was a responsible actor yet the act was rightful, while under excuses, despite the act being wrongful the accused was not a responsible actor.[14] This distinction is important for several reasons. Firstly, if it is used to effectively separate and classify the appropriate criminal law defences under their headings, then people can be clearly appraised of the reasons for which their unlawful actions are exculpated. Essentially, this then helps determine the course of future behaviour.[15] If people know that a prohibited act may be justified in its achievement of some greater social utility, then they will properly act in contravention of the law. Excuses however should not allow people to decide whether their normally illegal act may be acceptable in a particular situation.[16] The act is still wrongful and should therefore be avoided, yet people can be later reassured that the law will show compassion in deciding it is inappropriate to condemn this actor in the special circumstances.

The second reason for insisting on such a distinction is one of consistency. [17] By categorising a defence as either justification or excuse, one should be able to determine the relevant factors which are required to be present in the raising of a defence under that

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[12] N Cameron "Defences and the Crimes Bill" in Cameron & France (eds.) *Essays on Criminal Law in New Zealand - Towards Reform?* VUWLR Monograph 3, (VUW Press, 1990) 57, 59.
[13] S Yeo "Power of Self-Control in Provocation" (1992) 14 SydLR 3, 5.
[14] Alldridge above n 7, 666.
[15] E Colvin "Exculpatory Defences in Criminal Law" (1990) 10 Oxford Jnl Legal Studies 381, 385.
[16] Colvin above n 15, 385.

rationale. For example, justification defences seek to show that in certain circumstances, an illegal act is rightful. A defence following this rationale should therefore require these special circumstances to actually exist, or at least that the accused have a reasonable belief that they exist.[18] If the act is committed in order to further some social utility, then it is important that this is seen to be done. In theory, under an excuse basis this actual existence is irrelevant, as the true concern of such a defence is that the accused is acting in an intolerable situation.

Additionally, any justification defence would have to require that the defendant's response to the special circumstances be reasonable. If the accused's response is unreasonable, then it cannot be said to serve as a social utility and thus a defence must be denied. Tied to this then is the need for proportionality in that response. If the accused's act creates more harm than that which is avoided, then once again, the concept of satisfying a social utility is not fulfilled.

Excuses on the other hand are not engrossed with the concept of an avoided harm and so a failure to satisfy the proportionality and reasonableness requirements there should not rule out a defence. The relevant consideration is simply that the defendant has been forced to act as he or she has.

However, both concepts might be pertinent as evidentiary standards. If the defendant's response to the intolerable circumstances is highly unreasonable and the harm caused highly disproportionate, then doubts are forced over whether the defendant's acts were in fact caused by those circumstances or whether they are in fact the result of some other influencing stimulus. This is consistent with the idea that although excuse defences may operate as concessions to human frailty, they do not protect the frail human. The law has an important function in setting moral standards and so it requires actors to behave rationally, even in the face of intolerable circumstances.[19] Evidence of unreasonableness

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[17] K Greenawalt "The Perplexing Borders of Justification and Excuse" (1984) 84 Colum L Rev 1896, 1900.
[18] Cameron above n 12, 64.
[19] Cameron above n 12, 63.

might thus show that the actor gave in to the circumstances too easily and a defence will be denied.

Where appropriate then, it is highly desirable for criminal law defences to adhere to this theoretical distinction. While clarity may thus be obtained, reform will also be effectively guided and encouraged.[20] If a defence is seen to contain substantive requirements which are inconsistent with its rationale, then these may be abolished in favour of more relevant considerations which are more in line with the defence's theoretical basis. This is important when one comes to consider the problematic defence of provocation.

Provocation

It is therefore worth investigating just what the provocation defence might look like if it was based on either of the two rationales. In particular, how one would then treat the central elements of the loss of self-control and the provocative conduct. Before doing so, it must be noted that in talking of Provocation, the terms 'partial' justification and 'partial' excuse must be used. This is because one is not talking about a total exculpatory defence and thus the rationales can only be applied in part and not with the full impact that might be seen in other defences.

For Provocation as a partial justification then, it would be important for the victim to have actually committed the provoking behaviour. This would meet the requirement under justifications that the special circumstances must actually exist. Thus, it would not be sufficient for the defendant to have killed one person on provocation from another.

Secondly, this provocative conduct must be such as to make the ordinary person lose self-control. In this way the defendant's response is reasonable. In assessing this, it will therefore be important that proportionality is seen in the defendant's response. If the mode of resentment does not bear a reasonable relationship to the provocation received, then the accused's act will not be justified.

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[20] Colvin above n 15, 385.

If on the other hand the defence is based on excuse, the defence will cover a much wider range of situations. None of the tight restrictions under justification theory will apply. It will only be necessary that the defendant show that he or she lost self-control to what he or she honestly believed to be offensive conduct. If this is done then the actor cannot be held responsible for his or her act and a partial defence should be afforded them.

This will not mean however that an accused will be defended if he or she loses self-control to the slightest of offensive conduct. Excuses still require actors to behave rationally even in the face of intolerable circumstances.[21] Thus if the loss of self control is a wildly unreasonable response to minor provocative conduct, then the defence may well be denied on the grounds that the offensive conduct was not seen to cause that loss of self-control. Rather, the implication will be that the defendant's response was due more to a wickedness of mind. Similarly, if the defendant's retaliation is so greatly disproportionate to the provocation received, then the same doubts over causation are cast. The difference from the justification defence is that these requirements serve only as evidential factors and not as something which should rule out the defence altogether.

The question that now must be posed is; which of these requirements has the doctrine itself regarded as relevant for its application? Which rationale does the provocation defence most resemble when determining an accused's liability? In general, the history of the defence has at no time afforded a pure resemblance of either the rationale. A gradual shift from one rationale to the other can however be seen in the doctrine's journey from early common-law days to its current application in the courts.

III HISTORY OF THE DOCTRINE

Provocation as a defence to murder had early beginnings. From as far back as the seventeenth century, the doctrine was used primarily as evidence for negating the

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[21] Cameron above n 12, 63.

implication of malice in murder.[22] This showed that "the killing lay not in some secret hatred or design in the breast of the slayer but rather in provocation given by the deceased which inflamed the slayer's passions."[23] The test was thus subjective, assessing whether the accused had in fact lost self-control so as to eliminate the mental element.[24]

The situations in which these provoked killings could negate the presumption were laid out in *Mawgridge*[25]. Here, Lord Holt stated that: (a) a striking of the accused, (b) angry words followed by assault, (c) the sight of a friend or relative being beaten, (d) the sight of a man being unlawfully deprived of his liberty, and (e) the sight of a man in adultery with the accused's wife, were situations which could constitute provocation. Other matters were expressly excluded from consideration. Thus words alone, trespass to property and misconduct by a child or servant was conduct insufficient to warrant provocation.[26]

A closer look at these inclusive and exclusive categories however shows they contain elements consistent only with justification-based theory. For example, in the inclusive categories, it can be observed that the provocative behaviour generally involves an actual assault or physical threat. It has been argued that this showed the willingness of the provoker to fight.[27] In these situations, it could thus be said that the defendant was to some extent justified in making a punitive return against someone who intentionally caused him serious offence. [28]

A second general observation of the inclusive categories is that the provoker's behaviour involves the *unlawful* breach of a legally protected right.[29] For example, adultery, regarded as a serious criminal offence in the seventeenth century, is listed as the fifth category for possible provocation. However, it may be noticed that an act of

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[22] Garth Stanish "Whither Provocation?" (1993) 7(2) Auck U LR 381, 382.
[23] Andrew Ashworth "The Doctrine of Provocation" [1976] 35(2) CLJ 292.
[24] Stanish above n 22, 383.
[25] *Mawgridge* (1707) Kel. 119 per Holt CJ in Stanish above n 22, 383.
[26] *Mawgridge* above n 25, 130.
[27] Ashworth above n 23, 293.
[28] Ashworth above n 23, 307.
[29] Alldridge above n 7, 669.

unfaithfulness by one's lover is not included. This is because although appearing to be a similarly offensive act, it could not constitute provocation because it was not unlawful.[30] Hence, only in situations where the victim behaved illegally could he or she be said to have forfeited their right to full protection under the law.[31] It would appear then that consistent with justification-based theory, society's interest in protecting people from fatal conduct will be less intense when the victim's own illegal conduct has contributed to the act of violence. The essential question, as Lord Holt's categories seem to suggest, is "in what way has the victim 'asked for it'?"[32]

The excluded categories, on the other hand, reflect matters which were insufficient or 'too trivial' to arouse passions. In these cases it would be simply unacceptable for someone to lose their self-control. As Finbarr McAuley states, this principle of triviality implies a theory of partial justification.[33]

As the years passed however, the whole idea of negativing the implication of malice was soon abandoned. It simply failed to answer the criticisms of why the accused was not fully acquitted nor why in most cases there appeared to be a clear intention to kill.[34] Yet to take the step of converting previously justified behaviour into that warranting capital punishment was too dramatic. Instead, Provocation became a partial defence to murder once it had been proved beyond reasonable doubt that the accused had killed another with the sufficient mental state for murder.[35]

Similarly, the idea of having acceptable categories of provocation also fell into disfavour. These categories were instead replaced by the requirement that the provocation be "something which might naturally cause an ordinary and reasonable-minded person to

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[30] Alldridge above n 7, 669.
[31] Jacob Dressler "Provocation: Partial Justification or Partial Excuse?" (1988) 51(4) MLR 467, 477.
[32] J Horder "The Problem of Provocative Children" [1987] Crim.L.R. 655, 657.
[33] Finbarr McAuley "Provocation: Partial Justification not Partial Excuse" in S Yeo (ed.) *Partial Excuses to Murder* (The Federation Press, Sydney, 1992) 19, 26.
[34] Goode above n 1, 40.
[35] Goode above n 1, 40.

lose his self-control."[36] Thus an objective test, initially used to measure the truth of the defendant's claim for loss of control, was crystallised into a rule of law.[37]

This reasonableness requirement was codified in New Zealand's first statutory form of the provocation defence. Section 165 of the Criminal Code 1893 provided that murder in the heat of passion may be reduced to manslaughter if that passion was caused by a "wrongful act or insult of such a nature as to be sufficient to deprive the ordinary person of the power of self-control". This explicit element of section 165 continued to thus support the concept of Provocation as a partial justification.

Back at common law, the case of *Simpson*[38] reinforced the idea that the defence was dependent on the victim forfeiting his rights to full protection under the law. Here, a young husband returned home to find his wife admitting to numerous infidelities and to abandoning their handicapped child. Completely distraught, the husband chose to end his child's suffering. In convicting the husband of murder, the court stated that while a defence may have been available if it had been the wife who was killed, there was none when the victim was the child. Thus, in accordance with justification theory, it was important that resentment toward provocative conduct be directed at the provoker.

Also consistent with this, the requirement of proportionality expressly became part of the legal test. In *Mancini,* Viscount Simon expressed that the inquiry was whether the provocation was such as to lead the reasonable man to lose self-control, and in applying this test, the court must take into account the mode of resentment with which the homicide was effected.[39] If this mode did not bear a reasonable relationship to the provocation then the inference could not be drawn that a reasonable man would have done likewise.

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[36] *R v Welsh* (1869) 11 Cox CC 336 in Stanish above n 22, 383.
[37] Stanish above n 22, 383.
[38] *R v Simpson* (1915) 11 Cr App R 218 in Cross above n 3, 585.
[39] *Mancini v Director of Public Prosecutions* [1942] AC 1, 9 (HL). [*Mancini*]

All in all, it could thus be observed that the provocation defence possessed much which was consistent only with a justification-based defence. A consequence of this however was that the defence was strict in its application and hence might be refused to deserving defendant's whose case did not meet the objective criteria. This problem was illustrated in *Bedder*.[40]

Here, the sexually impotent defendant was mocked by a prostitute whom he had attempted to have intercourse with. The prostitute then assaulted the defendant, who responded by stabbing her to death. In assessing the reaction of a reasonable man, counsel for the defendant stated that the reasonable man must be imbued with the defendant's physical peculiarity – his impotence. Lord Simonds disagreed. He stated that if the reasonable man were imbued with the physical peculiarities of the defendant, then it "makes nonsense" of the reasonable man test.[41] The defence of provocation was thus denied.

The Move to a More Excuse-Based Defence

The problem was apparent. Defendant's who had been severely offended and so lost their self-control were not allowed a defence simply because the reasonable man, absent of the insulted peculiarity, would not have reacted to the same offensive actions. The legislature saw this as an undesirable outcome. They therefore enacted section 3 of the Homicide Act 1957 which made the jury the sole arbiters in determining how the reasonable person would respond.[42] New Zealand went one step further. Its legislature enacted section 169 of the Crimes Act 1961 which required the ordinary person to possess the individualising characteristics of the accused. [43] The result was a 'hybrid' person containing a mixture of objective and subjective elements.

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[40] *Bedder v Director of Public Prosecutions* [1954] 2 All ER 801 (HL). [*Bedder*]
[41] *Bedder* above n 40, 803 per Lord Simonds LC.
[42] Homicide Act 1957, s 3.
[43] above n 5.

The first case to apply this test was *R v McGregor*.[44] Here, although there was no evidence of provocation and thus a decision on the trial court's direction unnecessary, the Court of Appeal nonetheless provided guidance for the lower courts in interpreting and applying section 169. North J talked of section 169(2) as containing both a subjective and objective test, and thus involved the "fusion of…two discordant notions."[45] To prevent then the objective 'ordinary person' test from being wholly extinguished, he stated that the possible subjective characteristics of a defendant should be limited. The characteristic therefore had to have a "sufficient degree of permanence" to warrant inclusion in the defendant's personality.[46] However they could be mental or physical qualities and could also involve other attributes such as colour, race or creed. Importantly though, these had to be of "sufficient significance" to make the defendant different from the ordinary person.[47] A further limitation was that there had to be a real connection between the provocation and the characteristic to warrant departure from the strict ordinary person test.

Thus although in a limited form, the provocation defence was beginning to consider individualising aspects of the accused. These added considerations are consistent with excuse-based forms of thinking. The more idiosyncrasies of the accused that are considered, the more society might be able to understand the unjustified act of rage.[48]

The English courts waited several years before clearly affirming once and for all a test which appreciated a defendant's individualising characteristics. In *Camplin,* a fifteen-year-old boy was sexually assaulted by an older male and then laughed at.[49] The boy then lost control and split the deceased's skull with a chapati pan. On the strict reasonable person test, the trial court held that these were not the actions of an ordinary man to such provocation. Lord Diplock in the House of Lords however held that the test was whether a reasonable person of the accused's age and sex would have lost control to such

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[44] *R v McGregor* [1962] NZLR 1069 (CA).
[45] *R v McGregor* above n 44, 1081 per North J.
[46] *R v McGregor* above n 44, 1081 per North J.
[47] *R v McGregor* above n 44, 1081 per North J.
[48] Dressler above n 31, 475.
[49] *Director of Public Prosecutions v Camplin* [1978] AC 705 (HL) [*Camplin*]

provocation.[50] Hence the characteristics of the accused went to making the provocative conduct seem worse than it would be for the ordinary person.

Back in New Zealand, the requirements laid out in *McGregor* were being met with some difficulty. In *R v Taaka* the defendant awoke after a night's drinking to find his cousin in bed with his wife.[51] Suspecting his cousin had raped his wife, the deceased was deeply angered. A fortnight later, when getting into a fight with his cousin, the defendant drove home, got his gun and returned to shoot his provoker. Counsel for the defendant claimed that he was suffering from an obsessive-compulsive disorder such that he would brood and feel resentment for much longer than the ordinary person. This was accepted by the court as a characteristic, thus disregarding the *McGregor* restriction that the characteristic be directly linked to the provocation.[52]

Doubts on the *McGregor* direction were firmly addressed in *McCarthy*.[53] The court here made it clear that there need be no link between the characteristic and the provocation.[54] In light of mental characteristics which seemed to affect all aspects of the defendant's personality, as in *Taaka*, this requirement just caused problems. Similarly, the test now came in line with *Camplin* in that the characteristics made the provocation seem worse rather than lower the standard of self-control from that of the reasonable person.

Thus following *McCarthy*, the possible characteristics have been widely expanded. This has represented a growing trend to individualise the defence and thus make it more in line with excuse theory of criminal law. Less and less is the question whether the victim asked for it through their wrongful act, but more and more whether the defendant has lost self-control and so should not be fully blamed for his actions. [55] The idea being that the actor should suffer less punishment for his or her impulsive act than others who commit more

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[50] *Camplin* above n 49, 717 per Lord Diplock
[51] *R v Taaka* [1982] 2 NZLR 198 (CA).
[52] *R v Taaka* above n 51, 201.
[53] *R v McCarthy* [1992] 2 NZLR 550 (CA).
[54] *R v McCarthy* above n 53, 558 per Cooke P.
[55] Ashworth above n 23, 314.

deliberate offences. No more can this be seen than in the recent trend of case-law which involves victims who are morally irresponsible for their offensive act.

IV THE MORALLY INNOCENT VICTIM

R v Campbell[56]

In this case, the defendant had been invited into the deceased's house for a cup of coffee. Whilst having the coffee, the deceased touched the defendant's thigh and smiled at him. At that point the defendant experienced a flashback to his sexually abused past where his abuser had done the same thing. He lost control, hitting the deceased with a poker, punching him and then striking him with an axe. On the following charge of murder, a plea of provocation was allowed. The jury found that a reasonable person with the defendant's history of abuse and experience of the sudden flashback could have done the same in identical circumstances.

The important point for this discussion is the victim's conduct. If merely placing a hand on someone's knee can constitute provocation, then the defence has clearly shifted away from its historical roots. In no way is this action unlawful or conduct in which the victim was inciting violence such that he 'asked for it'. Indeed, it shows that "the victim may not comprehend their actions at all".[57] The emphasis now is clearly not on the gravity of the provocative conduct but on the accused's absence of self-control. Thus the shift away from a justification basis and towards the excuse rationale is ever more apparent.

The same observation is made in recent cases involving mentally handicapped and child victims. The point is more obvious though in that not only do these victims hold no moral responsibility for their actions, but they are in fact 'incapable' of doing so. Children, for example, by nature "lack the ability to evaluate the impact of their own conduct."[58]

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[56] *R v Campbell* [1997] 1 NZLR 16 (CA).
[57] C. Clarkson & H.Keating *Criminal Law: Text and Materials* (3 ed, Sweet & Maxwell, London, 1994) 648.
[58] L Kronman "Moral Reasoning" (1983) 92 Yale LJ 763, 789.

Indeed, the younger a child is, the more it lacks moral imagination and the ability to assess the moral significance of the things it does.[59] Thus the only basis for granting a defence in these cases is on the idea that since the defendant has lost self-control, the law should show compassion as the defendant's actions are not truly his or her own. The situation is illustrated firstly in *Doughty*.[60]

R v Doughty

Here, a young father allegedly lost control when overborne by the persistent crying of his 17-day-old son. He therefore tried covering the boy's head with cushions and subsequently knelt on them in an effort to quieten the child. Unfortunately, this led to the suffocation of the infant and a consequent charge of murder. In the Court of Appeal, it was held that since it had been accepted by both parties that the persistent crying of the child could be causally linked to the defendant's loss of self–control, then this satisfied section 3 of the Homicide Act.[61] Thus the defendant should have been entitled to have a defence of provocation heard before a jury. Since this right had been denied to the defendant in the lower court, a verdict of manslaughter was thus substituted for the mandatory murder sentence previously imposed.

The most recent New Zealand provocation case highlights the issue in relation to the mentally handicapped.

R v Albury Thomson[62]

This case involved a mother's intentional killing of her daughter. The daughter, Casey, was an autistic child who very difficult to raise. She constantly displayed sexually inappropriate behaviour, ripped her bedding and chanted repetitively. The accused, her mother, was herself particularly susceptible to stress and had an unreal expectation that

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[59] ibid p791
[60] *R v Doughty* (1986) 83 Cr.App.R. 319. (CA)
[61] *R v Doughty* above n 60, 326 per Stocker LJ.
[62] *R v Albury-Thomson* (1998) 16 CRNZ 79 (CA).

her daughter would get better. When Casey was turned away from five different health and social support facilities, the mother was forced to take Casey into the family home to look after her. This was a very exhausting time for the accused, burdened with the care of such a difficult child. One psychiatric report stated that the family "had been stressed beyond human endurance".[63] Many times in fact, Janine Albury-Thomson had thought prison was better than the life she was living.

On the fatal night itself, Casey had been chanting ceaselessly. When told to stop by her mother, Casey just laughed. The accused then asked Casey to get dressed, after which the pair drove out to the Oroua River Bridge. After failing to get Casey to jump, the accused returned home, got her dressing gown cord and strangled her daughter. The accused confessed this in itself was a difficult affair and took up to five minutes.

On a charge of murder before the High Court, Janine Albury-Thomson pleaded Provocation. She claimed that her particular susceptibility to stress, plus an unreal expectation that her daughter's autism would get better, had made it more than difficult to maintain her self control. Consequently, when she was laughed at on the fatal night itself, the mother claimed she "just snapped"[64]. The jury subsequently returned a verdict of manslaughter by reason of provocation.

Clearly, the defence has turned away from the historical justification-based rationale. In these cases it is simply inhumane to claim that an act of retaliation against the "perfectly natural episodes or events of crying and restlessness" of a child could be partially justified.[65] Thus it is similarly inhumane to claim that a mentally handicapped person could forfeit their full protection under the law by doing acts which inflame others passions. As illustrated in *Campbell*, the defence is really more about partially excusing actors who have understandably lost their grip on self-control.

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[63] *R v Albury-Thomson* above n 62, 83.
[64] *R v Albury-Thomson* above n 62, 85.
[65] *R v Doughty* above n 60, 326 per Caulfield J.

Many commentators regard this as a desirable outcome.[66] One commentator in particular has argued that the approach is laudable as the provocation defence is really about a person who *could* not control themselves.[67] Thus in the defence of duress, a defendant will often be shown sympathy when acceding to a threat even though he or she always has the opportunity to refuse. This is primarily because the defendant lacked a fair opportunity to conform to the law. Thus in the case of provocation, the defence is really about partially excusing an actor because on being provoked, that person is much less able to conform to the law that the ordinary unprovoked individual.

V PROBLEMS WITH THE MORALLY INNOCENT VICTIM

1. Popular Conceptions

While the move toward an excuse-basis might thus be applauded by some, several problems consequently arise which require contemplation. One problem is that the Provocation does not then accord with society's conception of the defence as justification-based. Public outrage might thus, and does, ensue when someone is partially defended for retaliating against irritant and persistent crying, mentally disturbed behaviour, or the touch of someone's thigh. Paul Robinson also raises this concern. He states "only a person who is aware of the evidence at trial will understand that acquittal is based upon those special characteristics of the actor, not on the approval or tolerance of the act."[68] Applying the defence of provocation to cases of the morally innocent victim then may lower the law's credibility by appearing to vindicate acts which are abhorrent in society's eyes.

2. Reasonable Self-Control

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[66] See S Yeo *Compulsion in the Criminal Law* (The Law Book Company Ltd, Sydney, 1990) 43, and J Smith & D Hogan *Criminal Law* (3 ed, Stevens & Sons, London, 1962) 354.
[67] Dressler above n 31, 480.
[68] Robinson, above n 8, 125.

Additionally, if the provocation defence is to be excuse-based and allow cases involving morally innocent victims, then there is a problem in insisting on a test of reasonable self-control. This is because in these cases, the individualising characteristics of the accused often "overarch all aspects of the accused's personality".[69] Hence "any action" by the victim would seem to be able to constitute provocation.[70] In these morally innocent cases, the defendants claim depression, stress and histories of abuse as characteristics and these make it difficult for juries to then also consider the ordinary person's level of self-control. As one commentator has pointed out, the acceptance of characteristics such as these "erode public confidence in the administration of the existing defence of provocation."[71] If Provocation is to operate as an excuse-based defence, then it should abandon this objective requirement.

3. Proportionality

Also, if the defence does show sympathy where the morally innocent are killed, then it is clear that the proportionality requirement is inappropriate. This idea that the defendant's act should not cause more harm than is avoided has always had a "loose meaning" in the law of provocation.[72] This is simply because it is difficult to claim that there is proportion in B's punching of A and A's killing B. The claim however is that the proportion is greater if A's killing B was a result of B committing adultery with A's wife. In the cases of the morally incapable victim, this same degree of comparison cannot be made. In no way is the retaliation reasonable considering the fact that the victim is unaware of the impact of his or her own conduct.

4. Statutory Inconsistencies

Further problems arise in New Zealand's statutory formulation of the defence. If the defence does allow provocative conduct to come from morally innocent parties and thus

[69] Stanish above n 22, 392.
[70] Stanish above n 22, 392.
[71] Stanish above n 22, 393.
[72] Ashworth, above n 23, 295.

be a defence based heavily on excuse, then subsection (5) of the defence needs to be reconsidered. This subsection provides that "No one shall be held to give provocation to another by lawfully exercising any power conferred by law".[73] The inconsistency is obvious. If the defence is to focus on the actor's loss of self-control then there is no reason why the law should not show sympathy to those who show resentment to their being restrained for arrest while under the influence of a loss of self-control.

Hence there is also no reason for subsection (6) to require that the provocation must be given by the person killed.[74] Under excuse theory, the defence should allow situations where the defendant loses control upon provocation from X, yet intentionally kills Y who has tried to restrain the defendant. Excuses give concessions to those who acts are not truly their own. If an ordinary person is provoked to lose his or her self-control then it is unlikely that they could have the capacity to stop an attack if another person sought to restrain them. Thus a defence should be allowed, a result which would be "eminently just".[75]

5. Time for cooling

Another problem particular to cases such as *Doughty* and *Albury-Thomson* is that they show the inappropriateness of the requirement that there not be 'time for the passion to cool'. Traditionally, the suddenness of the defendant's retaliation following upon the provocation was an important indication that the defendant had in fact lost self-control. Thus retaliation committed after there was 'time to cool' inferred that the defendant had not acted impulsively but merely with a desire to take vengeance.[76]

In cases such as *Doughty* and *Albury-Thomson*, there was ample time for passions to cool. For example, following the point at which she 'snapped', Janine Albury-Thomson drove her daughter around town, trying to decide whether or not to actually kill her daughter. The allowance of a defence in this case shows that 'cooling time', while

[73] Crimes Act 1961, s 169(5).
[74] Crimes Act 1961, s 169(6).
[75] Dressler above n 31, 476.

important in classic provocation cases, may not always be an appropriate test for pointing to deserving defendants. This will always be so when the provocation has involved the build-up of stress and the sense of hopelessness at living in intolerable circumstances.

One author has argued that this is because these situations are not clear provocation cases but are instead what can be called 'despair' killings.[77] These occur where an accused has killed through frustration, anger or despair in response to an exceptional situation, and where his or her final act cannot be said to have been characteristic of a loss of self-control. Consequently, 'despair' cannot be described as a sudden emotion like anger or fear but is in fact an abnormal, emotional state of mind brought about by more prolonged ill-treatment or wrongdoing. Any reaction out of 'despair' is thus not sudden or spontaneous but is more often seen as calm and deliberate.

Both Albury-Thomson and Doughty therefore fit neatly into this category of behaviour. Indeed, a psychiatric report issued at Janine Albury-Thomson's trial stated "At the time of the offence the appellant was suffering from a mixture of anxiety, depression, frustration and anger…such that she felt at the end of her tether and that she had to put an end to the suffering of her daughter and her own distress."[78] Thus Janine's calm and deliberate act of driving Casey around town before deciding on the ultimate method of her murder is consistent with this 'despair' reaction and not the 'sudden' loss of control associated with provocation.

The analogy can of course be drawn with Battered Women's Syndrome (BWS) cases. These situations similarly do not fit well within the provocation defence. Typically, they involve prolonged series of vicious abuse and threats at the hands of a male partner. The women's lives thus become a living hell such that they will do the only thing they see as

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[76] Duffy [1949] 1 All ER 932 (CourtCriminalAppeal).
[77] Jeremy Horder *Provocation and Responsibility* (Clarenson Press, Oxford, 1992) 191.
[78] R v Albury-Thomson above n 62, 85.

possible to escape it. Thus the act of killing often comes through a degree of premeditation, being more calm and deliberate than the typical provocation case.[79]

The important point is that like BWS cases, despair situations such as *Doughty* and *Albury-Thomson* have widened the scope of a provocation defence beyond anything it could ever have envisaged covering. The problems they cause clearly show that their situations are not meant to be dealt with by a defence meant for enraged killers. The question is, do these offenders deserve a defence at all?

VI THE NEED FOR A DEFENCE

Yes, killers such as Janine Albury-Thomson do need a criminal defence. The law's credibility must be maintained by not placing its standards above what can be expected of normal human behaviour. Through excuse theories of law, this credibility is maintained when people are not punished for their illegal acts because they are committed in such intolerable circumstances that the normal standards of the law cannot be applied to them. Sympathy should be shown to these offenders, especially when society has left a very limited choice of alternatives. In the *Albury-Thomson* example, severe autism has been described as a health condition which is "nobody's child" and which tends to fall through a gap in the health system.[80] The accused herself was turned away from eight different health or welfare agencies and it was really "inconceivable that society could expect a family to take care of such a severe and uncontrolled psychiatric patient within their home environment."[81] Although this does not mean the law should become a cure for social ills, these factors do show the limited choices available to defendants and thus indicate where others could act similarly. In the *Albury-Thomson* case for example, it is clear that the court decided that the circumstances involved were exceptional and even the most controlled individual could have acted drastically.[82]

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[79] See for one example *Ahluwahlia* [1992] 4 All ER 889 (CA) where the appellant deliberately set fire to the deceased's bedroom while he slept.
[80] "Loving mum's desperate remedy" *The New Zealand Herald*, Auckland, New Zealand, 17 July 1998, A:9.
[81] *R v Albury-Thomson* above n 62, 83.
[82] *R v Albury-Thomson* above n 62, 83.

There should not however be a total defence. Joshua Dressler, in attempting to explain how the provocation defence operates, uses the comparison of duress.[83] In this situation, defendants are excused because the threat of harm does not leave them realistic opportunity to conform to the law. However, a defence will not be available if the action under duress involves killing someone. In this situation the law requires people to be heroes and sacrifice themselves before violating the highest protected right in society – the sanctity of life. Thus for Albury-Thomson, even though we can sympathise with her plight in a despairing situation, it cannot overrun the value that society places on life itself. Clearly, Albury-Thomson deserves to be distinguished from other cold-hearted revengeful killers, yet her act is still one which is worthy of society's condemnation, whatever her circumstances.

However, these concessions should not be offered under the provocation defence. Ashworth states that the typical paradigm of provocation is that it deals with moral wrongs by both parties.[84] In the cases of the morally incapable, how can it ever be said that a mentally handicapped person has committed a moral wrong? He also comments that the defence is meant to deal with 'normal' victims in that it has always operated to cover situations where people have been provoked by others who intend the harm they inflict.[85] Jacob Dressler talks of using "clean tools".[86] No more is this necessary than for a defence which has been stretched beyond convenience in its attempts to show sympathy to those who do not fall within its reach. What killers such as Janine Albury-Thomson need a is defence expressly tailored to reflect the reasons for which they are excused.

VII OPTIONS FOR REFORM

[83] Dressler above n 31, 472.
[84] Ashworth above n 23, 307.
[85] Ashworth above n 23, 307.
[86] Jacob Dressler "Rethinking Heat of Passion: A Defense in Search of a Ratioanle" (1982) 73 J Crim L & Criminology 421, 425.

1. A Discretionary Sentence for Murder

One method is of course to abolish the mandatory life sentence for murder. Any evidence of provocation or extreme circumstances can then simply be taken as reasons to mitigate the full murder sentence. Obviously, the complexity of s 169 can then be completely disposed of. Indeed, this was the proposal of the New Zealand Crimes Bill 1989[87] which essentially repeated ideas put forth earlier by the 1976 Criminal Law Reform Committee[88].

The Bill's reasons for abolishing the provocation doctrine were simply that the defence was hedged round with too much difficulty and technicality.[89] It was thought also though that the doctrine was thought to have only originated in earlier times through a need for offenders to sometimes avoid the rigour of a death penalty.[90] As McAuley states, perhaps the defence emerged "after judges were trying to fashion a discriminating filter for cases of intentional killing which were thought…to be insufficiently heinous to warrant a capital sentence".[91] Since the death penalty no longer exists, the Bill, and indeed the Crimes Consultative Committee report on the Bill, recommended that the doctrine be only relevant to sentence and not conviction.[92]

However, it is submitted that both the decisions to adopt a discretionary sentence and to abolish the doctrine be avoided. The New South Wales Law Commission recently considered this very issue and strongly recommended that the provocation doctrine be retained as a matter for conviction.[93] The reason for this was to maintain the involvement of the community by way of the jury, in the decision-making process.[94] It is through the jury and not the judge that decisions as to levels of culpability need to be made, and conclusions drawn on whether or not the offender is to avoid the stigma of 'murderer'.

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[87] Crimes Bill 1989 Clause 128
[88] New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (Wellington, 1976)
[89] Crimes Bill 1989 – Report of the Crimes Consultative Committee (Wellington, 1991) 46.
[90] above n 89, 46.
[91] McAuley above n 33, 25.
[92] above n 89, 46.
[93] NSW Law Reform Commission *Report 83 – Partial Defences to Murder: Provocation and Infanticide* (Sydney, 1993) 54.

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Lord Cooke supported this view in his personal response to the Crimes Bill 1989.[95] He stated that it is up to the jury to condemn crimes and hints that it is only the jury, as an alleged cross-representation of society, who can adequately judge how the ordinary person might have reacted.[96]

Consequently then, the doctrine must be retained in its current statutory form. Society has yet to decide through Parliament that a loss of self-control will not constitute adequate ground for reducing blame. Thus in the public's view, there is still a difference between the even-tempered, deliberate killer and the hot-blooded, impulsive one. The provocation defence then should enable the law to label the two as dissimilar by allowing the impulsive killer to be convicted of manslaughter.

Whether this traditional form of thinking currently holds is uncertain. There are signs that things may be changing. The NSW Law Commission stated that contemporary conceptions of civilised society do not approve of excusing personal acts of retaliation.[97] One author has commented that it is okay to feel anger but another to express it.[98] He states that there are other outlets for outrage, other ways of expressing resentment, and therefore it must no longer be thought that the feeling and expressing of emotions are inevitably intertwined.

Whatever the outcome, the need for a defence which adequately caters for 'despair' situations is paramount. The provocation doctrine itself presently boasts a seemingly infinite flexibility in dealing with these but this has been at the expense of simplicity and sureness over the defence's rationale. What is needed is a defence which excuses killers because of their extreme situation and in fact indicates that this is the reason that their

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[94] above n 93, 55.
[95] R Cooke "The Crimes Bill 1989: A judge's response" [1989] NZLJ 235.
[96] Cooke, above n 95, 239.
[97] above n 93, 56.
[98] Horder above n 77, 197.

culpability is reduced. Only then will integrity and public confidence in verdicts be achieved.[99]

2. Degrees of Murder

One way of achieving this is to adopt the structure proposed under the current 'Degree's Of Murder Bill'.[100] This Bill, currently before Parliament, proposes that there be three degrees of murder. The first degree would cover malicious or sadistic killings and would carry a minimum sentence of 25 years. The second degree of murder would mirror New Zealand's current murder offence and thus cover less malicious but still heinous murders. Third degree murder would be reserved for those killings committed under provocation or diminished responsibility and would provide judges with a wide discretion for sentencing.

A finding of third degree murder by way of provocation would still require the jury to make a finding based on section 169. However this does provide an effective way of allowing juror involvement whilst giving the judge the power to determine an appropriate sentence for each deserving case. Thus this structure has much to commend it. However current problems raised by some commentators on the definition of first-degree murders and the large power given to the jury may well mean the structure does not come to fruition.[101] The impressive aspect of the Bill is that it considers a defence of diminished responsibility, something which is long overdue in New Zealand.

3. Diminished Responsibility

In England and Wales, this partial defence generally applies where the accused has killed while suffering an 'abnormality of the mind' such that mental responsibility for the act

[99] J Ablett-Kerr "A licence to kill or an overdue reform?: the case of diminished responsibility" (1997) 9(1) Otago LR 1, 18.
[100] Degrees of Murder Bill 1996.
[101] S McAnally "The Penalty for Murder" [1998] NZLJ 420.

has been impaired.[102] Clearly, this defence has an overlap with provocation in its consideration of mental deficiencies. However the difference is that diminished responsibility does not require a loss of self control, nor a comparison with the reasonable person.

The New Zealand courts have shown a clear intention to mould the provocation doctrine into a form of diminished responsibility. Cooke P explained in *McCarthy* that the added observations in *McGregor* had unduly restricted the ambit of provocation.[103] He added that this appeared "to have been influenced by the view that diminished responsibility had not yet been accepted by the New Zealand Parliament; yet within a limited field this may be seen as the inevitable and deliberate effect of the statutory changes embodied in s 169 of the Crimes Act."[104] Clearly, the acceptance of a growing number of mental characteristics under the defence has seen the doctrine merge closely to that of diminished responsibility. Yet as Brookbanks notes, "it should not be permitted to evolve by a process of extension of existing defences without an accompanying careful consideration of its theoretical considerations."[105]

Hence, despair situations would not be disqualified and could possibly be accommodated under a 'severe depression' abnormality. The problem of course is with classification. If the accused does not exhibit clear signs of an abnormality then the defence may be denied to him or her.

4. Model Penal Code

Overall, the best option is to adopt a wider manslaughter offence, something akin to the American Model Penal Code[106]. This provides that murder may be reduced to manslaughter if it "is committed under the influence of extreme mental or emotional

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[102] Homicide Act 1957 section 2.
[103] *R v McCarthy* above n 53, 558 per Cooke P.
[104] *R v McCarthy* above n 53, 558.
[105] W Brookbanks "Provocation – Defining the Limits of Characteristics" (1986) 10 Crim LJ 411, 418.
[106] *American Law Institute – Model Penal Code and Commentaries Part II* 55.

disturbance for which there is reasonable explanation or excuse"[107]. As the Code goes on to explain, this reasonable explanation is to be determined from the circumstances as the defendant believed them to be.

A classification of this type would clearly have enough flexibility to include a range of killers who deserve to be partially excused. The problematic defence of provocation and that of diminished responsibility could be effectively moulded under one head. Importantly, killers such as Doughty and Janine Albury-Thomson could be relieved of a charge of murder because of the extreme emotional disturbance at being presented with harmful circumstances outside of their control. In fact, a range of factors could be considered, much like the call for mitigating circumstances to be reserved for the judge's sentencing. In this form however, the jury can have an input by applying these factors to conviction.

By excusing the accused for emotional disturbance, the law sends the correct message and partially exculpates in a deserving situation. Really, the question which this form of manslaughter asks is; can the actor's loss of self-control be understood in terms which arouse sympathy enough to call for mitigation in the sentence.[108] It is arguable that this is really the type of question which the jury already applies. Faced with inadequate legal defences in a situation which calls for concessions, the jury will take the simple option of calling murder, manslaughter. A defence of this type would provide a legally accepted means of doing so.

VIII CONCLUSION

Overall, a suitable defence for 'despair' type situations is clearly needed. The move from a justification rationale to one of excuse has demonstrated the ability for these cases to be dealt with under the current provocation defence. Unfortunately this has meant undermining traditional requirements of the defence and illustrating various

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[107] above n 106, 55.
[108] above n 106, 57.

inconsistencies in its statutory formulation. The biggest impact however as been the weakening of the law's credibility by having a defence which appears to operate contrary to popular conceptions. Under the current provocation defence, confusion is to be expected when 17-day-old babies and mentally handicapped adolescents can be held to have provoked their own demise. What is needed is a separate defence like diminished responsibility, or even better the Model Penal Code, which is designed to give concessions to deserving defendants in a way that effectively tells society the reasons why. The defence of provocation can then continue to operate in a way which leaves its scope, requirements and rationale undisturbed.

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