THE HISTORICAL DEVELOPMENT AND PHILOSOPHICAL FOUNDATIONS OF THE ENGLISH DOCTRINE OF PROVOCATION - WITH SPECIAL REFERENCE TO THE DOCTRINE OF CHANCE MEDLEY.

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ABSTRACT: The Historical Development and Philosophical Foundations of the English Doctrine of Provocation - with special reference to the Doctrine of Chance Medley.

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My thesis seeks to resolve key areas of debate regarding the nature of provocation as a defence in English Law, by reference to both historical and philosophical analysis.

Academic commentators on the doctrine disagree on whether it should be seen as essentially an excusing condition alone, such as insanity, or should be understood as an excuse involving some element of "partial [moral] justification", such as duress.

I seek to resolve this debate by considering at a deeper philosophical level the nature of anger and action in anger. I argue that English Law has historically operated with two equally plausible conceptions of anger, anger as righteous indignation and anger as a loss of self-control. The former was the conception drawn on in the development of the early modern law, and the latter is the conception drawn on in the development of the modern law.

I go on to argue that controversy, referred to above, over the nature of provocation as a defence, can be only resolved by making clear the distinction between the two kinds of anger. Action in anger conceived as a loss of self-control bears more of a family resemblance to defences such as (temporary) insanity. Action in anger conceived as righteous indignation bears more of a family resemblance to defences such as duress.

I argue that whichever conception of anger is in issue, however, action in anger can be open to moral criticism, because all kinds of action in anger are based on at least a judgment of moral wrongdoing, that may be subject of such criticism. I argue that the law may thus legitimately require at least some moral justification for action in anger before allowing a defence of provocation to be pleaded successfully.

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It has been both a pleasure and a privilege to have had Andrew Ashworth and Sabina Lovibond, a lawyer and a philosopher from Worcester College, as my main supervisors. They have been an invaluable source of rigorous and imaginative advice, and have (I hope!) prevented me from making many errors.

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REFERENCE POLICY

1. Pronouns

The gender-specific pronoun "he" and its corresponding possessive "his" will be used in the first three chapters, as an indication that it was assumed by judges and commentators, until the early twentieth century, that defendants and victims would both be male. When more general issues are discussed, in the final two chapters, in relation to the modern working of the doctrine, the plural pronoun "they" and its corresponding possessive "their" will be employed, in that these are gender-neutral.

2. Cases

When a case is first mentioned in the text, it will be accompanied by the full reference of the report which is being used. Thereafter, it will simply be referred to by name or short title, without an accompanying reference, unless a particular passage is being cited or referred to, in which case the appropriate reference will be given.

3. Other Authorities and References

The vast majority of works and passages from works referred to in the text will be identified in the accompanying footnote by the name of the author, the year of the publication of the work, and the page reference. A fuller reference to the work will be obtained in the bibliography, by the name of the author, and the date of the publication. With some - chiefly philosophical, but some legal - works, however, this is not a standard way to proceed, and therefore the standard format is adopted. The abbreviations to be used are given here: the first letter(s) of the work will be given, followed by the line, book, or page reference.

ARISTOTLE:-

Nichomachean Ethics	:	NE, followed by paragraph and line reference, eg. NE102b3, or book and section reference, eg. NE Book 5. iv.
Eudemian Ethics	:	EE, and references as for NE.
Topics	:	T, and references as for NE.
On the Soul	:	DeA, and references as for NE.
Rhetoric	:	R, and references as for NE.
Magna Moralia	:	MM, and references as for NE.
Politics	:	POL, and references as for NE.

HOBBES:-

Leviathan	:	L, followed by page reference.
De Corpore	:	DC, followed by section and paragraph number.
Human Nature	:	HN, followed by section and paragraph number.

KANT:-

Critique of Pure Reason	: CPR, followed by page reference.
Groundwork of the Metaphysic of Morals	: GMM, followed by page reference.
Metaphysical Elements of Justice	: MEJ, followed by page reference.

HEGEL:-

Philosophy of Right : PR, followed by page reference.

COKE:-

Institutes : Inst., preceded by volume number and followed by page reference.

Reports : Co.Rep., preceded by volume number and followed by page reference.

FOSTER:-

Crown Cases : C.C., followed by page reference.

HALE\HAWKINS\EAST:-

Pleas of the Crown : P.C., preceded by volume number, and followed by page reference.

RUSSELL:-

Crimes and Misdemeanours : C.and M., followed by page reference.

STEPHEN:-

Digest of the Criminal Law: Digest, followed by page reference.

History of the Criminal law (Volume 3): History, followed by page reference

4. Citations

Passages cited from authorities will normally be presented in the form of an indented paragraph of single spaced text, in quotation marks. It will be indicated whether the author cited or I am responsible for emphasis added. Square brackets will be used, in the normal way, for words or letters added by myself to a passage to make it make sense or to make it fit typographically with what has gone before.

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As few statutes are mentioned in the text, they are not listed here, following the regulations of the Board of the Faculty of Law for the Degree of Doctor of Philosophy, p.686.

This thesis is dedicated to my family, for their unflagging support for me in my endeavour to make a career in law based on scholarship.

PREFACE AND INTRODUCTION

"Man, because he has only one life to live, cannot conduct experiments to test whether to follow his passion or not"[1]

As the title indicates, this thesis seeks primarily to analyse and explain both the historical development and the philosophical basis of the doctrine of provocation, as that doctrine has emerged and evolved through the reported cases and authorities[2]. In this introduction, I will set out the reasons why such an undertaking is of such historical and philosophical importance to the understanding of one of our[3] oldest, most colourful, and most intriguing defences[4], recently described at the highest appellate level as, "an anomaly in English Law"[5]. I will also give an indication of the way in which I propose to set about that undertaking.

There have been few systematic attempts to analyse and interpret the historical crystallisation of the doctrine as a partial defence separate from other defences, and its subsequent evolution[6]. It would at first sight appear, thus, that little more needs to be said in justification of one more such attempt. Like many other commentators upon the doctrine, however, I shall be studying its history as part of a wider project of inquiry: in this case, the inquiry into the doctrine's philosophical foundations. This inevitably gives the character of the historical investigation a different shape to that which it would have, were the whole project one of pure historical inquiry.

What, then, is to be the nature of my historical investigation that sets it apart from other investigations, and what is to be its

relationship with the wider project of inquiry? An insight into the kind of history of the doctrine I intend to write, can be gained through a brief critical analysis of aspects of the history provided by the most important and influential commentator on the doctrine, Andrew Ashworth[1].

A convenient focus, in this regard, is his treatment of the law as it stood in the early modern period[2]. As we shall see, by the beginning of the eighteenth century, four categories or kinds of provocation sufficient to reduce murder to manslaughter had emerged. One of these was seeing a man unlawfully deprived of his liberty, where the defendant, seeing someone so deprived, killed the person falsely detaining the man[3]. Contemporary explanations given for regarding seeing a man unlawfully deprived of his liberty as gravely provocative included the perception that[4], "when the liberty of one subject is invaded, it affects all the rest", and that[5]:

> "If a man is oppressed by an officer of justice, under a mere pretence of an authority, that is a provocation to all the people of England...I would fain know, when a man is concerned for the laws of the land, and for Magna Charta, whether that is not a provocation?"

Now Ashworth has said of this category of sufficient provocation[6]:

> "[A]nomalous as it undoubtedly was, it suggested a connection in the judges' minds between wrongful conduct by the deceased and the defence of provocation."

The key adjectives used here are "anomalous" and "wrongful", for they reveal the historical weakness of Ashworth's account of the early modern law as a whole. In what sense, first, can it be right to describe this category of provocation as anomalous? Doubtless,

the category seems anachronistic to the twentieth century mind. This cannot be enough, though, to warrant calling the category anomalous, if one's endeavour is to provide, as Ashworth wishes to do[1], "general criteria of "sufficiency" [of provocation] adopted by the judges at this time". If that is the endeavour, then in order to describe the category as anomalous, what is needed is evidence that to the early modern mind the category seemed for some reason out of place.

Yet the justifications given for the category, cited above, point in a contrary direction. They indicate that something about the bonds of citizenship, and a highminded concern for freedom under laws, captured the early modern (judicial) imagination, making the unlawful deprivation of liberty seem to be a grave provocation in a way it now, perhaps, does not.

The connection Ashworth makes, in this regard, between the unlawful deprivation of liberty and "wrongful" conduct by the victim is likewise somewhat question-begging, concealing more than it reveals. An abstract notion such as wrongfulness cannot convey what early modern judges understood by grave provocation, nor why they did so. For the notion cannot account for what might turn out to be an entirely different framework or set of values brought to bear by early modern judges on the question of what "wrongfulness" and hence to what "grave" provocation is, to the framwork or set of values brought to bear on that question by modern lawyers. This very point, indeed, is made by Viscount Simon in Holmes v. DPP[2]:

> "The application of common law principles...must to some extent be controlled by the evolution of society. For example, the instance given by Blackstone (Commentaries, Book IV., p.191, citing an illustration in Kelyng 135), that if a man's nose

> was pulled and he thereupon struck his aggressor so as to kill him, this was only manslaughter, may very well represent the natural feelings of a past time, but I doubt very much whether such a view should necessarily be taken nowadays."

What Ashworth's analysis of the early modern law in terms of "wrongfulness" lacks, thus, is a theory or frame of reference for explaining the gravity of provocation that is historically grounded in early modern, and not contemporary values. In this first two chapters of this thesis, I provide just such a theory or frame of reference. I analyse the emergence and initial development of the doctrine of provocation in terms of the concept of honour, as that was understood in the early modern period[1]. It is, as we shall see, a concern for honour that explains early modern defendants' rage at unlawful deprivations of liberty. It is, moreover, the concept of honour which shaped the early modern law's understanding that the conduct at issue in <u>all</u> of the four categories of sufficient provocation was gravely provocative.

The centrality of the early modern concept of honour to the understanding of the early modern law explains the need to make special reference to the doctrine of chance medley. This doctrine, equated with manslaughter at the time, was sub-divided into two separate but historically intertwined grounds for reducing intentional killings in hot blood from murder to manslaughter. One of these ultimately became the doctrine of provocation, but the other was a doctrine I refer to as "combate-manslaughter".

Combate-manslaughter, so I allege, was a condescension to killings in the course of hot-blooded duels, which were almost always fought for the sake and in defence of honour. An investigation into the connections between combate-manslaughter and

the concept of honour provides us, in the first chapter, with an essential historical introduction to the concept of honour, and its influence on the law, and with the legal-historical setting in which the doctrine of provocation emerged. This initial emergence and development is discussed in terms of the concept of honour in chapter two.

There has also been scarcely any analysis of the historical development of the doctrine of provocation in the late eighteenth and nineteenth centuries. Such an analysis is provided in chapter three. We discover that the doctrine in fact underwent profound changes during that period, consideration of which provides the building blocks for much of my discussion of modern case law and commentary.

In the course of the first interlude, and of chapter two, the relevance of the historical analysis to my wider project of philosophical inquiry becomes clearer. In the early modern period, honour was thought to be of importance only because the desire for it would spur men on to be <u>virtuous</u>, and the concept of a virtue is at the heart of my philosophical inquiry[1]. Of what, though, am I speaking in speaking of a "philosophical" enquiry into the foundations of the doctrine of provocation?

I propose to draw a distinction, in this regard, between what will be referred to as the "first-order" and the "second-order" foundations of the doctrine[2]. Questions about the philosophical foundations of the doctrine of provocation of a first-order kind are very familiar to theorists writing about provocation, and about the defences more generally. Such questions are the province of

what might broadly be described as moral philosophy. They concern such issues as the sense in which a condescension by the law to action in anger can be said to be an "excusing" condition[1], and whether the defence should require, as a condition of exculpation additional to the excuse of having acted in anger, that some element of moral justification for the violent action in anger be present, in the shape of grave provocation offered by the victim[2].

The question focused on excuse that has troubled theorists, is the question of how the doctrine of provocation fits with other recognised excuses. Does it, like the excuses or partial excuses of insanity, diminished responsibility or involuntary intoxication, rest on the supposition that the act of angry retaliation was fully or partly "normatively involuntary"[3], such that the act was not attributable to a rational or fully rational agent?

Or, on the other hand, does the doctrine rest on the supposition that the angry act of retaliation was, like acts taken under conditions of necessity or duress, attributable to a rational agent in the sense of having been chosen in accordance with a moral principle or maxim, but chosen under conditions not of the agent's making, and in which only the superhuman would have done otherwise[4]? This view, having at one time had no foothold whatsoever in academic theory, is now rapidly gaining ground[5].

The questions focused on moral justification have concerned the nature of that justification in provocation cases, and whether the law should insist on its presence, as a condition of exculpation. Does moral justification in provocation cases have its normal meaning of good moral reasons for acting in the way alleged to be

criminal[1]? If it does, then it would seem to be inconsistent with the notion that action in anger is not attributable to the agent, not being based on moral maxims or principles, and hence inconsistent with the first view of excuse set out above.

Yet if action in anger is indeed partly normatively involuntary, the judicial insistence[2], supported by distinguished commentators[3], that some element of justification be present in the form of grave provocation received, would seem to be as irrelevant and unjust as the insistence on its presence would be in cases of diminished responsibility, the other paradigm cases of partial normative involuntariness, as other commentators have pointed out[4]. These puzzles over moral justification seem to point us back in the direction of the question of excuse, but that question remains unanswered, and the subject of continuing dispute[5].

The key to solving the conumdrums over excuse and justification lies in addressing and answering a second-order question about the doctrine of provocation that is the province of what might, philosophically speaking, broadly be termed "ethics", theories of human character, or philosophical psychology. This question is focused on the nature of anger and action in anger.

Underlying all our questions and answers about excuse and justification in provocation cases must inevitably be a theory about the nature of anger and action in anger. Suppose we were to discover that the reason for theorists' sharp differences of opinion over the kind of excusing condition that provocation is, is that there are in fact two, <u>equally real and valid</u>, albeit very different conceptions of anger and action in anger. Suppose we were

further to discover that under one of these conceptions, actions in anger are in some sense normatively involuntary, but that under the other conception, they are based on moral principles or maxims. We would then be able to suggest that far from being an argument without end, theorists' differences over questions of excuse and justification are differences based on the fact that they are drawing on only one conception of anger and action in anger, whereas they should be accounting for two.

Incredibly, though, no commentator has given detailed consideration to the concept of anger and action in anger, at the level of philosophical psychology[1]. In this thesis, I will do so. I shall trace the emergence, during the historical evolution and development of the doctrine of provocation, of two conceptions of anger, what I refer to as anger as righteous indignation, and the conception which later came to replace it in judicial and academic thinking about provocation, anger as a loss of self-control. The key concept in understanding both of these conceptions of anger (although in rather different ways) will be that of virtue, being disposed to feel and act in the right way[2], that as I said above we will have encountered in explaining the early modern law in terms of the concept of honour.

This project occupies much of chapters two and three, and the first second and third interludes. We then return, in chapters four and five, to the questions of moral justification and excuse in relation to the doctrine of provocation. We do so, though, armed not merely with an unarticulated conception of anger, or with one conception alone, but with the two discrete conceptions that have

continued and continue rightly to underpin the law.

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[1]. M. Kundera, The Unbearable Lightness of Being Faber and Faber, (1985), 34.

[2]. The legal focus of this thesis is mainly reported cases, and the views of the standard commentators, such as Hale, Hawkins, Foster, East, and so on, in addition to academic commentary. It is sought to explain these in the light of contemporary works on honour and virtue, and in the light of works of philosophy, chief among which will be the works of Aristotle (in respect of the early modern law) and Hobbes (in respect of later developments), because they had a good deal to say about the passions and thus make a useful reference point, but which will include other sources. The final two chapters apart, extended criticism of other modern commentators will be kept to a minimum, as it detracts (other than in those final chapters) from the thrust of the argument.

[3]. Due to limitations on space, I will be focusing (except where otherwise indicated) on English Law.

[4]. Provocation, as a "partial" defence has the effect, if successfully pleaded, of reducing murder to manslaughter. A qualified attack on this will be made in chapter four.

[5]. Per Lord Diplock, in DPP v. Camplin [1978] 2 All E.R. 168, at 170.

[6]. The attempts have been of varying quality. By far the best is that of Ashworth: see page xix note 1 infra.

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[1]. See Ashworth (1973), and Ashworth (1976). The importance of his work on provocation, and thus the justification for paying detailed attention to it, in a thesis such as mine, is demonstrated by the fact that Ashworth (1976) is referred to as a principal authority in the following works: Smith and Hogan (1988), 331 note 18; Clarkson and Keating (1984), 540 note 34; Glanville Williams (1983).

[2]. The phrase "early modern" is used and meant to be understood loosely. It refers broadly to the period in English History dating from about 1500, until about 1730. Historians will quibble about these dates, but the term is, in the end, simply a label for a period under discussion, and seems considerably less controversial than, say, "Renaissance".

[3]. See Hopkin Huggett (1666) Kelyng 53, discussed in detail infra, chapter 2.

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4. Mawgridge (1707) Kel. 119, at 137.

5. Tooley (1709) Holt K.B. 485, at 489-490.

6. Ashworth (1976), at 294.

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1. Ashworth (1976), at 293.

2. Holmes v DPP. [1946] A.C. 588, at 600.

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1. I should not be taken to be implying that there was a single concept of what honour was, and required of men, in the early modern period. There were rival conceptions - see chapter 2, page 43. The conception that is of interest in explaining the law of manslaughter will be revealed in the course of chapter 1.

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1. See the discussion of virtue infra, in the first interlude, and in chapter 2.

2. No great significance should be attached to the use of these common philosophical terms, "first-order" and "second-order". Second order philosophical issues are here intended to mean simply questions which one sees as at a deeper level needing to be resolved in order to solve philosophical problems raised at a first-order level. This is not the place to go into precisely what "deeper" might mean in this context.

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1. See on this infra, chapter 5.

2. In exceptional cases, of course, it need not be the victim who provides the provocation; see Davies (1975) 60 Cr.App.R. 253.

3. For the use of the term "normatively involuntary", see Fletcher (1978), at 802-807. See also Perka v The Queen (1985) 13 D.L.R. (4th) 1, at 13-14.

4. See Brudner (1987), at 347-348.

5. See eg. Von Hirsch and Yareborg, in Schoeman, ed. (1987).

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1. See infra, chapter 4.

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[2]. See eg. Alexander (1913) 109 L.T. 745.

[3]. See in particular, Ashworth (1976), at 307-314, and 317-320.

[4]. See eg. Williams (1954), 742; Smith and Hogan (1973), 244.

[5]. See, by way of example, the sharp differences of opinion between Macauley (1987), and Dressler (1988).

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[1]. Ashworth - (1973), chapter 5; and (1976), at 303-306 - makes reference to "scientific" psychological literature, as do Smith and Hogan, in order to support a view much criticised by Ashworth - see (1988), at 342 note 18. Quite apart from being inconclusive, however, the psychological literature has an unduly deterministic flavour that, in my view, renders much of its analysis open to question. Von Hirsch and Yareborg, in Schoeman, ed. (1987), do analyse the doctrine, and the concept of anger, in philosophical terms, and I discuss their views in chapters 4 and 5.

[2]. See page xxii note 1 ante.

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CH. 1 THE FOUNDATIONS OF THE EARLY MODERN LAW OF HOMICIDE

> "When men had a glowing ambition to excel in all manner of feats and exercises they naturally conceived that manslaughter in an HONEST way...was the most chivalrous and gentlemanly of all their achievements."[1]

In a way not clearly understood by previous commentators[2], the historical foundations of the doctrine of provocation cannot be properly understood without reference to the early modern treatment of "malice aforethought"[3] in the law of homicide, and without reference especially to the early modern development of a broader doctrine concerned with mitigation, encompassing provocation, in virtue of which for many centuries[4] murder could be reduced to manslaughter. This doctrine was the doctrine of "chance medley". It is thus with the early modern notions of malice aforethought and chance medley that I commence my inquiry into the English doctrine of provocation.

The concern with the meaning of malice aforethought, and with the broader doctrine of chance medley, in particular, is most certainly not, though, purely a historical concern. A detailed investigation of the doctrine of chance medley is our starting point in the overall project of the first two chapters, an investigation into the concepts of anger and retaliation in anger. We approach this project through an explanation of a relationship central to the doctrine of chance medley, in the early modern period, the relationship between the law of manslaughter, the concept of honour, violence in anger, and the display of virtue. Through this explanation, we will discover what the anonymous Irish duellist meant, in the passage cited above, by "manslaughter in an HONEST way".

1. Murder, Malice Prepensed and Chance Medley

The distinction between murder and manslaughter in a broadly recognisable form emerged during the sixteenth century[1]. The precise nature of that distinction has been the subject of detailed scholarly debate[2], but historians seem to be agreed on two things. First, there is agreement that by the latter part of the sixteenth century, the felony of manslaughter was equated with the notion of killing in the course of a "chance medley"[3]. Secondly, chance medley manslaughter was in broad terms to be distinguished from murder, killing "upon malice prepensed"[4], in virtue of the fact that, as the term "chance medley" suggests, the felonious killing took place as a result of a sudden and unpremeditated encounter between defendant and victim.

What, though, precisely was chance medley manslaughter? Manslaughter has always been something of a "catch-all" category of culpable homicide, designed to cover killings which although blameworthy in themselves, do not merit conviction for murder[5], and so it was with chance medley. The method I shall employ in investigating the nature and scope of chance medley manslaughter, thus, is to outline sixteenth century changes in the kinds of killings that were then thought to merit conviction for murder, and so define chance medley manslaughter *per genus et differentiam*. The central concept, in this investigation, is the concept of malice, the defining element of *mens rea* in murder.

In the early part of the sixteenth century, a number of Tudor statutes[6] were passed whose aim was to deter what was then thought to be a dramatic increase in planned killings and robberies[7]. Many

of these referred to and presupposed a distinction between murder and manslaughter in law. An example would be the statute of 1530 which sought to restrict the protection of sanctuary[1]. This statute[2] denied the protection of sanctuary to anyone who had already taken advantage of it if they committed a subsequent "petit treason, murder or felony", but conceded the continuing availability of the protection to those who obtained a royal pardon for the first offence, and were guilty, on the second occasion, inter alia of "manslaughter by chance medley, and not murder of malice prepensed"[3].

The distinction between murder, "of malice prepensed", and manslaughter, "by chance medley", appears to have been drawn from some cases[4], the work of legal writers[5], and from other legal sources[6], dating back at least some one hundred and fifty years. Despite the importance of the distinction in the statute of 1530, though, it appears that the distinction did not become of central importance to the common law of manslaughter until the latter part of the sixteenth century[7]. Before that time, in the late 1530s and early 1540s[8], it was not uncommon for statutes to declare that both murderers and manslaughterers were to suffer death if convicted, making the practical importance of the distinction between murder upon malice prepensed and manslaughter by chance medley negligible[9].

A statute of 1547[10], however, made the distinction between the two of great importance, once more, in that it excluded murder but not manslaughter from the scope of benefit of clergy[11]. This meant, of course, that the disparity between the punishment for those convicted of murder and those convicted of manslaughter became very

great, if defendants accused of culpable homicide were in principle eligible for clergy. It is hence from this time onwards that closer attention is paid by the courts and legal writers to the precise distinction between murder, "of malice prepensed", and manslaughter, "by chance medley".

I said, above, that by the latter part of the sixteenth century, the distinction between murder and chance medley manslaughter was, broadly speaking, that the latter concerned felonious killings upon some sudden or unlooked for occasion, whereas the former concerned premediated killings, such as those deliberately perpetrated in the course of ambushes and the like. We must now consider the exact nature, in law, of this distinction in more detail.

As I earlier suggested, the distinction between murder and chance medley manslaughter is to be found in many authorities, some dating back to the fourteenth century. Legal writers of the early sixteenth century, probably drawing on these earlier authorities[1], typically defined the distinction in terms such as these[2]:

> "Nota qe murder est lou home gist en agaite de murder ascun person, ou murder ascun person de son malice devant pretence, mes si home chaunce melle sans malice purpence occide ascun, etc., nest proprement murder mes manslaughter."[3]

The distinction was similarly loosely formulated in a number of early sixteenth century cases[4], and further employed and given more detailed treatment in important and much discussed[5] cases decided in the 1550s.

In John Vane Salisbury's case[6], for example, one Richard Salisbury and others were lying in wait to ambush a man named Ellis. Ellis arrived, the trap was sprung, and an affray between

the two parties began. At this point and (as it would seem) without prior knowledge of the ambush, John Vane Salisbury arrived on the scene and joined in on Richard Salisbury's side, intentionally killing one of Ellis's servants. The case was referred to the King's Bench for advice on whether John Salisbury should be found guilty of murder given that, unlike the others, he took part without premeditation, having had no hand in the ambush. According to Plowden, "ieo ay oy graundement doubt", but the Court declared, relying on an earlier analogous case in which a servant had come to the aid of his master in an affray, and without malice aforethought killed his master's opponent, that[1]:

> "[S]i John Vane Salisbury navoit malice prepense, mes sodeynement prist part ove eux que avoyent malice prepense, ceo est manslaughter en luy et nemy murder, pur ceo qe il navoit malice prepense".

So manslaughter appears to have been confirmed in this case as, inter alia, an intentional but unpremeditated killing.

Chance medley manslaughter was not confined at this time to unpremeditated intentional killings (or as in Salisbury's case, intentional killings in the course of a premeditated affray to which the manslaughterer had come by chance). The doctrine covered an unintentional, accidental or chance killing of an innocent person in the course of an otherwise unlawful attack upon others[2]. This shows, as we said above, that from its inception, manslaughter was an elastic crime designed to capture blameworthy (and hence felonious) killings that were nonetheless not grave enough to warrant conviction for murder. It is a question concerning the blameworthiness of certain kinds of homicide that brings us to the problem facing sixteenth century lawyers of intentional unpremeditated killings with no mitigating factors,

such as substantial provocation or armed resistance by the ultimate victim.

The central case of murder, in the sixteenth century was a planned killing, and the focal meaning of "malice" accordingly literal premeditation of the crime[1]. Despite the fact, though, that some sixteenth century authorities, such as Fitzherbert in the passage cited above, and such as Plowden in Salisbury, appear to have referred to chance medley manslaughter, in a loose shorthand way, as any unlawful killing that took place without the premeditation that would have made the crime murder, some kinds of intentional killing upon a sudden occasion remained murder despite the absence of premeditation.

For public policy reasons, for example, killing an officer of justice was still regarded as murder, even if the killing took place suddenly[2]. Furthermore, and most importantly, if defendants were intentionally to kill "sur le sudden", but without any evidence of mitigating factors such as provocation or evidence that the victims had an opportunity to defend themselves, this kind of unpremeditated killing also fell outside the ambit of chance medley manslaughter. In Herbert's case[3], for example, decided in 1558, discussion of the then well-known[4] "scrumping" example demonstrates this point:

> "Auxi fuit mise la un President, qe un de son tort demesne entre in un orchard et la spoile un pere tree, et un vient a luy et rebuke luy de cest, et il fuit par luy occise: et cest fuit murder auxi agree, et il fuit attaint et endite sur cest..."

To similar effect was Burchet's case, decided in 1574[5]:

> "Un Burchet esseant prisoner en le Tower de Londres tue un longeworth (come il fuit lyant sur un lieur) ove un billet suddenment, et fut attaint de murder, et fuit execute in

Stronde a Londres 16 Eliz.

and the anonymous case of the Dorset hunters, decided in 1584[1]:

> "And if one strike a child in the street with his dagger wherof it dieth, it is murder, and yet there is no known malice, but malice intended.

The method employed in this last case to analyse intentional killings upon no provocation, of those who did not or could not defend themselves, namely analysis in terms of the kind of malice displayed by the defendant, became the predominant method for analysing such cases in the latter part of the sixteenth century, with one important difference. Malice was not found in the fact that the defendant intended to kill <u>simpliciter</u>; malice retained what we have referred to as its focal meaning, namely literal premeditation. Instead, the so-called doctrine of "implied" malice was developed, as a legal fiction designed to show that in such cases the defendant could be <u>presumed</u> to have acted out malice prepensed, the focal meaning of malice.

The doctrine of implied malice set up a rebuttable presumption. In cases of killings in circumstances such as those in the cases mentioned above, the law would simply presume that the defendant had malice prepense, even if there was no actual evidence of it, so that a murder verdict could be brought in. As Lambarde put it, writing in 1581[2]:

> "Nowe if one doe suddenly (without anye occasion of present quarrell offered) drawe his sworde and therewithall killeth an other, that standeth by him, this cannot be thought but to have bene done of a pretensed purpose, and therefore hath bene taken to be murder".

Crompton, writing in 1583, gives a similar example, also citing Dalison as his authority[3], and summarises the distinction between what became known as "express" and "implied malice" thus[4]:

> "Sont deux maners de malice, videlicet, malice implie, et malice expresse: Malice implie est, quant home tue auter sans ascun defence suddeinment, come alant ouster un stile, ou tiel semble: Et malice expresse est, quant est conus que malice est inter eux."

The important question, for the purposes of our inquiry, concerns the circumstances in which the presumption of malice, where there had been a killing upon a sudden occasion, could be rebutted; for these circumstances defined the precise scope of chance medley manslaughter. Indeed, one does not usually find commentators at this time entering explicitly into an examination of when the presumption of malice may be rebutted. They simply speak of the circumstances which will justify a finding of chance medley manslaughter[1].

As Kaye indicates[2], the key conceptual tool developed to explain the distinction between sudden killings which would be murder, through a presumption of malice, and those sudden killings which would be chance medley manslaughter, was the late sixteenth century notion of "heated blood". In principle, so the law came to hold, if it could be shown that a sudden killing took place in hot blood, in anger, then this would rebut the presumption that the killing took place due to malice prepense for, so it was assumed, those who plan their crimes execute them in cold blood, whereas those who are genuinely prompted to kill on the spur of the moment are so prompted by anger, by the heating of the blood.

The notion of heated blood was, no doubt, in this regard a rough and ready notion, but it constitutes the foundation stone for the modern law of voluntary manslaughter. For it was from the time of the development of the notion of heated blood onwards that the law's condescension, by way of reduction of the offence from murder

to manslaughter, to killings in the heat of blood became known, as Lambarde first put it, as[1] "a bearing (as it were) with the infirmity of man's nature"[2].

Those who did most to introduce the notion of heated blood into the law were Crompton and Lambarde[3]. As I have just said, Lambarde characterised chance medley manslaughter as a concession to human infirmity. Crompton frequently employed the notion of heated blood in his discussion of examples designed to serve as illustrations to the Justices of the Peace of the nature of chance medley manslaughter[4]:

> "Deux combate suddeinment sance malice pcedent, et apres divers blows done, lun ensua un graund space de lauter, et lauter ale in meason la pchaine pur un staffe, et luy pursua maintenant et tue luy q ensua, ceo est Manslaughter, es que tout fuit fait en un continuing furie, est fuit case dun Robinson."

and again[5]:

> "Deux pugneront sur le sudden sans malice pcedent, et lun infreint son sword et ale a son meason pur aur et revient et pugn ouster ove luy, et luy tue, ceo est murder si poit appere qe le sanke par intendement puit estre appease avant son revenue."

As a result of the work of Crompton and Lambarde, basing the distinction between murder and manslaughter on the distinction between killings in cold and in hot blood, and conceiving of chance medley manslaughter, killing in hot blood, as a concession to human infirmity, became the standard way to treat of homicide in the cases and commentary of the seventeenth and eighteenth centuries[6].

Clearly there is, though, more than one way to kill in hot blood. If one takes the "scrumping" example given in Herbert's case, if the trespasser had flown into a rage upon being rebuked for stealing pears, and killed the person who rebuked him, was this chance medley manslaughter just because the killing was in hot

blood? Although there is no mention of the trespasser having flown into a rage, the implication would seem to be that such a killing in hot blood, upon trivial provocation such as the rebuke, and with no opportunity apparently having been given to the orchard's owner to defend himself, was thought to be murder. There are other contemporary cases which give a similar indication[1]:

> "Deux ludront al tables, et fall out in lour game, et lun tue lauter ove dagger sodenment, ceo est murder. Fuit case dun Emerie q fuit attaint de murder pur ceo acte avant Bromley G."

In the first edition of Crompton's work, however, it was unfortunately perhaps never made absolutely clear whether there was indeed a requirement that killings in hot blood have been preceded by substantial provocation, or some armed resistance by the ultimate victim, if a manslaughter verdict was to be warranted, and later commentators assumed that there was no such requirement. Coke, for example, described chance medley manslaughter thus[2]:

> "Note, Homicide is called chancemedley, or chancemelle, for that it is done by chance (without premeditation) upon some brawle, shuffling or contention...[when] the heat of blood kindled by ire was never cooled till the blow was given".

Early in James 1's reign, moreover, the Statute of Stabbing[3] was passed (in 1604) which purported to remove benefit of clergy from manslaughters where the victim was suddenly stabbed to death whilst unprepared for the attack. This showed that James' government too believed, as Coke and Stephen[4] did, that all sudden killings, whether upon great or trivial provocation, and whether met with resistance or not, were manslaughter at common law at the beginning of the seventeenth century.

There is evidence, though, from the turn of the sixteenth century onwards, and before the Statute of Stabbing, that as Emerie's case and the "scrumping" example suggested, more than

trivial provocation was required to mitigate a hot-blooded, intentional, fatal attack, and so make the verdict chance medley manslaughter, and not murder. This evidence takes shape in the form of the development of two historically intertwined species of manslaughter, that emerged under the aegis of chance medley manslaughter. These two kinds of manslaughter, of intentional killing in hot blood, we can call "combate-manslaughter"[1], and manslaughter upon or by reason of provocation. In the following sections of this chapter, and in chapter two, we consider these two species of chance medley manslaughter, and their development in the light of the early modern understanding of the relationship between honour, violence, and the display of virtue.

2. Chance Medley, Manslaughter and the Duel

In the early modern period, discussion of the mitigation provided by way of reduction of murder to manslaughter was by and large divided between killings in two kinds of circumstance. First, there were cases in which there had been a hot-blooded unilateral attack on a victim by a defendant, a case where the victims were given no opportunity to defend themselves in kind against the attack. It was these cases that became the concern of the doctrine of provocation, for only very grave provocation, as that was understood in the early modern period, would reduce an intentional killing stemming from a unilateral attack on a victim from murder to manslaughter. We consider the early modern treatment of such cases in chapter two.

Secondly, though, there were cases in which there had been a killing in hot blood resulting from what might be called a

bilateral attack, a hot-blooded "combate", as the early modern writers called it. In these cases, even if the provocation that preceded the combate was trivial, if the victim was given a chance to and did defend himself against attack, before being killed in hot blood, the verdict would be manslaughter. It is in this chapter that we consider this species of chance medley, what I am calling combate-manslaughter.

It is my contention that mitigation provided by way of the doctrine of chance-medley for the kind of killing in hot blood that I am calling combate-manslaughter was seen as mitigation provided, most importantly, for the duel of honour in hot blood. Kaye claims that when chance medley manslaughter based on the notion of heated blood was developed during the sixteenth century, there is little evidence that legal writers were aware of the possibility that this opened up for those who killed in the course of hot-blooded duels to escape with a verdict of manslaughter[1]. In fact, quite the opposite appears to be the case.

We find many references to what are plainly duels in the work of early modern legal writers, when they are making the point that killing in cold blood is murder, because it is done upon malice prepensed, whereas killing in hot blood is chance-medley manslaughter. Lambarde, for example, illustrates the distinction between murder and manslaughter thus[2]:

> "For, if two do suddenly fall out, and thereupon draw their weapons, and one killeth the other, this is manslaughter...So it is taken [to be murder] if two fall out, and do appoint a place to fight together, and there the one of them killeth the other..."

Crompton distinguishes murder from manslaughter by the use of similar examples[3]:

> "Deux fall out sur le sudden in le ville, et ils per agreeint alont in les camps maint, et la lun tue lauter, ceo est murder, car la fuit malice precedent, Dalison in son reports. Mes sils combate sur le sudden sans malice precedent, et pause un petit in lour combate, et donqs maintenant ils ale en les camps, et la lun tue lauter, ceo est qe manslaughter, pur ceo q tout est fait in un continuing furie, come semble."

All legal writers like to give topical factual examples to illustrate the points they are making, and the examples used by both Crompton and Lambarde make it clear that whereas killings in the course of premeditated duels would be murder, in virtue of the fact of premeditation, a duel in the heat of blood, "avant le sanke...aver este appease"[1], would be but manslaughter. Coke gives examples very similar to Crompton in illustrating the murder-manslaughter distinction[2], as does Foster, citing Hale[3]:

> "A. useth provoking language or behaviour towards B.. B. striketh him, upon which a combate ensueth, in which A. is killed. This is holden to be manslaughter, for it was a sudden affray and they fought upon equal terms; and in such combats upon sudden quarrels it mattereth not who gave the first blow. But if B. had drawn his sword and made a pass at A., his sword then undrawn, and thereupon A. had drawn and a combat had ensued, in which A. had been killed, this would have been murder; for B. by making his pass, his adversary's sword undrawn, shewed that he sought his blood."

In a sense, it should come as no particular surprise to find that the law condescended to duels in the heat of blood, for these were a common feature of early modern England[4]. In large measure due simply to the spirit of the times[5], many duels of honour were fought as soon as some affront to honour was given and received[6]. They were to be distinguished from mere brawls, despite the fact that everything took place in the heat of the moment, by the fact that there was an intention to give and accept a verbal challenge, and an ensuing fight where each party employed the same kind of weapon; usually, of course, a sword. As the eighteenth century

honour theorist Cockburn put it[1]:

> "When the meaner sort fall out, the port which intoxicated them is thrown at one another's head, and they come to boxing and cuffing immediately...But...gentlemen...are not satisfied nor will put up their differences without a duel...Sometimes [gentlemen] quarrel accidently and abruptly, and draw and fight without any deliberation."

Of considerable importance, in this context, is the typical form which a sudden and unpremeditated duel would take, which was known as "taking the field", described thus by the sixteenth century honour theorist, Romei[2]:

> "[T]here is an other invention diabolical enough found out...and that is the field, whither Gentlemen of honour oftentimes runne to decide their quarrels with armes: And this manner of fighting is now in such use, as I am doubtful, whether a man of honour offered the field may refuse without presumption of cowardice."

A closer look at the passage cited from Crompton above shows that he, as did other legal writers[3], supposed that when men fought duels of honour in hot-blood, they would have taken the field; for Crompton supposes that following a disagreement between defendant and victim[4], "ils per agreeint alont <u>in les camps</u> maint, et la lun tue lauter" (my emphasis).

What is surprising about the law's condecension to the killing in the course of duels in the heat of blood, is that it was an accepted part of the law of manslaughter despite fierce contemporary opposition to the practice of duelling[5]. In particular, pamplet writers and other intellectuals, critical of duelling, bitterly opposed the routine verdicts of manslaughter in cases of sudden hot-blooded combates, and the consequent leniency of punishments[6].

Why, then, did the law condescend to sudden duels in the heat of blood, given that it must have been well known to judges that

such condescension was strongly disapproved of by enlightened opinion? It would, after all, have been perfectly possible for judges to stipulate that chance medley manslaughter was to be confined to killings in the course of sudden affrays in which deadly weapons were not used, as indeed they eventually did in the nineteenth century, at the exact time that the duel of honour finally lost its place amongst English social customs[1]. For an answer to this question, we turn to consideration of the early modern understanding of honour, violence in anger, and of the virtues displayed in the course of "honour violence"[2].

3. Combate-manslaughter, Honour and Violence

I have referred to the sudden duel in hot blood as the duel "of honour". What was the connection, though, between the duel and the concept of honour, and what is the importance of the concept of honour to my present concerns? It was for the sake of honour that men fought duels, and retaliated violently in the face of gravely provocative affronts to honour. We thus need an understanding of honour, and of what its relationship was with violent retaliation, in order to understand not only the early modern doctrine of combate-manslaughter but also, as we will see in chapter two, the early modern doctrine of provocation. Further consideration of the duel and combate-manslaughter provides us with this understanding.

The kind of honour which was at stake in the duel of honour was known as "natural" honour[3]. This was the good opinion of others based not on any positive conduct by the person honoured, but based on an assumption that the person honoured was morally worthy of esteem and respect because he had not failed in point of any

principal virtue, but particularly because he had not failed in point of courage[1]. As we shall see, it was thought that a man could retain his natural honour through a demonstration that he was courageous, that he was possessed of courage as a virtue, even if he lacked the other virtues. Of natural honour in general, Romei said[2]:

> "Man...bringeth with him honour from his mother's womb, because he is borne with that inward supposition that he is good; neither is it requisite, that to preserve this supposition, he labour greatly, in that it sufficeth only, he never extremely offend against any principal virtue. And for that of this supposition, in the end groweth opinion in him honouring, which is honour..."

A good opinion or recognition of moral worth, as honour was in general understood to be, can be expressed in a number of ways. In the case of natural honour, recognition of moral worth, meaning the supposition that the person honoured had not failed in any principal virtue, took the form of treatment with respect according to the canons of courtesy then prevailing, particularly in social intercourse[3]. To treat a man with irreverence, disdain or contempt, to poke fun at him, or to accuse him of some failing in point of virtue, even in jest, was accordingly held to be to fail to treat him with respect, and hence to undermine or disregard the supposition that he was not deficient in any principal virtue[4]. Breaches of the canons of courtesy and civility of these kinds were called points or punctilios of honour[5], or more loosely "affronts"[6], and were considered to be particularly serious offences against honour by early modern men[7].

What was meant to be the response of the man of honour in the face of an affront to his natural honour? The answer is that the man of honour was expected to retaliate in the face of an affront,

because so to do would be to avoid the implication that he was too cowardly to defend his natural honour. The need to do this was what was commonly referred to as one of the "laws of honour"[1]. Romei elaborates on this law of honour in the following passage[2]:

> "For honour perisheth not before opinion be lost; and opinion cannot be lost before some defect be manifest and made knowne: the injuried therefore, notwithstanding he knoweth himself to be justly offended, must labour the world have no notice of it; and this he shall do by revenging the injurie in proper valor, for by not failing in valour, his defect in justice shall be concealed; but on the contrary, if he shall beare to injurie...the world will judge that having wanted valor, he also failed in justice: and that therefore he is worthy of injurie and contempt."

What is more, the man of honour was not expected to retaliate reluctantly out a sense of duty, or for fear of shame. He was expected to resent the affront, and to retaliate <u>in anger</u>. The eighteenth century honour theorist Mandeville said that a man of honour[3], "must bear no affront without <u>resenting</u> it" (my emphasis), and Romei was likewise of the view that[4]:

> "[H]ee manifesteth vilitie who easile swalloweth injurie, without by his owne proper valor, shewing himself therewith <u>moved</u>." (my emphasis)

In early modern England, as the seventeenth century honour theorist Ashley put it[5], "honour amongst most men [was] of great estimacion". An offence against it was thus something likely to provoke retaliation in anger, customarily in the form of a duel in the heat of blood; for without reacting in such a way, a man could not avoid an implication of cowardice, and as Mandeville put it[6], "Courage and intrepidity always were, and ever will be the grand Characteristick of a Man of Honour".

Here, then is the connection between the duel of honour and the mitigation offered in law to those who killed in hot blood after a fight "upon equal terms", as Foster had it[7]. For the link between

honour and the likelihood of immediate angry retaliation is placed at the heart of the rationale of the law's condescension in cases of combate-manslaughter by Hawkins, towards the end of the following passage[1]:

> "But it is said, that if he who draws upon another in a sudden quarrel make no pass at him till his sword is drawn, and then fight with him and kill him, he is guilty of manslaughter only, because that by neglecting the opportunity of killing the other before he was on his guard, and in a condition to defend himself with a like hazard to both, he shewed that his intent was not so much to kill as to combat with the other, in compliance with those common notions of honour, which prevailing over reason during the time that man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of malice prepense."

As we shall see, there is a parallel link in the early modern doctrine of provocation between affronts to honour, and violent retaliation in anger.

4. Combate-manslaughter, and the display of virtue

As I pointed out at the end of the second section, chance medely manslaughter was not a condescension to any killing in hot blood. We may now add that where the species of chance medley I am calling combate-manslaughter was concerned, it was not any form of enraged retaliation in the face of an affront to honour to which the law condescended. As the passages cited in the foregoing section indicate, a verdict of combate-manslaughter would only be warrented where the person enraged by the affront fought on equal terms with his provoker, by waiting until the latter's sword was drawn before striking.

This indicates that is was not merely passions inflamed by a proper concern for honour that were the reason for the law's

condescension. It was also the display by the defendant, in killing the victim, of courage as that virtue was understood in the early modern period, namely in its Aristotelian sense of a display of martial courage, the willingness gladly to take risks with life and limb, for the sake of honour[1]. Martial courage was par excellence the virtue of the knight or soldier, and the understanding of courage as gladly risking one's life for the sake of honour was commonly placed, in the early modern period, in the context of fighting in war[2]:

> "A valiaunte courage, which consisteth in daungerous attempts, is lifted up right worthely to the highest steppe of honour and dignity. For it is a matter of no small importaunce so little to esteeme of life as to bestowe it willingely and cherefully for the safegarde and preservation of all men, and to refuse or feare for the wealth of our country no daunger or terrour of the enemy."

This understanding of the virtue of courage was not at this time confined, though, to courage displayed in war. Many honour theorists took the important step of extending the scope of the kinds of circumstances in which they thought it would be appropriate to maintain one's right to esteem through willingly risking one's life in "daungerous attempts" from times of war to one's conduct in civil society[3]. The display of courage, said the eighteenth century honour theorist Blewitt[4], "in most men is proportioned only to the degree of hazard they run", and from early on it was made clear that this applied to the hazards run in defence of natural honour generally, and not just hazards run "for the wealth of our country". As the seventeenth century honour theorist Cleland put it[5]:

> "Valour requireth that you hazard your selves...for the King, the Countrie, and your owne honour." (my emphasis)

Mandeville is even more explicit on this point[6]:

> "To be a Man of Honour, it is not sufficient that he who assumes that title is brave in war, and dares to fight against the enemies of his country, but he must likewise be ready to engage in private quarrels...He must bear no affront without resenting it, nor refuse a challenge, if it be sent to him in a proper manner by a Man of Honour."

It is the display of precisely this kind of courage, martial courage, that is a condition of mitigation in combate-manslaughter cases. Hawkins, as we saw at the end of the last section, stressed that the defendant pleading combate-manslaughter must have fought with his ultimate victim "with a like hazard to both", and Blewitt's notion that the degree of marital courage displayed is proportioned to the degree of hazard run is reflected in other contemporary legal sources.

It is evident in the contrast made, for example, not only by Hawkins[1] but by other early modern lawyers, between the man who is willing to risk or hazard his life to take revenge on his victim for an affront, and the man who is not[2]. As Holt C.J. said in the important early eighteenth century case of Mawgridge[3]:

> "[I]f two are in company together, and one shall give the other contumelious language (as suppose A. and B.) A. that was so provoked draws his sword and makes a pass at B. (then having no weapon drawn) but misses him. Thereupon B. draws his sword and passes at A. And there being an interchange of passes between them, A, kills B. I hold this to be murder in A...But if A. who had been so provoked draws his sword, and then before he passes, B.'s sword is drawn; or if A. bids him draw, and B. thereupon drawing, there happen to be mutual passes: if A. kills B. this will be but manslaughter, because it was sudden; and A.'s design was not so absolutely to destroy B. but to combat with him, whereby he run the hazard of his life at the same time." (my emphasis)

The link so abhorred by contemporary intellectuals between the condescension of the law in cases of combate-manslaughter and the unpremeditated duel of honour, is thus explained by the centrality of a display of hot-blooded martial courage to the concerns of

both.

A display of such courage was, of course, also a feature of the cold-blooded duel. Yet there can be no doubt the law did not condescend to premeditated duels. This point is made by every commentator, but is well illustrated by Hawkins[1]:

> "Sect 29. And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kill the other, he is guilty of manslaughter only, because he did it in the heat of blood.
>
> Sect 30. But the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his seconds are guilty of murder, whether they fought or not; and some have gone so far as to hold, that the seconds of the person killed are also equally guilty.

Why, then, it might be asked, if the law held cold-blooded duelling in such contempt, did common lawyers draw such a sharp distinction between cold and hot-blooded duelling? For as I have already indicated[2], from a wider social perspective, both forms of duelling were then regarded as posing an equivalent threat to public order and the quality of civilised living[3]. The answer to this question focuses on different features of cold and hot-blooded duelling respectively.

As far as cold-blooded duelling was concerned, the refusal of the law to condescend to killings in the course of it was the fact, further discussed in relation to the nature of an excusing condition in the final chapter, that unlike unpremeditated duels, they were, as Foster put it[4], "founded in deep revenge". This means, as he goes on to point out, that cold-blooded duels, whether undertaken in a courageous manner or not, demonstrated a[5] "defiance of all laws human and divine, whatever his [the duellist's] motive may be".

This criticism of duellists could not be made, in general, of duellists who fought in hot-blood, for their actions, it was thought, were attributable to men's infirmity and impetuosity, stirred by the heating of the blood upon a sudden provocation, and not to an arrogance born of a willingness to put a duty to the laws of honour before a higher duty to God and the common law. As Cockburn put it[1]:

> "Both Written Challenges, and those given by a third person, are more Criminal than that which is given upon the Spot when the Offence is conceived, whether it be Real or Imaginary; for a deliberate Evil is more heinous than that which is the Effect of a sudden inconsiderate Passion."

Turning to duels in hot-blood themselves, there were also special reasons for the law's condescension that take us to the heart of our present concern with the link between combate-manslaughter and the display of virtue. For the link, in the law's conditions of mitigation, between the need for a display of the virtue of martial courage and the need for such a display to take the form of action in anger is not coincidental. For every display of virtue involves not only an admirable quality of action, but a linked admirable quality of <u>feeling</u>[2].

The passions were regarded, in the early modern period, as an aid to the practice of virtue rather than a hinderance, if controlled and directed by reason[3]. So suggested the sixteenth century honour theorist Blandy[4]:

> "For by nature we waxe hoate, angry, and cholericke...Which affections before they become actions, least they should exceede theyr just and due proportion, and turne thereby to our annoy, are to be tempered and moderated by reason's rule and discipline...The affections therefore of the minde, as ire,...are not...to be raced out, but rather with the light and flame of reason in the best and highest mindes enkindled...And even as a skilfull and couragious horseman doth not alway delight in a soft and gentle pace, but sometymes geveth his horse the spurre...So by reason,

> sometymes the affections of the minde are styrred and prycked forward, that we might more cherefully dispatch our business."

As Blandy indicates here, in the early modern period it was thought that, under the guiding influence of reason[1], there were occasions when a man positively ought to be angry, afraid, compassionate, or whatever; for an appropriate passion would help him in acting in an appropriate way. This is also stressed by Romei, in the following passage, Romei making the important further point that it was in pursuit and defence of honour that the passions were regarded as an important driving force in action, assisting reason to this end. He says, of honour[2]:

> "This is the ardent heat which enflameth the minde of man, to glorious enterprises making him audacious against enemies, and to vices timeous. And therefore Plato in his Phedro, compareth the minde of a man to a Chariot, whereof reason is the coach man, the affectations of the minde the horses, and desire of honour the whip..."

The circumstances in which one ought to become angry are tied by Romei both to the concept of honour and to the practice of the virtue of courage. Honour is the "ardent heat" which whips up or enflames the passions. In so doing, though, it makes a man audacious, and "to vices timeous". In other words, the passions, spurred on by a concern for honour, assist men in the practice of virtue, and of courage in particular amongst the virtues. An "admirable" display of feeling, thus, is the display of emotion as part of a concern for honour, assisting the display of virtues such as courage whose display, as we now know, was a part of that same concern.

Defendants in combate-manslaughter cases were aware of and often, in their appeals to the jury, adverted to this link between feeling and action, where courage as a virtue is concerned[3]. An

example is provided by the trial of Lord Byron for the murder of one Chaworth, in the course of a duel, as a result of which Byron was ultimately found guilty only of manslaughter[1]. Speaking on his own behalf, Byron explicitly links the fact that he was angered, as the honour theorists would have claimed he should have been, by a praiseworthy concern for his honour, with the fact that he hazarded his own life for the sake of honour[2]:

> "[N]othing could be more sudden and unpremeditated than the conflict that ended so unfortunately; and in which I received the first thrust, at the peril of my own life...In such a case your Lordships will, no doubt, have some consideration for human weakness and passion, always influenced and inflamed in some degree by the customs of the world."

As we have seen, precisely this same link, between a concern for honour and admirable feeling and action constituting a display of virtue - here courage, is to be found in Hawkins' analysis of combate-manslaughter, as well as in the early modern honour theorists' reflections on honour, feeling and action, cited above.

The importance of this link between honour and virtuous feeling and action is that it explains not only the doctrine of combate-manslaughter, but the development of combate-manslaughter's sister doctrine under the aegis of chance medley manslaughter, manslaughter by reason of provocation. Both the mitigation offered by way of combate-manslaughter and that offered by way of the doctrine of provocation involved action in anger for the sake of honour.

As we shall see, moreover, the display of appropriate anger is not merely an aid to virtuous action, such as martial courage, but is itself the display of a virtue, the virtue of even-temperedness[3]. This is the virtue of being enraged for the (in the eyes of men of honour) right reason - for the sake of honour, by

the right thing - an affront or point of honour, at the right time - at the time of the offence.

Even-temperedness is, moreover, not merely a virtue linked in action, as we now know, with martial courage, the virtue associated with combate-manslaughter. As I shall demonstrate in chapter two, it is linked in action also with the display of retributive justice as a virtue, a virtue central to the understanding of the mitigation in the law of homicide through a verdict of manslaughter by reason of provocation. This discussion will lead us on to consider the centrality of the concept of virtue to an understanding of anger and action in anger themselves.

NOTES AND REFERENCES - CHAPTER 1

Page 1

1. An anonymous Irish duellist, cited by Baldrick (1965), 102.

2. For alternative accounts of the emergence and development of the doctrine of provocation and the doctrine of chance medley, that do not connect them closely enough at a theoretical level, see Snelling (1957 and 1958) passim, Kaye (1967), part 2 esp.; Ashworth (1973), chaps. 2 and 3.

3. For two excellent recent examinations of the concept of malice aforethought (sometimes written as "malice prepensed", malitia praecogitata, or malice devant pretence), see Kaye (1967) passim, and Green (1976) passim.

4. The doctrine of chance medley, and with it what we will be calling the doctrine of combate-manslaughter, were finally laid to rest in the relatively recent case of Semini (1949) 1 K.B. 405, on the grounds that they were anachronistic.

Page 2

1. See Kaye (1967), part 2 passim; Green (1976), part 4 passim.

2. ibid.

3. For discussion of early definitions of "chance medley", see Kaye (1967), part 2 sections 2 and 3; Green (1976) part 4 section A.

4. ibid.

5. Ashworth (1973), 412-413.

6. See Green (1976), 483, note 249.

7. Green (1976), 476, note 225.

Page 3

1. Green (1976), 479, note 237.

2. 22 Hen c.14.

3. 22 Hen. c.14. 2\4.

4. See Green (1976), 482, note 248\469, note 202.

5. See eg. Marowe, (1503), cited by Putnam, (1924), 378; The Boke of Iustyces of Peas (ed.1510), fo.4 a/b.; Fitzherbert, ed., (1537), cxxiiia.

6. Green (1976), 467.

7. Green (1976), 483, note 251; Kaye (1967), section 3.

Page 3 (cont.)

8. Green (1976), 483, note 251.

9. 33 Hen 8 c.12.

10. 1 Ed. c.6, 9.

11. For a short account of benefit of clergy and its importance in point of punishment in criminal cases, see Green (1976), 474-475.

Page 4

1. See Green (1976), 478, note 235.

2. Elyot, (1512-1522?) Britism Museum, Lansd. 1072 fo.43a.

3. See also Green (1976), 482, note 247.

4. Cited by Green (1976), 482, note 248.

5. See esp. Kaye (1967), 577-594.

6. (1553) Pl.Comm.100.

Page 5

1. ibid.

2. Herbert's case (1558) British Museum, Harl 5141, ff. 40-41.

Page 6

1. Green (1976), part 4 section A.

2. 4 Co.Rep.40a

3. See page 5 note 2 ante.

4. Crompton (1606 ed.), fo.24, eg.32.

5. Crompton (1606 ed.), fo.24b\119b.

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1. (1584) Sav. 87.

2. Lambarde (1581), 255.

3. Crompton (1606 ed.), 23b-24 eg.32.

4. Crompton (1606 ed.), 21a eg.2.

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[1] See eg. Crompton (1606 ed.), 21-26.

[2] Kaye (1967), 589-590.

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[1] Cited by Kaye (1967), 595.

[2] The phrase is later to be found, used in this context, for example in Clement v. Blunt (1625) 2 Rolle 460, and Foster, C.L. 296\316.

[3] See Kaye (1967), 594 et seq.

[4] Crompton (1606 ed.), 26a-b eg.9.

[5] ibid., 24 eg.36.

[6] See eg. Coke, 3 Inst.55; Hale 1 P.C. 453; Hawkins 1 P.C. 97.

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[1] Crompton (1606 ed.), 23a-b eg 27.

[2] 3 Inst. 57\55.

[3] (1604) 2 Jac. c.8. For detailed analysis, see Radzinowicz (1948), 695-698.

[4] History, Vol.3, 73.

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[1] For the purposes of analysis, I have separated the two doctrines, combate-manslaughter and manslaughter by reason of provocation, as species of chance medley manslaughter. In fact, however, what I have called combate-manslaughter was itself historically (somewhat confusingly) referred to as chance medley manslaughter, even though manslaughter by reason of provocation also started life as a species of chance medley manslaughter, before becoming perceived as a head of mitigation independent of chance medley manslaughter during the course of the eighteenth century - see Ashworth (1973), 31-55. For the sake of clarity, I will continue to use the separate names for the two doctrines as species of chance medley manslaughter.

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[1] Kaye (1967), 600.

[2] Lambarde (1581), 217\256.

[3] Crompton (1606 ed.), 23b eg.31.

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1. Crompton (1606 ed.), 24.

2. 3 Inst. 55.

3. Foster, C.L. 295, citing Hale 1 P.C. 456.

4. See Sharp (1984), chap.5; Stone (1965), 242-250.

5. ibid.

6. See Bryson (1938), xi.

Page 14

1. Cockburn (1720), 131-132\182-183.

2. Romei (1597), 161; see also Cleland (1607), 232.

3. See eg. Hale 1 P.C. 453.; 3 Inst. 55.

4. See page 12 note 3 ante.

5. See eg. Cockburn (1720), 352; Sharp (1773), 224; Babington (1677), 92-93.

6. ibid.

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1. On the decline of the duel as a social institution, during the late eigteenth and early nineteenth centuries, see Andrew (1980), 420-431. For the transformation of combate-manslaughter, at a similar time, into a form of mitigation less concerned with the duel than the public house brawl, in which swords would not be used and in which deadly force would probably not be intended, see eg. Kessal (1824) 1 C. and P. 437; Whiteley (1829) 1 Lew. 173; Smith (1837) 8 C. and P. 160; Caniff (1840) 9 C. and P. 359; Knock (1877) 14 Cox 1.

2. James (1978), 1-6.

3. Romei (1597), 82.

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1. Romei (1597), 80-81; Mandeville (1732), 14\15\45.

2. Romei (1597), 110.

3. Mandeville (1723), 244; Baldrick (1965), 1, citing the nineteenth century honour theorist, Jules Janin; Bosquett (1817), 21\87-88; Andrew (1980), 415 note 31.

4. Romei (1597), 81\88; Bryson (1938), 4.

Page 16 (cont.)

5. Romei (1597), 131; Bosquett (1817), 87-88.

6. Mandeville (1714), 180\181.

7. Mandeville (1714), 180-181.

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1. Mandeville (1714), 180.

2. Romei (1597), 99\100.

3. Mandeville (1732), 15.

4. Romei (1597), 81.

5. Ashley (1600), 50.

6. Mandeville (1732), 63.

7. See page 13 note 3 ante.

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1. Hawkins 1 P.C., 97 - section 28.

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1. NE Book 3, 6-9.

2. Osorius, Civill and Christian Nobilitie (1530?), fo. 25b., cited by Kelso (1911), 93.

3. See eg. Segar (1602), 124, who explicitly relies on Aristotle's conception of courage, as does Elyot (1531), fo.163.

4. Blewitt (1725), 79.

5. Cleland (1607), 231.

6. Mandeville (1732), 14\15.

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1. See page 18 note 1.

2. See eg. Hale 1 P.C., 456; East 1 P.C., 241\242.

3. Mawgridge (1707) Kel. 119, at 130-131.

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1. Hawkins 1 P.C., 97.

Page 21 (cont.)

2. See page 14 note 5 ante.

3. See on this point, Andrew (1980), 416-428.

4. Foster C.L., 297.

5. ibid.

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1. Cockburn (1720), 182-183.

2. See NE Book 2, and the First Interlude infra.

3. See eg. Kelso (1911), 31-32.

4. Blandy, The Castle, fo.13, cited by Kelso (1911), 92.

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1. See chapter 2, section 6.

2. Romei (1597), 78.

3. See, for example, the passage cited at the beginning of chapter 2.

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1. (1765) 19 St.Tr. 1178.

2. ibid., at 1231-1232.

3. This is the my own translation of Aristotle's virtue of Praotes. Other translators have preferred to call that virtue patience, gentleness, or good naturedness. I choose even-temperedness because that term seems, more than the others, to indicate that the virtue is concerned with becoming angry the right amount at the right times with the right people - see eg. NE1125b30 - and not necessarily primarily with restraining one's anger in the face of provocation, which is what the other terms might be taken to suggest.

FIRST INTERLUDE

1. Virtue, Action and Emotion

I have shown how the mitigation provided by way of the doctrine of combate-manslaughter hinged on the display of certain virtues by defendants. Principally involved was the virtue of martial courage, but at the end of the chapter, I suggested that the display of that virtue was associated with the display of another, even-temperedness, a virtue also said to be central to the mitigation provided through the doctrine of provocation, and said to explain the link between feeling and action worthy of mitigation under the doctrine of chance medley manslaughter.

The virtue of even-temperedness, along with that of retributive justice will, as I hinted at the end of the chapter, play a key role in explaining the link between feeling and action worthy of mitigation under the doctrine of provocation. Those virtues will also form the keystone of my account of a first concept of anger, the conception of anger as righteous indignation. Provocation and the concept of anger will be our focus in chapter two.

Before moving on to consider them, however, we need to know more about the nature of virtue. Now that I come on to consider the concept of virtue itself, we discover that the very essence of virtue is the display not only of a certain character and quality of action, but of a certain character and quality of feeling or emotion, the link that we found to be at the foundations of the mitigation available under the doctrine of combate-manslaughter.

In their ethics, their theories of human character, and thus in their accounts of the nature of virtue, the honour theorists drew

heavily on ancient philosophy[1]: in particular, on Aristotle's analysis of the virtues[2], and especially on his celebrated doctrine of the "mean" with regard to feeling and action[3]. In search of the true nature of a display of virtue, and hence of the true ethical foundation of the law's condescension in cases of homicide in hot blood, not only in the early modern period but at a more general theoretical level, we start, then, with Aristotle's conception of virtue. Aristotle had this to say of the "mark" of virtue[4]:

> "By virtue I mean moral virtue since it is this which is concerned with feelings and actions, and these involve excess, deficiency and a mean. It is possible, for example, to feel fear, confidence, desire, anger, pity, and pleasure and pain generally, too much or too little; and both of these are wrong. But to have these feelings at the right times on the right grounds towards the right people for the right motive and in the right way is to feel them to an intermediate, that is to the best, degree; and that is the mark of virtue."

So people who display virtue have the kind of character or disposition[5] that leads them to experience emotion in a "mean" - ie. a right or proper - way, as well as to act in a mean, proper or right way. The display of virtue is thus not solely concerned with for example acting justly, temperately, wisely, or courageously - as in the last case, as we have seen, by hazarding one's life for the sake of honour. As Kosman puts it[6],

> "[A] moral virtue with respect to feelings or emotions...is the power to have and avoid certain emotions, the ability to discriminate in what one feels".

The concept of a virtuous - a mean, proper or right way in which to experience emotion, is illustrated by Aristotle, in the passage cited below, using the example of the emotion which most closely interests us, namely anger. Although, as we shall see in the next chapter, an account of the virtue of retributive justice is also necessary fully to explain the display of virtue, where

action in anger is concerned, Aristotle associates the experience of anger primarily with the (more or less successful) display of the virtue of praotes, even-temperedness[1]:

> "[E]xcellence is that sort of habit...through which [people] are in the best disposition towards what is best; and best is what is in accordance with right reason, and this is the mean between excess and defect relative to us...Even-temperedness is an intermediate state with regard to anger...The excess might be called a sort of irascibility...Yet there is also excess in the direction of gentleness and readiness to be reconciled, and the repression of anger when one is struck."

There are a number of points of importance about the mean with regard to feelings as well as actions, for our purposes, compressed in this passage. The first is that the mean is a right or proper feeling or action lying between an excess and a defect; what constitutes "right", "excess", and "defect", being a judgment made "relative to us". These are all aspects of the mean that I shall have cause to consider further in the ensuing chapters, but some important preliminary points should be made.

First, as Aristotle remarks[2], departure from the mean or right response, where the virtue he associated with anger is concerned, does not simply connote getting more or less angry than one ought. Such a person is respectively "irascible" or "lacking in spirit"[3]. There may be others, though, who can equally be regarded as departing from the mean in that they became angry more quickly than they ought to have done, and sometimes angry with the wrong people - the "quick-tempered". There are also those who are angry for longer than they ought to be - those who are "bitter". All such people depart from the mean, where the virtue Aristotle connects with anger is concerned, in addition to those who become more angry than they ought[4]. There is thus more than one dimension to the notion of experiencing emotion in accordance with the mean with

respect to anger. As Aristotle puts it, only[1]:

> "the man who gets angry at the right things and with the right people, and also in the right way and at the right time and for the right length of time, is commended."

In this regard, secondly, we should note that although Aristotle refers to the display of the virtue he connects with anger, experiencing emotion in accordance with the mean, as "an intermediate state with regard to anger", a mean or right experience of emotion is most certainly not necessarily the experience or display merely of a moderate amount of anger[2]. What constitutes a mean experience and display of anger depends entirely on the circumstances in which we find ourselves[3]. If, for example, someone is confronted by the the torture of their loved ones, a moderate experience and display of anger would almost certainly not hit the mean. The mean would in these circumstances surely be closer to complete outrage. By way of contrast, in the face of the trivial irritation of a child, the mean might be nothing more than a mild annoyance[4]. Only, for example, in the face of an insult of a not too serious kind would (although merely coincidentally) the mean or right response be the experience and display of a moderate amount of anger. We find discriminations of just this kind, in the assessment of what is or would have been a mean or right response to provocation, made in the early modern period in the explanation of what killings in hot blood are to be manslaughter by reason of provocation at common law.

Following on from this point, thirdly, what will amount to a trivial or serious insult or provocation, and hence what will accordingly constitute a mean or right response, where the experience of anger is concerned, is a matter "relative to us", as

Aristotle puts it, meaning a matter dependant on the sort of people that we are[1]. When we come on to consider the early modern approach to killings in anger under provocation, we will see that shaping the law's conception of killing worthy of mitigation, one in which the defendant did not go too far beyond the mean in his response, is an understanding that a mean response to provocation should be judged relative to men of honour, to the sort of people that they were. This entailed judging a mean response to provocation relative to the sort of people who would be angered by affronts in point of honour.

Following on from this point, of great importance to my inquiry into both the first-order and the second-order foundations of the doctrine of provocation, is the Aristotelian notion that to experience emotion, and act under its influence, in a mean or proper way is a kind of "excellence" of character[2], and thus impliedly that not to do so may be a display of bad character. This was evident, in combate-manslaughter cases, in the way defendants played upon the inherent worth of the emotions, spurred on by a concern for honour, that guided them to kill in the face of an affront to honour, and the law's reflection of the worth attributed by men of honour to such emotions, and consequent actions[3]. It is, as we shall see, also evident in the early modern analysis of manslaughter upon provocation.

Building on these insights, in chapters two and four I shall be arguing that the first-order element of (lack of) justification in the doctrine is ultimately concerned with a display of good (or bad) character by defendants in feeling as well as in acting as they did, in response to the provocation in issue. "Good character"

in this regard is as Aristotle suggests, in the passage just cited, to be equated with conforming one feelings and actions to the mean - the right or proper way to feel and act in particular circumstances - and "bad" character is accordingly commensurate with the degree of departure from the mean. A key role, thus, is to be played by Aristotle's doctrine of the mean with regard to feelings as well as actions, in my analysis of the first-order philosophical foundations of the doctrine of provocation.

The mean is also, though, to play a role in explaining the second-order foundations of the doctrine. Aristotle claims, in the passage cited above, that to hit the mean in one's feelings, as well as in one's actions, is to experience emotion in accordance with "right reason". We have already seen, at the end of the first chapter, how the early modern honour theorists claimed that it was indeed reason which not only controlled but (being "the coachman") directed the passions in such a way that they would assist a man of honour in the practice of virtue, rather than hinder him.

In the ensuing chapters, we will analyse and explore the different ways in which this role for reason is central at a second-order level to the law's understanding of the experience of emotion, of anger[1]. This will hence give us a much improved understanding of the first-order elements of justification and excuse.

NOTES AND REFERENCES - FIRST INTERLUDE

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[1]. Romei (1597), 78\101; Segar (1602), 124; Hoopes (1962), passim.

[2]. See eg. Kelso (1911), 96.

[3]. For an instructive exposition of the doctrine of the mean, see Urmson, in Rorty, ed. (1980a), chapter 9.

[4]. NE1106b16-23.

[5]. For recent accounts of the meaning of "disposition", see Sherman (1989), chapter 5; Hutchinson (1986), passim.

[6]. Kosman, in Rorty, ed. (1980a), at 107.

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[1]. This passage combines citations successively from EE1222a7-10; NE1125b30; EE1222b1-3.

[2]. EE1221b10.

[3]. NE1125b30, and NE1126a3 respectively.

[4]. NE1126a19, and NE1126a13 respectively.

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[1]. NE1125b35.

[2]. Urmson, in Rorty, ed. (1980a), at 160-162.

[3]. NE1106a29ff.

[4]. Urmson, in Rorty, ed. (1980a), at 160-162; and see Horder (1987), at 659-660.

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[1]. POL3.5.17.

[2]. For discussion of the meaning of "excellence of character", see eg. Hutchinson (1986), chapter 3.

[3]. See the final section of chapter 1 ante.

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[1]. As we will see, in chapters two and five, reason also plays a crucial role in action in anger, where the kind of anger in issue is that which I will be calling "righteous indignation".

CH.2 THE FOUNDATIONS OF EARLY MODERN DOCTRINE OF PROVOCATION

> "It is impossible to define in terms the proper feelings of a gentleman; but their existence has supported this country for many ages, and she might perish if they were lost."[1]

1. Provocation, Honour, and Unilateral Retaliation

Our investigation into the doctrine of combate-manslaughter set in its proper historical context, the display of virtue for the sake of honour, illustrated that the law, in the conditions it set down for mitigation of deliberate killings in hot blood, recognised that, as Romei put it[2]:

> "an honourable man, is tyed in right or wrong by his own proper valour, to repel an injury, and also to maintain an unjust quarrel, lest he remain dishonoured."

As we have seen, valour ordinarily required a man to repel an injury or offence against honour with a display of martial courage, in a bilateral combate, and this was reflected in the conditions that had to be satisfied in a plea of combate-manslaughter.

Nonetheless, it was recognised that in the face particularly of a serious offence against honour, which courage required them to avenge, enraged men of honour would be tempted to avenge it immediately by some unilaterally inflicted retaliation. As Sir Thomas Elyot put it[3]:

> "Unto him that is valiant of courage, it is a great peine and difficultie to susteine injurie, and not to be <u>forthwith</u> revenged." (my emphasis)

Under the code of honour, moreover, it was often thought permissible or even right to avenge an injury by unilaterally inflicting some retaliatory blow. Where a man's natural honour was, for example, called into question verbally - by words of reproach or infamy - it was not thought that he must necessarily offer a

duel to the provoker, in order to avenge the injury and hence wipe out the challenge to the assumption that he was possessed of courage. It was thought that he could instead simply wipe out that challenge by the unilateral infliction of some roughly equivalent retaliatory injury on the provoker. This retaliation would then place the provoker's own natural honour in jeopardy, and the onus would switch to him to offer a duel, if he was in turn to keep intact his natural honour, his right to respect as a man who had not failed in point of courage[1].

The legitimacy, in point of honour, of sometimes revenging a verbal injury not "in proper valour", through a bilateral combate, but by direct unilateral retaliation was noted by Hobbes[2], and is evident in the following passage from Romei[3]:

> "They...that intreate of Combate...have set it down for a certaine rule that injury in words is taken away by the injury of deed, and that a lie is falsified with a boxe on the eare, or any blow with what thing else soever, they alleging this proposition for a maine, unto which no answer can be made, that one injury, by another greater than that is clear taken away, and that the injury of deeds is greater than that of words."[4]

The early modern law recognised, in this regard, the customs of honour. It recognised, first, that the role of the retaliatory blow was as a blow avenging in point of honour a previous verbal affront, and was not a blow necessarily indicating malice harboured by the striker against the person responsible for the injury[5]. This is made clear by Holt C.J. in the early eighteenth century case of Mawgridge[6]:

> "Suppose upon provoking language given by B to A A gives B a box on the ear, or a little blow with a stick, which happens to be so unlucky that it kills B who might have some impostume in his head, or other ailment which proves the cause of B's death, this blow though not justifiable by law, but is a wrong, yet it may be manslaughter, because it doth not appear

that he designed such a mischief."

More significantly, for our purposes, the law followed honour theorists such as Romei, in the passage cited above, in supposing that where a more serious provocation in point of honour than words was in issue, such as an insulting blow, a man of honour might well revenge it unilaterally "with what thing else soever" - even an intentional killing of the striker[1]. In such circumstances, just as the law mitigated the offence where a less severe unilateral retaliation than an intentionally fatal blow, ending in death, was struck to avenge a verbal provocation, so the law mitigated the offence where the more severe fatal blow was intentionally struck to avenge a more serious provocation. In a passage I shall have cause to consider again, Holt C.J. makes this quite clear in Mawgridge[2]:

> "[I]f one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault."

In section four below we consider the sense in which the law, in following in its conditions for mitigation common notions of what honour endorsed by way of unilateral retaliation upon provocation, was condescending to a display of the virtue of retributive justice by the defendant, as well as to a display of the virtue of even-temperedness, to which I now turn in section two. It is only through a grasp of the link between the early modern concept of honour and the display of the virtue of even-temperedness, that we can properly understand the historical emergence of kinds of provocations that were regarded as so serious that even an intentionally fatal blow, unilaterally struck to avenge the

provocation and hence restore natural honour, would merit a manslaughter conviction at common law. An analysis of the historical emergence of these kinds of provocation is the concern of section three below.

2. Even-Temperedness and the Concept of Honour

At the end of the first chapter, we saw that the mitigation provided through the doctrine of combate-manslaughter was as much a condescension to an admirable display of anger, for the sake of honour, as it was to a display of virtuous (courageous) action for the sake of honour. It was thought, in particular, by honour theorists that men would be and ought to be angered by affronts and points of honour[1], honour being the whip that stirred up the passions, which then assisted men to act in accordance with virtue[2]. This was reflected in the work of legal writers such as Hawkins, who described the condescension of the law, through the doctrine of combate-manslaughter, as being to defendants'[3] "compliance with those common notions of honour, which [prevail] over reason during the time that a man is under the transports of a sudden passion"[4].

We can interpret this early modern understanding of the connection between honour and the display of a certain quality of emotion in the light of what we now know about the virtue of even-temperedness. The essence of this virtue, it will be recalled, is experiencing anger at the right things at the right time, in the right way with the right people, and so on[5]. To experience anger in this way is to demonstrate excellence of character, to experience emotion in accordance with right reason, in a mean or proper way,

relative to us, to the sort of people that we are[1].

In the early modern period, as we have seen, the experience of appropriate emotions at appropriate times was indeed regarded as a kind of excellence of character[2]. In particular, the experience of anger in the face of affronts to honour was regarded as a sign of good character in that it was taken to demonstrate courage[3]. An affront was, for the honour theorists, the right thing about which to become angry, in the early modern period; to experience anger at an affront to honour was thus (at least in one respect) to have hit the mean with regard to the virtue of even-temperedness, in that it was to have experienced anger in accordance with right reason, by being angered on the right grounds[4].

To be angered by an affront was, moreover, where the right ground to be angered was concerned, to hit the mean with regard to even-temperedness "relative to us", as that was understood by many in the early modern period, and in the sense relevant for the law, namely as relative to men of honour. This is made very clear by Mandeville, who contrasts, in this regard, the views of the duelling authorities with those of the church[5]:

> "The only thing of weight that can be said against modern Honour is, that it is directly opposite to Religeon. The one bids you bear injuries with Patience, the other tells you if you don't resent them, you are not fit to live. Religeon commands you to leave all Revenge to God, Honour bids you trust your Revenge to no body but your self, even where the Law would do it for you. Religeon plainly forbids Murther, Honour openly justifies it."

In section three of this chapter, we analyse the early modern doctrine of provocation in terms of that part of the virtue of even-temperedness that concerns the right grounds or reasons to be very angry, seen in the light of the concept of honour. We will see

how affronts which were regarded as the gravest forms of provocation, so grave that an intentionally fatal unilateral attack on the provoker would be regarded as worthy of mitigation, were judged as so grave relative to the standards of men of honour for assessing the right reasons or grounds to become enraged.

3. The Doctrine of Provocation and the Concept of Honour

In spite of what Coke and Stephen thought about the treatment of intentional killings in hot blood stemming from unilateral attacks from the late sixteenth century onwards[1], there is good evidence that they were not all treated as chance medley manslaughter - only those following a combate (as we have seen), or grave provocation would be so treated. In the second edition of Crompton's Justice (1606), for example, the underlying premise of the Statute of Stabbing is explained as being that where[2] "[d]eux quarrell sur le sudden et lun stabbe lauter, cest que manslaughter, mes nauer clergy"; but then the following explanation is given of the distinction between murder and manslaughter[3]:

> "Si ascun stabbe aut suddenment si nest fur quarrelling avant tiel stabbing commence a mle temps, ceo semble destre murder de malice prepensed [ie. implied malice], come ou peute aut alont ouster un style ou alont avant luy in le voye. Fuit adjudge al Staff avant Walmesley et son copaignons Justice circa 43 Eliz que un home q chide ove son femme peut son feme ove un pestel dot el deure maintenat, q ceo fuit murder et fuit pendus al Stafford in Com Staff."

In this passage, we have, at first, a distinction made between sudden killings where prepensed malice would be implied, namely where it appeared that there was no provocation, and hence no loss of temper, and sudden killings "fur quarrelling", which would (so the passage seems to imply) be manslaughter. The example which then follows, however, seems to indicate that not all killings

"fur quarrelling", in the sense in which we would understand that notion, would lead to a manslaughter verdict, in that a man who kills his wife following an argument is said to have been found guilty of murder. This is the same indication that is implicit in Emerie's case, cited earlier[1], where victim and defendant "fell out in lour game", but Emerie's fatal stabbing of the victim in the heat of the moment was nonetheless murder.

A case which provides more conclusive proof that trivial provocation was not enough to reduce a hot-blooded intentional killing from murder to manslaughter is Watts v Brains[2], decided in 1600. In this case, there had been some dispute between defendant and victim the day before the killing, and on that day, the victim, Watts, made a rude gesture or pulled a face at the defendant Brains, who immediately came out of his shop and pursued Watts, hitting him in such a way that Watts died. The Court, in declaring the killing to be murder by implied malice, had this to say of the events leading up to it[3]:

> "[I]f one make a wry or distorted mouth, or the like countenance upon another, and the other immediately pursues and kills him, it is murder: for it shall be presumed to be malice precedent; and that such a slight provocation was not sufficient ground or pretence for a quarrel".

This decision thus provides evidence that even before the Statute of Stabbing, judges analysed cases of attacks in the heat of blood in terms of the sufficiency of the provocation that preceded them. This kind of analysis of intentional killings became more clearly articulated and systematised during the course of the seventeenth century[4], and led to the development of a discernible doctrine of provocation. It is this articulation and systematisation of manslaughter upon provocation which must be understood in terms of

the early modern concept of honour.

During the course of the seventeenth century, four kinds or categories of provocation sufficient to reduce unilateral attacks ending in a deliberate killing from murder to manslaughter emerged[1]. The first of these categories concerned seeing a relative, friend, or master being attacked. There are three cases dating from the early eighteenth century that establish this category of provocation.

The first of these is an anonymous case which arose out of a game of bowls at Great Marlow[2], decided in 1612. Coke's account of the case runs as follows[3]:

> "Divers men playing at bowls at Gt. Marlow in the county of Kent, two of them fell out, and quarrelled the one with another; and the third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died; this was held to be manslaughter for this, that it happened upon a sudden motion in revenge of his friend."

The importance of the way in which Coke presents this case is that mitigation is not made dependant on there having been a combate between victim and defendant before the killing. It is sufficient that the defendant's hot-blooded revenge is taken at the sight of a friend being attacked.

The second case is that of Royley[4], also decided in 1612. In this case, the defendant's son returned home bloody from a fight with another boy, and complained of his beating to the defendant, his father. The defendant, on hearing this story, picked up a cudgel and ran the three-quarters of a mile or so to the place where his son had complained of having been attacked, and finding the boy in question, killed him with a blow on the head with the cudgel. Croke reports[5]:

> "And all the court resolved, that it was but manslaughter; for he going upon the complaint of his son, not having any malice before, and in that anger beating him, of which stroke he died, the law shall adjudge it to be upon that sudden occasion and stirring of blood, being also provoked at the sight of his son's blood, that he made that assault, and will not presume it to be upon any former malice, unless it be found."

In this case there can be no question of a combate having taken place between victim and defendant, in which by definition no advantage is taken on either side. It is, as in the bowls case, the nature of the provocation giving rise to the heating of the blood that justifies a manslaughter verdict, even though the attack was a unilateral one on a victim unable to defend himself. In the third case, Cary[1], we again find no reference to the need for a combate to precede the killing if the heating blood is prompted by sufficient provocation, the same kind of provocation was in issue in the bowls case, and in Royley[2]:

> "A. and B. were fighting in a field in a quarrel. C., A.'s kinsman, casually riding by and seeing them in a fight and his kinsman one of them, rode in, drew his sword, thrust B. through and killed him. Coke C.J., and the rest of the court agreed that this is clearly but manslaughter in him [ie. C.] and murder in the other, for the one may have malice and the other not."

Authoritative confirmation that these three cases should be regarded as together constituting the emergence of a category of provocation sufficient to reduce murder to manslaughter is to be found in the judgment of Holt C.J., in the important early eighteenth century case of Mawgridge[3]. In setting out the four categories of sufficient provocation whose origins I am tracing, he describes the category under present consideration in the following passage, relying on the bowls case, and interestingly, on Salisbury's case, which I discussed in the first chapter, in relation to chance medley[4]:

> "Secondly, if a man's friend be assaulted by another, or engaged in a quarrel that comes to blows, and he in vindication of his friend, shall on a sudden take up a mischievous instrument and kill his friend's adversary, that is but manslaughter; so was the case, 12 Rep.87...So it is, if two be fighting a duel, though upon malice prepensed; and one comes and takes part with him that he thinks may have the disadvantage in the combat, or it may be that he is most affected to, not knowing of the malice, this is but manslaughter [by reason of sufficient provocation], Pl.Com.101."

By the middle of the second decade of the seventeenth century, thus, at least one category of provocation sufficient to reduce from murder to manslaughter intentional killings stemming from unilateral attacks had emerged: seeing someone with whose interests one could be expected to identify being attacked. The link between the conditions in which mitigation is warranted and the concept of honour here, the link that was also present in the close association between combate-manslaughter and the duel in hot blood, is a link that we consider more closely in relation to other analogous kinds of provocation sufficient to reduce murder to manslaughter below.

The present category of sufficient provocation is focused, of course, on a set of facts not dissimilar to those which typically give rise to a combate-manslaughter plea, namely an affray or duel, and as we shall see below, some efforts were made, in the seventeenth century, to deny that verdicts of manslaughter in such cases were based on provocation at all. The importance of later seventeenth century developments, though, is that they in fact mark the development of a doctrine of provocation conceived as having grounds of mitigation clearly independent of combate-manslaughter.

A common source of provocation, in the sixteenth and seventeenth centuries at least, stemmed from jostling in crowded

streets, and in particular from attempts by pedestrians to secure for themselves, at the expense of others, a position right by the wall adjoining the street, in order to avoid both being splashed by passing coaches, and to obtain the protection of the overhang from waste being thrown from windows. Crompton may have had this kind of provocation in mind where, in the passage cited above[1], he claimed that it was murder by implied malice to stab someone to death "si nest fur quarrelling... come...ou alont avant luy in le voy". Coke more explicitly refers to this kind of provocation, in his exposition of chance medley manslaughter[2]:

> "There is no difference between murder, and manslaughter; but that one is upon malice aforethought, and the other upon a sudden occasion: and therefore is called chance medley. As if two meet together, and striving for the wall the one kill the other, this is manslaughter and felony."

More light is shed upon the law's attitude towards the provocation constituted by "taking the wall" in Lanure's case, decided in 1642[3]. It was held that[4]:

> "If A be passing the street, and B meeting him, (there being convenient distance between A and the wall) takes the wall of A and thereupon A kills him, this is murder; but if B had justled A this justling had been a provocation, and would have made it manslaughter, and so it would be, if A riding on the road, B had whipt the horse of A out of the track, and then A had alighted, and killed B it had been manslaughter."

Some efforts were made, during the seventeenth century, to deny that cases such as these constituted part of the emergence of a doctrine of provocation that was essentially distinct in character from other, better established defences. The fact that there had to be some jostling on the part of the victim in the endeavour to take the wall, if the verdict was to be manslaughter, was taken as evidence that the defendant mistakenly supposed that the victim was making an attack on his life, and the verdict of manslaughter

accordingly justified on the grounds of what is now commonly referred to as "excessive defence"[1].

Similar treatment was also handed out to an analogous category of cases in which the provocation in issue was unlawful imprisonment. One such case was Buckner[2]. In this case, the victim had gone with a friend to Buckner's house to secure payment of a debt which Buckner owed to him. The two entered Buckner's house, and the friend took down a sword in a scabbard which was hanging on the wall, and stood guard by the door to prevent Buckner escaping before a bailiff could arrive to arrest Buckner for the debt. While the friend stood by the door, the victim exchanged words with Buckner,and at some point in the conversation, Buckner drew a knife and stabbed the victim to death.

The defendant was indicted for murder under the Statute of Stabbing, but the judges held that his killing fell outside the ambit of the statute, and thus that Buckner could claim benefit of clergy, inter alia because he was provoked by the unlawful actions of the victim and his friend[3]. Hale[4] thought that this case was one in which the victim had rushed into Buckner's house and employed violence against him, in the face of which he had overreacted by killing the victim. If this were true, it might plausibly have made the case explicable on the grounds of excessive action taken in self-defence. It is, though, entirely at odds with the facts as reported by Style, as pointed out by the later editor of the Pleas of the Crown[5]. The case was treated as one where the provocation was a factor that took the killing outside of the Statute of Stabbing, and hence justified a manslaughter verdict.

An analysis of Buckner in terms of provocation seems to be

justified in the light of the later case of Goffe[1], decided in 1672. Here, the defendant had lawfully entered a house to collect the King's duty of chimney money. Finding only a maid servant at home, who said there was no money to pay the debt, he distrained a silver cup. When he tried to leave with the cup, his way was barred by the maid servant who stood across the door. Goffe knocked her head against a door post, as a result of which she died. It was said by the court that the verdict should be manslaughter only in Goffe and his men[2], "for hindering their passage out, to go away with the distress, was a provocation".

All of these cases are, in fact, illustrations of what were in the early modern period considered to be some of the grossest forms of insult or contempt. Let us reconsider the contrast drawn in Lanure's case, between the "taking the wall" example in which the victim simply interposes himself between the defendant and the wall by filling a gap left by the defendant, and the example in which the victim jostles the defendant in order to obtain the position by the wall. It seems obvious that the reason for the refusal of mitigation in the first case, and for the mitigation provided by the law in the second case, relates not to the likelihood of any threat to the defendant's safety present in the latter but not in the former case, but to the way in which the defendant is treated by the victim in each case.

Where B takes A's position by the wall by simply moving into a convenient gap left by A, without touching A, however annoyed he might be A has only himself to blame for his loss of position, and B's action is regarded, in law as well as in common moral discourse, as no real provocation. It was, indeed, a ground for

considerable criticism of over-zealous men of honour, at this time, that they regarded such an advantage taken by B, in the example given in Lanure's case, as the moral equivalent of having been jostled. Pamphlet writers deplored the common attitude that[1]: "nothing but the blood of a man were a satisfaction it may be for an innocent takeing the wall of, or a neglectful stumble upon one of these night-walking gentleman". As Cleland put it, likewise speaking of so-called men of honour[2]:

> "[S]o indiscreet and rash in quarrelling [are they], that if a man come neare their shadow they will make him believe, that he hath justled them."

Where B does, though, thrust A out of the way in order to take the position by the wall, or whips A's horse out of the track, the position is different. The physical interference with A here should be seen as having a special symbolic meaning in point of provocation. It represents a form of the highest contempt for A, a contempt not present or intended where B simply moves into a gap left by A between himself and the wall.

The provocation at issue in Buckner and Goffe should be analysed in similar manner. The unlawful and insolent barring of the defendant's way has the same symbolic significance as the physical interferences discussed in Lanure's case. It is not (or at least not most importantly), pace Hale, a sign of any impending attack which should put the defendant on his guard, but is a sign that that the defendant is being treated with a high degree of contempt, a degree of contempt that constitutes a provocation sufficient to reduce murder to manslaughter.

It is a gross insult, symbolised in some overt act of contempt, such as jostling or wrongful imprisonment, that forms the substance

of Holt C.J.'s first category of provocation sufficient to reduce murder to manslaughter, which he describes in Mawgridge thus[1]:

> "First, if one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault. Besides, he that was so affronted might reasonably apprehend, that he that treated him in that manner might have some further design upon him.There is a case in Stiles 467, Buckner's case...This was...adjudged only manslaughter, for the debtor was insulted, and imprisoned injuriously without any process of law, and though within the words of the Statute of Stabbing, yet not within the reason of it."

Here, then, Holt C.J. makes it plain that what is to explain the manslaughter verdicts in Goffe and Buckner, in the jostling example given in Lanure's case, and in other cases falling under the first category, is the particularly grave provocation constituted by indignities and insults that are embodied in actions symbolic of great contempt, such as being plucked by the nose, or thrust aside from one's position by the wall, or having one's horse whipped out of the track. Most importantly, moreover, Holt C.J. adds only by way of afterthought the possibility that the rationale of mitigating the offence in these circumstances is that the defendant might have thought that the person assaulting him intended to make some further attack on him, an explanation which Hale had made the explanation for almost all provocation cases.

Cases falling within Holt C.J.'s first category are to be contrasted with that of Watts v Brains, where the insulting act, a rude face or gesture, was in its essence much more trivial. It was an act whose social meaning, whilst certainly being associated with contempt, was not associated with that degree of contempt implicit in the kind of insulting physical interference involved in plucking

someone by the nose, pushing them or their horse out of the way, or wrongfully detaining them[1]. In condescending to killings in hot blood in response to provocations of the latter kind, the law was simply reflecting the fact that, in the face of serious affronts it was for men of honour, as Elyot put it[2], "a great peine and difficultie to susteine injurie, and not to be forthwith revenged".

We can already see, in the examples making up the first two categories of provocations grave enough to reduce murder to manslaughter, that considerable influence was exercised on the development of the doctrine of provocation by what Mandeville described as the points of honour[3]:

> "[I]f the least Injury be done either to himself or his Friend, his Relation, his Servant, his dog, or any thing which he is pleased to take under his honourable protection...if it proves an Affront...a Battle must ensue...for either there is no Honour at all, or it teaches Men to resent Injuries, and accept of Challenges."

It is no coincidence, then, that the cases conceived as falling under the second category of sufficient provocation concern friends (the bowls case), relatives (Royley; Salisbury; Cary), and masters and servants (the anonymous case mentioned by Plowden in Salisbury). For the ties involved in these relationships were, as one modern commentator on the early modern concept of honour has put it, "the solidarities of honour...lordship, kinship, friendship"[4] (my emphasis). A connection with the notion of those in respect of whom one was in honour bound to regard an injury as if it had been done to oneself, is thus the best explanation for the emergence of the second category of provocation sufficient to reduce murder to manslaughter, in which, as Holt C.J. put it in Mawgridge[5], where a man kills "in the vindication of his friend...or it may be [one] that he is most affected to, this is

but manslaughter".

As far as Holt C.J.'s first category of sufficient provocation is concerned, the grave insult embodied in an act of physical interference symbolic of great contempt, the close connection with the concerns of the man of honour is equally clear. The man of honour, says Mandeville, should[1] "suffer no Affront, which is term of Art for every Action designedly done to undervalue him". Clearly, though, affronts vary in the degree to which they undervalue a man, and as illustrated by the judgment and verdict in Watts v Brains, the law required that a man of exercise a degree of self-restraint in the face of provocations that were in law regarded as manifesting less than the highest contempt. We find, in this regard, explicit use of the concept of undervalue, employed by Mandeville, to explain this point in Lord Morley's case[2]:

> "[A]s it is murder to kill without any provocation, so if the provocation be slight and trivial, it is all one in law, as if there were none. For the law of England allows no man to value himself at such a rate as if the blood of his neighbour were fit sacrifice to expiate every mean and slight affront."

I consider how the law expected a man of honour to react in the face of more trivial affronts if he was still to deserve mitigation for a killing in the second interlude, when I discuss the relationship between provocation and combate-manslaughter.

Where grave insults manifested in acts of physical interference symbolic of grave contempt were concerned, however, the law took account of the great importance attached by men of honour to the observance of canons of courtesy and respect that were a central part of the code of honour[3], and of the grave provocation breach of those canons was to them[4], in its assessment of mitigating circumstances falling within the first category. This explains the

somewhat quixotic character of the examples of provocation falling within the first category thought sufficient to mitigate the offence, such as being taken by the nose. It is precisely these kinds of insulting assaults that men of honour took to be amongst the gravest of provocations. This is evident from the work of many honour theorists, such as Jacob[1]:

> "There is a coarseness of manners among the higher ranks [in Spain] very visible in these parties, and language sometimes passed which in other countries would lead to serious consequence. To call a man a liar, or even to take him by the nose would not produce a duel, nor perhaps be thought of the next day; the point of honour is not observed; there is in consequence none of that delicate sensibility which characterises the gentleman in England."

Jacob was not writing in the early modern period, but he was certainly writing from an early modern perspective. This is evident from a passage making a similar point in Romei[2]:

> "He shall remain...dishonoured...that takes the Bastanado, a boxe on the eare, a blow, or any such like injurie of deede: for not to attempte revenge of a blowe or bastanado, notes small valour and impotencie..."

The cases of jostling in order to take the wall, of whipping another's horse out of the track, and of falsely detaining another are what the law regarded as "any such like injurie of deede", acts of physical interference symbolic of great contempt, like a box on the ear, a pluck on the nose or a fillip[3] on the forehead. All such acts constitute grave injustices done to the person so affronted, whose honour was thereby placed in jeopardy, and who could keep it intact and hence avoid an implication cowardice only by seeking his revenge in the provoker's blood[4], as I earlier pointed out. The early modern law recognised this, and accommodated the fact in the grounds for mitigation of the offence that it provided by way of provocation, as well as by way of combate-manslaughter.

If we move on now to consider the other two categories of provocation sufficient to reduce murder to manslaughter that emerged during the seventeenth century, the connections with the concept of honour are likewise clear. In Hopkin Huggett[1], decided in 1666, the defendant was accused of the murder of a press master who, at the time he was killed by Huggett, had been impressing men for the wars against the Dutch, a practice, it is perhaps important to point out, that was much resented by the communities on whom the burden of providing men fell most heavily, those close to the ports[2].

In this case, the press master, one John Berry, was taking impressed men through Smithfields. Huggett and his followers, seeing this, stopped Berry and his party, and demanded to see the warrant for their actions. Berry showed Huggett a piece of paper, but it either was not a warrant, or was not such as to have persuaded Huggett that it was a warrant, for Huggett and his party thereupon drew their swords and attacked Berry and his party before the latter had had time to draw their swords, thus effectively precluding any possibility of a plea of combate-manslaughter by the defendants[3]. In the ensuing melee, Berry was killed by Huggett.

The question of whether Huggett was guilty of murder of manslaughter only was reserved for the consideration of all the judges. Eight of twelve judges held that Huggett was guilty only of manslaughter. The rationale for their decision was that[4]:

> "[I]f a man be unduly arrested or restrained of his liberty by three men, altho' he be quiet himself, and do not endeavour any rescue, yet this is a provocation to all other men of England, not only his friends but strangers also for common humanity sake, as Lord Bridgman said, to endeavour a rescue."

This case is thus of importance for three reasons. Not only did it

see the creation of a new category of sufficient provocation, seeing another unlawfully deprived of his liberty, but it also saw an explicit rejection of the opportunity to confine chance medley manslaughter to combate-manslaughter, and a rejection, more importantly, of the opportunity to turn what had hitherto been a nascent "doctrine" of provocation into a doctrine of excessive defence.

The decision in Hopkin Huggett was affirmed as an independent head of mitigation in both Mawgridge and the slightly later case of Tooley[1]. In Mawgridge, Holt C.J. described the third category of provocation sufficient to reduce murder to manslaughter thus[2]:

> "[I]f a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty, though the person abused doth not complain, or call for aid or assistance; and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter, 18 Car.2, adjudged in this Court upon a special verdict found at the Old Baily, in the case of one Huggett, 18 Car.2."

In Mawgridge, thus, the authority of the decision in Hopkin Huggett, as it was established by the majority of the twelve judges when the case was first reserved for the consideration of all the judges, was confirmed obiter by Holt C.J.

The decision was, further, purportedly applied by Holt C.J., shortly afterwards in the much criticised case of Tooley. In this case, a constable had taken a woman into custody on the grounds that she was a disorderly person. The arrest was, for reasons unknown to Tooley and his company, technically illegal, which meant that the woman had as a matter of fact been unlawfully deprived of her liberty, as the impressed men in Hopkin Huggett had been. Tooley and his company, unlike Huggett in Hopkin Huggett unaware of

the illegality of the arrest, endeavoured to rescue the woman, and in the ensuing struggle, one of the constable's assistants was killed, and Tooley was charged with murder.

The majority in the case, led by Holt C.J., were of the opinion that Tooley was guilty of manslaughter only. Holt C.J. had this to say on the issue of provocation[1]:

> "[N]ow the question is whether or not they had a sufficient provocation? I take it they had. If a man is oppressed by an officer of justice, under a mere pretence of an authority, that is a provocation to all the people of England...I would fain know, when a man is concerned for the laws of the land, and for Magna Charta, whether that is not a provocation?"

Foster rightly points out, in criticising this case[2], that Holt C.J.'s argument is wholly undermined by the admitted fact that Tooley and his company knew nothing of the unlawfulness of the arrest of the woman, and were probably simply determined to secure her release whatever the circumstances. Far from acting out of a high-minded concern for the laws of the land and Magna Charta, the defendants were mostly likely, as Foster says, simply ruffians. Holt C.J.'s answer to this point at the time[3], "surely ignorantia facto will excuse but never condemn a man...he must not lose his life for his ignorance, when he happens to be right", simply begs the important questions about whether the defendants were provoked, and if so by what. It is also simply an argument for an ex post facto pardon, and seems to be a thin and insubstantial argument as a proposition of law.

Foster, though, like other critics[4], concentrates too narrowly on the fact that this was an inept application of valid law, and does not give proper consideration to the law's rationale, which is our concern. The minority in Tooley argued, as in fact the minority in Hopkin Huggett had done, that there should be a close

relationship such as kinship between the defendant and the person unlawfully detained, if the provocation claim was to be sufficient to reduce murder to manslaughter. This was an argument, in effect, that the case should be judged in the light of considerations pertinent to the second category, and should not be treated as breaking new ground.

Holt C.J.'s dicta in Mawgridge and Tooley indicate that this is not to be the case. Seeing someone unlawfully deprived of their liberty is treated by him as a head of provocation sufficient to reduce murder to manslaughter that is separate from the second category. The provocation that is the subject matter of the second category is primarily concerned with action stemming from a sense of loyalty to those close to one, stemming from ties in honour, what James called, as we earlier saw, the "solidarities of honour...lordship, kinship, friendship"[1], that will naturally make any attack on them a grave provocation to oneself. Where seeing a stranger unlawfully deprived of their liberty is concerned, however, it is the defendant's sense that a grave injustice is being done to the stranger that is the primary source of the provocation, and not, subject to what will be said below, the solidarities of honour binding him to the victim of the injustice. This is made quite clear by the judges in the majority in Hopkin Huggett[2].

Nonetheless, the connection with the concept of honour is as clear in this third and most quixotic of all the categories of sufficient provocation as it is in the first two categories. Seeing a stranger unlawfully deprived of their liberty is variously described in Hopkin Huggett, Mawgridge and Tooley as[3] "a

provocation to all other men of England...for common humanity sake...to endeavour his rescue"; as a provocation because[1] "when the liberty of one subject is invaded, it affects all...people"; and as a provocation because[2] "[i]f a man is oppressed by an officer of justice...that is a provocation to all the people of England". What is the thread running through these rationales for the third category of sufficient provocation?

We start with the early modern understanding of how men of honour ought, in general, to understand their responsibilites and duties towards others. Cockburn expressed this understanding thus, in 1720[3]:

> "[N]o Man whatsoever can live independant of others, and therefore every one ought to recommend himself to all; and the best Way to do that, is to show himself a Man of Honour and worthy of their esteem."

In what way, though, was one meant to show oneself <u>to all</u> to be a man of honour, in the context of one's public life and not simply to someone who had insulted one, or to those to whom one was bound in honour to protect? The point of honour at issue where civic responsibilites were concerned was the duty of the man of honour "to prefer the Publick Interest to his own", as Mandeville put it[4]. In the early modern period[5], this meant in particular being willing to risk one's life in war for King and country[6], but in peace time meant more broadly being willing to take risks in the name of "Justice, Truth, and Right"[7]. To this end, preferring the public interest to one's own meant showing, in one's civic life, "great valiancy in great attemptes, [and] great justice in great executions"[8].

The notion of "great attemptes" was in this regard an important

one, in early modern accounts of the virtue of courage[1]. One preserved one's honour by performing[2] "dangerous attempts...for the safeguarde and preservation of all men", thus showing that one was not deficient in point of courage, and one could lose honour by failing to embark[3] "willingly and cherefully" on such an attempt when the opportunity presented itself. For to refuse such an opportunity would smack of cowardice in the same way that, as we early said, not to be willing to avenge an injury or insult would smack of cowardice, and hence lead to a loss of honour, a loss of one's claim to respect a someone who had not failed in any principal virtue[4]. As the honour theorist Segar put it[5]:

> "he is accompted valiant, <u>that</u>...<u>never doth shun</u> any generous action tending to publique benefit, or his own private reputation." (my emphasis)

The judges in <u>Hopkin Huggett</u> declared that[6] "if a man be unduly arrested or restrained of his liberty...this is a provocation to all other men of England...for common humanity sake...to endeavour his rescue". When they declared this they were reflecting the common early modern understanding that men, and in particular men of honour, could be expected to put the public interest before their own safety, as Mandeville thought they ought, where the opportunity to gain honour through[7] "great valiancy in great attemptes, [and] great justice in great executions" presented itself. It follows that men could be expected to regard injustice stemming from a sense of an affront to the public interest, such as[8] "[i]f a man is oppressed by an officer of justice, under a mere pretence of an authority", as as great a provocation as injustice stemming from an affront to their private interests and reputation, and that of their kinsmen and friends, the subject matter of Holt

C.J.'s first, second and fourth categories of sufficient provocation, set out in Mawgridge. For both such kinds of affront were a serious challenge to early modern men in point of honour to be "forthwith revenged"

This brings us, finally, to the last category of provocation sufficient, in the early modern period, to reduce murder to manslaughter, Holt C.J.'s fourth category in Mawgridge: catching one's wife in the act of adultery. The date at which this kind of provocation was first declared sufficient to reduce murder to manslaughter is usually given as 1671, the date of Manning's case[1]. In Manning, the defendant returned home to find the victim in the act of adultery with his wife, and in a rage, threw a joint-stool at the victim, killing him. The judges of the King's Bench were all of the opinion that[2]:

> "[I]t was but manslaughter, the provocation being exceeding great, and found that there was no precedent malice; and it was taken to be a much stronger case than Royley's case 2 Cro.296..."

Manning confirms what was in any event clear from the decision of the majority in Hopkin Huggett, namely that provocation, as a partial defence, was seen as conceptually separate both from chance medley and from (excessive) self-defence by the end of the seventeenth century. The stamp of authority was placed on it in Mawgridge, where Holt C.J. said of the provocation in question[3]:

> "Fourthly, when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of the man, and adultery is the highest invasion of property, 1 Vent. 158...If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law though it may seem hard, that the killing in the one case should not be as justifiable as the other."

There can be no doubt that in the early modern period, the

seduction of a man's wife was thought to be very high indeed in the catalogue of offences against honour, and hence to be one of the most direct and forceful of challenges to the cuckold to show himself to be a man of honour by revenging the offence. As one honour theorist put it[1]:

> "I have never known a man whose heart was in the right place bring an action for damages against another for seducing a beloved wife, a daughter etc...For these and such like offences the law can make no adequate retribution - in such a state life is a burthen, which cannot be laid down or supported, till death either terminates his own existence or that of the despoiler of his peace and honour."

In the light of these sentiments, it is thus not surprising to find Holt C.J. saying of catching one's wife in the act of adultery[2], "a man cannot receive a higher provocation"; for the "man" he refers to here is the man "whose heart is in the right place", the man of honour who, like Manning, would be forthwith revenged on those who despoil their peace and honour.

This final category, then, should be analysed in the same way as all the categories of provocation sufficient to reduce murder to manslaughter in the early modern period. For it was an attempt, built on the perceived moral legitimacy, in point of honour, of unilateral retaliation in response to provocation that we considered in the first section, to reflect in the law's conditions for mitigation in the law of homicide the gravity of the affronts to honour contained in such provocations.

The connection between the gravity of the provocations sufficient to reduce murder to manslaughter in the early modern period and the concept of honour, that we have now explored, should be seen in the light of the virtue of even-temperedness. As I said earlier, the key aspect of this virtue, for our purposes, is the

notion that experiencing anger on the right grounds to the right extent relative to the standards of men of honour, is an excellence of character[1]. We find all of these aspects very much implicit in Holt C.J.'s analysis of the categories of sufficient provocation in Mawgridge.

When he asked rhetorically, of the man faced with what is (or is believed to be) the unlawful deprivation of another's liberty[2]:

> "Sure a man ought to be concerned for Magna Charta and the laws - I would fain know, when a man is concerned for the laws of the land, and for Magna Charta, whether that is not a provocation?"

and when he said of the man who catches his wife in the act of adultery that[3], "jealousy is the rage of the man", he is clearly affirming that the provocations at issue in these, and by implication in the other categories that he endorses, are indeed proper and admirable grounds on which to have become enraged. Rage is a mean or right amount of anger in the face of such provocations, a display of the virtue of even-temperedness, getting angry at the right things to the right extent, and so on.

As we will see in the next chapter, this explicitly evaluative, virtue-centred approach to the grounds on which men become angry, stands in stark contrast to the understanding of the experience of anger that became prevalent during the eighteenth and nineteenth centuries. For passions then became understood to be a kind of uncontrollable storm or pathological affliction.

Holt C.J.'s analysis reveals likewise his view that to become very angry at the provocations forming the subject-matter of the categories, is to demonstrate excellence of character, in the sense

of an admirable quality of emotional response - an ability to discriminate in what one feels, as Kosman put it[1]. His claim that "jealousy is the rage of the man" is a reflection of this aspect of even-temperedness as a virtue. For Holt C.J., jealous rage is a admirable emotion to experience upon the discovery that one is being cuckolded, because it is a manly emotion to experience, a "manly sentiment", as Burke put it[2]. The experience of it in these circumstances is a display of the qualities valued as excellent or admirable in the character of a man. As Aristotle puts it[3], "[i]ndeed we sometimes praise those who...display temper, calling them manly".

Similarly, as we have seen, when the provocation at issue in the third category of sufficient provocation was discussed, it was described as[4] "a provocation to all other men of England...for common humanity sake...to endeavour [a] rescue", and as being[5], "a provocation to all people, as being of ill example and pernicious consequence". The implication is that to be filled with righteous indignation at the sight of another being unlawfully deprived of his liberty is an excellence of character, in the sense described by the honour theorists, cited above[6], namely as being conduct which shows one to be public spirited, as a man of honour should be.

It is clear, moreover, that rage experienced in the face of provocation is to be judged an excellence of character - a display of the virtue of even-temperedness, relative to the standards of men of honour. The man whose rage takes the form of jealousy in the face of being cuckolded, is for Holt C.J. clearly the man of honour who is concerned, as he should be[7], for the external goods of

honour and "a faire and modest wife"[1]. The man who experiences anger stemming from compassion at the unlawful detention of another is likewise the quixotic man of honour who, as we saw Segar indicated[2], "never doth shun any generous action, tending to publique benefit, or his own private reputation". Similarly, as we have seen, to revenge the kind of insulting assault at issue in the first category was said to be, as Jacob put it, to display[3] that delicate sensibility which characterises the gentleman in England". It is thus relative to the values and character of men of honour that the standards for temper-keeping implicit in these categories are set.

The link between the concept of honour and the categories of provocation sufficient to reduce murder to manslaughter, that we have traced in this section, can thus be reinterpreted in the light of the virtue of even-temperedness. The categories of sufficient provocation reflected what were, in the early modern period, thought to be the right grounds on which to become enraged with the right people at the right time, and so on. They reflected the occasions on which to be enraged would be the mean response in anger, the mean in point of the virtue of even-temperedness, and thus a display of excellence in character, relative to the standards for judgment of men of honour.

Understanding the concept of honour in the light of the virtue of even-temperedness thus gives us an insight into why it was that the provocations at issue in the categories of sufficient provocation, set out in Mawgridge, were regarded as so serious. It also gives us a way of understanding the categories philosophically, in terms of an ethical, virtue-centred theory

commonly held by honour theorists influential at the time. All that has thus been explained in terms of honour and virtue, though, is why rage, a feeling of great anger, was thought to be an appropriate response to the provocations at issue in the categories: This on its own is not sufficient to explain why the law condescended to killings resulting from unilateral attacks in anger, in response to grave provocation.

What has not been explained is why fatal revenge in hot blood, action in great anger, was also thought, to a lesser or greater extent, to be an appropriate response to the provocations at issue in the categories, and hence properly the subject of mitigation of the offence. In order to explain this, we must turn to the relationship between the concept of honour and a second virtue connected with anger, the virtue of retributive or corrective justice.

4. Unilateral Retaliation and the Display of Justice as a Virtue

At the end of the first chapter, we saw that anger was, in the early modern period, regarded as a aid to the practice of virtue. As Blandy put it, as we have seen[1]:

> "So by reason, sometymes the affections of the minde are styrred, and prycked forward, that we might more cherefully dispatch our business."

In chapter one, we consider the link, in this regard, between courage and anger, a link stressed by the honour theorists, and reflected in the conditions for mitigation in the law of homicide laid down by the law, through the doctrine of combate-manslaughter. It is by no means courageous action alone, however, that is tied to and assisted by anger. As we saw in the preceding sections of this

chapter, it was also thought, in the early modern period, that a unilaterally struck blow, in retaliatory response to the kinds of affronts to honour found in the categories of sufficient provocation, should be accompanied by anger and resentment at the provocation, such as "the rage of the man".

The connection made here by the honour theorists is not accidental. It is a reflection of the wider notion, highlighted by Aristotle[1], that the practice of virtue is concerned with action as well as feeling, and that in a display of virtue, action and feeling will and should run together. As Kosman has, more recently, expressed this idea[2]:

> "But considered more broadly, there is no way to identify a feeling or emotion without taking into account...actions on the part of the agent which are characteristically and naturally associated with such feelings. Fearing is related to fleeing, desiring to reaching for, anger to striking out at, in no accidental way. In each of these cases, a certain action or range of actions is connected to a pathos in some important logical sense...These considerations suggest that there may be two elements to the actuality corresponding to any given virtue. A virtue is a complex disposition in the sense that...its actualisation consists of a characteristic set of feelings and a correspondent characteristic set of actions." (Kosman's emphasis)

Kosman identifies the action that goes with the feeling of anger with what we have referred to in this chapter as unilateral retaliation - "striking out at". This, of course, reflects the more modern view that action associated with anger is not, as the early modern honour theorists supposed, primarily connected with a display of courage, a display of the willingness to hazard one's life for the sake of honour. To give the connection between a feeling of anger and courageous action (in this sense) such primacy would now be regarded as a quixotic anachronism, and Kosman's more modern view, of course, explains at least in part the demise of

chance medley as a defence[1].

What Kosman does not bring out here, though, is the sense in which both the feeling and the action related logically and morally to anger are displays of virtues in themselves. We have seen that the grounds on which it was thought that men should be enraged, should experience a feeling of great anger - points of honour, were connected with the display of the virtue of even-temperedness. As I have said, what we will consider in this section is the connection between unilateral retaliatory action and the display of virtue in anger, that virtue being retributive justice, the discussion being set, as before, in the context of the early modern understanding of the concept of honour.

In the early modern period, the display of the virtue of justice was defined, in a broadly Aristotelian sense[2], as giving each his due. Segar, for example, praised its display thus[3]:

> "What may be more blessed than Justice? Whereby we refraine from all injuries, and give unto each one that which to him appertaineth."

This definition reflects the use of the term "injustice" that I have been employing to describe the kind of affront that would provoke in a man of honour the desire to strike back unilaterally, or to fight a duel. For in cases of combate-manslaughter and manslaughter upon provocation, the affront that presaged the killing was precisely some failure, on the part of the victim, to refrain from an injury. To be just, though, clearly means more to Segar than avoiding injustice by refraining from all injuries. It means giving each his due, that which appertains to him. What is meant by this? For an answer to this question, we must turn to Aristotle's account of the nature of justice[4].

The aspect of justice which is of most importance to our present concerns is the kind of justice which Aristotle calls rectificatory, retributive or corrective justice. Finnis provides us with a useful summary of Aristotle's conception of corrective justice[1]:

> "Aristotle too wished to divide the whole field of problems of justice into two broad classes...The second class of problems he named problems of corrective justice (diorthotikon dikaion), the justice that rectifies or remedies inequalities which arise in dealings (synallagmata) between individuals. These "dealings" may be either voluntary, as in sale, hire, or other business transactions, or involuntary, as where one man "deals with" another by stealing from him, murdering him, or defaming him."

What Segar referred to simply as "injuries", injustices, are what is meant here by inequalities arising arising in involuntary dealings. We must now explain this point in more detail.

In what sense, first, can provocations falling within the categories of sufficient provocation, discussed in section three, be said to be injustices arising through "involuntary" dealings? This is easily enough explained, since a provoked party rarely asks or agrees to be provoked[2]. His dealing with the provoker is thus involuntary. It is interesting to note that when Aristotle comes to list the kinds of injustices that arise out of involuntary transactions, the list contains all of the provocations that were deemed sufficient, for the purposes of the early modern doctrine of provocation, to reduce murder to manslaughter[3]:

> "Involuntary transactions are either secret, such as...adultery, poisoning...killing by stealth, and testifying falsely; or violent, eg. assault, forcible confinement, murder...and public insult." (my emphasis)

In what sense, secondly, are these activities thought to be kinds of injustice? Aristotle tells us[4] that the unjust man is, inter alia, the man who takes an unfair advantage of another, or

who breaks the law. It is not, of course, a necessary condition precedent to provocation being deemed sufficient to reduce murder to manslaughter that it have involved a breach of the law, so only the first kind of injustice is of real relevance for present purposes, the taking of an unfair advantage over another. All of the involuntary transactions just mentioned, Aristotle tells us[1], involve the taking of an unfair advantage over another in the sense that they involve an unjustified gain by the perpetrator, and an unjustified loss by the victim. Aristotle does not, though, go into the question of what is meant by the terms "gain" and "loss" here, except to say that the terms are derived from the process of voluntary exchange[2], which is not of great assistance in analysing involuntary transactions. Nonetheless, some sense can be made of this notion of taking an unfair advantage.

The loss to the victim of an assault is presumably a degree of bodily integrity, the loss to the victim of forcible confinement, his liberty, the loss to the victim of adultery (at least in Aristotle's time), some kind of proprietorial interest, and so on. The gain made by the unjust man, although not explicitly so described by Aristotle, is best seen in terms of a gain in liberty, in the sense of lack of self-restraint. The unjust man, in committing adultery or assault, for example, casts off the morally and legally obligatory burdens of self-restraint which just men recognise and to which they adhere, and hence, to use Aristotle's terminology, the unjust man makes an unfair gain. The unjust man makes an unfair gain in such cases in the sense that he gets more than his fair share of liberty, of liberty to act as one pleases, or in the case of "public insult", of liberty to say what one

wishes[1].

The next matter we must address concerns the rectification of such injustices, for Aristotle was concerned not merely with illuminating and analysing the different kinds and nature of injustices, but also with the need to correct them. The first point to make about rectification is that in order to remedy such injustices, so that the status quo ante will be restored, it seems clear <u>both</u> that the unjust wrongdoer must be deprived of his unmerited gain <u>and</u> that the wronged victim must regain his unmerited loss. Aristotle expresses this in the following way[2]:

> "For it makes no difference whether a good man has defrauded a bad one or vice versa, nor whether a good man or a bad one has committed adultery; all that the law considers is the difference caused by the injury; and it treats the parties as equals, only asking whether one has committed and the other suffered an injustice, or whether one has inflicted and the other suffered a hurt..It follows that in involuntary transactions justice is a mean between a sort of gain and loss: it is to have an equal amount both before and after the transaction."

The important thing to note is that the concept of rectificatory or retributive justice is not the same concept as "having done to one what one has done to another"[3]. In the case of an assault, for example, this would simply negate the perpetrator's gain, without restoring the victim's loss. In such a case, true rectificatory justice would require some punishment to be meted out on the perpetrator with a negative value greater than that of the assault which is the subject of the litigation, the amount by which the punishment in negative value exceeds the latter representing the notional compensation of the victim for his loss. Even though the early modern account differs in important respects from that of Aristotle, this crucial aspect of retributive justice, as we shall

see, is reflected in the early modern understanding of that virtue.

The second point of importance concerning Aristotle's conception of rectification is implicit in his reference to that which "the law considers" as the injustice to be rectified. It is evident that Aristotle supposes that rectification is not here to be done through the angry retaliation of any private citizen, but through due process of law and punishment on behalf of the state, although as the following passage illustrates, he recognises that the very reason why state punishment is important is the desire of private citizens to revenge injustices themselves[1]:

> "It is proportional requital that holds the state together, because people expect...to return evil for evil → and if they cannot, feel that they have lost their liberty."

When we turn our attention to the early modern treatment of this subject, though, we will find a somewhat different story, with the honour theorists affirming the private citizen's right to administer "proportional requital" through retaliation.

This brings me, then, to the early modern account of rectificatory justice. Not only did early modern writers associate more clearly, as Aristotle did not, the rectification of injustice with individual retaliation by provoked men of honour, but they also conceived of the loss in an unjust involuntary dealing, an injustice, in a different way.

On the question as to who was a proper agent for the infliction of rectificatory justice, proportional requital, it was the lack of any legal redress for what men of honour took to be serious offences against honour that led them to suppose that the display of rectificatory justice through retaliation inflicted by the injured party himself was justified. As one honour theorist said[2]:

> "A duel makes of every one of us a strong and independent power, and constitutes out of each individual life the life of all; it grasps the sword of justice which the laws have dropped, punishing what no code can chastise - contempt and insult...It is to duelling alone that we owe the remains of our civilisation."

Some honour theorists adopted what might be called a compromise position between Aristotle's view of who could legitimately administer retributive justice, and the opposed view of men of honour. Romei, for example, advocated the establishment of a "court of honour" in which disputes which were then resolved by duels would be settled by an authoritative ruling of a judge conversant with the laws of honour[1].

As far as the majority of honour theorists were concerned, however, it was the very failing of the state to provide an institutionalised and adequate remedy for insults and other dishonours that led them to place stress on the importance of developing and strengthening in oneself the disposition not only to resent but personally to oppose and rectify injustice; for only in this way, it was thought, would honour, virtue and hence order within society be preserved[2]:

> "[I]f it was out of Fashion to ask Satisfaction for Injuries which the Law cannot take hold of, there would be twenty times the Mischief done there is now, or else you must have twenty times the Constables and other Officers to keep the Peace."

This brings me to the early modern understanding of rectificatory or retributive justice itself.

Aristotle, as Finnis says[3], divided the field of problems of justice into two classes. One class concerned problems of corrective justice, which we have briefly considered. The other class concerned problems of distributive justice, problems concerning the criteria to employ in distributing valuable external

goods such as money and honour. An injustice in this sphere of justice is clearly the acquisition of more honour or money, for example, than is warranted according to the criteria for assessing merit appertaining to that sphere. Aristotle explains this sense of injustice thus[1]:

> "What is just...is what is proportional, and what is unjust is what violates the proportion. So one share becomes too large and the other too small. This is exactly what happens in practice: the man who acts unjustly gets too much and the victim of injustice too little of what is good."

Many early modern honour theorists employed this concept of injustice, distributive injustice, as getting too much and too little of what is good in their accounts of retributive or corrective justice. They did so in order to emphasise that as they saw it, what was unjustly lost by the victim in the involuntary dealings dealt with by the kinds of provocation at issue in the categories of sufficient provocation, was not so much the integrity of body or of property, but the integrity of a man's honour.

As we have seen[2], as a good, honour was of the first importance in early modern England, which explained the highly provocative character of a challenge to it. Crompton ranked honour "above gold and precious stones"[3]. Romei described honour as the most precious of the "external"[4] goods, above "riches, friends, a faire and modest wife, nobility and power"[5]. When a man, thus, publicly insults, cuckolds, or assaults another, he threatens to deprive him, in the ways we have described, of his natural honour. As a result of the provoker's action, the injured party thus ends up with "too little of what is good", using Aristotle's terminology, and being the deliberate cause of this is what makes a man unjust.

This shift in the notion of what is lost when such kinds of

provocation are received is well brought out in the following passage from Romei's work on honour, where he is discussing the adulterer, the subject of the fourth of Holt C.J.'s categories of sufficient provocation[1]:

> "this man remaineth dishonoured, because he sinneth extreamly against the virtue of Temperance, and faileth in Justice, hee being a grievous injurier or destroyer of an other man's honour; the which (as I have said) of all other goods externall, is the most pretious."

It is important to note that Romei also gives here an account of what is unjustly gained by the adulterer, as well as an account of what is lost by the cuckold. The adulterer, in Romei's eyes, sins against the virtue of temperance, which is simply a more detailed specification of the gain made by the wrongdoer as we analysed it above, a gain constituted by throwing off morally and legally obligatory burdens of self-restraint by taking more than one's fair share, in terms of liberty to do as one pleases.

So in the hands of the early modern theorists, Aristotle's theories of corrective and distributive justice were to some extent merged into a single theory. What needed in point of justice to be corrected was still analysed in terms of a gain by the unjust person and a loss by the injured person, and the nature of the gain made by the provoker remained the same, an unfair arrogation of the liberty to do as one pleases. What changed, and took the form of the merger, was the conception of the loss suffered by the victim of a grave provocation. This was seen primarily as a loss of honour, to be rectified, along with the provoker's unwarranted gain in liberty to do as he pleased, through the personal infliction of retaliation.

In other respects, Aristotle's theory of corrective justice was

simply transposed to account for this fact, namely that the honour theorists thought it right that the personal infliction of retaliation was a proper means by which to rectify injustices. We saw that the essence of the Aristotelian theory of corrective or retributive justice, in respect of unjust involuntary dealings, is not the mere restoration of the victim's loss alone, or as far as the wrongdoer is concerned, solely "having done to one what one has done to another". In as much as it is seeks to secure a return to the status quo ante, retributive justice - proportional requital - is a punishment that amounts to the value of both of these together.

It is an attempt to capture this key aspect of the Aristotelian theory of corrective justice that explains the early modern honour analysis of the right kind of retaliation to inflict. In a typical case of injury done by way of insult, the Aristotelian theory would dictate that the unjustly treated party would be entitled to inflict slightly more serious an injury upon the original wrongdoer than he received, for he thus both wipes out the gain in terms of liberty made by the original wrongdoer, and restores his own lost honour through the amount by which his retaliation was more serious than the injury he first received. This would be a mean display of retributive justice, retaliation of the right kind inflicted at the right time on the right person, and so on.

This understanding of a mean display of retributive justice is captured in Romei's observations on the views of men of honour on a proper or mean amount of retaliation or proportional requital, as a correction or rectification of injustice, that we cited in the first section[1]:

> "They...that intreate of Combate...have set it down for a certaine rule that injury in words is taken away by the injury of deed, and that a lie is falsified with a boxe on the eare, or any blow with what thing else soever, they alleging this proposition for a maine, unto which no answer can be made, that one injury, by another greater than that is clear taken away, and that the injury of deeds is greater than that of words."

Interestingly enough, we find Hobbes at this time making the same observation about the amount of retaliation which it was thought right by men of honour to inflict in order to correct an injustice[1]:

> "[E]very man looketh that his companion should value him, at the same rate he sets upon himself: and upon all signs of contempt, or undervaluing, naturally endeavours, as far as he dares, (which amongst them that have no common power to keep them in quiet, is far enough to make them destroy each other), to extort a greater value from his contemners, by damage; and from others by the example".

So we now have an account of the display of justice as a virtue understood, as it was in the early modern period, as tied to the restoration of honour. We also have an understanding of the relationship between the display of justice as a virtue and the infliction of unilateral retaliation, "striking out at" as Kosman put it, by private citizens in response to injustices such as those at issue in the categories of sufficient provocation.

The "mark" of any virtue - including justice - is, as Aristotle suggested[2], to act (as well, as we earlier saw, as to feel) in the right way to the right extent at the right time, towards the right person; it is hence to display justice in accordance with the mean, a right or proper way to act justly. In the light of what we have learned, we may now add to what we already know of the early modern analysis of what it is to display emotion in accordance with virtue, an account of what it is to <u>act</u> in anger in accordance with virtue.

To act justly in the face of an affront or other injustice is to inflict retaliation of a right amount, proportional requital, at the time the injustice is suffered, on the perpetrator of the injustice. This is, in the face of provocation, to act justly[1]; to display retributive or corrective justice in a mean, proper or right way. What must now be considered is the relationship between this account of appropriate action in anger, conceived as the display of retributive justice in accordance with the mean, and the theoretical basis of the mitigation provided for killings in anger upon grave provocation.

5. Culpability, and the Mean in Point of Retributive Justice

As I showed in the third section,[2] the early modern understanding of the virtue of even-temperedness gave us an insight into the early modern understanding of what constituted the gravest kinds of provocation, the kinds of provocation in respect of which rage would be a mean response, in point of emotion. It is, though, ultimately the evaluation of acts of retaliation, and not of angry feelings that determines culpability in provocation cases, even though the feelings obviously usually explain the actions, in individual cases, and will figure in the determination of culpability.

What I shall consider first in this section, thus, is the sense in which the justification for conviction of manslaughter, in cases even of grave provocation, was thought to rest on a departure from the mean, in point of retributive justice - on an understanding that the defendant had overreacted. The understanding was, thus, that the defendant had acted to retaliate against the right person

(the provoker) for the right reason (a grave provocation) at the right time (the time of the affront), but that he had departed from the mean in not acting to the right extent or in the right way, by inflicting too much retribution for the affront - a disproportionate requital. Theoretical analysis in these terms of the mitigation provided through the doctrine of provocation, will provide us with a starting point from which then to analyse, in similar terms, the justification for murder convictions in cases such as Watts v Brains, and the possible justification (in early modern eyes) for complete acquittals in such cases as Manning, and other cases that I will consider.

We have seen that both Aristotle and the early modern honour theorists had a sophisticated conception of what a mean or proper response in point of retaliatory action would be, a mean or proper display of justice as a virtue. It was retaliation which would both restore a personal loss of honour and wipe out the gain in terms of lack of self-restraint made by the provoker. The right amount of this retaliation could, as both Aristotle and the honour theorists supposed[1], be measured - a blow in retaliation for words of insult, and so on. This being so, where a man responded with fatal violence to injustices such as those at issue in the categories of sufficient provocation, despite the fact that he had acted for the right reason at the right time, it could be said that by responding with an intentionally fatal strike where a lighter blow would have been the right response, he departed from the just response by exceeding the mean, by overreacting.

It could be said, thus, that because he did not act to the right extent, in point of retributive justice, such a man deserves

conviction for at least manslaughter. The key reason for mitigation, however, should be seen as lying in the fact that even upon the experience of extreme anger, given the gravity of the provocation, the defendant did not go too far beyond the mean, in point of extent, with regard to the display of retributive justice, action in anger, even by deliberately killing his victim. We explore this point further below, and in chapter four.

If the key reason for mitigation in provocation cases is that the defendant did not go too far beyond the mean, in point of retributive justice, in the proportionality of the requital, then there would at first sight appear to be inexplicable complexities in the judgment of Holt C.J. in Mawgridge. In the course of his judgment Holt C.J. says that[1]:

> "[I]f one man be trespassing upon another, breaking his hedges or the like, and the owner or his servant shall upon sight thereof take up an hedge-stake, and knock him on the head; that will be murder, because it was a violent act beyond the proportion of the provocation".

Holt C.J. seems to be suggesting here that even where the defendant is properly angry at an apparent wrongdoing, if he overreacts, and goes "beyond the proportion of the provocation" in point of retributive justice in his retaliation, he is to be convicted of murder. I have just suggested that, set against the fact that the defendant experienced the appropriate emotion at the right time for the right reason, in respect of the right person, the important reason for the manslaughter conviction in cases concerning the categories of sufficient provocation is the fact that the defendant overreacted only somewhat, given the gravity of the provocation. This passage would, then, appear to contradict that suggestion, by making it clear that the proper verdict in a case where the

defendant has overreacted is murder. In order to explain why there is in fact no contradiction, and how this passage is indeed perfectly consistent with the analysis of the early modern doctrine of provocation in terms of departure from the mean in point of the extent of retaliation, we must consider in more detail Holt C.J.'s judgment in Mawgridge.

In Mawgridge, the defendant had been invited into a guard room by the victim, one Cope, a Lieutenant of the Queen's guards in the tower. Whilst there, Mawgridge insulted a woman of Cope's acquaintance. There then followed an exchange of angry words, as a result of which Mawgridge demanded satisfaction of Cope, who said that he would give it at a more appropriate time and place, but that in the meantime, Mawgridge must leave. As he was going, Mawgridge suddenly picked up and threw a wine bottle at Cope, striking him on the head. Cope threw a bottle back at Mawgridge, striking him, upon which Mawgridge drew his sword and ran Cope through before the latter had had a chance to draw his sword.

Although the position is not entirely clear[1], it appears that a question arose over whether Mawgridge should be found guilty of murder, because he did not appear to have acted in cold blood, and because he received some provocation, in the shape of the blow inflicted on him when his victim threw the wine bottle. The case was removed for consideration into the King's Bench, and all the judges but one were agreed that Mawgridge was guilty of murder. The judgment in the case is given by Holt C.J., and takes the form of a rejection of the notion that murder is deliberate killing in cold blood alone[2], a rejection of the submission that Cope's throwing of the bottle could amount to any sort of provocation, on the grounds

that it was lawful resistance to Mawgridge's own initial throwing of a bottle[1], and an extended discussion of what could then in law amount to provocation sufficient to reduce murder to manslaughter[2], and what could not[3], parts of which I have already considered[4].

We must begin here with Holt C.J.'s critique of the distinction drawn at an earlier time between express and implied malice[5], which he develops in order to reject the claim that Mawgridge was not guilty of murder because he did not act with any proven preconceived malice. As we have seen, in the sixteenth century the notion of malice, a finding of which was normally necessary to convict of murder, was understood as <u>malitia praecogitata</u>, as literal premeditation. This necessitated the development of the doctrine of "implied" malice to ensure that sudden killings which were not attended by any mitigating circumstances, but where there was no evidence of express malice, were also deemed to be malicious, and hence murder. Where killings of this kind were concerned[6], the law would simply presume that there was malice aforethought, in order to ensure that unmeritorious cases of sudden but wanton cruelty were not found to be only manslaughter, for want of evidence of express malice[7].

Holt C.J. thought that the conflation of malice and malice aforethought was misconceived, malice having been confused, in his view, with hatred and thus with[8] "a rancour fixed and settled in the mind". Holt C.J. thus distinguished malice from hatred, defining the former as the premeditated <u>or</u> unpremeditated intentional exposure of the victim to serious violence or danger[9] where there was no provocation[10], or even if there was a little provocation, where there was so little that the intentional act

could nonetheless still be described, in his words, as "cruel". An example that he gives of the latter is Halloway's case[1], where according to Holt C.J.[2]:

> "[T]here was some kind of provocation in the boy, who was stealing the wood in the park, of which Halloway had the care...yet in regard the boy did not resist him, his tying him to the horse's tail was an act of cruelty, the event whereof proving so fatal, it was adjudged to be of malice prepensed, though of a sudden, and in the heat of passion."

Now "cruelty" is not and never has been, in the law of murder, a legal term of art, and later in his judgment Holt C.J. replaces this notion with that of excessive retaliation in response to trivial provocation. Speaking of D.Williams' case[3], where there had been only verbal provocation, Holt C.J. said[4]:

> "the provocation did not amount to that degree, as to excite him designedly to destroy the person that gave it to him."

Cases of this kind, it is suggested, cases where trivial provocation is met with a "violent and dangerous" retaliation, are viewed by Holt C.J. as involving a gross overreaction, "cruel" retaliation going far beyond the proportion of the provocation and the bounds of proper retribution, not merely a reaction going somewhat beyond the mean in point of proportional requital. It is the (great) extent of the departure from the mean response in these cases, in point of retributive justice, that makes them murder rather than manslaughter in Holt C.J.'s view, despite the fact that they took place in the heat of passion.

Such cases are to be contrasted with those where the provocation was of a kind falling within the categories of sufficient provocation, where there has been[5]:

> "in law such a provocation to a man to commit an act of violence upon another, whereby he shall deprive him of his life, so as to extenuate the fact, and make it to be

manslaughter only."

Does Holt C.J. here suppose, as we are alleging, that there is any overreaction at all in such cases, any departure from the mean in point of retributive justice or proportional requital? The key phrase here is "such a provocation...as to extenuate"; for Holt C.J. also gives examples of provocations which are said to justify and not merely to extenuate the retaliation taken in anger[1]:

> "If a man shall see another stealing his wood, he cannot justify beating him, unless it be to hinder him from stealing any more...If a man goes violently to take another man's goods, he may beat him off to rescue his goods...if a parent or master be provoked to a degree of passion by some miscarriage of the child or servant, and the parent or master shall proceed to correct the child or servant with a moderate weapon, and shall by chance give him an unlucky stroke, so as to kill him; that is but a misadventure."

These cases would not now, of course, be regarded as provocation cases, but as action in prevention of crime and lawful correction respectively, but Holt C.J. treats them as provocation cases where no blame or punishment is appropriate, and so therefore must we. It seems clear that Holt C.J. treats the retaliation inflicted in the stealing and lawful correction cases as justified because it is a right or mean retributive response to the provocation received. This explains why if the child is killed in the course of the correction, the verdict should be misadventure, because the killing took place in the course of a perfectly lawful act, and one to which no moral blame can be attached[2].

None of the cases of a justified or mean retributive response to a particular provocation are, of course, cases where that response has taken the form of the deliberate infliction of fatal violence, and that might be thought to be the explanation for Holt C.J.'s willingness to regard them as cases of justified-because-in-

accordance-with-the-mean retaliation. It is not.

The judgment of an action as being in accordance with or as a departure from the mean, is a judgment of degree, of "more or less"[1]. It follows, thus, that just as there may be cases of moderate provocation, such as those just mentioned, where moderate retaliation is the mean, in point of retributive justice, and is hence a morally justified response, so there could conceivably be cases of provocation so grave that fatal retaliation might seem to be a mean and hence a morally justified response. Holt C.J., in his discussion of the fourth category of sufficient provocation, thinks that catching one's wife in the act of adultery is indeed a case of the latter kind, even though the law does not in fact treat it as such, which he regards as an anomaly[2]:

> "If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law though it may seem hard, that the killing in the one case should not be as <u>justifiable</u> as the other. 20 Leviticus, 10 ver. If one commiteth adultery with his neighbour's wife, even he the adulterer and the adulteress shall be put to death. So that a man cannot receive a higher provocation." (my emphasis)

For Aristotle, to hit the mean in every respect is a "rare, laudable and fine achievement"[3]. In cases where angry retaliation is concerned, to hit the mean is to retaliate in anger for the right reason at the right time, and particularly, to the right extent. If this is done, the retaliation is to be regarded as completely morally justified, in Holt C.J.'s view, because no other moral judgment would be appropriate for a mean response.

This is where we begin to see the importance of Holt C.J.'s description of the provocations at issue in the categories of sufficient provocation as "such...provocation[s]...as to <u>extenuate</u> the fact". Killing in such cases is not regarded by Holt C.J. as a

"cruel" act, unlike killing in cases involving more trivial provocations, such as D.Williams'. Killing in such cases is, nonetheless, a form of retaliation that goes somewhat beyond the mean in point of its extent - it is an overreaction, even if the response is a mean or right one in terms of the person attacked, the time of the attack, the reason for it, and so on.

It is the fact that, given the degree of the provocation involved, fatal violence as a form of retaliation goes only somewhat beyond the mean in point of retributive justice, is thus partially morally justified, and is not in such circumstances the gross overreaction that it was in D.Williams' or Watts v. Brains, that leads to the view that the provocation extenuates the offence. Given the admitted departure from the mean in point of the proportion of the requital, however, such a degree of deliberate violence cannot be regarded as completely morally justified.

The early modern doctrine of provocation thus reflects a central feature of the notion of the mean, namely that it is a judgment kata ton orthon logon, a judgment of degree, of more or less. We can best express this by suggesting that Holt C.J. views provocation cases as all falling along a kind of continuum or spectrum of moral justification.

Right at one end of the spectrum are cases of self-induced provocation such as, perhaps, Mawgridge itself, where it cannot plausibly be said that the defendant has even felt anger and acted in anger towards the right person for the right reason, quite apart from the fact that the retaliation far exceeds in proportion the "provocation" received. Such cases, suggests Holt C.J., are properly regarded as murder in the same way as a homicide resulting

from "a rancour fixed and settled in the mind".

Not much further along the continuum are cases such as Halloway's and D.Williams' cases where the defendant has felt and acted towards the right person for the right reason, but has, like Mawgridge, far exceeded the mean in point of the extent of the retaliation in anger that would be proportionate to the provocation - where the defendant has grossly overreacted. Such is the departure from the mean in point of the extent of retaliation, in these cases, despite conformity with the mean with regard to retributive justice in other respects, that they are for Holt C.J. likewise properly regarded as falling within the moral scope of murder, being almost completely without moral justification.

Further along the spectrum or continuum are the cases involving[1] "such a provocation as will make the act of killing to be but manslaughter only", the provocations that are the subject of the four categories of sufficient provocation. The provocations at issue in these cases are sufficiently grave to make even the deliberate infliction of fatal violence only a response going somewhat beyond the mean, and the offence is thus extenuated on the grounds that there was some moral justification for the degree of violence used.

Right at the other end of the spectrum or continuum, in Holt C.J.'s view, are cases such as Manning, or the hypothetical cases he mentions dealing with beating off thieves and moderate chastisement of children. In these cases, the response of the defendants was in all respects in accordance with the mean in point of retributive justice. As far as the angry response is concerned, justice as a virtue was displayed in accordance with the mean in

that, most significantly, the retaliation taken in anger was proportionate to the wrongdoing of the victim. The actions are thus regarded as completely morally justified.

Actions judged in terms of conformity to or departure from the mean are, moreover, to be judged, as Aristotle says[1], "as the outcome of a certain state of character", just as we earlier saw that displays of emotion were so to be judged. This state of character is one in which the emotions are in harmony with or at least controlled by reason, and not impelling a man towards action contrary to its dictates, so that a man is able to act in the right way[2]. There is clear evidence, for example, that a gross overreaction, involving retaliation far in excess of proportional requital, was regarded in the early modern period as a manifestation of bad character. Part of the reason, indeed, for the refusal of mitigation is not only the cowardice of the attack manifested by the defendant in such cases, but the despicable or wanton character of the emotions that led the defendant to make such an attack.

This point is brought out clearly in Foster's judgment in Curtis[3]. In this case, some officers arrived at the house of one Cowling to arrest him. Arriving at the house, they called up that they had a warrant for Cowling's arrest, and would break down he door to enter the house if he did not let them in. Cowling was in the house with the defendant. The defendant shouted back that the first person to enter the house would be killed with his axe. The officers broke down the door, and the defendant killed one of the officers with an axe. The warrant for the arrest was technically illegal, but of this minor provocation, Foster said[4]:

> "[Y]et surely the knocking of a man's brains out, or cleaving him down with an axe on so slight a provocation, savoureth rather of brutal rage, or, to speak more properly, of diabolical mischief, than of human frailty."

We find a similar analysis of killing upon slight or no provocation in terms of the bad character displayed by the defendant in so acting in the later work of Russell[1]:

> "[T]hus where a man kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause."

Not only, though, did the early modern law follow Aristotle in supposing that a display in action of virtue - here retributive justice - in accordance with the mean was a display of a certain (good or bad) quality of character. As has been stressed on a number of occasions, the judgment that feeling and action are in accordance with or depart from the mean, with regard to a virtue, is a judgment made relative to particular standards and values; in the period under discussion, these were the values of men of honour.

What was to be regarded as a mean display of retributive justice, thus, was crucially dependent on <u>what amount of honour was lost</u>, as well as on what gain in lack of self-restraint was made in virtue of any given provocation, and hence in total what amount of wrongdoing was to be avenged. This important fact explains what might otherwise appear to be some counter-examples to the foregoing analysis of the theoretical justification for conviction and mitigation in cases of provocation.

In <u>Steadman</u>[2], the defendant was about to enter an affray in a public house to attack another man, when the victim standing on the sidelines cried out to him, "you will not murder the man will

you?", to which he replied, "what is that to you, you bitch?". The woman then struck the defendant Steadman, upon which he chased her and ran her through with his sword. The crucial issue in the case appears to have been the manner in which the woman struck Steadman, for there was some dispute over how she did this. Holt C.J. instructed the jury that if she had merely boxed him on the ears, this would not be sufficient provocation to reduce murder to manslaughter, but that if she had struck him with an iron patten, this would be sufficient provocation.

At first sight, this case might seem to be inconsistent with Holt C.J.'s own approval in Mawgridge of the first category of sufficient provocation that we considered above. A box on the ear was just the kind of provocation that was there said by Holt C.J. to be sufficient to reduce murder to manslaughter, a insulting assault symbolic of great contempt for a man's natural honour. There are other instances, in the discussion in Mawgridge itself, which would appear to be inconsistent not only with the analysis of early modern developments in terms of great offences against honour, but with their analysis in terms of degree of departure from the mean with regard to the extent of morally warranted retaliation, justified in point of retributive justice.

Where Holt C.J. is speaking of the provocation of children or of servants, for example, he draws no distinction between angry retaliation going slightly beyond the mean, and angry retaliation that is a gross overreaction to the provocation. In both instances the defendant is to be convicted of murder, if the victim dies. In respect of children, this difference in approach is evident in the following passage[1]:

> "The like in obstinate and perverse children, they are a great grief to parents, and when found in ill actions, are a great provocation. But if upon such provocation the parent shall exceed the degree of moderation, and thereby in chastising kill the child, it will be murder. As if a cudgel in the correction that is used be of large size, or if a child be thrown down and stamped upon."

Likewise, where the provocation of servants is concerned, in discussing, in Mawgridge, the defendant's acts in the earlier case of Grey[1], Holt C.J. says[2]:

> "This was held to be murder, yet here was a provocation on a sudden, as sudden a resentment, and as speedy putting in execution; for though he might correct his servant both for his neglect and unmannerliness, yet exceeding measure therein, it is malicious...Grey's action was right, as to the striking his servant by way of correction; but the error was in the degree, being too violent, and with an improper weapon."

Despite the fact, thus, that the ill actions of children are described as a great provocation, Holt C.J.'s view is that if a parent so much as exceeds the mean or right degree of retaliation, a moderate amount, the offence (should the child die) is murder. This is in spite the fact, moreover, as we have seen, that if the child should unluckily die in the course of an administration of a mean or right amount of correction, the verdict should be misadventure. He therefore draws no distinction between retaliation going somewhat beyond the mean, such as using too large a cudgel, and grossly excessive retaliation in the shape of throwing the child down and stamping upon it. A similar approach is taken to the provocation of servants. It is enough for a murder conviction that a master exceeds the mean or proper proportion in point of requital, when correcting a servant for provoking him[3].

How are these apparent inconsistencies with the analysis provided in this chapter to be explained? They are to be explained in terms of the values and standards relative to which a mean or

right response to a provocation was to be judged in the early modern period, namely the values, standards, and understanding of what virtue required, of men of honour.

It was made clear by the honour theorists that the laws of honour applied only as between men of honour. As Paley put it[1]:

> "[T]his law [of honour] only prescribes and regulates the duties betwixt equals; omitting such as relate to the Supreme Being, as well as those which we owe to our inferiors." (Paley's emphasis)

This had a crucial influence on the understanding of when a man of honour was to resent and revenge an affront to honour. This is evident from Mandeville's discussion of this point[2]:

> "[I]f the least injury be done...to himself...Satisfaction must be forthwith demanded, and if it proves an Affront, and he that gave it is likewise a Man of Honour, a Battle must ensue." (my emphasis)

In Holt C.J.'s judgment in Mawgridge, where the categories of sufficient provocation are in issue, it is consistently assumed that the provoker who gives the affront is another man - another man of honour, we may suppose[3]. That explains the frame of reference within which the provocations are judged to be grave; for where a man received an insult from an equal, from another man of honour, retaliation or the offer of a duel was the means by which he sought to restore equality between himself and the insulter[4].

Where, though, the insulter was an inferior there was by definition no equality to be restored, and the proper response was usually thought to be disdain or forgiveness, and not angry retaliation. As Aristotle remarks of the magnanimous man[5], "[dis]honour conferred by ordinary people for trivial reasons he will utterly despise...because it cannot rightfully attach to him". This is evident, for example, in the work on honour and virtue of

the seventeenth century duellist Lord Herbert[1]:

> "[E]ven in the employing of our virtues, discretion is required; for every virtue is not promiscuously to be used, but such only as is proper for the present occasion...[t]here is no occasion to use your fortitude against wrongs done by women or children, or ignorant persons...since you might by a discreet wisdom have declined the injury."

It was a common opinion in early modern England that, as a man, amongst one's natural inferiors were numbered women, servants, and children[2]. The man of honour, says Elyot[3], has a "double gouvernance", an inward and an outward gouvernance. The inward gouvernance is over "his affectes and passions, which do inhabit within his soule, and be subject to reason". This inward governance, of course, we have considered. The outward governance, though, was of those under the authority of the man of honour, such as his wife, children and servants.

The implication, so neatly captured in this notion of the "double gouvernance", is that inferiors are to be controlled and directed in accordance with their proper status and function, just like the "affectes and passions" which are the subject of the inward gouvernance. It follows that provocations from inferiors, at least of a trivial kind, should be met with a response that errs on the side of deficiency. The status of inferiors precludes them from touching a man in point of honour through such a provocation, and thus to respond to it as if it did, to treat them as in this sense an equal, would be to abandon or compromise his position as their natural superior and "gouvernour".

That is not to say, as seems clear from Holt C.J.'s judgment in Mawgridge, that no angry response is appropriate in the face of the provocations of an inferior. It is only to say that a much lesser

response is appropriate in such circumstances, one which is sufficient to punish their lack of self-restraint, and not the kind of response which would be appropriate for the like provocation from another man of honour. This explains the early modern law's insistence that any departure from the mean retaliatory response, where the provocation of children and servants is concerned, will not be worthy of mitigation in the way a similar provocation might have been from another man of honour.

Aristotle explains the idea we have been presenting in terms of the values of men of honour in terms of the doctrine of the mean in the following passage[1]:

> "[I]t is not easy to determine what is the right way to be angry, and with whom, and on what grounds, and for how long. Indeed, we sometimes praise those who show deficiency, and call them patient, and sometimes those who display temper, calling them manly."

What Aristotle is suggesting is that there are times when, perhaps somewhat ironically, it is right to depart from what would in other circumstances be the right or mean response, and err on the side of deficiency or excess in one's response[2]. One circumstance in which it is right to err on the side of deficiency in point of anger is where one is confronted with an insult from an inferior. In such a case there is no need to restore one's lost honour as well as to punish lack of self-restraint, for honour cannot be lost to an inferior, (at least, as Aristotle suggests, where the insult is trifling) and thus less is required by way of retaliation in such a case, for which a show of disdain or mild annoyance may suffice.

What, though, of the cases mentioned by Aristotle where one ought to incline towards <u>excess</u> in one's response, where a show of (excess) temper would be called "manly"; are these also dealt with

under the early modern law? It seems reasonable to suppose that part of the explanation for Holt C.J.'s view that killing in anger having caught one's wife in the act of adultery should be regarded as completely morally justified, is that he regards cases involving provocation of this kind as just the kind in which one ought to incline towards excess, as cases in which an excessive display is indeed "manly". As we have seen, being cuckolded was regarded, in early modern England, as a particularly grave dishonour[1], and Holt C.J. himself says in support of an angry reaction in such a case[2], "jealousy is the rage of the man, and adultery is the highest invasion of property".

In summary, the mitigation provided through the doctrine of provocation, in the early modern period, should be thus regarded as a sophisticated reflection of the virtues of even-temperedness and retributive justice. The early modern understanding of even-temperedness underpins the kinds of provocation then thought to be gravely provocative. Built on this understanding, in any individual case, is a judgment of the degree of conformity to or departure from the mean with regard to the virtue of retributive justice, taking the form of retaliatory action in anger. It is this judgment that ultimately determines culpability in provocation cases.

Conformity to the mean was, in this regard, seen as a display of good character. Great departure from the mean, grossly overreacting, was regarded as a display of bad character. Some departure from the mean, as in the kinds of overreactions at issue in the categories, was regarded as something in between these - becoming very angry at the right things, but inflicting rather too much, by way of retaliation. The judgment, finally, of what was in

conformity to or a departure from the mean, in point of even-temperedness or justice, was a judgment relative to the standards and values of men of honour. As we shall see in chapter four, all of these aspects of the early modern law are of the first importance in analysing the working of the modern doctrine of provocation.

In particular, the discovery that the exculpating effect, if any, of a plea of provocation was in the early modern period a matter of judgment and degree, a question of assessing the extent of conformity to or the degree of departure from the mean with regard to virtues, is an important one in two respects. First, as we will see below, it enables us to analyse a second-order conception of anger underpinning the early modern law. Secondly, though, this discovery provides the essential building blocks on which the discussion of the first-order moral justification for retaliatory action in anger will be based in chapter four.

The element of moral justification is not customarily thought to concern a judgment of the character of accused persons, the quality of their inner resources assessed by a judgment of conformity to or departure from the mean with regard to virtues. The element of moral justification is thought to centre on the supposed role of the victim in precipitating the defendant's angry reaction. As Ashworth puts it[1]:

> "It is contended here that the doctrine of provocation as a qualified defence rests just as much on notions of justification as upon the excusing element of loss of self-control...the claim implicit in partial justification is that an individual is <u>to some extent</u> morally justified in making a punitive return against someone who intentionally causes him serious offence...The complicity of the victim cannot and should not be ignored, for the blameworthiness of his conduct has a strong bearing on the court's judgment of the seriousness of the provocation and the reasonableness of

the accused's failure to control himself."

Now I would certainly not contend that the role of the victim is irrelevant to the discourse on the element of justification in provocation cases. Ashworth's description of the element of justification in these terms has done much to broaden and enrich discussion of the foundations of the doctrine of provocation. Our present investigation has demonstrated, however, that the role of the victim in provocation cases is only an integral part of a broader first-order concept of moral justification for provoked action. As described above, this concerns the display of more or less good character by accused persons in becoming angry at the provocation in hand, and retaliating to a greater or a lesser extent in the way and at the time and with the person that they did; it concerns their conformity to or departure from the mean in point of the virtues of even-temperedness and justice. We will discuss this issue further in chapter four.

6. Anger as Righteous Indignation

We have discovered, then, that the development of the early modern doctrine of provocation is best explained in terms of the concept of honour, and that the theoretical foundations of the law's condescension are best explained, in particular, in terms of conformity to and departure from the two virtues of even-temperedness and justice. This discovery yields a conception of anger underpinning the doctrine of provocation at a second-order level, a conception I shall refer to as "righteous indignation".

In provocation cases, the defendant has displayed anger, but anger is not itself a virtue[1]. What, then, is anger? We approach

this question largely through an analysis of Aristotle's account of the feelings and virtues that comprise what we commonly refer to as "anger". Aristotle draws an important distinction between simple "feelings", some examples of which he thinks are desire, fear, envy, and anger, and more complex "dispositions" which are conditions or states of character in respect of which, inter alia, we are well or ill disposed as far as feelings are concerned[1]. A good disposition or state of character with respect to a feeling is a virtue, the ability to display the feeling in a mean or proper way, as I have said.

"Even-temperedness" is the virtue Aristotle associates with anger, the good disposition which leads men to experience the feeling of anger in a mean or proper way, on the right grounds with the right people in the right way and so on[2]. Aristotle gives more detailed consideration to the relationship between even-temperedness as a virtue and the feeling of anger, which we should consider.

What is a "feeling" of anger? A physicist, says Aristotle[3], would define anger as a "boiling of the blood", a shorthand definition of a kind so commonly employed, of course, in the early modern period to describe one of the necessary conditions for mitigation by way of provocation[4]. A logician, on the other hand, says Aristotle[5], would define anger as the "desire for retaliatory suffering".

Neither is wrong, according to Aristotle. Whereas the one describes the "material conditions" of anger, the other speaks of its "form or account"[6]. To describe anger as a desire for retaliatory suffering is to give an account of anger, whereas to

describe it as a boiling of the blood is to describe what is necessary for the actual existence of anger, its embodiment in certain material facts[1]. Just as, though, the "account" of anger is not a complete description of anger without reference to its embodiment in material facts, so it is not complete without some reference to the grounds for anger[2], that which gives rise to the desire for retaliatory suffering.

The broad ground on which anger is felt, for Aristotle[3], is an apparent slight[4] or injustice. Upon receipt of injury, the man who is angered by an apparent injustice experiences the desire for retaliatory suffering. The experience of this desire is not, though, a "reflex" response to the simple perception of injustice. The grounds on which the desire is based, the person against whom retaliation is desired, and the degree of retaliation desired are in large measure determined by reason. For Aristotle[5], to be angry at the right things the right amount at the right time and so on, is to be angry in the way that <u>reason</u> dictates or prescribes. What is meant, though, by "reason" in this context?

Anger, when it is displayed in a mean or proper way, involves reason in the sense of moral judgment[6]. In order to display the right amount of anger on the right grounds, a man must clearly have a good grasp of the concepts of injustice and denigration[7], because he must be able accurately to judge whether he has been insulted, and if so, how badly, and by whom. If he is to be angry on the right occasions with the right person for the right reason and so on, he must in other words be able to make, as I shall henceforth call it, an accurate moral <u>judgment of wrongdoing</u>[8].

It is through his use of reason that a man makes such moral

judgments correctly, and hence displays anger in a mean or proper way. In the man who is well disposed with regard to anger[1], reason mediates the apparent injustice and the desire for retaliatory suffering, by ensuring that the latter is proportionate to the former[2], so that no more retaliatory suffering is desired than is warranted by the degree of the injustice suffered. In the man who is unduly quick-tempered, however, reason fails in its mediating task. Men of this kind become angry without their anger being based on a correct moral judgment, on a reasoned assessment of the degree of injury received, and hence tend to become more angry than they ought, at the wrong times and all the rest[3].

So anger is properly seen as based both upon desire and reason in the sense of moral judgment. The desire is for a particular kind and degree of retaliatory suffering which, like its material embodiment - the heated blood sensation, typically follows in the wake of and reflects the reasoned moral judgment that wrongdoing of that particular kind has been suffered. The importance of this understanding of anger concerns its relationship with the virtue of even-temperedness.

Even-temperedness, feeling anger in a mean or proper way, like all other virtues, involves a harmony of desire and reason[4]. When the even-tempered man is rightly angry, and angry in the right way with the right person, and so on, we may now suggest, he has first and foremost made the correct judgment concerning the nature and degree of the wrong or injury, if any, done to him. The ability to make a correct judgment of this kind is a <u>sine qua non</u> of experiencing the right amount of anger on the right occasions.

In the wake of a correct judgment of wrongdoing, will follow[5]

not only the heating of the blood, the material embodiment of anger, but a desire to inflict retaliatory suffering. In the good-tempered man, this desire will be a desire to inflict a degree of retaliatory suffering of a kind that reflects the judgment of wrongdoing: that is what it means, as I have said, for a man, as Aristotle puts it[1], "to be angry in the manner, at the things, and for the length of time, that reason dictates". We find, a very similar stress on the role of reason in determining the proper degree of anger in the work of the early modern honour theorists, as in Blandy, in a passage which it is well worth setting out once again[2]:

> "The affections therefore of the minde, as ire...are not (as ignoraunt men suppose) to be raced out, but rather with the light and flame of reason in the best and highest mindes enkindled...And even as a skilfull & couragious horseman doth not alway delight in a soft and gentle pace, but sometymes geveth his horse the spurre, to the end his stede should move more lively: So by reason, sometymes the affections of the minde are styrred, and prycked forward".

At this point, we have an account of what it means to be good-tempered, of what it is to feel angry, and to be angry in a right or proper way, in the way reason prescribes; in accordance with the mean. What we do not have, though, is an account of what it means to act or respond angrily, and do so in a right or proper way, in the way dictated by reason. Such an account is clearly essential to an explanation of the foundations of the doctrine of provocation, which must be as much focused on certain kinds of angry response as it is focused on angry feelings.

Aristotle does not clearly distinguish his analysis of anger from that of angry retaliation. He considers them together, and speaks simply of the ability, where any virtue is concerned[3], "to feel or act towards the right person to the right extent at the

right time for the right reason in the right way" (my emphasis). It is, though, to some extent necessary to separate anger from retaliation in anger for the purposes of analysis, for it requires a further argument to justify the infliction of retaliation in anger, over and above feeling angry[1]. The modern ethical theorist De Sousa gives a good example of why this is so[2]:

> "Surprising one's lover in bed with someone else, one may react with jealousy and rage...It has become the paradigm scenario for jealousy and so the emotion aroused by it must be counted appropriate...But even if the original scenario as learned, involves the response of murderous aggression, this will not necessarily make murder rational...the mere existence of the scenario will not determine whether extreme revenge is ever rational."

Our first concern, surprising though this may sound, is to distinguish the material embodiment of a feeling of anger - heating of the blood, changes in facial expression, and the like - from retaliation in anger. There is a natural tendency to associate retaliation in anger with physical aggression, but reflection on the scope of what may be perceived as retaliation demonstrates that this is not so. It could be argued, as Aristotle points out[3], that the angry man cannot desire vengeance, because we become angry with our parents, but do not desire vengeance upon them. As he says, though, in rebutting this argument[4], "Very likely the objection is not valid; for upon some people it is vengeance enough to cause them pain and make them sorry". "Looking daggers" may be as much a form of retaliation, in certain circumstances, as using a dagger[5]. If this is so, however, and if it is right to say, as we earlier did, that the material embodiment of anger (which includes outward visible signs of anger such as facial expression) simply follows in the wake of a judgment of wrongdoing, does this mean that angry

retaliation in the form of a "dirty" look is inflicted involuntarily? It does not. As Hampshire points out[1], when one "looks daggers", that look may be involuntarily or voluntarily directed; it may simply be the material embodiment of a feeling of anger that has followed in the wake of a judgment of wrongdoing, or it may voluntarily be maintained and directed at a provoker as deliberate retaliation. In both cases, of course, it may well be that the look causes pain and makes the provoker sorry, but only in the latter case could it properly be said that that pain and sorrow had been inflicted by way of retaliation.

Having demonstrated the scope of retaliation inflicted in anger, we may move on to consider its nature. We have said that a proper account of feeling angry shows it to be comprised of a desire for retaliatory suffering, based upon a judgment of wrongdoing. What is the basis of angry retaliation? Our starting point is Aristotle's description of the typical reaction of the man who cannot control his anger. In him, says Aristotle[2], "passion, as soon as it hears the first mention of injury, is impelled to take vengeance, without waiting to hear whether it ought or ought not, or not so vehemently". The implication is, clearly, that in the self-controlled man angry passion waits to hear whether, and if so exactly how, it ought to issue in vengeance, but to what does it listen? As Aristotle makes clear elsewhere[3], it is reason which ought to guide men in whether they retaliate, and if so how vehemently. What is the role of reason here?

The role of reason in relation to action in anger, in relation to retaliation, again takes the form of moral judgment. It is a judgment of the right amount of retaliation to inflict. Just as

people must have a good grasp of the concepts of injustice and denigration, of insult, if they are to make correct judgments of wrongdoing, so they clearly must have a good grasp of the concept of retributive justice, if they are to make correct moral judgments of the right amount of retaliation to inflict[1]. I shall call this facet of reason's role - as a moral judgment - in relation to anger, the judgment of appropriate response.

If this analysis is accepted, then retaliation may be an appropriate response to wrongdoing because it corrects the imbalance of gain and loss as between wrongdoer and victim that arose, as discussed in section four above, as a result of the wrongdoing. If retaliation is an appropriate response[2], then it should "match" the wrongdoing perpertrated by the wrongdoer, because its purpose is simply to restore a balance of fair order, that restoration being effected by as much retaliation as is necessary both to wipe out the wrongdoer's gain and compensate the victim for his loss. If it goes way beyond this, it can be regarded as no more or less than than vindictive and illegitimate revenge.

If anger is conceptually linked not only with even-temperedness as a virtue, but also with retributive justice as a virtue, then it would seem to follow not only that unjust involuntary dealings of the kind Aristotle mentions are the right things about which to become angry, and their perpetrators the right people with whom to become angry, but also that angry retaliation that matches the wrongdoing is the right response in anger. What is the relationship, though, between the judgment of appropriate response and the judgment of wrongdoing, rather than the wrongdoing itself simpliciter, and between the judgment of appropriate response and

the desire for retaliatory suffering?

I have said that even-tempered people become angry at the right times to the right extent and so on, because their judgments of wrongdoing reflect the actual wrongdoing perpetrated by the wrongdoer, and hence the desire for retaliatory suffering that follows in the wake of those judgments is the desire for the right amount of retaliation. If people make wrong judgments of wrongdoing, and hence desire more retaliation than is appropriate, does this mean that they inevitably go on to judge more retaliation appropriate than is in fact warranted, and hence inflict greater retaliation than is appropriate? It does not.

Although I shall have cause to differ from him on this point in the third interlude[1], for Aristotle it is only in the person who lacks self-control that the desire to retaliate based on the judgment of wrongdoing <u>impels</u> the taking of vengeance of the kind and degree desired, which will be a wrong kind and degree if a mistaken judgment of wrongdoing was made. In the self-controlled person, if more retaliation is desired than is in fact appropriate for the wrong done, the judgment of appropriate response will ensure that only retaliation in fact reflecting the wrong done is inflicted. The judgment of appropriate response can thus have a restraining role, in relation to the desire for retaliatory suffering, as well as a role in lending moral legitimacy to retaliatory action. In respect of De Sousa's discussion of the anger of the cuckold, for example, it might well be that a cuckold would at the time desire to inflict very great retaliation; but in the self-controlled man, this desire would be held in check by reason, by the judgment of appropriate response, and some lesser

and perhaps more morally legitimate retaliation would be inflicted, in accordance with the judgment, such as angry words.

We now have a virtue-centred account of a conception of anger, which I shall henceforth call righteous indignation, a conception of anger built on the two virtues, even-temperedness and justice, integrally linked to the concept of honour, and underpinning the early modern law. We consider the relevance to the modern law of this conception further in the second interlude, and in chapter four.

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[1]. The words of Captain MacNamara, speaking in his defence at his trial for murder in 1803, the killing having taken place in the course of a duel. He was acquitted of both murder and manslaughter; see Baldrick (1965), 97-98.

[2]. Romei (1597), 100.

[3]. Elyot (1531), 170b.

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[1]. See on this eg. Romei (1597), 162; Baldrick (1965), 33-36.

[2]. L142.

[3]. Romei (1597), 151.

[4]. For evidence that the law recognised the well-understood form of the sequence of retaliations for affronts leading up to the duel, see Foster, C.L. 295, sec. 3.

[5]. See eg. Mawgridge (1707) Kel. 119, at 128. The facts of this important case will be given later in the chapter.

[6]. Mawgridge (1707), Kel. 119, at 131.

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[1]. There is, it should be pointed out, an ambiguity in the text cited at page 40 ante that is of some importance here. The clause "or a blow with what thing else soever" can be read as a continuation of the explanation of what will "falsify" a lie, and hence be taken to suggest that "blow" means a blow equivalent to a box on the ear, the blow mentioned in the preceding passage. This seems to me, however, to be a strained reading. The more natural reading is that presupposed in the my discussion on this page, which treats the words "or a blow" disjunctively, as a provocation one grade more severe than a lie, and hence warranting more violent retaliation, "with what thing else soever", than a lie. For confirmation, in this regard, that a blow was regarded as a more grave provocation, in point of honour, than a lie, see the second interlude infra, and Romei (1597), 151.

[2]. Mawgridge (1707), Kel. 119, at 135.

Page 42

[1]. See eg page 39 note 3 ante; also Mandeville (1714), 208.

[2]. See eg. Romei (1597), 78.

[3]. Hawkins, 1 P.C. 97.

Page 42 (cont.)

4. It is obvious from this passage, of course, that Hawkins does not himself share the common early modern view that passions assisted reason in its task of directing man to virtue. He considers instead that passions, guided by honour, overcome the power or reason to restrain them. In this, he reflects the view of the effect of passions that, as we shall see in the next chapter, came to prominence in the eighteenth and nineteenth centuries. He shares the early modern lawyers' view, however, that when passions, guided by honour, led to killing in hot blood in the face of an affront, this was a ground for the law's condescension.

5. See the first interlude ante.

Page 43

1. ibid.

2. See eg. Kelso (1911), 91-92.

3. See eg. Romei (1597), 81\99.

4. See chapter 1, pages 22-25.

5. Mandeville (1714), 211.

Page 44

1. See chapter 1 ante.

2. Crompton (1606 ed.), 119b eg 57.

3. Crompton (1606 ed.), 120a eg 61.

Page 45

1. See Chapter 1 ante.

2. Watts v. Brains (1600) Cro.Eliz. 778.

3. ibid., at 778-779.

4. See eg. 3 Inst. 47; Mackalley's case (1612) 9 Co.Rep. 61b.

Page 46

1. See Ashworth (1976), 292, at 293.

2. 4 Co.Rep. 67.

3. ibid.

4. (1612) 12 Co.Rep. 87; Cro.Jac. 296.

Page 46 (cont.)

5. Cro.Jac. 296.

Page 47

1. (1616) Unreported, but described by Stephen in Digest, 221.

2. ibid.

3. Mawgridge (1707) Kel. 119.

4. ibid., at 136.

Page 49

1. Page 44 ante.

2. 3 Inst. 55.

3. (1641) Unreported, but described by Hale at 1 P.C. 455.

4. ibid.

Page 50

1. See Hale 1 P.C. 479. See also the cases discussed by Morris and Howard (1964), chapter 4.

2. (1641) Style 467.

3. ibid., at 469.

4. 1 P.C. 470.

5. See 1 P.C. 469 (f).

Page 51

1. (1672) 1 Vent. 216.

2. ibid.

Page 52

1. Hutchins (1684), "A true Account of Bloudy and Barbarous Murder, Committed on the Body of John Sparks, Waterman", cited by Sharp (1984), 98.

2. Cleland (1607), 232.

Page 53

1. Mawgridge (1707) Kel. 119, at 135-136.

Page 54

[1]. See on this, the passage cited at page 57 infra.

[2]. Elyot (1531), 170b.

[3]. Mandeville (1714), 181\208.

[4]. James (1978), 5.

[5]. Mawgridge (1707), Kel. 119, at 136.

Page 55

[1]. Mandeville (1714), 180.

[2]. Lord Morley's Case (1666) 6 St.Tr. 770, at 780.

[3]. See eg. Mandeville (1714), 180.

[4]. Baldrick (1965), 33-36.

Page 56

[1]. Jacob (1818), 202.

[2]. Romei (1597), 152.

[3]. Quite what a "fillip" meant in this context has not been easy to find out. It technically meant the movement of thumb and forefinger in flipping a coin, which is the usage that seems to have given rise to its present colloquial meaning of something that suddenly boosts one's confidence, or a stroke of good fortune. Other meanings, though, included a blow of some kind, such as a box on the ear, and this would seem to be what Holt C.J. had in mind in using the term in Mawgridge.

[4]. See on this eg. Romei (1597), 99; Bosquett (1817), cited by Baldrick (1965), at 32-33.

Page 57

[1]. Hopkin Huggett (1666) Kel. 59.

[2]. For a moving account, by a Press Master, of the hostility facing Press Masters such as Berry, see British Historical Documents (1660-1714), 832.

[3]. See chapter 1 ante.

[4]. Hopkin Huggett (1666) Kel. 59, at 60.

Page 58

[1]. Tooley (1709) 2 Ld.Raym. 1296.

Page 58 (cont.)

[2]. Mawgridge (1707) Kel. 119, at 136.

Page 59

[1]. Tooley (1709) Holt K.B. 485, at 489-490.

[2]. C.L. 312-316.

[3]. Tooley (1709) 2 Ld.Raym. 1296.

[4]. Ashworth (1973), 50-52.

Page 60

[1]. See page 54 note 4 ante., and Mawgridge (1707) Kel. 119, at 136.

[2]. Hopkin Huggett (1666) Kel. 59, at 60.

[3]. ibid.

Page 61

[1]. Mawgridge (1707) Kel. 119, at 137.

[2]. See page 59 note 1 ante.

[3]. Cockburn (1720), 147-148.

[4]. Mandeville (1714), 180.

[5]. See eg. Kelso (1911), 93-94; James (1978), 4-5; Caspari (1968), 306.

[6]. Mandeville (1732), 14\15.

[7]. Barclay (1570), 45. See also Kelso (1911), 71.

[8]. Mulcaster (1888 reprint), cited by Kelso (1911), 75, note 17.

Page 62

[1]. Kelso (1911), 93; Romei (1597), 81.

[2]. Kelso (1911), 93.

[3]. Osorious (1530?), cited by Kelso, ibid.

[4]. See chapter 1 ante; Romei (1597), 99\100.

[5]. Segar (1602), 124.

[6]. Hopkin Huggett (1666) Kel. 59, at 60.

[7]. See page 61 note 8 ante.

Page 62 (cont.)

[8]. See page 59 note 1 ante.

Page 63

[1]. Manning (1671) 1 Vent. 158.

[2]. ibid., at 158-159.

[3]. Mawgridge (1707) Kel.119, at 137.

Page 64

[1]. Bosquett, (1817), cited by Baldrick (1965), 32-33..

[2]. Mawgridge (1707) Kel.119, at 138.

Page 65

[1]. See the first interlude ante.

[2]. The quotation here combines passages from Tooley (1709) 2 Ld.Raym.1296\Tooley (1709) Holt K.B. 489-490\Mawgridge (1707) Kel.119, 137.

[3]. Mawgridge (1707) Kel. 119, at 137.

Page 66

[1]. Kosman, in Rorty, ed. (1980a), 107.

[2]. Burke, "The Age of Chivalry is Gone".

[3]. NE1109b15.

[4]. Hopkin Huggett (1666) Kel 59, at 60.

[5]. Mawgridge (1707) Kel. 119, at 137.

[6]. See pages 61-62 ante.

[7]. See Romei (1597), 79.

Page 67

[1]. ibid.

[2]. Segar (1602), 124.

[3]. See page 56 ante.

Page 68

[1]. Blandy, cited at chapter 1 ante, page 22-23.

Page 69

[1]. NE1106b23-24.

Page 70

[1]. See chapter 1 ante, page 15, note 1.

[2]. For more detailed consideration of Aristotle's conception of justice as a virtue, see infra.

[3]. Segar (1602), 203; Romei (1597), 81.

[4]. Discussed at length by Aristotle in NE Book 5.

Page 71

[1]. Finnis (1981), 178; He is drawing on NE, Book 5 iii-v.

[2]. Except, of course, in cases of self-induced provocation.

[3]. NE1131a6-10.

[4]. NE1129a31-1129b2.

Page 72

[1]. NE1131b32ff.

[2]. ibid.

Page 73

[1]. For this kind of analysis, see Finnis (1981) 260-264.

[2]. NE1131a2-6\1132b19-21.

[3]. NE1132b23.

Page 74

[1]. NE1132b33-1133a1.

[2]. Janin, a 19th century writer on honour, cited by Baldrick (1965), 1.

Page 75

[1]. Romei (1597), 145.

[2]. Mandeville (1714), 208\209.

[3]. Pages 70-71 ante.

Page 76

[1]. NE1131b17-20.

[2]. See chapter 1 ante.

[3]. Crompton (1606 ed.), cciiii.

[4]. See page 68, note 3 ante.

[5]. Romei (1597), 79,

Page 77

[1]. ibid., at 96.

Page 78

[1]. ibid., at 151.

Page 79

[1]. L142.

[2]. See first interlude ante.

Page 80

[1]. This statement must be somewhat qualified. It may sometimes be appropriate to overlook provocation, and not retaliate: where, for example, the provocation is trifling. In such instances a concern for good manners in not showing one's annoyance can, for example, be ethically more important at the time of the affront than retaliation. The desirability of showing tolerance towards the young may likewise counsel against retaliation where the provocation is trivial. See NE1125a3-4.

Page 81

[1]. See eg. NE, book V; Romei (1597), 151-152.

Page 82

[1]. Mawgridge (1707) Kel. 119, at 132.

Page 83

[1]. Mawgridge (1707) Kel. 119, at 119 et seq.

[2]. ibid., at 121-128.

Page 84

[1]. ibid., at 128-130.

[2]. ibid., at 135-138.

Page 84 (cont.)

3. ibid., at 130-135.

4. In the preceding sections of this chapter, and in chapter 1.

5. Mawgridge (1707), Kel. 119, at 121-130.

6. See eg. Crompton (1606 ed.), 24b.

7. ibid., at 21a eg 2.

8. Mawgridge (1707), Kel. 119, at 126.

9. ibid., at 129\130\132.

10. ibid., at 127\129.

Page 85

1. Halloway's Case (1629) Cro.Car. 131.

2. Mawgridge (1707) Kel. 119, at 127-128.

3. D.Williams' Case (1641) Jones 432.

4. Mawgridge (1707) Kel. 119, at 132; see also 131.

5. ibid., at 130.

Page 86

1. ibid., at 132-133.

2. Assuming, of course, that the correction was inflicted for the proper moral purpose of correction itself. The courts had not, to my knowledge, yet been confronted with the kind of problem presented by Dadson (1850) 3 Car. and Kir. 148, where there is legal but no moral justification for the action.

Page 87

1. MacIntyre's phrase: MacIntyre (1981), chapter 12.

2. Mawgridge (1707) Kel. 119, at 138.

3. NE1109a29.

Page 89

1. Mawgridge (1707) Kel. 119, at 130.

Page 90

1. NE1106a36-1107a2. See also NE, book 3 iii-v.

Page 90 (cont.)

[2]. NE1102b25-28.

[3]. Curtis (1756) Fost. 135.

[4]. ibid., at 137-138.

Page 91

[1]. C. and M., 614.

[2]. Steadman (1704), unreported, but discussed by Foster at C.L. 292.

Page 92

[1]. Mawgridge (1707) Kel. 119, at 134.

Page 93

[1]. Grey's Case (1666) Kel. 64.

[2]. Mawgridge (1707), Kel. 119, at 133-134.

[3]. See on this the judgment of Holt C.J. in Keite (1697) 1 Ld.Raym. 139.

Page 94

[1]. Paley (1799), Vol.11, bk1, ch.11.

[2]. Mandeville (1714), 181.

[3]. See eg. Mawgridge (1707), Kel. 119 at 135.

[4]. See Pitt-Rivers (1968), 508; Bryson (1938), 4\6.

[5]. NE1124a10.

Page 95

[1]. Herbert (1620?), 39-40.

[2]. See eg. Elyot (1531) 163a; Mandeville (1714), 181.

[3]. Elyot (1531), 163a.

Page 96

[1]. NE1109b14-17.

[2]. For a controversial example given by Aristotle, see MM1203a30ff.

Page 97

[1]. See pages 64-65 ante.

[2]. Mawgridge (1707) Kel. 119, at 137.

Page 98

[1]. Ashworth (1976), 307-308.

Page 99

[1]. It is a psychic state: see NE1105b19ff.

Page 100

[1]. NE Book 2, v and vi.

[2]. EE Book 3, iii.

[3]. DeA403a29.

[4]. See eg. Royley (1612) Cro.Car. 296; Hale 1 P.C. 452-453.

[5]. DeA403a30.

[6]. ibid., at 403b1-2.

Page 101

[1]. ibid., at 403b2-3.

[2]. R1378a24-28.

[3]. T156a31-32; NE1135b29.

[4]. For a detailed discussion of different kinds of slights, see R1378a29-b2.

[5]. NE1125b34-36.

[6]. For some insights into the role of moral judgments in the experience of anger, see Solomon (1973), reprinted in Rorty, ed. (1980b), chapter 10.

[7]. See Scruton (1979), reprinted in Rorty, ed. (1980b), chapter 22, 524-525.

[8]. ibid.

Page 102

[1]. Such a man experiences feelings that are in harmony with reason, and acts accordingly: see NE Book 2. v.

[2]. See page 90 note 2 ante.

Page 102 (cont.)

[3]. NE1126a12-15.

[4]. Page 90 note 2 ante.

[5]. On this, see NE1105b29 onwards.

Page 103

[1]. NE1125b35-36.

[2]. See chapter 1 ante, page 22 note 4.

[3]. NE1109a27-29.

Page 104

[1]. See on this, Kosman, in Rorty, ed. (1980a), at 109.

[2]. De Sousa (1987), 183-184.

[3]. T156a36-38.

[4]. T156a38-39.

[5]. Hampshire's example: (1960), reprinted in Watson, ed. (1982), 75.

Page 105

[1]. ibid.

[2]. MM1202b19-21.

[3]. NE1149a25-26.

Page 106

[1]. See page 101 note 7 ante. See also NE1135b28-29.

[2]. See page 80 note 1 ante.

Page 107

[1]. In chapter 3, the third interlude, and to some extent in chapter five, I will be defending a conception of anger as a loss of self-control as anger experienced by ordinary people, whilst not being, unlike Aristotle's conception, a fully virtue-centred conception. For it does not rest on the supposition that actions in anger are based, at the time of the action, on a maxim or principle. As we shall see, however, the concept of a morally justifiable loss of self-control involves reference, like the concept of morally justifiable righteous indignation, to evaluation of actions in terms of the virtue of even-temperedness, and is to this extent reliant on an account of virtue for its proper exposition.

SECOND INTERLUDE

1. Verbal Provocation and the Requirements of Honour

In the foregoing chapters, I have now done enough to show the connections between both combate-manslaughter and the kinds of provocation thought sufficient in the early modern period to reduce murder to manslaughter, and the concept of honour. What remains to be done, in this regard, before I turn my attention to the modern law, is to explain the interrelation between the two kinds of manslaughter and the concept of honour.

The categories of sufficient provocation reflected, as I have suggested, points of honour, affronts which would be a very grave provocation to the man of honour. The critic of an endeavour to establish this connection between the law of manslaughter and the concept of honour could point, though, to what might appear at first sight to be a puzzling omission from the categories of sufficient provocation.

It has not been necessary to analyse the emergence of the rule in any detail, but by the end of the seventeenth century, it was clear law that mere words, whatever their nature, could not amount to such a provocation as would reduce murder to manslaughter[1]. It was explicitly recognised by the judges, that this rule meant that insulting a man or calling him a liar, in particular, was no provocation as would mitigate the offence if the affronted party then immediately killed the provoker[2]. But if the categories were meant to reflect the concept of honour, so the critic's argument runs, why were words of gross insult, and accusations of mendacity, not included within the first category sufficient provocation? For

these were frequently supposed to constitute just the kind of injustice or apparent injustice to the man of honour that he was meant to wipe out through retaliation, thus retaining his honour. As Addison remarked[1]:

> "The great Violation of the point of Honour from man to man, is giving the lie. One may tell another he whores, drinks, blasphemes, and it may pass unresented; but to say that he lies, tho' but in jest, is an affront that nothing but blood can expiate. The Reason perhaps may be, because no other vice implies a Want of Courage so much as the making of a lie; and therefore telling a Man he lies, is touching him in the most sensible part of Honour, and indirectly calling him a coward."

It is probably for one or both of two reasons that the rule developed that verbal provocation could not reduce a killing from murder to manslaughter. The first reason relates to the very nature of verbal provocation, as compared with the overt acts of provocation at issue in the four categories of sufficient provocation.

Characteristic of the acts of provocation at issue in the categories is the fact that they are all assumed to be self-evidently gravely provocative, and do not vary much in terms of degree, thus laying themselves open to interpretation as less provocative than they appear on their face. Each category of sufficient provocation centres on what has been called a "paradigm scenario"[2], an instantly familiar situation or set of facts in the face of which there is both an appropriate emotion and an appropriate response for the man of honour. In the early modern period, to know that a man had been plucked by the nose, or had caught his wife in the act of adultery, was to know that he had been gravely provoked, and the only live issue remaining would be whether in retaliating he had precedent malice. Accordingly, in Manning, for example, the distinction between the cuckold who acts

in cold blood and the cuckold who surprises the adulterers, and kills in a fit of rage, is indeed treated as the most important issue[1]. The paradigm scenarios of honour-violence, embodied in the categories, spoke for themselves, in the early modern period, as gravely provocative.

To have allowed words as in principle capable of reducing murder to manslaughter on the grounds of provocation would have meant abandoning the simplicity of a doctrine of provocation based on familiar paradigm scenarios. It was not every kind of verbal affront that demanded a retaliatory response, as Addison indicates in the passage cited above. Even in respect of those verbal affronts which were regarded as gravely provocative, moreover, such as giving the lie, it was notorious that whether a man had indeed been accused of lying was a matter very much open to interpretation, a point recognised and ridiculed by Shakespeare's Touchstone in respect of Muzio's "catalogue of lies"[2]. As Cleland said of men of honour[3]:

> "[I]f they heare any speake, through malitious ignorance, they will demande a commentarie of his wordes, to understand what he meaneth by this, or that, to challenge him presentlie in the field."

If words in general, or even just giving the lie in particular, had been admitted in principle to be capable of reducing murder to manslaughter, then there would have been good reason to fear that the same subtleties of interpretation and meaning would have dogged trials of men for their lives, as then plagued civil actions for words[4].

None of this is necessarily true, of course, of the insulting gesture, such as that which was thought not to be sufficient

provocation in Watts v Brains. But although insulting gestures might not be open to such subtleties of interpretation as words, they were not thought sufficient provocation because they were thought just too trivial an insult even partially to mitigate a fatal unilateral attack on the victim. As Holt C.J. said in Mawgridge of Brains' action in killing his victim in response to a rude gesture[1], "the affronting him in that manner was not any provocation to A. to use that violence to B" (my emphasis).

The point Holt C.J. is making here about the kind or degree of response that a provocation such as a rude gesture will warrant is one to which we return shortly. The importance of mentioning the differences between words and gestures, as far as the understanding of their meaning is concerned, is that inherent triviality could in fact be the reason the refusal to condescend to provoked killings in response to verbal provocation.

Although Addison was right to say that many men of honour regarded verbal provocation such as giving the lie as very serious provocation, it was not universally held amongst men of honour that verbal provocation was as serious as an insulting assault, the kind of provocation at issue in the first category of sufficient provocation. Romei remarked, for example, that[2]:

> "They...that intreate of Combate...have set it down for a certaine rule...that the injury of deeds is greater than that of words...feathers and words, are carried away with the wind, but deeds continue everlasting."

In assessing the gravity of verbal provocation, the law thus followed authorities on the point of honour such as Romei, and refused to condescend to verbal provocation for the same reason that it refused to condescend to rude gestures. To use the language of Lord Morley's case[3], the law did not allow man to value himself

at such a rate that the life of the provoker was a "fit sacrifice" to expiate the mere injury of words. As Holt C.J. put it in Mawgridge[1]:

> "First, no words of reproach or infamy, are sufficient to provoke another to such a degree of anger as to strike, or assault the provoking party with a sword or to throw a bottle at him, or strike him with any other weapon that may kill him; but if the person provoking be thereby killed, it is murder."

This passage brings us to the question of the kind and degree of response that more trivial affronts, such as words and gestures, were thought likely to provoke. There can be little doubt, as Mandeville claimed[2], that the man of honour was meant to avenge every attempt to undervalue him, in order to preserve his honour, even if the attempt took only the form of a more trivial provocation such a rude gesture or verbal abuse. Despite the fact, though, that the law did not condescend, in provocation cases, to fatal attacks in response to more trivial provocations, the law did not neglect, in its conditions for mitigation in the law of homicide, this fact about the link between violent retaliation and all threats to honour. It simply distinguished between what would mitigate a unilateral, undefended attack upon the person posing the threat to honour, and what would mitigate a bilateral combate, in cases where some threat to honour had been posed.

Now where unilateral attacks on provokers were concerned, where - as the early modern lawyers put it - the defendant intentionally sought the provoker's blood, without giving him the opportunity to defend himself, the defendant's response lacked the mark or the requirements of courage, as we earlier defined them[3], namely as a willingness to risk one's own life for the sake of honour. This being so only a provocation such as would, to use Romei's words,

grievously injure or destroy a man's honour (were he not to avenge it) would reduce murder to manslaughter in such cases. For only such a provocation could be expected to produce in the man of honour such a degree of anger that he might excusably neglect the requirements of courage in the satisfaction of his desire immediately to avenge grave injustice. These provocations were the key paradigm scenarios for honour-violence, embodied in the four categories that we have considered, all involving[1]:

> "such a provocation to a man to commit an act of violence upon another, whereby he shall deprive him of his life, so as to extenuate the fact, and make it to be manslaughter only."

Where <u>bilateral</u> attacks of the kind that were the focus of combate-manslaughter were concerned, however, as we have seen, it is supposed that the defendant did give the victim an opportunity to defend himself by waiting for him to draw his sword. He thus demonstrated his courage, in being willing to risk his own life for the sake of his honour, and his display of courage in the heat of the moment is the reason for the law's condescension.

The important point, though, is that the <u>obverse</u> of what was said about the nature of the provocation sufficient to reduce murder to manslaughter in cases of unilateral attacks will hold good in respect of bilateral attacks. That is to say, the provocation preceding a bilateral attack will be supposed typically to be of a kind which is <u>not</u> so grave that one might expect a man of honour to be made so angry that he might avenge the injustice with no regard for the requirements of courage.

When speaking of combate-manslaughter, lawyers such as Holt C.J. accordingly deliberately use examples of provocations preceding the combate that would not have sufficed to reduce murder

to manslaughter where the requirements of courage had been neglected, namely where the provocation produced a fatal unilateral attack[1]. They do so in order implicitly to emphasise that the importance of provocation, where combate-manslaughter was concerned, was only that it showed that the combate in the name of honour took place in hot blood, as the conditions for mitigation required. Any provocation that showed this was therefore relevant - even verbal provocation. As Foster put it[2]:

> "The rule laid down in the first section [ie that verbal or otherwise trivial provocation cannot reduce murder to manslaughter] will not hold in cases where from words or actions of reproach or contempt, or indeed upon any other sudden provocation, the parties come to blows, no undue advantage being sought or taken on either side. (my emphasis)
>
> A. useth provoking language or behaviour towards B. B. striketh him, upon which a combate ensueth, in which A. is killed. This is holden to be manslaughter; for it was a sudden affray and they fought upn equal terms; and in such combates upon sudden quarrels it mattereth not who gave the first blow."

So the law did not neglect the fact that men of honour considered some forms of provoking language, particularly giving the lie, to be the kind of provocation that must be immediately revenged. If a man avenged the threat to his honour posed by such provocation in proper valour, in the heat of blood, he would be convicted only of manslaughter. By not including such provocation within the ambit of the categories the law simply indicated, inter alia, that it did not regard it as so grave as to excuse a unilateral attack, in neglect of the requirements of courage, ending in death.

2. Righteous Indignation - a modern understanding of anger?

For Aristotle, although anger involves a combination of desire,

feeling and moral judgment, the former two are parasitic upon the latter. It is only in the wake of moral judgment that desire for retaliatory suffering and boiling of the blood of a specific intensity follow. Action in anger is likewise thought by Aristotle to be founded on a moral judgment, the judgment of appropriate response. Actions in anger conceived as righteous indignation are, accordingly, actions based on a moral maxim or principle.

From a virtue-centred ethical perspective, such as that adopted by Aristotle and the early modern theorists, it is moral judgment that thus plays the most important role amongst the components of anger and action in anger. Moral judgments associated with anger make it possible to conform one's feelings and actions, through the use of reason, to the mean in point of virtues; in this instance, the virtues of even-temperedness and justice.

The fact that reason, in the guise of moral judgment, can dictate the nature of feelings and actions in anger leads Aristotle to suppose that feelings and actions in anger should be regarded as voluntary, and that they are feelings and actions for which agents are morally responsible. If it were otherwise, he thinks, the basis on which we praise being angry at the right time and to the right extent, and blame their opposites would be inexplicable[1]. The basis of moral praise and blame is, of course, the fact that angry people are capable of using moral judgments of wrongdoing and appropriate response to conform their feelings and actions to a mean response, to that which reason dictates to be the right response in the circumstances[2].

Virtuous people, in this regard, conform both their feelings and actions to the mean. They make correct moral judgments of

wrongdoing and of appropriate response, and therefore neither desire nor inflict more by way of retaliation than is warranted by the provocation received. Self-controlled people, on the other hand, go wrong in point of even-temperedness and hence desire more by way of retaliation than is morally warranted. In them, however, as Aristotle says, although[1] "passion struggles and strains against the rational", passion is controlled by reason, by the judgment of appropriate response, and therefore they act, in spite of their feelings, in the same way as virtuous people.

What of defendants who overreact in righteous indignation, unlike virtuous or self-controlled people? They overreact in anger for one of two reasons. They may overreact through too hastily matching their judgments of appropriate response to an incorrect judgment of wrongdoing, making incorrect judgments of wrongdoing and of appropriate response. They will thus have gone wrong in point of even-temperedness and retributive justice due to impetuosity. They may, however, overreact through succumbing to the temptation to act on their incorrect (because excessive) judgment of wrongdoing, because of the strength of the desire to inflict the excessive retaliation, even when they know that a lesser amount of retaliation is appropriate. In such a case, where there has been a desire to inflict excessive retaliation, an appropriate judgment of wrongdoing, but nonetheless an overreaction, it is not hastiness of judgment that undoes people, but weakness of will.

We consider these differences between defendants who act in righteous indignation further in the final chapter on excusing action in anger. The important point for present purposes, though, is that in both cases action is based on a maxim or principle

concerned with the amount of retaliation that defendants have decided in anger to inflict, albeit a maxim or principle reached impetuously or due to weakness of will, and that is the primary focus in point of criminal culpability, where the amount of retaliation inflicted is excessive.

Is righteous indignation attractive to the modern as well as to the early modern way of thinking about anger? I suggest that it is. It is commonly our experience of anger, contrary to the impression given by the very different conception of anger that came to dominate the law in the eighteenth and nineteenth centuries, that angry retaliation, at the time, is based upon a decision that a certain measure of retaliation seems appropriate. Ashworth expresses the idea that retaliation is often righteous indignation, a measure of retaliation inflicted in accordance with a maxim, principle, or moral judgment, thus[1]:

> "[T]he form of behaviour may represent certain choices...[f]or example, someone who reacts suddenly to provocation may retain sufficient control to pass over a glinting knife and vent his or her anger with a wooden spoon or with pottery."

An example of a decision to inflict objectively excessive retaliation in anger is provided by a recent case is Devlin[2]. Devlin had been engaged in a long-running dispute with a neighbour over the frequent occasions on which the latter had flooded his flat. On the sixth occasion that this happened, he lost his temper, rushed upstairs, and began to beat his neighbour with a chair leg. During the beating, the victim at one point said, "Well, I'm bleeding - now are you satisfied?". Devlin shouted back, "No. You're going to die", and killed him. He was sentenced to five years' imprisonment for manslaughter upon provocation.

We have seen that the first-order element of justification in a case such as this varies according to the degree to which it can be said that the retaliation inflicted departed from the kind of retaliation which would have been a mean response in the circumstances. We can now add that the degree of the departure from the mean, in any given set of circumstances, is not a mere matter of moral luck, where righteous indignation is concerned, because the righteously indignant man <u>decides</u> to inflict in anger that (objectively excessive) degree of retaliation. The important question, though, arising from this analysis concerns the basis of provocation in excuse rather than in justification.

Aristotle thought that the man whe acted in anger was less blameworthy than the man who acted in cold blood because the former acted without premeditation[1]. This analysis, however, begs questions. If the defendant <u>decided</u>, albeit in anger, to inflict a fatal degree of retaliation, as the conception of anger as righteous indignation supposes, why is it thought right to offer him mitigation, where the degree of retaliation was not too far beyond the mean, whilst no mitigation is offered to the man who decides <u>without premeditation</u>, on the spur of the moment, to inflict a similar degree of retaliation in like circumstances, but does so in cold blood? Explaining the answer to this question must wait until we have considered the emergence and development of an alternative conception of anger to the Aristotelian conception of anger as righteous indignation, the conception of anger as loss of self-control.

NOTES AND REFERENCES - SECOND INTERLUDE

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1. Lord Morley's Case (1666) Kel. 53.

2. ibid., at 60.

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1. Addison, The Spectator, ii, 99 (1794), 322.

2. For more detailed discussion of this concept, see De Sousa (1987), eg. at 181-184.

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1. See Manning (1671) 1 Vent. 168.

2. See Kelso (1911), 154.

3. Cleland (1607), 232.

4. Confirmation for this hypothesis is perhaps to be found in the early modern civil law's approach to actions for words (defamation). As Milsom notes (1981, 386), such actions were at this time kept to a highly artificial list of categories, in order to prevent a flood of litigation in a society obsessed with reputation, and the threat to it posed by verbal abuse. As he says of litigation over defamation at this time (1981, 386):

> "The extent of this can be seen only from the Plea Rolls, where a surprising proportion of the weary annual miles of parchment is taken up with actions for words."

It seems not unreasonable to suppose that the same fear of limitless controversy over the effect of particular words that led lawyers to keep civil actions for words within strictly limited bounds, led them also to refuse to allow defendants to plead verbal provocation as having been so serious as to extenuate their killings.

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1. Mawgridge (1707) Kel. 119, at 131.

2. Romei (1597), 151\152.

3. Lord Morley's Case (1666) Kel. 53.

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1. Mawgridge (1707) Kel. 119, at 130.

2. Mandeville (1714), 180.

Page 125 (cont.)

[3]. See chapter 1 ante.

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[1]. Mawgridge (1707) Kel. 119, at 130.

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[1]. Mawgridge (1707) Kel. 119, at 130; See also eg. Foster C.L., 295.

[2]. C.L., 295.

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[1]. NE1111a33-1111b3.

[2]. NE1109b14-26.

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[1]. NE1102b17.

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[1]. Ashworth (1976), at 306 and 306n77.

[2]. Daily Mirror, 4.8.88.

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[1]. NE1111b18-19; see also NE1135b19-25.

CH.3 THE FOUNDATIONS OF THE MODERN DOCTRINE OF PROVOCATION

> "The man who lacks self-control is like a state which passes all the right decrees and has good laws, but makes no use of them".(NE1152a20-21)

In this chapter, we turn our attention to the foundations of the modern law. As in previous chapters, our concern is not only with the historical foundations of the law, which were laid through important developments in the eighteenth and nineteenth centuries. It is also, indeed it is primarily with what we have called second-order questions about the law's philosophical foundations, with the concept of anger underpinning the law, and with the influence of that concept of anger on the development of the substantive law.

In the first section, it will be suggested that the historical emergence of a new conception of anger, during the eighteenth and nineteenth centuries, was premised on philosophical foundations that were radically different from those of the early modern law with which we have hitherto been concerned. This difference is located in a profound change in the law's conception of the relationship between reason and the passions in the human soul, and an accompanying change in the analysis of anger and action in anger presupposed by the more modern writers on homicide and in the case law. These changes as I will suggest, lead to the emergence of a conception of anger no longer understood as righteous indignation, but seen as a loss of self-control.

In the second section we see how, linked to this shift in the law's conception of anger and action in anger, first-order questions of excuse, questions concerning whether the defendant had acted in anger or not, came in the eighteenth and nineteenth centuries to dominate the issue of mitigation by way of provocation

in the law of homicide. In the third section, we consider the different theories of desert of mitigation by way of provocation that, in different cases and in commentators' views on the doctrine, gained a foothold as explanations for the doctrine of provocation in terms of the question of excuse, of action in anger conceived as a loss of self-control, in the eighteenth and nineteenth centuries.

In the final section, we consider a different and now authoritative theory of mitigation focused on loss of self-control. Unlike its eighteenth and nineteenth century counterparts, the authoritative, "modern" theory, interprets the conception of anger as a loss of self-control in a way that does not entail a primary focus on the issue of excuse, on the issue of whether the accused acted in anger, conceived as a loss of self-control or not. The "modern" theory makes possible the restoration of first-order questions of justification, questions concerning the extent of defendants' conformity to or departure from the mean with regard to virtue, to a place within the doctrine at least as important as it occupied under the early modern law.

1. The Legal and Philosophical Origins of Loss of Self-Control

In the early modern law, set in the background of what we might call a perspective for assessing the desert of mitigation that took as its focus the virtuous and/or self-controlled man of honour, and underpinning the analysis of the doctrine of provocation in Mawgridge, was a conception of anger as (as we have called it) righteous indignation. Linking that background perspective with that conception of anger was, most relevantly for present purposes,

an understanding of the relationship between reason and the passions within the soul in which it is reason which is, to use a favourite metaphor employed by the early modern theorists to make this point[1], in the saddle.

In the man of virtue, the desire for a certain retaliatory suffering, and the amount of retaliation reason dictates as appropriate are the same; for in him, passions speak with the same voice as reason. In the self-controlled man, the amount of retaliation he desires is greater than that which reason would dictate as appropriate, but his passions are obedient to reason, and hence the desire waits, as Aristotle puts it[2], "to hear whether it ought [to take vengeance] or ought not, or not so vehemently". Both the man of virtue and the self-controlled man, in other words, when they act in righteous indignation, act on a maxim or principle concerned with the retaliation which it seems appropriate, in point of justice, to inflict[3].

For Aristotle, thus, where anger as righteous indignation is concerned, passion seems in principle always to be capable of being directed by reason. When he says that the desire for retaliatory suffering should wait, before taking vengeance to hear whether it ought or ought not, or not so vehemently, he does not suggest that this injunction applies only, for example, in respect of minor irritations. The implication seems rather to be that this is an ethical duty, and a feature of the response of the self-controlled man, and <u>a fortiori</u> of the man of virtue, whatever the degree of the provocation.

The same implication, that reason is and should always be in the saddle, seems to underlie the following dictum of Holt C.J.'s

in Mawgridge[1]:

> "The like in obstinate and perverse children, they are a great grief to parents, and when found in ill actions, are a great provocation. But if upon such provocation the parent shall exceed the degree of moderation, and thereby in chastising kill the child, it will be murder."

Whatever the degree of the provocation, thus, criticism of an angry response, whether that criticism relates to the kind of provocation to which a defendant responded, or to the extent of his reaction, is always on this view criticism of the extent to which the action departed from that which reason would prescribe as the mean or right response in anger.

The foundations of the notion of loss of self-control are to be found in the departure from this analysis of the angry response, in the eighteenth and nineteenth century cases and commentary. This departure took shape through the emergence of a supposedly qualitative distinction between the relationship between reason and the passions within the soul when a man was calm, and the relationship between them when he was angry, a distinction that was to prove to be of the first importance for the understanding of action in anger, and evidence for which abounds in virtue of the striking fact that judges and commentators of this period began themselves, through the use of metaphor, to paint the picture of the inner workings of the mind which they employed.

A survey of eighteenth and nineteenth century authority indicates that when a man is calm, reason is thought in these circumstances to be capable of exercising a "dominion"[2] or "voice"[3] from its "seat"[4] or "throne"[5] within the soul, these metaphors conveying a sense of the dominating and controlling influence of reason over action, when the blood is cool[6]. The important break

with the assumptions underpinning the law as it stood in the early modern period came, in the eighteenth and nineteenth centuries, with a transformation in the analysis of the state of the soul upon the disruption of that calm by the onset of anger.

A stray example of the portrayal of a different picture of the soul in such circumstances, to be found towards the end of the early modern period, is in Walters[1], where Baron Jenner describes the nature of provoked anger as "nothing but an ungoverned storm that...men are subject to". This kind of graphic metaphor becomes characteristic of attempts to describe the effects of rage during the next two centuries. What is more, we must take note of the changed conception of the relationship between reason and the passions within the soul that the "ungoverned storm" metaphor is meant to convey. The image created is one according to which, following provocation, the passions, and the desires associated with them such as the desire for retaliatory suffering, temporarily eclipse the power to reason to control them, and hold sway within the soul unbridled or "ungoverned".

This theme is taken up in the important early eighteenth century case of Oneby[2]. Here the defendant had killed his victim in a fairly fought duel in a public house. Whether his offence was to be murder or manslaughter turned on whether sufficient time had elapsed between the initial quarrel and the duel itself for the defendant properly to be considered to have acted with malitia praecogitata. The point of interest, in this context, is the way in which the Lord Chief Justice, Lord Raymond, sets out the issues to be decided by the jury[3]:

"Acts of deliberation will make it appear, whether that violent

> transport of passion was cooled or no...the Law of England is so far peculiarly favourable...as to permit the excess of anger and passion (which a man ought to keep under and govern) in some instances to extenuate...the taking away of a man's life; yet in those cases it must be such a passion as for the time deprives him of his reasoning faculties; for if it appears, reason has resumed its office...which cannot be as long as the fury of passion continues, the Law will no longer...exempt him...so as to lessen [the offence] from murder to manslaughter."

Here we see more authoritatively confirmed the interpretation of Walters, offered above, as embodying a different conception of the relationship between reason and the passions when a man is in a state of rage. Whilst it is said by Lord Raymond that a man ought to keep his passions under control, great passion is said to deprive men of their reasoning faculties; it is suggested that reason will be incapable of exercising control over actions until the passion abates, after which it will do so once again by resuming its "office".

This understanding of the effect of strong passions on reason is underlined by the use, perhaps for the first time in an important legal context, of the "transport" metaphor to describe this effect, the eclipse of the power of reason by the passions. The picture conjured up by this metaphor is, of course, the same as that conjured by the "storm" metaphor of Walters, namely one in which the supposed effect of the emotions is to carry one off into a state akin to automatism, a condition in which a controlling influence over actions is thought to be by definition beyond the reach of reason[1].

The same image is created by a third metaphor, that came into use in Scottish and English cases on provocation at about this time[2], according to which provocation is said to "throw a man's mind of its balance", whilst the passing of time after the

provocation has been given may permit the mind to "recover its balance"[1]. The image created of the effect of serious provocation on the state of the soul upon the onset of anger is analogous to that of a large rock being thrown into a pool of still water. For a short time chaos, in the shape of the emotions, reigns before calm gradually returns, and along with it, the controlling power of reason.

The idea which the "storm", "transport", and "balance" metaphors were intended to convey, that the experience of strong passion produces a mental condition beyond the reach of reason, was sometimes also expressed by analogies with insanity. As we saw above, Lord Raymond in Oneby, for example, referred to strong passion as a kind of "fury". Foster, borrowing a phrase of a kind familiar to ancient Roman writers[2], sometimes refers to provoked anger as a "furor brevis"[3], and Stephen is quite happy to employ the concept of loss of self-control to describe the effect of both provocation and insanity[4]. The idea of rage as a "furor brevis" beyond the control of reason is also found in contemporary cases. In Fisher[5], for example, a case whose facts we will consider below, the defendant's counsel argued that the question the jury had to consider was whether, inter alia, the provocation was such as to make it likely that the defendant would be[6] "goaded into desperation and madness".

This brings us more directly to the important institutional support that was given to this new conception of the relationship between reason and the passions by the most influential eighteenth and nineteenth century writers on homicide. In the seventeenth century, Hale had never suggested more about anger than that its

effect is that a man acts in a "sudden heat and passion"[1], a notion that is perfectly consistent with, indeed part of the Aristotelian theory of anger as righteous indignation[2]. By the time we reach the eighteenth century, however, and the work of Hawkins, Foster, and East, the presentation of the passions is quite different to that which we have considered to be characteristic of the early modern period. Hawkins, for example, said of provocation cases that[3]:

> "In these, and indeed in every other case of homicide upon provocation, how great soever it be, if there is a sufficient time for passion to subside, and for reason to interpose, such homicide will be murder."

and he, like Lord Raymond, employs the "transport" metaphor to describe the supposed overthrow of reason by the passions[4], as do Foster[5], East[6], and Russell[7] after him. Foster elaborates on the "transport" of passion notion in much the same way as Lord Raymond did, although with a little more hyperbole[8]:

> "The indulgence shewn to the first transport of passion in these cases is plainly a condescension to the frailty of the human frame, to the furor brevis, which, while the frenzy lasteth rendereth the man deaf to the voice of reason."

East says of provocation cases, in a similar vein, that[9]:

> "The party killing is supposed to have taken all the advantages in the heat of blood over the person slain; but to have received such a provocation as the law presumes...that the party may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive."

Hawkins, Foster, and East manifestly popularised the idea that the effect of strong passion is to induce a state of mind in the defendant where the power of reason has been suspended or eclipsed. For this picture of the working of the mind under provocation is employed by judges in a number of cases during the nineteenth century, as a means of explaining what the jury must find in order

to bring in a verdict of manslaughter upon provocation.

In Ayes[1], for example, where the defendant had killed the victim following the latter's attempt to pickpocket him, the question for the jury was said to be whether the defendant acted out of malice, or whether[2]: "what he did was the effect of a sudden transport of passion beyond the control of reason". Two somewhat more authoritative examples are Hayward[3] and Kirkham[4]. In Hayward, some time had elapsed between the initial argument and scuffle between the accused and the victim, during which the accused had, so it appeared, returned to his house to fetch a knife with which he killed the victim a short time afterwards. Accordingly, Tyndal C.J. instructed the jury that they had to consider whether the accused, in stabbing his victim, had been[5]:

> "smarting under a provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding : in which case the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only : or whether there had been time for the blood to cool, and for reason to resume its seat...in which case the crime would amount to wilful murder. The exercise of contrivance and design denoted rather the presence of judgment and reason than of violent and ungovernable passion."

In Kirkham, in a similar vein, Coleridge J. said that[6]:

> "[A]s it is well known that there are certain things which so stir up a man's blood that he can no longer be his own master, the law makes allowance for them...[T]he Law...supposes that the individual was not guilty of malice prepense, but that what he did was done in a moment of overpowering passion, which prevented the exercise of reason."

To summarise developments thus far, in the eighteenth and nineteenth centuries there was both an increasing focus on the inner workings of the mind of the provoked defendant, and the emergence of a very different conception of those workings, of the state of the soul, when a man had been enraged by provocation. In these circumstances, according to this new conception, it is no

longer thought that the desire for retaliatory suffering of the ordinary man can be made, as Aristotle supposed, to wait to hear whether it ought or ought not to take vengeance, or not so vehemently. Indeed, it is precisely Foster's point, as we have seen, that rage renders a man deaf to the voice of reason. Rage is thought to consist, accordingly, in "overpowering" or "ungovernable" passion, the power of reason having been temporarily "suspended" or removed from its "office".

What we must now consider is the sense in which this new understanding of the state of the soul following rage prompted by serious provocation can be said to amount to the emergence of a new concept of anger, conceived as loss of self-control. In doing this, it will be helpful to break "anger" down for the purposes of analysis, as we have been doing, between a feeling of anger and an angry response. In this way we will consider the similarities and differences between the conception of anger, summarised above, held in the eighteenth and nineteenth centuries, and two other well-known conceptions of anger, the conception adhered to by Hobbes, which he thought was the kind generally experienced by all men, and the conception of anger which Aristotle thought was only experienced by the akrates, the man who lacks self-control.

As far as the feeling of anger is concerned, the desire for retaliatory suffering[1], Hobbes conceived of the passions generally in much the same way as the courts and commentators of the eighteenth and nineteenth centuries conceived of rage in the face of serious provocation. Echoing the "transport" metaphor much favoured by the lawyers of that period, Hobbes claimed that the natural passions, anger being amongst them, "carry us to

partiality, pride, revenge, and the like"[1], and he too, as we have seen that Foster did, amongst others, drew an analogy between an excess of passion and the effects of madness[2]:

> "In sum, all passions that produce strange and unusual behaviour, are called by the general name of madness...And if the excesses be madness, there is no doubt but the passions themselves, when they tend to evil, are degrees of the same...madness is nothing else, but too much appearing passion."

We also find in Hobbes the same supposition that the inclinations of the passions may not or cannot be resisted by the power of reason[3]:

> "[T]here are few crimes that may not be produced by anger. As for the passions, of hate, lust, ambition, and covetousness, what crimes they are apt to produce, is so obvious to every man's experience and understanding, as there needeth nothing to be said of them, saving that they are infirmities, so annexed to the nature, both of man, and of all other living creatures, as that their effects cannot be hindered, but by an extraordinary use of reason, or a constant severity in punishing them."

What is of importance, in this context, about Hobbes' apparent concurrence in the view that passions are or can be, like madness, beyond the control of reason, is the analysis of the angry response that accompanies it: the analysis of how passions such as anger "produce" crimes, as he puts it. We consider this in due course. At this point, though, we must take note of an important difference between Hobbes' understanding of what produces the "furor brevis" that for him, as for the lawyers of the eighteenth and nineteenth centuries, is the feeling of anger, and the understanding of what produces that temporary madness held by those same lawyers.

As we have seen, central to the experience of righteous indignation is the making of two kinds of moral judgment, the

judgments of wrongdoing and of appropriate response. Defendants' responsibility for action in anger is assessed by reference to these judgments, through assessment in accordance with the doctrine of the mean, in a way we shall consider in more detail in chapter four. In Hobbes' conception of anger, neither the judgment of wrongdoing nor the judgment of appropriate response has any significant role to play in the experience of anger, and thus it is supposed that the experience of anger is entirely beyond the reach of rational control or moral judgment.

Let us first consider the judgment that one has been wronged, only in the wake of which, where anger as righteous indignation is concerned, does the desire for retaliatory suffering, and the heating of the blood, follow. In Hobbes' largely mechanistic analysis of anger, the desire for retaliatory suffering is aroused by a chain of physical reactions that starts with the operation of an external object, such as a provocation, upon the senses, ultimately causing a reaction in the brain or heart[1]:

> "The cause of sense, is the external body, or object, which presseth the organ proper to each sense...as in seeing, hearing, and smelling; which pressure, by the mediation of the nerves, and other strings and membranes of the body, continued inwards to the brain and heart, causeth there a resistance, or counter-pressure, or endeavour of the heart to deliver itself, which endeavour, because outward, seemeth to be some matter without. And this seeming...is that which men call sense."

Hobbes lumps together anger, lust, hunger, and thirst as the kinds of "senses" produced in this way, and commonly experienced by all living creatures[2]. Anger is thus conceived of by Hobbes as the equivalent, for example, of a "pang" of hunger, in a man who has not eaten for some time, prompted by having seen food, the critical role being played by perception, and not moral judgment. As Hobbes puts it[3]: "SENSE is a phantasm, made by the reaction and endeavour

outwards in the organ of sense, caused by an endeavour inwards from the object"; and he continues[1]:

> "[From] heat in the heart, whatsoever be the cause of it, is generated anger...as love and beauty stir up heat in certain organs."

It is important to recognise that Hobbes seems to have isolated a debased conception of anger that may indeed be common to the more advanced of living creatures. We might recognise a dog's reaction in snarling at the approach of a stranger as a kind of "angry" reaction. It is clearly not, though, anger based on a moral judgment, but on what can best be described as the conditioning of senses[2]: a dog learns to feel "anger" in the same way as in the famous Pavlovian experiment, it learns to feel hungry at the ringing of a bell, after which it has been accustomed to receive food.

This conception of anger is based at a first-order level on factual rather than evaluative criteria. In order to know whether a dog is angry, in a Hobbesian sense, we need only know first under what circumstances, either through instinct or conditioning, it responds or has learned to respond by snarling, and secondly, whether it has recently perceived those circumstances as existing. We do not think it sensible or relevant to ask whether, on perceiving the circumstances in issue, the dog <u>judged</u> that it had been insulted or wronged in some way[3]; for on Hobbes' conception of anger, once one has been conditioned to feel anger in certain circumstances, the perception of those circumstances leads through a purely physical process to a feeling of anger.

Now there may be, in some second-order sense, grounds for criticism of an angry reaction of even this kind; for we may

criticise the owner of the dog for failing to train it not to be enraged at the arrival of the postman, and so forth, just as we curse ourselves for having got into the habit of wanting to eat chocolate in the middle of the day, when we are on a diet. The criticism in these cases relates, though, to a failure of previous training, and not directly to the reaction at the time it is experienced, for this reaction is dependent, given the background of prior habituation, purely on the fact of perception - this is the postman; it's "chocolate" time - and not on any contemporaneous judgment that could be the subject of criticism in itself[1].

Hobbes' elimination of the judgment of wrongdoing from the process of becoming angry is in fact at odds with the conception of anger that emerged in the eighteenth and nineteenth centuries. Although their analysis of anger certainly often mirrors the mechanism of Hobbes' descriptions[2], courts and commentators of this time did not, in general, follow Hobbes in supposing that anger was not preceded by any judgment of wrongdoing. The supposition, in the authorities of the time, that the "furor brevis" is preceded by a judgment of wrongdoing would seem to be evident from the following passage from Foster (endorsed by East[3])[4]:

> "The provocation that extenuateth in the case of homicide must be something which the man is conscious of, which he feeleth and resenteth at the instant the fact which he would extenuate is committed." (my emphasis)

The significance of this divergence between the Hobbesian conception of anger and that of the eighteenth and nineteenth century, will become apparent when we come on shortly to consider the anger of the akrates, the person who lacks self-control. The importance of including, here, a relatively full account of Hobbes'

conception of anger is that, as we shall see in chapter four, leading proponents of the view that mitigation is provided by way of provocation because provocation "causes" anger, follow this Hobbesian account much more closely by supposing that anger is indeed not preceded by a judgment of wrongdoing.

So where are we to find an account of the origins of the "furor brevis" in resentment, in a judgment of wrongdoing and not in mere facts about perception, that analyses this, as an experience of anger, as a "loss of self-control"? We find it in Aristotle's account of the experience of anger by the akrates, the man who lacks self-control[1].

For Aristotle, as we have seen, in the man of virtue, who experiences anger as righteous indignation, passion[2] "speaks, on all matters, with the same voice as reason", and in the self-controlled man, if he feels that he is, for example, getting too righteously indignant, he will[3] "[press] well away from [his] failing - just like somebody straightening a warped piece of wood". This is not possible, though, for the akrates, who is incontinent with regard to temper; in such a man, as Aristotle says[4]:

> "Anger seems to listen to reason to some extent, but to mishear it, as do hasty servants who run out before they have heard the whole of what one says, and then muddle the order...so anger by reason of the warmth and hastiness of its nature, though it hears, does not hear an order, and springs to take revenge. For reason or imagination informs us we have been insulted or slighted, and anger, reasoning as it were that anything like this must be fought against, boils up straight away...Therefore anger [in the akrates] obeys reason in a sense...for the man who is incontinent in respect of anger is in a sense conquered by reason..."

There is an obvious similarity between this understanding of the relationship between reason and the passions in the akrates and the law's new understanding of the typical relationship between reason

and the passions in a man who has been enraged by provocation. In the akrates, the response to a real or imagined insult is immediate. The akrates' anger "boils up straight away", when he has been informed by reason or imagination that he has been insulted. This claim about the akrates experience of anger parallels Foster's claim that the provocation to which the law condescends is[1] "something which [a man] feeleth and resenteth at the instant the fact which he would extenuate is committed".

The importance of this similarity is that the notion of the instantaneous character of resentment experienced upon provocation provides grounds for supposing that the law holds it generally to be true, as Aristotle thought it true only of the quick-tempered who lack self-control, that provocation characteristically leads one to make excessive judgments of wrongdoing, to leap before looking, as it were, in an assessment of what injury or insult one has suffered. As we shall see in chapter five, this provides one explanation for the foundation for mitigation by way of provocation in excuse, not only in fact for those who lose their self-control, but also for those who act in righteous indignation.

Aristotle's suggestion that in the akrates, the judgment of wrongdoing leads to an immediate and hasty reaction, and hence often to an overreaction, is not the only aspect of the akrates' passions that is reflected in the law's new conception of anger. As Aristotle elsewhere says of the person who lacks self-control[2]:

> "His passion gains the mastery and brings his reasoning to a standstill. But when the passion...has been got rid of, he is himself again."

This mirrors exactly the picture of soul upon receipt of provocation that became authoritative in the eighteenth and

nineteenth centuries, and the presentation of the passions by Hobbes, and is what marks out the person who loses his self-control from the man who acts in righteous indignation. As we saw, the question was, as it was put in Oneby, whether the defendant was acting under[1] "such a passion as for the time deprives him of his reasoning faculties", or whether there has been[2] "a sufficient time for passion to subside, and for reason to interpose".

This enables us to give a preliminary definition of the law's new conception of anger in terms of a loss of self-control. The law supposed that receipt of a provocation would lead to a hasty judgment of wrongdoing, to resentment at the instant of the fact. It might hence in all probability lead, as Aristotle points out, to a desire for retaliatory suffering greater than was in fact warranted by the provocation, because the anger has boiled up straight away without waiting to hear from reason whether it ought not to have done so vehemently.

This passion or desire for retaliatory suffering, as Aristotle indicates in the passage just cited when speaking of the akrates, and as we know that the law now supposed more generally, then brings reasoning to a standstill; it temporarily displaces reason from its seat within the soul, depriving people, for the moment, of their reasoning faculties. It is this temporary havoc wrought within the soul by provocation, of a kind that the righteously indignant person does not experience, and the passion to which it immediately leads that we may, following Aristotle[3], call loss of self-control due to impetuosity.

The definition is preliminary, however, for we have so far only defined the feeling of anger in terms of a loss of self-control.

What we must now do is to show how Hobbes' analysis of action in anger, of the angry response, completes the conception of loss of self-control due to impetuosity reflected in the law.

Aristotle tells us that the akrates whose passion has brought reasoning to a standstill "springs to take revenge", or is[1] "carried away by his feelings". Does the akrates do so, though, on the basis of a principle or maxim, like the person who acts out of righteous indignation, or is he moved to action by some other guiding force? The fact that reason has been displaced from its seat within the soul by provocation suggests that it cannot be a rational principle or maxim that guides the will before anger subsides, and this is precisely the analysis of action in anger that we find in Hobbes' discussion of the passions[2].

We have seen that Hobbes, like the judges and commentators of the period under discussion, conceived of anger as a kind of all-consuming madness, which mirrors Aristotle's conception of it (in the akrates) as a passion that brings reasoning to a standstill. Now for Hobbes, desires such as the desire for retaliatory suffering create imperatives which must be followed[3], although he thinks that actions motivated by desires are nonetheless voluntary actions, products of the will[4]. In any given situation, however, a man may face a conflict between different desires, between which he must choose[5]. A good example of this kind of conflict is provided by the passage, cited earlier, where Hobbes suggests that the effects of the various passions in producing crimes "cannot be hindered" except by "constant severity in punishing".

Let us suppose that a man has been provoked, and that the provocation has produced in him a desire for retaliatory suffering:

it has angered him. In this situation, supposes Hobbes, he will experience a conflict of desires. On the one hand, there will be the desire to strike the provoker, but on the other hand there will be the desire to avoid the punishment that would ensue from such a striking.

Faced with such a conflict, a man must deliberate on the consequences of giving precedence to one desire rather than the other, deliberation of the kind "if this be done, then this will follow"[1]. The outcome of this process of deliberation is that "by necessity of nature [men] chuse that which appeareth best for themselves"[2]. If the desire to avoid the punishment is, in the circumstances, greater than the desire to strike, the angry man will not strike, and vice versa.

As some commentators have noted[3], it is not easy to reconcile this analysis of action or inaction in the face of provocation with Hobbes' view that the punishment for crimes committed in anger need not be so severe as that for premeditated and other sorts of crimes[4]. In theory, the greater the desire to overcome present opposition, and hence normally the greater the provocation that has been received, the greater will need to be the punishment threatened, in order to deter men from deciding that they would rather, on this occasion, satisfy their anger. This theoretical difficulty, though, concerns us less than the analysis of action in anger on which it is built.

A man may deliberate, in cases where his desires conflict, on which of those desires it would be best for him to satisfy in the circumstances, but as soon as the process of deliberation on this question has ended, he will be impelled willy nilly to satisfy the

desire that seems best, at the end of the process of deliberation[1].

As Hobbes himself puts it[2]:

> "Neither is the freedom of willing or not willing, greater in man, than in other living creatures. For where there is appetite, the entire cause of appetite hath preceded; and, consequently, the act of appetite could not choose but follow, that is, hath of necessity followed" (my emphasis).

There can, for Hobbes, thus be no question of anger, where it is the dominant desire, waiting to hear from reason whether it ought or ought not to take vengeance, or not so vehemently, as was the case with righteous indignation. Where anger is the dominant desire (as it would be, we may suppose, in cases where grave provocation has been received) a man "by necessity of nature", as Hobbes has it, is impelled to take the vengeance that his desire demands, because no countervailing force is operating within the soul to prevent "nature" taking its course. No judgment of appropriateness, in other words, mediates the desire for retaliatory suffering and the response inflicted in anger.

As critics have noted[3], Hobbes thus seems to present human nature as essentially psychopathic. On this view, the theoretical foundations of the excuse offered, if any, to the kleptomaniac and the psychopath, and to the angry man, would be largely the same, namely that each is at the mercy of his desires; for each, to experience desire is to be impelled nolens volens to take the action that forms the content of the desire[4]. (The only difference that there will usually be between them is that in the case of the angry man, his anger may have resulted from a disposition induced in himself over time, not some mental disorder).

We find precisely this kind of analysis of the effect of great anger in the modern case law and commentary. It is in fact,

of course, simply implicit in the notion, examined in the first section, that the effect of great passion is to deprive men of their power of reason, the power to resist the dictates of the passions, and hence to lead them to "spring to take revenge". An explicit example of the Hobbesian conception of the angry response in operation is provided by the summing up in the case of Kelly[1], where the defendant, suspecting his lover of a romantic association with another soldier, shot her dead with his musket. The point of interest, for our purposes, is Rolfe B.'s presentation of the fourth category of sufficient provocation[2]:

> "It is said, that, if a man were to find his wife in the act of committing adultery, and kill her, that would only be manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it." (my emphasis)

Clearly the idea, employed here, that great anger produces an irresistible impulse which, as East put it[3], "cannot be borne in the first transport of passion", shows how close a resemblance the law's analysis of the effect of anger upon provocation came to bear, during the modern period, to Hobbes' conception of the angry response, according to which the desire to retaliate simply carries a man to the response desired, displacing the normally controlling influence of reason.

We may now offer, by way of summary, a more complete definition of the concept of loss of self-control, as anger had come to be understood in the eighteenth and nineteenth centuries. The analysis of the treatment of anger in the case law and commentary at this time, reflects Aristotle's understanding of the passions of the akrates and Hobbes' general theory of the passions.

The mark that separates the akratic-Hobbesian angry person of

the eighteenth and nineteenth century case law, from the person of virtue or the self-controlled person of the early modern law, is the former's inability to prevent his passions, through the use of reason, from making him spring to take the amount of revenge desired rather than the amount that might have been thought appropriate[1]. The desire for retaliatory suffering that the former experiences upon serious provocation may (if, by chance, he has made a correct judgment of wrongdoing) be of the same intensity as that of the man of virtue or the self-controlled man, in which case he will inflict the same retaliation as they would. But unlike the latter two, the man who is angry, on the akratic-Hobbesian conception of anger, cannot upon receipt of such provocation make his passions conform to the dictates of reason, if they command a different response. For he has received an impulse from his passions so violent that he cannot resist it, as Rolfe B. put it in Kelly. The experience - following resentment, a judgment of wrongdoing - of a desire to retaliate that displaces reason from its seat, and the consequent inability to resist the impulse to inflict the retaliation desired are what is meant, in the period under discussion, as a loss of self-control, loss of self-control due to impetuosity.

2. From Justification to Excuse

We have now traced the historical and philosophical foundations of the law's concept of loss of self-control. What we must now consider is how, in the eighteenth and nineteenth centuries, the modern question of excuse at a first-order level, the question of whether the defendant acted in anger, now understood as a

question concerning the presence or absence of self-control as we have defined it, displaced questions about justification as the central question relevant for assessing desert of mitigation by way of conviction only for manslaughter in provocation cases, and what effects this had upon the substantive law. Once again, a discussion of the early modern law provides a convenient starting point.

From our consideration of the early modern law, it should be evident that in assessing the foundations of the desert of mitigation in provocation cases, judges and commentators gave the element of excuse at a first-order level little by way of attention, compared with the element of justification. The early modern judges thought it adequate, in treating of excuse, to insist that the defendant have killed whilst acting in the heat of blood, "in un continuing furie", or something of this kind. They developed nothing so psychologically sophisticated as the modern concept of loss of self-control to ground the element of excuse, where acting in righteous indignation was concerned. Much of the endeavour of chapter two, indeed, was devoted to teasing out from the judgment in Mawgridge the second-order conception of anger, underpinning the early modern law, on which the element of excuse is focused, the Aristotelian conception of anger as righteous indignation.

By way of contrast, almost all of the parts of the judgment dealing with provocation in Mawgridge, for example, are devoted to the establishment of gradations of provocation in response to which a fatal blow given in anger will (or should) be in law regarded as fully morally justified - killing an adulterer in flagrante delicto, partially justified - eg. killing a man attacking one's friend or relative, or completely unjustified - eg. killing someone

in response to a rude gesture. The need for the killing to have taken place in hot blood is regarded by Holt C.J. merely as the necessary setting within which these important first-order issues of justification must be settled. We find the same emphasis on the first-order questions of justification, rather than on the first-order elements of excuse, on questions about the state of the aggressor's mind, in Aristotle's discussion of provocation[1]:

> "Again the matter in dispute is not whether the thing happened or not, but its justification; for it is apparent injustice that occasions anger. For they [ie victim and aggressor] do not dispute about the occurrence of the act...but, agreeing about the fact, they dispute on which side justice lies (whereas a man who has deliberately [ie with malice aforethought] injured another cannot help knowing that he has done so), so that one thinks he is being treated unjustly and the other disagrees."

For Aristotle, thus, the issue of excuse, the fact that a crime has been committed in hot blood, is merely a precondition for knowing that a disputed question of justice has arisen - ie a disputed question over whether the provoked act was wholly, partly, or not in fact at all justified; for if the crime was premeditated, there would be no dispute about its injustice.

To some extent, the puzzle of why the focus of the early modern law should have been the element of justification, the extent of conformity to or departure from the mean, rather than the element of excuse, the grounds for looking with benignity upon righteously indignant action, may be explicable by the fact that righteously indignant action is action on principle, whereas action following a loss of self-control is not. The will is in the latter case for a time compelled by desire. It might appear, thus, that righteously indignant people demonstrate in their response a quality of inner resources or character that we have said to be associated with the

element of justification that people who lose their self-control do not.

As we shall see in the final section of this chapter, and in chapter four, this is not necessarily true. People who lose their self-control at the right time for the right reason and so on can also be regarded as demonstrating good character. Nonetheless, because righteously indignant people act on principle, and it is that principle that illustrates their more or less good character, there is a more direct and vivid connection between the element of justification (conceived as a display of more or less good character) and righteously indignant action than there is with action following a loss of self-control, and this perhaps explains the considerable attention paid to the element of justification in early modern provocation cases.

This observation provides our starting point in the attempt to integrate the historical and the philosophical foundations of the modern law. For as we now know, in the eighteenth and nineteenth centuries, the law ceased to conceive of anger as righteous indignation, the conception of anger in which reason plays the dominant role in guiding action, and instead conceived of it as a loss of self-control, the akratic-Hobbesian conception of anger, according to which passions overwhelm the power of reason, leaving a man at the mercy of his desire for retaliatory suffering.

What, then, were the implications of this change, it might be asked, for those justificatory elements of the early modern doctrine that were, as we have just said, directly and vividly connected with the conception of anger as righteous indignation as it was experienced by the man of honour? What were the

implications, in particular, for the categories of provocation, and for what we can call, more generally, the requirement of proportionality, the requirement that defendants have not greatly exceeded the mean in their response?

The answer to these questions divides into two parts. I will show, first, how the issue of excuse, understood as the issue of whether defendants lost their self-control, moved to the centre of the stage in provocation cases. I will then go on in the next section to trace the historical evolution of the role of loss of self-control, in point of mitigation, during the late eighteenth and nineteenth centuries.

Judges and commentators continued throughout the eighteenth and nineteenth centuries, by and large, to suppose that the categories laid down by Holt C.J. remained the basis of the substantive law, for they continued to tinker with their number and scope. Foster, for example, heavily criticised the third category of sufficient provocation[1]; the scope and nature of the first category, an insulting assault, was considered in a number of cases[2], and the fourth category was extended, in theory, to cover a case where a father saw a man abusing his son[3].

Given, thus, that the categories remained as restrictions on the scope of mitigation throughout the period under discussion, how can it be maintained that the issue of excuse, here understood as the question of whether or not defendants had lost their self-control at the time of the killing, became the dominant issue in the period under discussion? This occurred through a transformation of the relevance of the requirement that the provocation be of a kind falling within the purview of the categories, and the

relevance of the requirement of proportionality, into relevance not for justification, for the mean response, the right reason and extent to feel and act, but for excuse, for action in anger understood as a loss of self-control.

Discussion in the case law of and commentary on the fourth category, catching one's wife in the act of adultery provides a good example of this transformation. It will be recalled that when Holt C.J. discussed this category, the issue of justification, the extent to which the cuckold had acted in anger at the right time for the right reasons in the right way and so on, was at the heart of the discussion[1]:

> "When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter : for jealousy is the rage of the man, and adultery is the highest invasion of property...So that a man cannot receive a higher provocation."

For Holt C.J. the "higher" the provocation the greater the "extent" of the angry reaction that will be justified, and in accordance with the principles based on the doctrine of the mean that we discussed in chapter two, fourth category provocation being for him the highest form of provocation, he thinks that the killing of the adulterer should be justifiable homicide.

According to the emerging loss of self-control centred approach of the eighteenth and nineteenth century discussion of the fourth category, by way of contrast, it is not the justifiability of the degree of the angry retribution taken that seems to have been thought to be the most important thing affected by the degree of provocation received, but the effect that the provocation had on the state of the defendant's mind, on the effect within his soul of the relationship between reason and the passions. Foster[2], and

East[1], for example, suggest that what is significant about the sight of a wife in the act of adultery is that it is something that "cannot be borne in the first transport of passion", and in the mid-nineteenth century case of Kelly[2], Rolfe B. highlights in like manner, as we have seen, the fact that it is supposed that receiving fourth category provocation will produce[3] "an impulse so violent that he [the defendant] could not resist it".

A similar approach to the fourth category is taken in Fisher[4], the case which extended the category, in principle, to cover catching a man abusing one's son. The defendant in this case killed a man whom he suspected of having abused his son. By something of an irony, when taken into custody, Fisher himself defended his actions with the kind of appeal to the element of justification in his action, to the virtuous-because-in-accordance-with-the-mean nature of his angry response, to his good character in thus responding to the provocation, that might have appealed to Holt C.J.. He said that he had only done[5] "what a father and an Englishman would have done under similar circumstances". The irony lies in the fact that his counsel sought mitigation of his offence on quite different grounds, urging the jury that[6]:

> "[Y]ou will have to say, consulting your own natures, whether the prisoner was not under such a state of excitement as to be totally unconscious of what he was about...The more a father brooded over a case like this, the more likely he would be to be goaded into desperation and madness...At least it is reducible to the offence of manslaughter, if reason had not had time to resume her seat."

Here, as for Foster, East, and Rolfe B., what is perceived by Fisher's counsel to be of most significance about the provocation received is the state of mind which it induces - "desperation and madness", to recall Foster's "furor brevis" metaphor, which

displaces reason from its seat - and not the issue of the mean or right extent to which the defendant expressed his righteous indignation at an apparent injustice, which would have been Holt C.J.'s starting point. We find a similar approach taken by Park J. in the trial in Fisher, when he sought to explain the fourth category of sufficient provocation to the jury[1]:

> "[T]he provocation is so grievous, such as the law reasonably concludes cannot be borne in the first transport of passion."

What is particularly notable about this understanding of the fourth category, as of all those just cited, is the new rationale for the existence of the categories that it presupposes. They are no longer important as illustrations of the element of justification, of cases where the defendant has displayed good character in feeling and acting towards the right person for the right reason at the right time, and more or less to the right extent. Instead, the categories are important, so it would seem, for no more than evidentiary reasons, simply because they are provocations of such gravity that they justify a kind of legal presumption (from which the law "reasonably concludes", as Park J. had it) that the defendant was in fact carried to revenge, as Hobbes put it, by the irresistible impulse of ungovernable passion. By 1871, indeed, in this regard, Hannan J. felt able to make the general proposition that[2]:

> "[T]he law, having regard to the infirmity of man's nature, admits evidence of such provocation as is calculated to throw a man's mind off its balance."

The categories are thus seen as important simply because they are the best evidence that the newly conceived element of excuse in the doctrine has been satisfied, that the defendant lost his self-control.

If we now turn briefly to combate-manslaughter, we find a similar shift in perceptions of what is of importance for the purposes of mitigation. It will be recalled that the position under the early modern law was that, in order to warrant mitigation of the offence from murder to manslaughter, a killing in the course of a sudden duel had, inter alia, to be justified, in the sense that the defendant faced the right thing (death), at the right time (in the heat of blood) for the sake of honour, the defendant being moved by the fearless bravery that leads men to do courageous acts in anger. The understanding that the foundation of mitigation, in combate-manslaughter cases, is in the fact that the maxim on which feeling and action were based constituted in a sense a display of virtue, is almost completely lost in Foster's characteristically vivid presentation of the rationale for mitigation. The fighting of a duel in the heat of blood is presented as little more than a blind lashing out in self-defence[1]:

> "To what I have offered with regard to sudden rencounters let me add, that the blood, already too much heated, kindleth afresh at every pass or blow : and in the tumult of the passions, in which mere instinct, self-preservation, hath no inconsiderable share, the voice of reason is not heard; and therefore the law in condescension to the infirmities of flesh and blood hath extenuated the offence."

What is of importance about this passage is not, clearly, that it represents an attempt to equate chance medley and self-defence, which it does not. Foster was well aware of the distinction between the two[2], and as we have seen, he regarded the basic legal ingredients of chance medley in much the same way as the early modern lawyers did, as a duel fairly fought in anger[3]. What is new about this presentation of chance medley is, of course, the same as what was new about the portrayal of the adultery category by East,

Rolfe B., and Foster himself. It is the emerging sense that the episode in question - the duel, or the provocation - is relevant simply in as much as it provides good evidence of what is coming to dominate the question of desert of mitigation: the question of whether reason has been displaced from its seat at the time of the killing, leaving the defendant at the mercy of "instinct" and the "tumult of the passions". The central question in point of mitigation has become, in other words, whether the defendant in fact lost his self-control due to impetuosity, a question of excuse.

The process of transformation was not confined, however, to this aspect of justification. We must now consider the significant change in attitudes, in the eighteenth and nineteenth centuries, towards the aspect of justification whose focus is a gross overreaction to a provocation, what we are calling the requirement of proportionality.

Holt C.J. in Mawgridge defined malice, in the homicide context, simply as an intention to kill, and hence spoke of all unprovoked intentions to kill, whether sudden or premeditated, as express malice, confining implied malice to a residual category of cases where a defendant had, without intending to do so, killed an officer of justice who was acting lawfully in the execution of his duty[1]. The old distinction between express and implied malice gained, however, a new lease of life in the eighteenth and nineteenth centuries as an explanation of the distinction between killings upon sufficient provocations, or killings in the course of a fair duel in the heat of blood, and unfair killings upon no or insufficient provocation. It is Foster who seems to have been the

person mainly responsible for this rehabilitation of the doctrine.

An example of Foster's use of the notion of implied malice in preference to that of proportionality is to be found in his discussion of some of the examples used in Mawgridge itself. At one point, Holt C.J. contrasted the position in law of one who intentionally kills upon some trifling matter such as contumelious language, and one who merely gives the provoker a box on the ear in such circumstances, as a result of which the provoker dies because the provoker has, unknown to the striker, what we would now call a thin skull[1]. The former is guilty of murder, says Holt C.J., because he intended to kill upon a slight provocation, whereas the latter is guilty of manslaughter only, because he intended only some lesser harm than death.

In other words, the difference between the two cases rests for Holt C.J. on the extent beyond the mean or right response, as we have defined (lack of) proportionality, that each intended to go. Given that the mean or right response to insults from an equal is, perhaps, a verbal insult returned, a box on the ear, where that is not intended to kill, is only slightly in excess of the mean response, and thus a manslaughter verdict is warranted if death results. A fulfilled intention to kill upon receipt of a mere verbal insult is, however, a response so greatly in excess of the mean that no condescension by the law is deserved, and the proper verdict is murder, as if the defendant had indeed killed the victim deliberately and in cold blood.

This basis for distinguishing murder and manslaughter is entirely changed in Foster's analysis of these selfsame examples, where implied malice provides the key to the distinction[2]:

> "The difference between the cases is plainly this...In this case [the case where the killing in response to a verbal insult was the unintentional product of a slight blow] the benignity of the law interposeth in favour of human frailty; in the other [the case where the killing in response to a verbal insult was intentional] its justice regardeth and punisheth the apparent malignity of heart...the outrage is considered as flowing rather from brutal rage or diabolical malignity than from human frailty...these circumstances are some of the genuine symptoms of the mala mens, the heart bent upon mischief, which...enter into the true notion of malice in the legal sense of the word."

East mentions proportionality as a relevant factor in provocation cases[1], but he follows Foster in supposing that what provides the decisive argument for a murder conviction in cases of intentional killings upon insufficient provocation is not ipso facto lack of proportion in the degree of retaliation, but the presumed fact that the lack of proportion shows that the defendant was "bent upon mischief" and could therefore be treated as if he had malice in the classical sense of malitia praecogitata[2].

This kind of analysis of cases where the defendant had killed intentionally upon trivial provocation was also adopted in the courts. In Thomas[3], for example, where the question was whether a fatal blow in anger with a sword-stick, in response to a blow with a fist, was murder or manslaughter, Parke B. says, in his direction to the jury[4]:

> "If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which the law terms malice...then the offence would not be manslaughter. Suppose, for instance, a blow were given, and the party struck the other's head to pieces by continued cruel and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder."

What we must now consider is the significance to our present concerns of the renaissance of implied malice during the eighteenth

and nineteenth centuries. As demonstrated particularly well by the final remarks of Parke B. in Thomas, the rationale of the doctrine of implied malice has changed by the eighteenth and nineteenth centuries from what it was in the sixteenth century, and has changed in a way that parallels the developments with regard to the categories.

The lack of proportion in the defendant's response, in any given case, is not said to be important because of the simple lack of justification for the killing, as it was for Crompton[1]. Neither is it of importance in that it constitutes a reaction going way beyond the proportion of the provocation, as it was for Holt C.J.. We find, in the eighteenth and nineteenth centuries, a significantly different explanation for the proportionality requirement. Lack of proportion is to be taken in law to be conclusive evidence that the defendant simply did not act in sudden anger. It is said that the jury, in such a case, simply "could not attribute [the] act to the passion of anger", that "the outrage is considered as flowing rather from...diabolical malignity than from human frailty".

The significance of this change is that, as with the change effected in the relevance of the categories, it is a change that mirrors the latter in making loss of self-control the key issue in provocation cases; only in this case the relevance of a lack of proportion in the response, the degree to which the defendant's response went way beyond the "right extent", is the obverse of the relevance of the categories. Its relevance is in demonstrating (by way of legal presumption) that there was in fact no sudden loss of self-control, but that the show of violence stemmed instead from a

wicked disposition or a "heart bent upon mischief".

Cases such as Curtis, Watts v. Brains, and other cases where the basis for the refusal to mitigate the offence was a lack of proportionality are, so it would seem, to be assimilated in terms of rationale to cases such as Mason[1] where, after a fight with his brother in a tavern, the defendant returned home and fetched his sword, concealing it under his jacket. Returning to the tavern, he continued the quarrel with his brother and killed him with the sword.

The requirement of proportionality is thus transformed, as was the case with the categories, as we saw above, from an issue relevant to justification to one of relevance to the question of excuse. It is relegated, like the categories, to the status of a subsidiary evidential question bearing on the defendant's state of mind at the time of the killing, on whether the relationship, at that time, between reason and passions within the soul could be said to amount to a loss of self-control, the evidentiary issue being, in the case of the proportionality requirement, whether the defendant's supposed loss of self-control was authentic.

It was not long, following these developments, before the question of excuse, of whether the defendant had lost his self-control was equated with the point, in provocation cases, of offering mitigation at all. As Russell said, for example, the law of homicide in provocation cases now condescends[2]:

> "to the first transport of passion...a condescension to the frailty of the human frame, to the furor brevis which, while the frenzy lasts, renders a man deaf to the voice of reason...All of the circumstances of the case must lead to the conclusion that the act done...was not the result of cool deliberate judgment and previous malignity of heart, but solely imputable to human infirmity."

3. Loss of Self-Control and the Foundations of the Modern Law

We have now traced the path by which the concept of loss of self-control and hence the question of excuse came to dominate the question of mitigation in provocation cases. We turn, now, briefly to consider the historically different ways in which the concept was employed, during the late eighteenth and nineteenth centuries.

We have, in effect, already been considering significant aspects of the first and (in the late eighteenth century, at least) most authoritative "loss of self-control theory". This was a theory which understood the role of loss of self-control as the point of mitigation in provocation cases from the perspective of the man of honour; for short, we will call it simply the "honour" theory.

According to the "honour" theory, loss of self-control is the foundation upon which the doctrine of provocation is built: that to which the law condescends in provocation cases, as the analysis of the previous section made clear. By restricting, though, what will in law count as good and sufficient evidence of genuine loss of self-control, the "honour" theory retained the link that we forged in the first two chapters between mitigation in the law of homicide and the concept of honour.

The explicit link between the concerns of honour and loss of self-control was made by Hawkins, who shows himself to be a holder of the "honour" theory in his discussion of the rationale of chance medley, where he says of a defendant who successfully pleads the defence, as we saw in the first chapter[1]:

> "[B]y neglecting the opportunity of killing the other before he was on his guard, and in a condition to defend himself, with a like hazard to both, he shewed that his intent was not so much to kill as to combat with the other, in compliance with those

> common notions of honour, which, prevailing over reason in the first transport of passion, so far mitigate the offence in fighting, that it shall not be adjudged to be of malice prepense."

As I have said, most courts and commentators of the eighteenth and nineteenth centuries, like Hawkins, did nothing to alter the restrictive conditions, moulded by the concept of honour, placed on mitigation by the categories of provocation, the requirement of proportionality, and the requirement of "like hazard to both" in a sudden duel[1]. They all, however, as we may now suggest, held the honour-based loss of self-control theory. The change was thus in the philosophical understanding of the nature of action in anger, which we analysed in the first section, that understanding remaining, in this loss of self-control theory, imbued with common notions of honour.

Adhering to an akratic-Hobbesian conception of anger, later commentators understood the relevance of the restrictive conditions to be that if satisfied in any particular case, they provided the best evidence that the defendant killed having lost his self-control, that the element of excuse was satisfied. The relevance of those restrictive conditions was no longer that if satisfied, they demonstrated that the defendant had not gone too far beyond the mean or right response, that the element of moral justification was satisfied, an analysis more closely associated with the conception of anger as righteous indignation.

The change does not, though, reflect a change in the perspective from which desert of mitigation is assessed, which remains the perspective of the man of honour. What has changed is the understanding of the man of honour himself. He is no longer what we could call the righteously indignant man of honour, who

responds in anger in accordance with the dictates of reason. He is the akratic-Hobbesian man of honour, who is subject to and cannot resist the strong impulse of his desire to retaliate when faced with provocation judged grave from the perspective of the man of honour, and who is "deaf to the voice of reason" when fighting a duel in hot blood.

During the eighteenth and nineteenth centuries, though, criticism of the code of honour, and of the violence which it glorified greatly intensified[1]. As I have said[2], express criticism of the English Courts' accommodation of notions of honour, in point of mitigation, was made by influential pamphlet writers, and such criticism was even expressed judicially, as in the Scottish case of Stephenson[3], where it was said that[4]:

> "Very suitable it may be to the rest of the English practice, which holds that a pull by the nose or a fillip on the forehead (injuries not more material than a rude invasion of a person's liberty) is a provocation to extenuate the guilt. But as suitable as such a rule is to their practice, as unsuitable it would be to ours, which is quite a stranger to any plea of extenuation grounded on such trivial offences, and requires bodily distress and agitation of the spirits."

The Scottish conception of grave provocation as some form of "bodily distress", instead of an affronts to honour of the kind mentioned, is of some importance, in that this conception gained a foothold in English Law, with the decline in the significance of the concept of honour.

In the important case of Sherwood[5], for example, when his wife had assaulted him with a broom, and had used "aggravating language", and "very indecent and insulting gestures", the defendant cut her throat with a razor. Sherwood's counsel seems to have Holt C.J.'s first category in mind when, in addressing the

jury, he suggested that although words were not a sufficient provocation, an insulting blow such as a box on the ear was[1]. In his direction to the jury, however, Pollock C.B. seems to have thought this somewhat too lenient to the defendant, for he directed them that[2]:

> "It is true that no provocation by words only will reduce the crime of murder to that of manslaughter; but it is equally true that every provocation by blows will not have this effect...Still, however, if there be a provocation by blows which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only.

The importance of this passage is that the early modern emphasis on it being the affront to honour that makes an assault serious enough to reduce the crime to manslaughter under the first category is conspicuous by its absence. Instead, what is stressed, as in other nineteenth century cases decided at this time, is that the provocation must be capable of being regarded as the equivalent of a "violent blow"[3].

According to the "physical harm" theory of grave provocation, as we can call it, the point of mitigation remains a condescension to loss of self-control, but it is supposed that self-control will only be lost, when there has been a threat or infliction of serious harm. Implied malice is therefore employed, in a way analogous to the use of it under the "honour" theory, to attribute passions of anger induced by trivial blows to malice secretly harboured[4].

The "physical harm" theory was thus loss of self-control centred in a sense similar to the first theory. The fact that a man had killed only because he had lost his self-control was said under

each theory to be the point of mitigation in provocation cases, but the jury were not permitted to attribute the defendant's actions to a loss of self-control, under either theory, unless the provocation which each deemed sufficient had been received. Where insufficient provocation had been received, under both theories it was supposed that the defendant's act stemmed from a wicked disposition or from some harboured grudge, not from a loss of self-control, and the defendant would be found guilty under the doctrine of implied malice[1].

It is apparent that something of a fiction was thus necessary to maintain that either theory was based on a loss of self-control, on the issue of excuse alone. For if it could be shown that a defendant <u>had</u> genuinely lost his self-control in the face of a trivial provocation, if mitigation by way of provocation was meant to be based on the fact of loss of self-control, logic would seem to dictate that the crime should be reduced to manslaughter. The seeming analogy, in such circumstances, with such cases as <u>Mason</u> simply breaks down.

The fictional character of the doctrine of implied malice was not lost on some nineteenth century commentators. The Criminal Law Commissioners, for example, who were considering offences against the person at this time[2], were clearly troubled by what we can refer to as the <u>logic</u> of a self-control centred basis for mitigation by way of provocation, whose historical rise was detailed in section two, namely that if defendants lose their self-control, they are entitled to mitigation. As they put it[3]:

> "The question [of when malice should be found], however, cannot be one of mere presumption or inference independently of inquiry, and, therefore, cannot be a question of law, if it be possible that, in point of fact, the insult offered excited

such a state of passion and want of self-control as occasioned the act."

What is important about this view is that it points inexorably towards the conclusion that <u>whatever</u> the provocation, be it serious or trivial, if it is found as a matter of empirical fact that the defendant genuinely lost his self-control before killing, the killing should be reduced to manslaughter. The logic of holding a loss of self-control centred theory dictates, in effect, that mitigation should be offered to the bad-tempered person who kills upon a punctilio for the same reason as it is offered to the even-tempered person who loses self-control in the face of a serious provocation, namely that they both lost their self-control at the relevant time. This is a conclusion of which the Commissioners are not unaware, for they recognise that it could be that[1]:

> "[A] violent and irascible person was, in fact, excited by [the trivial] cause to a pitch of passion which, had it arisen from a just cause, might, by reason of the temporary suspension of the judgment, have properly extenuated the offence."

and hence that[2]:

> "[A]s a necessary allowance for human infirmity, and the actual subjugation of the judgment to uncontrollable passion are the grounds of the extenuation, it is manifest that to punish a man as a murderer by virtue of any peremptory rule limiting the cause of provocation, may be in effect to inflict punishment not so much in respect of the particular act of deliberate malice, as of a want of habitual control over a mind naturally impetuous and ready to break forth on slight occasions."

The Commissioners' conception of anger is the <u>akratic</u>-Hobbesian conception, according to which, as we have seen, in the tumult of the passions, the voice of reason is not heard. The point of mitigating an intentional homicide committed under the compulsive force of passion so conceived, is said to be the very fact and only the fact that the defendant was in the grip of a sudden transport

of passion, whatever its cause. Homicide in such circumstances is thus contrasted with a killing stemming from "deliberate malice". The implication is that the term "deliberate malice" means malice prepense, express and not implied malice, the killing having thus taken place when reason was in its seat or throne, the killing hence falling outside the purview of mitigation founded on action in anger as a loss of self-control.

This kind of approach has its influence in some cases. The problem of the effect of drink upon powers of self-control was on at least one occasion received sympathetically in the light of the logic of a loss of self-control centred theory. It was said by Holroyd J. in Grindley[1], for example[2], that[3]:

> "[T]hough voluntary drunkenness cannot excuse from the commission of the crime, yet where, as on a charge of murder, the material question is whether an act was premeditated or done only with sudden impulse, the fact of the party being intoxicated has been holden to be a circumstance proper to be taken into consideration."

Here, then, we find the historical foundations of the subjectivist approach to the mitigation provided by way of provocation, later given institutional support by Glanville Williams[4], and by Smith and Hogan[5]. Under this approach, the bad-tempered person who kills upon trivial provocation is thought to be as worthy of mitigation as the even-tempered person who kills upon grave provocation, so long as each killed having lost self-control[6].

As we shall see in chapter four, in rejecting this purely subjectivist approach, the contemporary provocation theorist, Ashworth, has attempted to revive a different and more sophisticated kind of fiction to that founded in the nineteenth century on the doctrine of implied malice, to justify the law's

condescension only in cases of loss of self-control following grave provocation. As we shall see, this is the distinction between provocation and personality as causes of an angry response.

4. Loss of Self-Control and the Modern Law

Despite the frequent strictures of academic commentators[1], the more purely subjectivist approach to provocation never gained a strong foothold in modern English law. In this section we consider what happened to the more objectivist "honour" and "physical harm" theories during the course of the nineteenth and twentieth centuries, leading us to the objectivist theory underpinning the modern law.

Later cases to those we have been considering, saw the theoretical development of a different role for loss of self-control in a theory of mitigation to any that we have yet encountered. For simplicity's sake, we will call this theory the "modern" theory. The "modern" theory offers a different conception of loss of self-control, and also a different perspective for mitigation to that of the "honour" theory. In eliciting these, we start with consideration of analysis of the state of the soul following trivial provocation, that began to receive some attention in the middle of the nineteenth century.

The "honour" and "physical harm" theories had no need to consider in any detail what the state of man's soul might be upon receipt of trivial provocation, for if he killed in response to it, as we have seen, he was deemed to have acted out of malice, whether he in fact lost his self-control or not. As we saw in the first section, the only contrast made in law, in the late eighteenth and

early nineteenth centuries, was between the state of the soul when a man was calm, when reason was thought to be in its seat, and its state when a man was enraged, when reason was thought to have been dethroned or driven from its seat[1].

From the about middle of the nineteenth century onwards, however, the state of the soul upon receipt of trivial provocation began to receive more attention in the courts. Important observations on the state of the soul following trivial provocation are to be found in the nineteenth century case of Welsh[2], the case which, significantly, provides a starting point both in law and for many modern academic commentators in discussion of the doctrine of provocation[3]. In the judgment, we find the following dictum[4]:

> "When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it, the law does not say that an act of homicide intentionally committed under the influence of that passion is excused."

The first point to note here is that Keating J. assumes that when a man is angered by a trivial provocation, and kills in response to it, he did not lose his self-control due to impetuosity, due to the displacement of reason from its seat within the soul. Keating J. supposes instead that such a man gave way to his passions, indulged them rather than conform his actions, as it is supposed that he could have done, to the dictates of reason.

An important distinguishing feature of this analysis of the man who kills upon trivial provocation is that it draws upon a conception of lack of self-control other than that due to impetuosity, to ungoverned storms of passion, the conception on which most of the late eighteenth and nineteenth century cases

relied. The conception of lack of self-control on which Keating J. draws is the conception of lack of self-control due to weakness of will, as Aristotle calls it[1], under the influence of which men simply fail to abide by their decision or knowledge as to what is the right thing to do in particular circumstances, and follow the inclinations of a less compelling emotion, as Aristotle puts it[2]. This, says Aristotle[3], and as Keating J. implies, makes them more blameworthy than than those who fail to exercise self-control due to impetuosity[4]. We consider the possible theoretical basis for excusing those who lose their self-control due to weakness of will in the face of grave provocation in the final chapter.

The second point of importance about this passage is that the analysis of the state of the soul upon trivial provocation it employs provides the basis for a refusal to condescend to killings in anger following trivial provocation quite different from the basis underpinning earlier theories, the implication of malice. It could be claimed, quite simply, that the reason why no mitigation would be held out in respect of such killings was that, in the face of trivial provocations, defendants' ought to retain their self-control, to use reason to govern their desire for retaliation rather than giving in to that desire.

Authority for this view is to found not only in Welsh, but also in the earlier case of Kirkham[5], decided in 1837, where Coleridge J. (as he then was) stated that[6]:

> "[T]hough the law condescends to human frailty, it will not indulge to human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions."

This dimension to the analysis of the state of the soul upon receipt of trivial provocation, in which reason is capable of

controlling the passions, is of course to be contrasted directly with the state of the soul upon receipt of grave provocation, when, as we have seen, it is supposed that the passions are so strong as to eclipse the controlling power of reason[1], and that a defendant will accordingly lose his self-control due to impetuosity. As Coleridge J. put it in Kirkham[2]:

> "[A]s it is well known that there are certain things which so stir up a man's blood that he can no longer be his own master, the law makes allowance for them...[when] what he did was done in a moment of overpowering passion, which prevented the exercise of reason."

More recent authority confirming this analysis of the requisite state of the soul following great provocation, for the purposes of mitigation, namely loss of self-control due to impetuosity, is to found in Duffy[3], where Devlin J. (as he then was) said[4]:

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

If, then, a man kills in anger following trivial provocation, he is now not deemed necessarily to have acted out of malice, but to have indulged his passions in circumstances in which he could and should have controlled them, to have lost self-control through a blameworthy weakness of will[5]. If he kills in anger following great provocation, however, he is thought to have lost self-control due to a less blameworthy impetuosity, due to the eclipse of reason by ungovernable passion, rather than through the indulgence of a less than compelling emotion.

With the emergence of this new dimension to the analysis of the state of the soul, its condition following trivial provocation, the the doctrine of provocation moved away somewhat, as suggested

above, from a loss of self-control centred basis, the cause of loss of self-control having been previously understood, as we have seen, solely as impetuosity. The question was not now simply (with the assistance, in the "honour" and "physical harm" theories, of the implied malice fiction) whether or not the defendant lost his self-control due to impetuosity before committing the crime. The central question was whether, if he did lose his self-control, he ought not to have done, or in particular, ought not to have vented it to the extent that he did in the circumstances.

The difference between the loss of self-control centred approach of the "honour" and the "physical harm" theories and the "modern" theory, is in this regard encapsulated in the two versions of the question that Keating J. says that a jury must consider. He first presents the question phrased in loss of self-control centred terms, as we have analysed them[1]:

> "[T]he law is that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man and so lead the jury to ascribe the act to the influence of that passion."

As in the cases considered in the foregoing section, the issue of sufficiency of provocation is here presented as one relating to the question of whether the defendant can properly be considered genuinely to have lost his self-control or not. It is only when the reasonable man would have been provoked that the jury can ascribe the act to the influence of passion. In a later passage, however, the relevant question for the jury is presented, as it was in Kirkham, more in terms of an assessment of the degree of control exercised over his passions by the defendant[2]:

> "[I]n law it is necessary that there should have been a serious provocation in order to reduce the crime to manslaughter, as,

> for instance, a blow, and a severe blow - something which might naturally cause an ordinary and reasonable-minded person to lose his self-control."

It is, in other words, only when the ordinary or reasonable person might, in the face of the provocation concerned, have lost his self-control due to impetuosity, due to the suspension of reason by strong passion, that the law offers mitigation through conviction for manslaughter rather than murder.

Through the attention paid in the cases to the state of the soul upon receipt of trivial provocation, thus, which was pointedly contrasted with its condition upon receipt of grave provocation, the first new aspect of the "modern" theory has emerged, namely the new perspective adopted by the law for assessing desert of mitigation. This perspective for mitigation is no longer the perspective of the man of honour, but the perspective of the man possessed of reasonable powers of self-control. The stamp of recent authority for the "modern" theory's perspective for mitigation is to be found in Camplin[1], in the passage where Lord Diplock stated that[2]:

> "[F]or the purposes of the law of provocation the "reasonable man"...means an ordinary person...possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today."

We must now turn to the "modern" theory's second important modification of the philosophical premises of the loss of self-control centred theories, its modification of the understanding of the nature of loss of self-control itself, and the circumstances in which it is lost. The development of the "modern" theory through this modification indicates a further important movement away from the loss of self-control centred basis of the doctrine of provocation, as it had developed in the eighteenth and nineteenth

centuries.

In as much as the result of Kirkham, Welsh, and Duffy was that it was now supposed that loss of self-control due to impetuosity only occurs following grave provocation, this view was corrected in a well-known dictum of Lord Diplock's, in Phillips v R[1]. In Phillips v R, Lord Diplock rejected the view that[2]:

> "loss of self-control is not a matter of degree but is absolute; there is no intermediate stage between icy detachment and going berserk. This premise...is...false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly, if the provocation is gross and there is a dangerous weapon to hand, with that weapon."

This passage should not be taken to be asserting that the condition of the soul we have been describing as "loss of self-control" is in fact not a distinct condition at all. The passage could be read as claiming that the ability of reason to control the passions is simply a matter of degree, having a relationship of inverse proportion with the gravity of provocation, such that when one is unprovoked reason has total control, when one is just irritated reason is largely in control, when one is very angry reason has little control, and when one is beside oneself with rage, reason has no control[3]. Such an interpretation would mean that only in cases where a defendant had indeed "gone berserk" could a provocation plea fulfil the condition that reason have been displaced from its seat[4].

It is the notion of degrees of loss of self-control that has a tendency to give rise to this fallacy[5]. What Lord Diplock is implicitly claiming in fact in the last two sentences, although the first part of the passage cited seems to contradict it, is that there are three different states of the soul which may be of

relevance to the doctrine of provocation, not just two, icy detachment and being "beside oneself" with rage. The third one is loss of self-control, a state not to be confused, as he thinks it has been, with going berserk. As I shall argue, this - the "modern" theory's understanding of loss of self-control - is an accurate account of a kind of action in anger.

As White notes[1], a temporary loss of self-control or of temper, as a description of the state of the soul, is equally applicable, to use Lord Diplock's examples, to a case where a man blurts out angry words upon trivial provocation, and then perhaps regrets doing so, as when he instantly strikes with a dangerous weapon following gross provocation. In each case, reason is displaced from its seat by passion in the form of the desire to retaliate. This state of the soul is accordingly what leads in each case to an instantaneous reaction, for as Hobbes said[2], when the will is controlled by desire rather than reason, the action desired cannot choose but to follow the experience of the desire immediately, for there is nothing to prevent it doing so, in the absence of a stronger countervailing desire.

Loss of self-control does not hence lead necessarily or even typically to wild lashing out, or anything of the kind. It leads merely to the retaliation <u>that is desired</u>. The nature of that retaliation desired depends on the prior judgment of wrongdoing, as I earlier pointed out, for it is that judgment of wrongdoing that determines the nature and intensity of the desire, and hence the degree of retaliation desired. As East says of the even-tempered person possessed of reasonable powers of self-control[3], provocation "heat[s] the blood to a <u>proportionable</u> degree of resentment" (my

emphasis), where the "proportionable" character of the resentment, and hence the proportionable character of the retaliation, stem from a judgment of wrongdoing that is proportionable to the gravity of the provocation.

Further evidence that this is the "modern" theory's conception of loss of self-control is to be found in Phillips v R itself, in the importance attached by Lord Diplock, in justifying the defendant's conviction in that case, to facts of the case he gives immediately after the passage cited above, and meant to be contrasted with the appellant's actual reaction in killing his victim with a machete[1]:

> "It is not insignificant that the appellant himself described his own instantaneous reaction to the victim's provocation in spitting on his mother as "I spin around quickly was to punch her with my hand"."

The conception of loss of self-control employed here is one in which self-control may indeed be lost, following provocation, by the even-tempered man possessed of reasonable powers of self-control, but where in him the ensuing reaction can and should nonetheless still be a proportionable one, as East put it, this being just as true of cases of trivial provocation as in cases where the provocation is grave.

A trivial provocation may lead to a temporary loss of self-control, and hence to angry words blurted out, or something of this kind, but there is, equally, nothing about even the gravest provocation that will necessarily take the even-tempered man possessed of reasonable powers of self-restraint beyond loss of self-control, and a proportionable reaction, into the kind of state of mind referred to as "going berserk". "Going berserk", although

it may be a response that sometimes follows very grave provocation, is not a temporary loss of self-control, or indeed properly called a form of anger at all, but is a kind of temporary madness into which, perhaps very occasionally, rage may lead a man.

The association of loss of self-control with only grave provocation and a blind lashing out, in the loss of self-control centred theories, stems from a focus on only a single facet of the state of the soul upon the experience of anger. On this facet of the soul upon the experience of anger, reason appears as a kind of dam, of a certain roughly equal strength in most men, holding back the pressure of the passions to dominate the will. When the passions are whipped up into a storm by grave provocation, the dam is breached, and an uncontrolled lashing out is the result.

This may occasionally be how provocation is experienced, particularly perhaps in cases of cumulative provocation, which is experienced as "chipping away" at our powers of self-control[1]. This picture of the soul is, though, a picture only of one of its facets, upon the experience of anger, and seen as a complete picture of the soul in such circumstances, misrepresents the nature of reason, and hence distorts the account of loss of self-control. As suggested above, reason may be displaced from its seat by only trivial provocation. Reason is not always a dam that holds such "ripples" in check, giving way to anger only when it is an "ungoverned storm".

If reason may be dethroned, and self-control lost following trivial provocation, doe this amount to saying, though, that all men are by nature bad-tempered, and lose their self-control following even trivial provocation? It does not. In the bad-

tempered, the problem is not that reason is displaced from its controlling seat within the soul by anger upon trivial provocation. Their problem is that reason is displaced from its seat on the wrong occasions, principally on too many occasions, and that when it is displaced from its seat, it is displaced, in the quick-tempered, by a desire for retaliation much greater that is warranted by the gravity of the provocation, leading to grossly excessive retaliation.

This is what marks out the bad-tempered person from the even-tempered person. Both are liable to lose their self-control on occasions but only one, the bad-tempered person, consistently goes wrong in his judgment of wrongdoing by far too hastily judging that he has been wronged, and by judging that he has been wronged much more seriously than he really has[1].

This important point shows up what might be taken to be something of an inadequacy in the "modern" theory's perspective for mitigation, the perspective of the person possessed of reasonable powers of self-control, constructed as that perspective was, on the foundation provided by Welsh and Kirkham. For the notion of powers of "self-control" seems to suggest, as do the judgments that treat of it, that a man is experiencing anger following provocation, but is or is capable of employing reason to control it. This leads almost inevitably to the view that where a man loses "self-control", he simply gives in in a battle to control himself, that he loses control due to weakness of will rather than due to impetuosity

Looking back at the first key passage cited from Welsh[2], we find that this is indeed the case. Keating J. seems simply to

assume that those who lose their self-control and kill in response to a trivial provocation will do so through weakness of will, knowing that their action is wrong but not abiding by that knowledge, rather than doing so through impetuosity, through a hasty judgment that much more wrong has been done to them than has in fact been done.

Yet this, of course, need not necessarily be the case. As Aristotle said, in the passage cited in the first section[1], it is one of the features of the man who lacks self-control that he tends to make hasty and thus mistaken judgments of wrongdoing, that he tends to be impetuous, such that by his passion[2] he "is impelled to take vengeance, without waiting to hear whether [he] ought or not, or not so vehemently".

This explains why, in discussing East's and Lord Diplock's views on the "proportionable" character of a reaction stemming from a loss of self-control, it was said that in their view, this kind of reaction would be the reaction of the "<u>even-tempered</u> man possessed of reasonable powers of self-control". This admittedly more ponderous phrase has the merit of capturing the sense that reasonable people do not only make reasonable efforts to control their desires. They also occasionally lose their self-control, and react on impulse in accordance with their desire to retaliate without being able to make any effort to control it. When they do this, though, because they are even-tempered, they still react in a proportionable way, because their judgment of wrongdoing that led to the desire to retaliate is a mean, or not far in excess of a mean or right judgment.

This suggests that perhaps holders of the "modern" theory ought

to phrase their perspective for mitigation not simply as the person possessed of reasonable powers of self-control, but as I phrased it in discussing East's and Lord Diplock's views, as the perspective of the even-tempered person possessed of reasonable powers of self-control. This would be more faithful to the modern law, in that it would account more accurately for the fact that we wish to convict of murder not only those who are bad-tempered in the sense that they give in to the strong desire to inflict much more retaliation than they know is warranted, but also those who are bad-tempered in the sense that they precipitately judge that much more wrong has been done to them than has in fact been done, and are hence impelled willy nilly grossly to overreact[1].

The importance of the understanding of loss of self-control accepted in Phillips v R, is that it moves the "modern" theory even further away from the theories of the eighteenth and nineteenth centuries that took loss of self-control due to impetuosity per se to be the point of the mitigation provided by the doctrine of provocation. It shows Phillips v R to be reaffirming, in fact, the way of understanding the focus for mitigation that was said at the beginning of the second section of this chapter to be that which characterised the approach of early modern judges to a doctrine of provocation centred on the conception of anger as righteous indignation.

The question of excuse, of whether the defendant acted in anger, now understood as a question of whether he lost his self-control due to impetuosity, whilst being a most important sine qua non, is in the "modern" theory merely the setting within which questions of justification arise. These questions were, as we saw

in chapter two, questions of the extent to which the defendant's reaction went beyond what would have been, in the circumstances, a mean or right response. They were the questions of whether the reaction was proportionate (fully morally justified), only "proportionable" (partially morally justified), or a gross overreaction to the provocation concerned (without moral justification). There are, though, crucial differences between the way in which the early modern law, underpinned by the conception of anger as righteous indignation, understood the questions of justification, and the way the "modern" theory does, underpinned as it is by the conception of anger as a loss of self-control due to impetuosity.

A defendant's adherence to or departure from the mean, where righteous indignation is concerned, is primarily dependent on his judgment of appropriate response. This judgment, whilst it normally reflects the desire for retaliatory suffering and the judgment of wrongdoing that gave rise to that desire, is what ultimately guides the will where righteous indignation is concerned[1], and is hence what leads the defendant to overreact to the provocation, if that is what he does. It is the judgment of appropriate response, then, that is the measure of a man's (more or less) good character in cases involving righteous indignation, in that that judgment is the measure of his (more or less successful) display in anger of the virtue of justice.

In cases involving a loss of self-control, by way of contrast, this judgment cannot be the measure of a man's good character, because as we have seen, when self-control has been lost due to impetuosity, there is no judgment of appropriateness mediating the

desire to retaliate and the retaliatory action itself. Nonetheless, as we now know, under the "modern" theory, it is expected in law that the retaliation inflicted following a loss of self-control will be proportionate or at least proportionable to the gravity of the provocation.

This expectation stems, of course, from the fact about loss of self-control highlighted by the "modern" theory, that the retaliation inflicted reflects the amount of retaliation desired, and the amount of retaliation desired reflects the judgment of wrongdoing, which should be, in turn, a reflection of the gravity of the provocation. It is, thus, the judgment of wrongdoing that ultimately determines the defendant's reaction where he has lost his self-control, because as we earlier said, the desire for retaliatory suffering simply follows in the wake of that judgment, and when self-control is lost, the desire leads ineluctably to the infliction of the retaliation desired.

It is thus the judgment of wrongdoing that must be the measure of man's character when he loses his self-control, rather than the judgment of appropriate response. A correct judgment of wrongdoing, as we earlier said, is a display of the virtue of even-temperedness. It follows that the further beyond the mean a man goes in his judgment of wrongdoing, the greater his departure from the path of virtue, the greater will be the extent of his overreaction when he loses his self-control, and hence the more likely we will be to make an adverse judgment of character displayed in action against him.

Despite the differences, then, between the two conceptions of anger, the element of moral justification is the same in both. It

is the extent of good character displayed in action measured by the conformity to or the degree of departure from a mean or right response in anger, in point of a virtue. This is so, even though the virtue in issue, where action in anger of each conception is concerned, is different: retributive justice where anger as righteous indignation is concerned, and even-temperedness where anger as a loss of self-control is concerned. The discovery that the display of virtue is the keystone of moral justification whatever kind of anger is experienced is an important discovery, which we pursue in greater depth in the next chapter.

Lastly, it should be pointed out that it is the refinement of the "modern" theory in Phillips v R that most closely reflects that part of the doctrine of provocation now governed by the Homicide Act of 1957. That is, in large measure, the reason for calling the theory, as it has developed, the "modern" theory.

The Homicide Act requires, inter alia, that a defendant have both lost self-control at the time of the killing, and that the provocation have been enough to make a reasonable person do as he did. The latter requirement is understood to mean not only that the provocation must have been enough to make a reasonable person lose their self-control, but that it must have been enough to make them respond with the degree of violence that the defendant did, a requirement of proportionality. These requirements, thus, seem to presuppose that loss of self-control is consistent with a response being "proportionable" to the provocation, a presupposition that is reflected in the "modern" theory's conception of loss of self-control.

NOTES AND REFERENCES - CHAPTER THREE

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[1]. Romei (1597), 78; Kelso (1911), 92.

[2]. MM1202b20-21.

[3]. For a fuller investigation into the role of reason in guiding the will on the basis of a maxim or principle concerned with a judgment of appropriate response, see chapter four infra.

Page 137

[1]. Mawgridge (1707) Kel. 134.

[2]. Lynch (1832) 5 C.and P. 324, at 325.

[3]. Foster, C.C., 296.

[4]. Hayward (1833) 6 C.and P. 157, at 159.

[5]. C.and M., 554; Ashworth (1973), 57.

[6]. Lynch (1832) 5 C.and P. 324; Hayward (1833) 6 C. and P. 157.

Page 138

[1]. Walters (1688) 12 St.Tr., 113.

[2]. Oneby (1727) 2 Ld.Raym., 1485.

[3]. Oneby (1727) 2 Ld.Raym.1485, at 1494\1496

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[1]. The "transport" metaphor is employed by all the major writers at this time, such as eg. Foster C.C., 296;, Hawkins 1 P.C., 97; East 1 P.C., 232.

[2]. See e.g. Selten (1871) 11 Cox C.C. 674, at 675.; H.M.Advocate v. Robert Smith (1893) 1 Adam, 34, at 50.

Page 140

[1]. per Hannan J. in Selten (1871) 11 Cox C.C.674, 675.

[2]. See e.g. Seneca, De Ira, Book 1.1, where anger is also referred to as breve insania.

[3]. C.C., 315.

[4]. Compare Digest 219, with History (Vol.3), 85-6.

[5]. Fisher (1837) 8 C.and P. 182.

Page 140 (cont.)

6. ibid.

Page 141

1. 1 P.C., 453.

2. In that, of course, the "heat of blood" sensation is what follows in the wake of a judgment of wrongdoing, along with the desire for retaliatory suffering; see chapter two ante.

3. 1 P.C., 99, sec.40.

4. 1 P.C., 97, sec.28.

5. C.C., 296.

6. 1 P.C., 234.

7. C.and M. Bk.3, 631-2.

8. C.C., 315.

9. 1 P.C., 238.

Page 142

1. Ayes (1810) R.and R., 166.

2. ibid., at 168.

3. Rankin (1833) 6 C.and P., 157.

4. Kirkham (1837) 8 C.and P., 116.

5. ibid., at 159.

6. ibid., at 117.

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1. It should be noted, at this point, that Hobbes defined anger in a way slightly different to Aristotle. For Hobbes, as for Aristotle, at the core of the idea of anger is a desire. Hobbes, however, defines it as the "desire of overcoming present opposition" (HN 9.5), or as an "aversion from some imminent evil, but such as is joined with appetite of avoiding that evil by force" (DC25.13.). Hobbes thus sees a close link between anger and fear (L91):

> "AVERSION, with the opinion of hurt from the object [is] FEAR.
> The same, with the hope of avoiding that hurt by resistance, COURAGE.
> Sudden COURAGE, ANGER."

Page 144

[1]. L173.

[2]. L105\6; and see NE1147a16-18.

[3]. L268.

Page 145

[1]. L61.

[2]. L70.

[3]. DC25.2.

Page 146

[1]. DC25.9.

[2]. See Irwin in Rorty, ed., (1980a) 126-128\134.

[3]. Scruton, in Rorty, ed. (1980b), 525; Bernard Williams (1973), 207.

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[1]. Irwin, in Rorty, ed., (1980a), 134; see also the discussion of Hart and Honore (1985), infra chapter five.

[2]. See eg. Foster, C.C. 316; East, P.C. 238; Selten (1871) 11 Cox C.C. 674, at 675.

[3]. East, 1 P.C., 326.

[4]. Foster, C.C., 315.

Page 148

[1]. See NE1150b36-1151a5

[2]. NE1102b28.

[3]. NE1109b4.

[4]. NE1149a24-1149b3.

Page 149

[1]. C.C., 315.

[2]. MM1202a6-7.

Page 150

[1]. Oneby (1727) 2 Ld.Raym.1485, at 1496.

Page 150 (cont.)

[2]. Hawkins, 1 P.C., 99, sec. 40.

[3]. NE1150b19-28.

Page 151

[1]. ibid.

[2]. See also MM1202a6-7.

[3]. L96; DC25.13

[4]. ibid.

[5]. L265\6.

Page 152

[1]. L96.

[2]. L266.

[3]. Ashworth (1973), 282.

[4]. L273.

Page 153

[1]. L95. For more extensive treatment of Hobbes' conception of desire, deliberation, and action, see Sorell (1986), 92-95.

[2]. DC25.13.

[3]. See eg. Benn (1976), 116.

[4]. On this point, see Watson, in Watson, ed. (1975), 97.

Page 154

[1]. Kelly (1848) 2 C.and K., 814.

[2]. ibid., 815.

[3]. 1 P.C., 234.

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[1]. It should be noted at this point that, in chapter five, it will be argued that it is true not only of the man who loses his self-control, in the sense that that has been set out in this chapter, but also true of the man who acts in righteous indignation that judgments made in anger, be they judgments of wrongdoing or of appropriate response, tend to be made in haste, and that one may

Page 155 (cont.)

tend to go wrong in anger by overreacting. It will be argued that this provides one, but only one, basis for excusing overreactions in anger. This is not, of course, to argue that all people are or tend to be bad-tempered. The bad-tempered differ from the even-tempered not because the latter never overreact to provocation whereas the former do, but because the former consistently overreact more than the even-tempered, and overreact to a greater extent that the even-tempered would in the face of a like provocation; see further, section four below.

Page 157

[1]. NE1135b28-34.

Page 159

[1]. C.C., 314-317.

[2]. See eg. Sherwood (1844) 1 C.and K., 556.

[3]. Fisher (1837) 8 C.and P., 182.

Page 160

[1]. Mawgridge (1707) Kel. 119, at 137.

[2]. C.C., 296.

Page 161

[1]. 1 P.C., 234.

[2]. Kelly (1848) 2 C.and K., 814.

[3]. ibid., at 815.

[4]. See page 159 note 3 ante.

[5]. ibid., at 183.

[6]. ibid.

Page 162

[1]. ibid., at 815.

[2]. Selten (1871) 11 Cox C.C. 674, at 675.

Page 163

[1]. C.C., 296.

[2]. C.C., 275.

Page 163 (cont.)

[3]. C.C., 295.

Page 164

[1]. Mawgridge (1707) Kel. 119, at 129-130; see also Kaye (1967), 591-592.

Page 165

[1]. Mawgridge (1707) Kel.119, at 131.

[2]. C.C., 291.

Page 166

[1]. 1 P.C., 238.

[2]. 1 P.C., 234.

[3]. Thomas (1837) 7 C.and P., 817.

[4]. ibid., at 819.

Page 167

[1]. See eg. Burchet's case, Crompton (1606), 24b.

Page 168

[1]. Curtis (1756) Fost., 132.

[2]. C.and M., 631-632.

Page 169

[1]. 1 P.C., 97.

Page 170

[1]. A good example of this is provided by the fact that in spite of Foster's severe criticism's of the third category of sufficient provocation, made from the perspective of what we will below call the "physical harm" loss of self-control centred theory, courts continued to apply the third category well into the nineteenth century. On this point, see Ashworth (1973) 52-53, and 62.

Page 171

[1]. On this see Andrew (1980), at 420ff.

[2]. See Chapter 1 ante.

[3]. Stephenson (1759) St.Tr., 846.

Page 171 (cont.)

[4]. ibid., at 879.

[5]. Sherwood (1844) 1 C.and K., 556.

Page 172

[1]. ibid.

[2]. ibid., at 557.

[3]. See also, on this point, Hopkins (1866) 10 Cox C.C. 229.

[4]. On this point, see Thomas (1837) 7 C.and P. 817, at 819.

Page 173

[1]. See section two ante.

[2]. 4th Rep. Brit. Parl. Pap. C.L. 3 (1834-1841) 233.

[3]. ibid., at 258 xxvi.

Page 174

[1]. Page 173 note 2 ante, at article 3 (43 i).

[2]. ibid.

Page 175

[1]. C.and M., 8.

[2]. See also, on this point, Thomas (1837) 7 C.and P., 817.

[3]. See note ! ante.

[4]. Glanville Williams (1954), 742-743\752.

[5]. Smith and Hogan (1973), 243-244.

[6]. For further discussion of this point, see Ashworth (1976), 309-311.

Page 176

[1]. See references cited by Ashworth (1976), 309 note 89.

Page 177

[1]. See section one ante.

[2]. Welsh (1869) 2 Cox.C.C., 336.

[3]. See eg. D.P.P. v. Camplin [1978] 2 All E.R. 168, at 171;

Page 177 (cont.)

Ashworth (1976), 298.

4. Welsh (1869) 2 Cox C.C. 336, at 337.

Page 178

1. NE1150b18.

2. NE1151a2-3.

3. NE1150b35-1151a5.

4. ibid.

5. Kirkham (1837) 8 C.and P., 115.

6. ibid., at 119.

Page 179

1. See section 1 ante.

2. Kirkham (1837) 8 C.and P.115, at 117.

3. Duffy [1949] 1 All E.R., 932.

4. ibid.

5. We explore the possibility of founding in excuse a plea of loss of self-control where that was due to weakness of will in chapter five.

Page 180

1. Welsh (1869) 2 Cox C.C. 336, at 338.

2. ibid.

Page 181

1. DPP v Camplin [1978] 2 All E.R. 168; see also DPP v. Bedder [1954] 58 Cr. App. Rep. 133, at 142.

2. DPP v Camplin [1978] 2 All E.R. 168, at 171.

Page 182

1. Phillips v R [1969] A.C., 130.

2. ibid., at 137.

3. Ashworth (1976), 303-306

4. White (1970), 446.

Page 182 (cont.)

[5]. Unfortunately given prominence by Ashworth (1976), 302-306.

Page 183

[1]. Page 182 note 4 ante, at 447.

[2]. DC25.13

[3]. 1 P.C., 238.

Page 184

[1]. Phillips v R [1969] A.C. 130, at 137.

Page 185

[1]. On the effects of cumulative provocation, see Ashworth (1975); Wasik (1982); Horder (1989).

Page 186

[1]. On the foundation in excuse of claims that in haste one judged slightly more wrong to have been done, or that slightly more retaliation was appropriate than was in fact done or was appropriate, see chapter five.

[2]. See passage cited on page 177.

Page 187

[1]. See page 148 ante.

[2]. MM1202b20.

Page 188

[1]. On this see the observations of Glanville Williams, (1983), 528.

Page 189

[1]. But see the discussion of weakness of will in chapter five below.

THIRD INTERLUDE

We have now uncovered, at a second-order level, the different conceptions of anger that have been employed by the law - anger as righteous indignation, and anger as a loss of self-control. We summarised the nature of righteous indignation in the interlude following chapter two, and before returning to consider first-order questions concerning the nature of justification and excuse in the final chapters, it will clarify the second-order position, for which I have been arguing, if the two conceptions are briefly compared and contrasted.

The essential difference between the conception of anger as righteous indignation, and the conception of anger as a loss of self-control, concerns the possibility of making, in anger, a judgment of appropriate retaliation. Under both conceptions of anger it is supposed that anger is preceded by what we called a judgment of wrongdoing, an "occasion for resentment"[1]. Under both conceptions, it is supposed that in the wake of that judgment of wrongdoing follows a desire for retaliatory suffering.

Putting it in Aristotelian terms, as far as anger as righteous indignation is concerned, in the person of virtue that desire is proportionate to the (correct) judgment of wrongdoing, but in the person of self-control, it is greater as a result of an incorrect judgment of (too great a degree of) wrongdoing. Self-controlled people, of course, knowing how much retaliation ought in point of justice to be inflicted, in a particular set of circumstances, manage to keep their desires for excessive retaliation in check through their judgments of appropriate response, and hence act as the man of virtue would have done.

People who lack self-control, on the other hand, because when they experience a desire for retaliatory suffering give way to it or are carried away by it, are impelled to act on a judgment of wrongdoing not mediated by a judgment of appropriate response. As Aristotle indicates[1], such people accordingly do not follow the maxim "more haste, less speed" when acting in anger; they jump to a retaliatory conclusion[2] "without waiting to hear whether [they] ought or ought not or not so vehemently".

As an examination of the "modern" theory demonstrated, however, it seems not to be merely people who lack self-control who respond in anger in a way ungoverned by a judgment of appropriate response. If Aristotle thought so, then his understanding of the nature of anger was too limited. We may all sometimes lose our self-control, at least in some trivial way, such as by blurting out angry words. It is not merely the quick-tempered who do so.

It follows that as was implied in the discussion of the "modern" theory, the fact that retaliation following a loss of self-control is unmediated by a judgment of appropriate response, does not mean that people who lack self-control do not act in a mean or proper way. It simply means that whether they do so act is dependant on whether their initial judgment of wrongdoing was correct; for if it was incorrect (being a judgment of excessive wrongdoing), because they lack self-control they will not be able to control the desire for excessive retaliation that follows in its wake. This desire will impel them to inflict an excessive degree of retaliation.

The important point to note about the conception of anger as righteous indignation is thus that it is possible to control the

desire for retaliatory suffering, if it is excessive, and hence inflict a just amount of retaliation through a judgment of appropriate response at the time of experiencing the desire. Criticism of the excessive extent of retaliation inflicted through righteous indignation is hence criticism of a maxim or principle relating to appropriateness of response on which the indignant person acted at the time of the retaliation[1].

Where anger as a loss of self-control is concerned, by way of contrast, one cannot draw nice distinctions between the reactions in anger of the person of virtue and the person of self-control, because it is assumed that everyone is rendered akratic by the experience of anger, and hence that there can be no judgment of appropriateness mediating someone's desire for retaliatory suffering and the infliction of retaliation following on that desire. People are thought to be impelled by passion to inflict the amount of retaliation that they desire, without there being any intervening guiding and controlling influence of reason.

This being so, criticism of the excessive extent of a reaction in anger cannot relate to any principle or maxim relating to appropriateness of response on which the person who lost their self-control acted at the time. For anger, conceived as a loss of self-control, is supposed to remove the possibility of acting on any maxim or principle relating to appropriateness of response, unlike anger as righteous indignation.

On what, then, for the purposes of justifying conviction even for manslaughter, is the focus of criticism of the excessive extent of retaliation following a loss of self-control? The focus can only be on the defendant's judgment that the wrongdoing constituted by

the provocation was greater than it in fact (objectively viewed) was, and hence on the consequent desire for excessive retaliatory suffering that led the defendant willy nilly to inflict that excessive degree of retaliation itself. The failure to make a correct judgment of wrongdoing must clearly be the key failure, where excessive retaliation resulting from a loss of self-control is concerned. For once that judgment of wrongdoing has been made, loss of self-control entails that the desire for retaliatory suffering and the retaliation desired follow without reason being able to resist them, without there being accordingly any principle or maxim of appropriateness of response governing action in anger.

Is one or other of the conceptions of anger that we have now considered based on some philosophical or psychological mistake, meaning that, for example, when judges spoke of ungovernable passion or the dethronement of reason in provocation cases, they were misrepresenting the state of the soul upon the onset of anger? In the absence of convincing evidence demonstrating that this would be a philosophical mistake, I propose to work on the basis that the two forms of anger that we have been considering both play a role in our emotional make-up that, as was implicit in the judgment in Phillips v. R., does not depend on the gravity of the provocation received. The mistake, if any, that has probably been made by both lawyers[1] and philosophers[2] is to have supposed that only one or the other conception could in fact really exist.

We considered, at the end of the previous chapter, an example of a modern case, Devlin, in which the facts revealed a response that was a very good illustration of anger expressed as righteous indignation in action. Many modern cases also illustrate anger

inducing and expressed as a loss of self-control. It is common to find, for example, that defendants describe their reaction on receipt of the provocation in question as being that something in them "snapped"[1] or "cracked"[2], upon which they "exploded" into violence[3]. Likewise, defendant's often claim that, following provocation, they simply "found themselves"[4] with gun or knife in hand, and the victim dead before them, when they finally "came to their senses"[5].

Naturally, a few isolated examples of ex post facto attempts to describe the experience of anger upon provocation does nothing to prove the existence of either or both of anger as righteous indignation or as loss of self-control. Nonetheless, it is some indication, at least, that both conceptions of anger form a part of our emotional make-up, and that without convincing argument neither should be ignored or ruled out as a mistake, and that, most importantly, an adequate first-order analysis of the philosophical foundations of the doctrine of provocation must take both into account. It is from a second-order to a first-order analysis of the foundations of the doctrine that we now turn, for we must consider how each second-order conception of anger relates to and influences first-order conceptions of moral justification and of excuse.

NOTES AND REFERENCES - THIRD INTERLUDE

Page 201

[1]. Strawson (1962), reprinted in Watson, ed. (1982), 64.

Page 202

[1]. MM1202a6.

[2]. MM1202b19-21.

Page 203

[1]. NE1109b20-23; NE1126b2-5; see also *infra* chapter 5.

Page 204

[1]. See eg. Brett (1970), who assumes that men only experience anger as a loss of self-control, and only in a Hobbesian sense, at that.

[2]. See eg. Solomon (1973), who by way of contrast to Brett (note 1 above) equates anger with a judgment of appropriate response, leaving no room for loss of self-control at all.

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[1]. See eg Warner, *The Guardian* 1.5.1982; Brown, *Daily Telegraph* 22.9.1987; Wyatt, *Daily Telegraph* 22.11.1984; Hancock, *Daily Telegraph* 22.12.1987.

[2]. See eg. Wheeler, *Daily Telegraph* 25.9.1986.

[3]. See eg. Rowlands, *Daily Telegraph* 8.7.1986.

[4]. See eg. S v. Arnold (1985) 3 S.A.L.J., 256.

[5]. See eg. Hinton, *Daily Telegraph* 26.3.1982; Walton, *Daily Telegraph* 4.12.1984.

CH.4 THE MORAL JUSTIFICATION FOR ACTION IN ANGER

> "Do we really understand more fully and with greater warranted certainty why an insult tends to produce anger, than why a rainbow is produced when the sun's rays strike raindrops at a certain angle?" [1]

In the introduction, it was claimed that we could not answer first-order questions about the foundations of the doctrine of provocation, questions about the sense in which acting in anger is an excusing condition and questions about whether the doctrine involves an element of justification, without conducting an investigation at a second-order level into the concept of anger itself. We have now completed that second-order investigation, and have discovered that there are or have been two equally plausible conceptions of anger employed by the law, anger conceived as righteous indignation, and anger conceived as a loss of self-control.

What we will consider in the two concluding chapters, returning to questions of a first-order nature, is how the existence of the two second-order conceptions of anger, as they have been analysed, affects the answers to those questions. In this chapter we will be concerned with first-order questions about the nature of moral justification. These are relevant to the doctrine of provocation, because of the existence of the evaluative question[2], which makes mitigation dependant, <u>inter alia</u>, on the killing having been preceded by grave provocation[3].

In the first two sections, I consider two attempts by academic commentators to explain the first-order foundations of the doctrine, and reject them as unsound, in part at least because they are based on two false second-order conceptions of anger. In the third section, a different understanding of the first-order

element of moral justification is presented, based on the two conceptions of anger I have analysed, and on the preliminary observations on the nature of moral justification made in chapter two. In the final section, I offer some brief reflections on the future for the doctrine of provocation, in part based on my understanding of moral justification.

1. "Asking for it", and Anger as the Conflict of Reason and Drives

In this and the following section, we consider two different conceptions of the first and second-order foundations of the doctrine that, like mine (to be considered in the third section), are premised on, or provide support for the view that the law should condescend only to killings upon grave and not upon trivial provocations. The first of these to be analysed, the nature of which is encapsulated in the sub-section's title, is propounded by Ashworth in support of this view.

In chapter two, it was suggested that the first-order element of moral justification in the doctrine of provocation centred on the display of good character, of a certain quality of inner resources. This was demonstrated by feeling and acting in anger in accordance with the mean, the right amount or degree to feel anger and act in anger: a display of good character exemplified by a display of the virtues respectively of even-temperedness and\or justice. This first-order conception of moral justification, to be considered in more detail in the third section, was briefly contrasted with the conception of the element of moral justification thought by Ashworth to underpin the doctrine of provocation, namely its conception as the extent to which it can be

said that the victim "asked for it". The first task of this section will be to show why it must be a mistake to regard the element of moral justification in provocation cases as concerned with whether the victim "asked for it" or not.

What Ashworth calls the element of "partial justification"[1] is claimed[2] by him both to explain and justify the objective condition or evaluative criterion. Partial justification is defined by him as[3] "the claim...that an individual is <u>to some extent</u> morally justified in making a punitive return against someone who intentionally causes him serious offence" (Ashworth's emphasis), or in the words in which the definition has become better known, as a question of the extent to which it can be said that the victim is to blame for the defendant's "punitive return", through having brought it on themselves or "asked for it"[4]:

> "The complicity of the victim cannot and should not be ignored, for the blameworthiness of his conduct has a strong bearing on the court's judgment of the seriousness of the provocation and the reasonableness of the accused's failure to control himself."

The first point to note is that the notion of "asking for it" is not special to provocation as a defence. In duress, for example, the notion of "asking for it" plays an important role, in justifying the denial of the defence to defendants who were themselves voluntarily members of the violent criminal gang that threatened them[5]. As Ashworth suggests[6], the idea of "asking for it", as reflected in ordinary language, certainly directs attention to the role played by victims in precipitating harms done to them whose immediate cause lies in the actions of another, but that does not <u>ipso facto</u> seem to capture what might be special about the element of justification in provocation as a defence.

In order to provide a more secure basis for notion of "asking for it" as a first-order explanation of the element of justification in the doctrine, it would have to be conceded that the notion of "asking for it" plays a role in many contexts other than provocation, but that its special status in each different context depends on the nature of the "it" for which the defendant was asking. In bursting in through a door suddenly, one is "asking for" someone to be startled. In joining a criminal gang, one is "asking for" threats to one's vital interests. In a similar way, in offering grave provocation, one is "asking for" violent retaliation. The special nature of the "it" of "asking for it", where provocation cases are concerned, must thus be understood in the light of Ashworth's alternative definition of the element of partial justification as the extent of the justification for a punitive return in anger.

Unfortunately, this sharpening of the notion of "ask for it" cannot establish its position as the first-order explanation for the element of justification in the doctrine, precisely because the notion fails to explain why someone must in fact be "asking for" violent retaliation before there is an element of moral justification for the defendant's reaction sufficient to satisfy the objective or evaluative criterion. We can see this more clearly by starting with consideration of Ashworth's use of Aristotle in his discussion of the "ask for it" first-order basis of the element of justification in the doctrine of provocation. He understands Aristotle to have associated the justifiability of anger and angry retaliation with the extent to which the victim can be said to have "asked for it"[1]:

> "Aristotle clearly...acknowledg[ed] the element of partial justification in his statement that "it is apparent injustice that occasions rage"...Aristotle seemed to accept this reasoning when he wrote that "it is...he who enraged him that starts the mischief".

As it stands, this is a misleading account of what Aristotle said on the question of justification in provocation cases. It fails, first, to set Aristotle's account of provocation in the context of his account of the relationship between anger and the virtues. More significantly, the passage does not support the view that the element of justification in provocation cases is conceptually tied to the extent to which the victim in fact "asked for it".

What Aristotle is saying here is subtly different. The relevance of the fact that the victim "starts the mischief" is that that shows, as Aristotle makes quite clear[1], that actions in anger are unpremeditated. He then goes on to say that as far as the element of justification is concerned, "the ground of anger is an apparent injustice"(my emphasis)[2]. Now what this indicates about the element of justification where anger is concerned, is that the starting point in its assessment will not be reference to the extent to which the victim was in fact to blame, but reference to the injustice apparent to the person enraged, reference to the nature or the degree of the wrongdoing that the defendant took the victim to have perpetrated, whether the victim did in fact perpetrate that wrongdoing, or that degree of wrongdoing, or not.

Let us consider two kinds of example that demonstrate this. In the first kind, victims offer grave provocation, but defendants mishear them, thinking they said something that amounted to only trivial provocation, but lose their tempers and kill anyway. In such cases, it still makes sense to speak of victims as having

"asked for" the violent retaliation, but the question of whether the defendants were justified in responding as they did would surely still be far from decided. In the second kind, victims offer trivial provocation, or no provocation at all, but the defendants in fact mistakenly suppose them to be offering grave provocation, lose their tempers, and kill the victims. The victims cannot be said to have "asked for" the violent retaliation, but would we not say that the defendants' anger was in this instance morally more justified than in the first example, where the victims had indeed "asked for it"?[1]

The mistake made by Ashworth, stemming from his misreading of Aristotle, is in focusing too narrowly on the "injustice" in fact perpetrated by victims, failing sufficiently to emphasise, as Aristotle does, that it is APPARENT injustice that occasions rage. The role of victims is relevant not necessarily because blame attaches to them, but because their provocation is <u>understood</u> <u>by defendants</u> as a proper ground to become angry or enraged, and to retaliate accordingly. Now it might well be replied that in the second example, the defendants <u>think</u> that the victims are "asking for it", even though, as it happened, the victims are not, and that this demonstrates the conceptual connection between moral justification and the notion of "asking for it" just as well as any case where the victims did in fact "ask for it". The stumbling block here is the first example. In the first example, the defendants think that the victims are "asking for it", the victims are in fact "asking for it", but the defendants' retaliation is properly regarded as completely unjustified, leaving aside questions about insanity or diminished responsibility.

As we shall see, in this regard, the focus in point of justification should be, in the case of anger as a loss of self-control, on a moral assessment of defendants' judgments of wrongdoing, and in the case of the conception of anger as righteous indignation, of their judgments of appropriate response as well. The role of victims in this is to have provided, whether they "asked for" the retaliation or not, the grounds on which the more or less morally justified judgment of wrongdoing is based. Somewhat ironically, in view of his emphatic espousal of the "ask for it" basis of justification in provocation cases, Ashworth's analysis itself betrays a recognition that the judgment of wrongdoing is at the foundation of the element of justification in provocation cases, when he says where that element is concerned, what one is looking for is[1] "perceived injustice" (my emphasis), evidence of[2] "[t]he victim...doing something which the accused regards as a wrong against him" (my emphasis). We consider this point further in the fifth section. We must now turn to Ashworth's main[3] second-order account of anger and the angry response, from which stems his explanation of the basis of provocation in excuse, and after exposing flaws within it, show that he often himself discusses anger as if it were what we have called righteous indignation.

Accompanying the notion of "asking for it" as the justificatory element in the first-order foundations of the doctrine of provocation, in Ashworth's work, is the idea, forming the element of excuse, that when victims are "asking for it", defendants, upon the onset of anger, will experience a difficulty in controlling their response[4], this being the basis of the excuse in provocation cases. It is the second-order dependance of this conception of the

element of excuse upon flawed conceptions of emotion and reason that casts doubt upon its explanatory power at a first-order level.

Ashworth rejects the view that the dependance of the modern doctrine of provocation on the concept of loss of self-control logically entails the view that when the desire for retaliatory suffering is the dominant desire within the soul, there is effected some kind of "transition to exclusively emotional behaviour"[1]. He rejects, in other words, the conception of loss of self-control following grave provocation that we have argued underlay the development of the law in many cases during the eighteenth and nineteenth centuries, and draws on psychological theory to expound a different conception of the concept. According to Ashworth, loss of self-control is a matter of degree, that relates to the gravity of the provocation received[2]. Even following grave provocation, however, of the kind to which the law condescends, loss of self-control may not be total, and neither does the law require it to be total, in the sense that it requires that the defendant's power to control his passions by reason have been totally eclipsed by the desire to retaliate. There is, says Ashworth, a condition in which the "emotional drives" and the "rational controls"[3] may be in conflict, where the defendant may still be able to make choices to some extent influenced by reason rather than purely by desire[4]:

> "For example, someone who reacts suddenly to provocation may retain sufficient control to pass over a glinting knife and vent his or her anger with a wooden spoon or with pottery."

The notion that such control is possible, even following grave provocation finds support in some psychological theory referred to by Ashworth[5]. Maier, for example[6], to whose theory Ashworth gives a good deal of prominence[7], speaks of an intermediate condition

between "choice behaviour" and "compulsion", where the individual experiences a conflict within himself between the demands of the "voluntary control mechanisms"(ie. reason), and the demands of the "autonomic processes"(ie. the passions), the outcome of which may be action constituting some kind of "compromise" between the demands of the two, such as, in the example given, the throwing of pottery rather than the use of a knife.

This conception of the relationship between reason and the emotions, or as Ashworth has it, between rational controls and emotional drives or autonomic processes, is a picture of what we may call "optimistic Hobbesianism". Hobbes, as we have seen[1], treats the desire for retaliatory suffering as produced by perception of certain stimuli, just as (in his view) the desire for sexual satisfaction may be produced by "the image of an unresisting beauty"[2]. For Hobbes, it would seem, it is thus quite proper to speak of anger and fear[3] as drives in the same way that one might speak of sex or hunger as drives, all produced simply by the perception of certain stimuli and not acquired through a process of cultural, moral and sentimental education, as for example, the desire for a "life with art"[4]. The Hobbesian conception of the emotions seems clearly to be that which underlies the Ashworth-Maier notion of emotions as drives or autonomic processes. As far as the role of reason in relation to these drives is concerned, however, Hobbes and Ashworth differ.

For Hobbes, notoriously, only an exceptional use of reason could control the passions[5]. According to Ashworth and Maier's more optimistic Hobbesianism, however, it is merely sometimes difficult to control passions through the use of reason, namely when one has

been gravely provoked. In such situations, the conflict between emotional drives and rational controls may well issue in violent retaliation, as pointed out above, but the ability of reason to control the drive of anger to some extent[1], legitimates critical examination of the violent retaliation, examination of the kind required by the objective or evaluative criterion. The relationship between reason, emotion and criticism of resulting action presupposed by the Ashworth-Maier understanding of provocation is well expressed in a somewhat different context by Irwin[2]:

> "A. might...compulsively desire a sweet thing, but realise that both this cake and that fruit are sweet things, and consider whether to get the cake, which is three feet away, or the fruit, which is six feet away. We could not hold him responsible for eating a sweet thing rather than refraining; but we might hold him responsible for eating the cake rather than the fruit, since he could do something about which he ate."

The difficulty with this new understanding of loss of self-control as "partial"[3] is that it rests on a questionable understanding of the nature of both emotions and reason, the former being thought to be mere "drives" or "autonomic processes", and the latter thought to have only a controlling function in relation to emotional "drives". Let us consider first the suppostion that anger is an autonomic drive, produced by a fact of perception, as a hunger pang may be produced by the sight of food.

It is not difficult to illustrate just how defective a conception of a anger this is. What one "perceives" when confronted with a "provocative" event is simply someone speaking words or performing certain actions, such as striking. In order to describe these events as provocative events, it is obviously necessary to evaluate the event rather than record what one has perceived, so

that one can describe the speaking of the words as the giving of an insult, or the striking as an assault[1]. The ability to evaluate events in this way, as Aristotle knew very well[2], involves the understanding of and ability to employ a concept of wrongdoing; it is not an education acquired through the kind of habituation that leads a dog to slaver at the sound of a bell, as the Hobbesian theory of emotional development supposes that it is[3]. It follows (and this explains the use of inverted commas around the word "provocative" above) that the very idea of something having been provocative is dependant upon more than perception, that it is dependant on a judgment of wrongdoing. As Scruton puts it[4]:

> "Emotions, therefore, are teachable, for one may teach a man both a way of understanding and an appropriate reaction; together these will constitute a feeling. For example, one may teach someone how to understand another's utterance as an insult. An insult may not be obvious, and becomes obvious only when a man recognises that he is being treated in a highhanded or contemptuous way; that recognition involves the acquisition of concepts of justice, right, and denigration...[a man] must therefore learn the arts of anger and resentment, so that he can measure his response in accordance with his understanding of its object."

If we examine Ashworth's treatment of a provoked reaction, we in fact find some evidence that he accepts this point about anger. In defending the objective or evaluative criterion and the requirement of proportionality, he relies on psychological research in support of the view that these restrictions on the scope of mitigation available through the doctrine of provocation cannot be condemned or ridiculed, as some have tried to do[5], on the grounds that it is too difficult or impossible to predict when and how violently a man will react to provocation.

The conclusion he draws from his assessment of this psychological literature runs as follows[6]:

> "[R]ational factors do affect the arousal of emotional behaviour, in the sense that the likelihood of an aggressive response decreases in proportion to the justifiability of the actions of the frustrations or provoking person (e.g., whether the latter intended to challenge the accused's self-image)." (Ashworth's emphasis)

Now the important point about this passage is that, for Ashworth, it would seem that anger and aggression do not only follow naturally in the wake of a provocation as a result merely of a fact of perception, leading by a mechanistic process to a display of anger, as is the case under the Hobbesian conception of anger and aggression. For Ashworth, it would seem, preceding anger and aggression is a judgment that one has been wronged, and a judgment of how much one has been wronged - what we have been calling, in short, a judgment of wrongdoing. For if anger, and its degree, were not, on Ashworth's view, preceded and influenced by a judgment of wrongdoing, what sense could be made of the distinction to be drawn, in making such judgments and hence in the degree of anger, between intended and unintended challenges to self-image? The acceptance that anger is based on a judgment of wrongdoing thus commits him to acceptance of either or both of the conceptions of anger that were analysed in previous chapters, an essential part of both of which is the judgment of wrongdoing, and commits him to rejection of the Hobbesian conception of anger, which denies that this judgment precedes the experience of anger.

It is not only, however, the Ashworth-Maier understanding of the emotions as mere "drives" that is defective. Their understanding of reason is also incomplete, for reason performs not only a controlling function, but is also the yardstick by which to judge one's emotions as more or less appropriate[1], as expressed to more or less the right degree, and so on, a function qualitatively

different from that of mere "rational control". This second dimension of reason's function is well brought out in Von Hirsch and Jareborg's discussion of the nature of culpability in provocation cases[1]:

> "In situations of resentment...the role of the moral sense is more equivocal: It becomes the spur as well as the bridle to the passions...Far from having a purely suppressing role, one's sense of right and wrong is part of what prompts and gives legitimacy to the anger...Conscience thus has a divided role, of encouraging animus against the instigator, prompting one to take certain actions against him, and yet restraining one from making other kinds of responses."

These reflections on the judgmental as well as the controlling power of reason take us straight back to the early modern Aristotelian conception of anger[2]. For Aristotle, it will be recalled, it was possible to feel anger and act in anger, _inter alia_, for a right or wrong reason, and to the right or wrong extent, and further, to know at the time of being or becoming angry or acting in anger whether one was under or overreacting[3]. In the man of self-control, for example, the desire for retaliatory suffering can and should[4] wait[5] "to hear whether it ought [to take vengeance] or ought not, or ought not so vehemently", Aristotle's auditory metaphor encapsulating nicely the "equivocal" role of reason in relation to anger adverted to by Von Hirsch and Jareborg, who themselves revive the same metaphor to describe the judgmental role of reason that was so commonly used to the same end by the early modern honour theorists, that of the spur, as well the bridle[6].

The importance of the understanding that reason may spur one on to inflict retaliation in anger, as well as rein in the urge to inflict it, is that it may go some way to explaining why, as

Williams points out[1], it is not always or even usually the case that angry people experience a struggle within themselves upon the onset of anger, reason pulling them in one direction and their emotions in another. More often than not, they inflict precisely the retaliation that they want to inflict in the heat of the moment, even if in a calmer moment they would have inflicted much less, or none at all. This suggests that the explanation of the first-order foundations of provocation in excuse must be sought through some explanation, or through some additional explanation(s), other than difficulties experienced in keeping the emotions in check. We consider this point further in the next chapter, where different bases for the first-order foundation of provocation in excuse are considered.

We can in fact interpret Ashworth's first-order characterisation of partial justification as the extent of the moral justification for a[2] "punitive return" in anger as not simply an alternative verbal formulation of the justification as the extent to which the victim "asked for it", but as embodying, at the second-order the Aristotelian conception of the role of reason in relation to anger. To conceive of action in anger as the making of a "punitive return" echos, of course, Aristotle's basic definition of anger as the desire for <u>retaliatory</u> suffering, but further than this, such a conception of action in anger as a form of punishment may be inconsistent with the notion that anger is a "drive" or "autonomic process".

Michael Moore, building on his view that the emotions, if they are virtuous ones[3], are heuristic guides to moral insight, an extra potential source of insight into moral truths[4], argues that we

think it right to feel anger at criminal violations of our own and others interests[1], and that this constitutes an insight into the moral worth of retribution, and hence the soundness of retributivism as a theory of punishment[2]. On this view, the fact that retributive theories urge, for example, that the degree and mode of punishment should vary with the moral culpability of the offender, is in part at least explained by the parallel perception in relation to anger, namely that "the ground of anger is an apparent injustice"[3], and that the greater or lesser the injustice, the greater or lesser should be the anger, and the angry response, that is a right or mean response to the injustice[4].

If Moore is correct in locating the grounds of retributivism as a theory of punishment in the connection between anger and justice as a virtue, a connection we explored in chapter two, then Ashworth's alternative conception of partial justification as the extent of the moral justification for a punitive return would seem likewise to presuppose that anger is at least in part based on justice as a virtue, as we argued righteous indignation was, and that anger is not a mere drive or autonomic process. Having no moral worth, the latter can hardly provide the foundation for moral insight and the judgments of appropriateness that underpin both retributive theories of punishment, and hence as we have argued, the concept of anger as righteous indignation. If retribution (of which action in anger is an example) is based on moral insight, both in respect of when it is justified and in respect of how much, then the conception of partial justification as the moral warrant for a punitive return in anger cannot stand with the non-moral conception of anger as an autonomic process.

Just as we understood Ashworth's references to the influence of "rational factors" upon emotional behaviour, such as the possibility of discriminations between intentional and unintentional insults, as an implicit admission that a judgment of wrongdoing (and not merely a perception) preceded anger, so we may thus understand his references to the conception of partial justification as the moral warrant for a punitive return as an insight into the role played by the judgment of appropriateness in an angry response. We may thus reinterpret the example he gives of the angry man who passes over a glinting knife to vent his anger with a wooden spoon or pottery. This should not now been seen as the outcome of a conflict between anger as an uncontrolled drive towards great violence and reason as a check upon any impulse towards violence. It is rather the product of a judgment of appropriateness on the part of a self-controlled person, of their endeavour to make passion[1] "speak...with the same voice as reason", an instance of the agent making his anger wait[2] "to hear whether it ought [to take vengeance] or ought not, or ought not so vehemently", in accordance with the demands of justice as a virtue. We will reflect on this kind of example again when we turn to consider the question of excusing anger conceived as righteous indignation in the next chapter.

2. Provocation and Personality as Causes of an Angry Reaction

We have now done enough to show that the English doctrine of provocation's first-order requirement of (some) moral justification with respect to the killing under provocation, so as to distinguish in law as in morality, killing under grave as opposed to trivial

provocation, cannot be captured by the notion that the victim must in fact have "asked for it". This notion entailed a misplaced emphasis on the wrongdoing of victims rather than on the judgments of wrongdoing by defendants, what Aristotle elliptically called "apparent injustice". We also saw that the first-order conception of excuse as the difficulty of controlling anger through the use of reason was mistaken because at a second-order level the Hobbesian conception of anger as an autonomic drive was mistaken, and the conception of the role of reason as concerned solely with the function of controlling the expression of anger was too limited. In this regard, we saw that Ashworth, a principal proponent of these conceptions, could be taken in fact to adhere to neither, and to hold instead a second-order conception of anger as righteous indignation.

Ashworth himself, though, explicitly adopts what is in fact a different conception of the first-order foundations of the doctrine, supported by yet another conception of anger at a second-order level. This different conception of the first-order foundations of the doctrine seeks to ground the distinction to be drawn in point of mitigation between killings upon grave and upon trivial provocation in a distinction between provocation as the cause of an angry reaction, in the case of the former, and personality as the cause of an angry reaction, in the case of the latter.

As we shall see, other commentators have more recently followed Ashworth in grounding the first-order foundations of the doctrine in the distinction between provocation and personality as a cause of an angry reaction[1]. Our starting point, though, in seeking to

understand this distinction, is Ashworth's important modifications to the foundations of the early loss of self-control centred theories which supported restrictions on the scope of mitigation by way of provocation, the "honour" and "physical harm" theories. Ashworth's modifications to these two loss of self-control centred theories relate to the sophisticated theoretical justification given by Ashworth for the law's continuing refusal to condescend to killings in anger upon trivial provocations.

It will be recalled that where a defendant had killed upon no or insufficient provocation, according to the two loss of self-control centred theories as they had developed in the eighteenth and nineteenth centuries, the act would not be attributed to the defendant's passion, but would be regarded as[1]:

> "a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief...rather...the effect of a brutal and diabolical malignity than...human frailty."

The distinction being drawn, through the doctrine of implied malice, is thus between a case where the (grave) provocation given will be taken genuinely to have induced a loss of self-control, the killing thus being attributed to "human frailty", and a case where the (trivial) provocation will be taken merely to have been the setting within which the defendant displayed his bad character or malice in killing the victim. Noting the historical origins of this approach[2], Ashworth endeavours to improve on the rationale for the condescension of the law only in cases where rage was induced by grave provocation in the following way[3]:

> "[T]he primary rationale of the objective standard is that it declares the widely-felt distinction between someone who is truly provoked to kill (so that it may be said that the provocation <u>caused</u> the loss of self-control and partially

> justified it), and someone upon whose personality a relatively trivial provocation reacts in a disproportionate way." (Ashworth's emphasis)

Ashworth's contribution to the jurisprudence of the loss of self-control centred theories here, is to provide a substitute for the doctrine of implied malice, and hence to avoid reliance on the manifest fiction that a defendant who loses his temper in the face of a trivial provocation cannot genuinely have reacted in sudden anger. The distinction relied on is now whether the cause of the admittedly genuine angry reaction is the provocation, or some defect in the defendant's personality, an angry reaction being attributable to the former where the provocation was grave, and to the latter where it was trivial.

It is not now supposed, according to this modification of the basis of the loss of self-control centred theories, that the hypothetical congenitally incapable defendant of Alexander[1], who is outraged by the sight of a man with red hair and kills him for it, acted out of malice, as it would have been in the nineteenth century. Rather, it is supposed that such a defendant's angry reaction, being attributable not to the provocation but to his personality, should receive mitigation, if at all, through a plea of diminished responsibility rather than through the doctrine of provocation[2]. Ashworth's modifications thus amount to the insistence that no mitigation should be held out to those who respond to trivial provocations with fatal violence, because the doctrine of provocation is centred on provoked angry reactions, angry reactions "caused" by provocation, and not on angry reactions simpliciter, and an angry reaction in such circumstances is not to be regarded as having its root cause in provocation, but in

personality.

What we must now do is focus more closely, first, on the notion of provocation as the supposed cause of an angry reaction. What conception of cause is being employed? It seems tolerably clear that in speaking of the distinction between provocation and personality as "causes" of an angry reaction, Ashworth, and those who follow him in drawing this distinction[1], in supporting the objective condition or evaluative criterion, have in mind the familiar distinction drawn in law between an "operating...and a substantial cause", and a bare or but-for cause, the mere "setting in which another cause operates"[2]. For example, in criticising the arguments of the holders of the "pure" theory for a test for mitigation based on a loss of self-control <u>simpliciter</u>, entailing the abolition of the objective condition, Ashworth says[3]:

> "Would the proposed test refer to provocation at all? If it provided that the accused must have been provoked to lose his self-control, would this import a substantial causal connection between the provocation and the loss of self-control? Do the abolitionists seriously maintain that every quarrel or petty affront which causes a loss of temper should become grounds for reducing murder to manslaughter?"

It would seem to follow, on this analysis, that in a case where the defendant had killed upon provocation which was, let us say, not self-evidently grave, that the judge perhaps ought to tell the jury that if they regard the provocation as the "real" or operating and substantial cause of the defendant's angry reaction, then they should go on to consider whether a man having reasonable powers of self-control would have done as the defendant did; but that if they regard the provocation as the mere setting in which another cause, namely the defendant's (abnormal) personality, was the operating cause, they should, other things being equal, convict of murder or

find the defendant guilty of manslaughter on the grounds of diminished responsibility, and not provocation[1]. Where, for example, the defendant has been enraged by the victim's red hair, and killed him for it, we would say, Ashworth would claim, that the "provocation" constituted by having red hair was merely the setting in which an enraged attack occurred[2], that is best causally explained by reference to some peculiar character trait or defect in the defendant's personality, and thus, if mitigation is warranted at all, the case is best dealt with through a claim of diminished responsibility[3].

We now know what conception of cause is being employed when a distinction is drawn between provocation and personality as causes of an angry reaction, but this brings us to the question of what it could mean for <u>provocation</u> to be an "operating...and a substantial cause" of an angry reaction in the "clear cases"[4] which Ashworth would regard as worthy of mitigation by way of provocation, such as "where a teenage son loses control and attacks his bullying father"[5]. What content or meaning is being given to the notion of "cause" in this analysis?

What we find is that in elaborating on the notion of provocation as a cause of an angry reaction, Ashworth relies on a different conception of anger to any we have hitherto considered. According to this conception of anger, which we can call anger as irresistible impulse, not only, as in anger as loss of self-control, is it not thought possible to control the expression of anger through judgements of appropriateness, but according to the conception of anger as irresistible impulse it is also thought that the experience of anger is not mediated by judgments of wrongdoing.

In his discussion of provocation as a cause of an angry reaction, Ashworth acknowledges his indebtedness, in this regard, to the conception of cause employed by Hart and Honore[1], and so it is to this account of causation in provocation cases that we must turn. For Hart and Honore[2], the cause of a provoked angry reaction is a conscious experience in the context of an interpersonal transaction, but does not, in contradistinction to cases of duress for example, involve the provision of a reason by one party (here, the victim, in virtue of his provoking conduct) rendering action (here, retaliatory action in anger) by the other party more eligible. The explanation they give, in order to explain the nature of the consciously experienced cause in provocation cases runs as follows[3]:

> "[I]f one person, by suddenly appearing, startles another so that he jumps or runs away in fright, the sudden appearence would correctly be said to have made the second person behave as he did...in this non-purposive aspect these cases resemble causal connection between two physical events. In the law there are many examples of this borderline type of causal concept. Perhaps the most important is the cases of provocation...It is...an integral part of the idea of provocation that one person arouses another's passions and <u>makes</u> him lose normal self-control."(Hart and Honore's emphasis)

Mediating the provoking event and the response of the defendant, where anger as irresistible impulse is concerned, is said to be a sudden perception of an event, but not any judgment of wrongdoing. "You made me react angrily" is the causal equivalent, for Hart and Honore, of "you made me jump", the causal sense of "made" here being dependant on facts of perception, the facts respectively of provocative conduct and someone suddenly appearing, not on moral judgments. Hart and Honore's analysis of provoked anger explains why this conception of anger has been referred to as irresistible

impulse, for if it is right to regard action in anger as analogous to action when one "starts", then it would seem right to regard such actions as something entirely beyond the control or resistance of reason, for such actions, whose entire cause is perception, are not in any way mediated by judgment and reason[1].

One objection that might immediately be raised to the explanation of provocation as a cause of an angry reaction in terms of anger as an irresistible impulse, is that it sits uneasily alongside the distinction that Ashworth wishes to draw between provocation as the cause of an angry reaction where the provocation is grave, and personality as the cause of an angry reaction where the provocation is trivial. In the hypothetical case of the man who is enraged by and kills at the sight of red hair, it might indeed plausibly[2] be claimed that in such a case the provocation is the mere setting in which another cause operates, namely the defendant's personality. Nonetheless, if it is true to say that the defendant was enraged by the sight of red hair, if our conception of anger is that of anger as irresistible impulse, just as if he had unexpectedly been startled at someone's approach, should we not say that the sight of red hair caused his angry reaction?

It is possible to rebut this objection, if "provocation" is taken to mean not simply that which in a but-for sense causes the angry reaction, but that which it is reasonable to expect will produce or cause an angry reaction, that which the victim "asks for" in giving the provocation concerned, in the words of Ashworth's definition of partial justification. Suppose, to give a more complex version of a "start" example given by Hart and Honore, that A. is repairing B.'s valuable vase, and B., seeing A. through

A.'s shop window holding the vase up for inspection, bursts through A.'s door in order to see whether the repairs are finished, so startling A. that A. drops the vase. In this instance, were B. to complain about the damage thereby caused to the vase, A. could justly say that B. "asked for it", because A.'s startled reaction was just the kind of thing which B. ought reasonably to have anticipated as a possible result of his action, and hence that A. was not at fault, because the true or "operating and substantial" cause of the breaking of the vase was B.'s action.

An analogous hypothesis may be put forward about provocation. Given some degree, at least, of homogeneity in socialisation, at least in relation to what Ashworth calls "central values"[1], most people will come to know what kinds of stimuli can be expected to "cause" anger, in Hart and Honore's sense. When, therefore, it is they who provide such a stimulus, it is they who are rightly regarded as causing the anger, just as the Pavlovian scientist who rings a bell, having trained a dog to expect food afterwards, is rightly regarded as having caused the dog to slaver, because that reaction is what, in the circumstances, it is reasonable to expect as a result of the stimulus. In a case such as the hypothetical example given in Alexander, by way of contrast, a stimulus has been given in the face of which people would most certainly not be expected to feel anger, the sight of someone with red hair. In this instance, however, the defendant has experienced and given way to the "desire of overcoming present opposition", and killed. In such a case, the victim clearly has not "asked for" the response of the defendant, because no stimulus has been given which could reasonably have been expected by the victim to produce the angry

response. Neither, accordingly, would it be reasonable to regard the "provocation" as a cause of the reaction, in Hart and Honore's sense, just as we could not reasonably regard salivation by a dog as caused by the preceding ringing of a bell, unless the dog had previously undergone a process of habituation as a result of which it had come to expect food as a result[1]. Hence, in the provocation context, as Ashworth puts it[2]:

> "[I]f the provocation was objectively slight, this suggests that the substantial cause of the loss of self-control was not the provocation but rather some weakness (or wickedness) in the accused's character, and the case then becomes one of murder or mental abnormality - not provocation".

We consider the validity of importing notions of what it is reasonable to expect into causal reasoning in provocation cases below.

We now embark on the task of showing how that attempt to ground the doctrine of provocation in a first-order distinction between provocation and personality as a cause of the defendant's angry reaction fails. We begin by showing how the second-order conception(s) of anger on which that first-order distinction depends are fallacious. To this end, we must consider Dressler's recent attempt to base the provocation-as-a-cause\personality-as-a-cause distinction on a conception of anger at a second-order level not unlike Ashworth's conception considered in the first section, the "optimistic Hobbesian" conception of anger as an emotional drive which conflicts with rational controls[3].

It is perhaps because they are discussing causation rather than provocation, that Hart and Honore do not consider the implications of accepting their conception of anger as irresistible impulse for the basis of provocation in excuse; but those who hold a conception

of anger as irresistible impulse must suppose that people have even less control over action in anger than is supposed under the "optimistic Hobbesian" theory of anger discussed in the foregoing section. It is not supposed that defendants can struggle to control their emotional drives through the use of rational controls, but that they are carried to inflict instantaneous retaliation in the same way that one might be led or made to drop something on being unexpectedly stung on the hand by a wasp.

This being so it is not clear why, if anger does indeed take the form of irresistible impulse, a complete acquittal is not the result that should of necessity follow from findings that defendants acted in anger upon grave and unexpected provocation, as it would if they had been charged with criminal damage upon dropping something, and it were found that they had been led to drop the property in question upon being unexpectedly startled or stung[1]. Those who hold the conception of anger as irresistible impulse cannot explain why only mitigation of penalty and punishment is thought appropriate where provocation has been successfully pleaded[2]. More significantly, in relation to this point, they cannot explain why it is accepted that a provoked killing can in principle be worthy of mitigation even though the killing or indeed any lesser amount of harm was intentional[3]; for if provoked angry retaliation is like a "start", it must have been almost by definition unintentional, and not a product of the will. Any theory of anger and angry retaliation which is driven to this conclusion, though, would seem, to say the least, to be counter-intuitive. This brings us to Dressler's alternative second-order foundation for the first-order distinction between provocation and

personality as a cause, the "optimistic Hobbesian" conception of anger.

Dressler draws an analogy between cases of killings upon trivial provocation where the defendant partially lost his self-control, in the sense in which that is understood by holders of the "optimistic Hobbesian" conception of anger, and cases of voluntary intoxication leading to a diminished capacity for controlling actions[1]:

> "Voluntary intoxication is not an excuse even if the intoxication does affect a person's power of self-control. The blameworthiness involved in becoming intoxicated is adequate reason not to excuse a person's later intoxicated acts. Similarly, we blame - and thus do not excuse - a person who becomes angry enough to lose his self-control and kill if his anger was inexcusable. Put somewhat differently, under excuse theory, we do not (fully) blame a person who (partially) loses his self-control if, <u>but only if</u>, he is not to blame for his anger and for his homicidal actions which result from it."

There are two important points to make about the analogy with intoxication provided in this passage. The first is, as Dressler makes somewhat clearer elsewhere[2], that it draws on the "optimistic Hobbesian" conception of anger and retaliation in anger, namely the account of anger in which people are thought to be capable of only[3] "some measure" of control, and thus "barely could"[4] conform their conduct to the law. This conception of anger, of course, escapes the criticisms just made of the conception of anger as irresistible impulse, because it is perfectly consistent with a claim that defendants act intentionally in anger, and with the status of provocation as a partial excuse. The claim made by holders of the "optimistic Hobbesian" theory of anger is that although defendants may well act intentionally in anger, just as those who are intoxicated may act intentionally, the reduction in their capacity for self-control effected by receipt of the

provocation, and the conflict between emotional drives and rational controls that that produces, is part of the rationale for mitigation of the offence. The basis of the conviction for manslaughter in provocation cases is precisely the residual capacity for self-control that is thought to be present even after grave provocation[1], as it usually is even after great intoxication.

The second point about the intoxication analogy is that, in Dressler's theory, it provides the basis for distinguishing, for the purposes of mitigation, between cases where a killing in anger follows grave provocation, and a killing in anger which follows trivial provocation. In Dressler's view, defendants in successful provocation cases (where the provocation was grave), like those in cases of involuntary intoxication, "are not to blame for [their] anger and for [their] homicidal actions which result from it"[2], whereas defendants in unsuccessful provocation cases (where the provocation was self-induced or trivial), like those in cases of voluntary intoxication, are to blame for their partial loss of self-control and the actions stemming from it. So the rationale for mitigation by way of provocation where the provocation was grave is that defendants are[3], "only capable of some measure of self-control as the result of conditions for which they are not to blame".

Dressler does not elaborate much on his use of the key but ambiguous term "(not) to blame" here, which as we shall see is fatal to the first-order explanation of provocation that he wishes to provide. As we shall see, though, in using it he appears to be invoking, as Ashworth did, the distinction between provocation and personality as causes of an angry reaction to explain the refusal of the law to mitigate the offence in cases of killing upon trivial

provocation. By tinkering somewhat with his account of the intoxication-provocation analogy, we can bring more sharply into focus the sense of "blame" intended, and its relationship with the provocation-personality distinction on which he and others have relied.

In Dressler's view, where someone has become involuntarily intoxicated, they are not "to blame" for their reduced powers of self-control. This is because the reduction in their powers of self-control is attributable to a causally linked combination of an external circumstance - the actions of another in doing the intoxicating, and an internal consequence - the physiological process whereby the intoxication leads to the deadening of the higher control centres in the intoxicated person[1], for neither of which can the latter bear any responsibility, for neither is the product of their will, character, or personality. It is different, though, in Dressler's view, where the external circumstance that gives rise to the internal consequence is the voluntary consumption of intoxicants. In such cases, the reduced powers of self-control that result from that consumption are the product of defendants' wills, and they are hence properly held "to blame" for actions that are attributable to such reduced powers.

Dressler's contention appears to be that defendants are not "to blame" for the reduced powers of self-control which are the result of grave provocation for similar reasons. The reduced powers of self-control are the product of a causally linked combination of an external circumstance - the actions of another in being so provocative, and an internal consequence - the (supposedly) purely physiological process whereby the provocation places defendants'

emotional drives in conflict with rational controls, for neither of which can the latter be considered responsible, for both occur independantly of their wills. In a case where, by way of contrast, as Dressler puts it[1], "[a] person...unjustifiably creates the situation in which the provocation gives birth" (my emphasis), the external circumstance is that person's responsibility, and hence the internal consequence that follows is ultimately a product of their will, and they are thus properly regarded as "to blame" for the reduced powers of self-control that result, and the actions that ensue.

The need for some adjustment to be made to this account stems from the fact that it explains only how homicide resulting from reduced powers of self-control attibutable to self-induced provocation, being ultimately a product of defendants' wills, is something for which they are to blame, and hence deserving of no mitigation. It does not explain how the intoxication analogy assists in explaining why the law regards those who respond with fatal violence to trivial provocation that is not self-induced are "to blame" for their reduced powers of self-control, and hence receive no mitigation. If we extrapolate from Dressler's account, however, accepting for the moment the basic premises of his argument, it is possible to show how the intoxication analogy provides an explanation for the refusal to offer mitigation to killers upon trivial provocation that parallels that of Ashworth. The key in doing this lies in expanding the scope of the notion of provoked reactions for which one is "to blame". Once we have followed the analogy through, however, the defects and inadequacies of the distinction between provocation and personality as causes of

an angry reaction, as a first-order explanation of the doctrine of provocation, become apparent.

Suppose that someone is involuntarily intoxicated, and commits a crime in consequence of the reduced powers of self-control that resulted from the involuntary intoxication, but that their powers of self-control were reduced to a state in which they "barely could"[1] control their actions by, say, half a glass of wine surreptitiously introduced into their Perrier. In this case, there is the relevant external consequence, involuntary intoxication, leading to the relevant internal consequence, partial loss of self-control, and both have occurred independently of the defendant's will. Nonetheless we would say, if we were to adopt the kind of causal approach favoured by Ashworth, that the operating and substantial cause of the intoxication was not the external circumstance, the actions of another in doing the intoxicating, but some peculiar aspect of the defendant's constitution or physiological make-up; it is this peculiar aspect which is "to blame". In order for the involuntary intoxication to be regarded as the "true" cause of the partial loss of self-control there would on this theory have to have been, I would suggest, the kind or amount of intoxicant given that could or would partially have impaired the powers of self-control of a reasonable person.

Following the analogy through, in a provocation case where the external circumstance, another's provocation, leading to the internal consequence, a partial loss of self-control, both occur independantly of a defendant's will, they are thus <u>prima facie</u> not "to blame" for their having occurred. Where the provocation is some very trivial matter, however, we will say, as Ashworth does, that

the substantial cause of the loss of self-control is some defect in the defendant's character or personality for which they <u>are</u> responsible, and not the provocation for the simple occurrence of which they were not responsible. The defendant in such a case is properly given no mitigation of the offence, because the loss of self-control ultimately stems from something for which they are "to blame", their defective character. Just as one might require evidence of the involuntary consumption of an amount of alcohol that would affect a reasonable person in order for impaired powers of self-control to be attributed to the involuntary consumption, so one requires evidence of grave provocation, such as would affect a reasonable person as it did the defendant, to be persuaded that a partial loss of self-control in anger is due to the provocation.

It is at this point that the analogy with intoxication breaks down, and must be abandoned, along with the distinction between provocation and personality as causes of an angry reaction as a first-order explanation of the refusal to condescend to killings upon trivial provocation. What remains unclear in the analogy drawn between involuntary intoxication by a small quantity of drink and involuntary provocation by some trivial insult, and what is unclear throughout Dressler's analysis, is the sense in which it is the defendant who is "to blame" for their reaction in each case.

In the drink case, it might be possible to claim that the defendant was "responsible" for the fact that they were intoxicated by such a small amount of drink, in that, let us say, they had through abstinence failed to build up in themselves the kind of tolerance to drink reasonably to be expected of ordinary people. Even if were so, however, we would not say that they were "to

blame" for the impaired powers of self-control that resulted from consuming a small amount of drink, because there is nothing morally or otherwise wrong in having failed to develop the kind of constitution which is unaffected by small quantities of drink.

Putting aside, considerations of congenital mental abnormality, however, someone who has failed to develop the kind of personality or character which is resistant to trivial provocations is not only responsible for that condition, but "to blame" for it as well. The reason for this is clear, namely that it is, as Aristotle noted[1], and as Scruton argues[2], a moral failing to have failed to develop the kind of character and personality that endows one with reasonable powers of self-control. Dressler confuses "am responsible for" with "am to blame for", failing to recognise or give sufficient attention to the element of moral condemnation present where the latter is concerned but lacking in the former. This confusion, though, points further to the fallacious basis of the distinction between provocation and personality as causes of an angry reaction in cases of grave and of trivial provocation respectively.

As we saw earlier, the personality-provocation distinction in respect of the causes of an angry reaction depends, as in fact does the intoxication-constitution distinction in respect of the causes of a drunken reaction, on what we can for short call a Humean theory of causation[3]. On this theory, where we tend to associate or expect a particular reaction to follow from a particular kind of stimulus, because of our experience, as when someone is enraged by their father's violence against a member of the family, or becomes intoxicated after ten pints of lager, that stimulus is deemed to be

the cause of the reaction. Where the reaction unexpectedly happens, as when someone reacts angrily to the sight of red hair, or becomes intoxicated after half a glass of wine mixed with Perrier, we attribute the unexpected reaction to some other cause - in these cases, personality and constitution respectively.

The problem with this account of causation in the provocation context, as we saw in the last section, is that provocation does not "produce" anger in the same straightforward way that drink produces intoxication, namely through a purely physiological process. Although the "optimistic Hobbesian" conception of anger which Dressler employs to buttress his version of the provocation-personality distinction is not tainted with the kind of comprehensive implausibility that attachs to Hart and Honore's conception of anger as irresistible impulse, it suffers, naturally, from the major defect that we discussed in relation to the "optimistic Hobbesian" conception of anger in the foregoing section. Given his use of the intoxication analogy, Dressler must suppose, as Ashworth did in discussing anger as an "autonomic drive", that anger is produced, like intoxication, by facts and not moral judgments, by facts relating to individual perception and psychological make-up, just as intoxication is produced by facts relating to individual constitutions. This understanding of the causes of anger we saw in the last section to be false, because the very understanding of something as "provocative" involves not the knowledge that it has been known to cause angry reactions in the past, the essence of the Humean account of causation, but a judgment that it is a wrong, an apparent injustice. If one accepts that there is a conceptual connection between "provocation" and

judgments of wrongdoing, then one must accept not only the rejection of the use of the Humean account of causation in provocation cases, but the rejection of any meaningful distinction between provocation and personality as causes of an angry reaction.

Our personality and character includes the values that we hold and the moral judgments that we make flowing from those values[1]. Ashworth, who employs the provocation-personality distinction, rejects what he takes to be the claim of determinism, namely that we are the helpless products of our environment and of social conditioning[2]. He appears to accept, in other words, that we are at least to some extent responsible for the values that we hold and thus for our moral characters, as Aristotle claimed[3]. If this is true, though, an angry reaction in the face of grave provocation is something for which we are responsible, because it stems from a judgment of wrongdoing that is the product of our sets of and hierarchies of values, and hence of our moral characters and personalities, for which we are equally responsible.

In like manner, an angry reaction in the face of a trivial provocation is something for which we are responsible, so long as we are responsible for the moral character that led to a judgment of much greater wrongdoing than was morally warranted by the provocation. If we are not responsible for that moral character, as in cases of congenital abnormality, then the proper plea is insanity or diminished responsibility, for as Ashworth himself says[4], "[t]he defence of provocation is for those who are in a broad sense mentally normal", which means it is for those who are responsible for their moral characters, and hence for the judgments of wrongdoing that stem from them.

To say, though, that a reaction in the face of grave provocation is something for which we are responsible, because we are responsible for the moral characters that led us to judge the wrongdoing as grave, is not the same thing, to recall the earlier discussion, as saying that we are "to blame" for that reaction and for our moral character from which the reaction stems. An attribution of blame involves an adverse moral judgment in the way an attribution of responsibility simpliciter does not[1].

In a case such as the hypothetical one mentioned by Ashworth[2], where a son attacks his violent and bullying father, the son is responsible for his reaction, in as much as he is responsible for having the kind of moral character a part of which involves his adhering to a set of values according to which he judges as a great wrongdoing the violent treatment of other family members. Nonetheless, although he is responsible for his moral character, and thus for the judgment of wrongdoing that led him to lose self-control and attack his father, he is not or not much to blame for his reaction, because there is nothing or not much to blame in his having made the judgment of great wrongdoing that he did, and hence nothing or not much to blame in having the kind of moral character that he has, from which the judgment of wrongdoing, and hence the reaction flowed[3]. We consider this point further in the next section.

It is sometimes suggested, by way of contrast, that when defendants lose their tempers and respond with fatal violence in the face of a trivial provocation, this indicates not that they are both responsible and to blame for the judgment of wrongdoing that they have made, and for the set of values, as part of their

(im)moral character that led to that judgment being made, but that they must be suffering from some disease of the mind or congenital mental disability[1]. It is easy to show that this is in fact not necessarily so.

Consider the case of a South African defendant brought up in England as a die-hard Afrikaner (let us call him Terreblanche) who fervently believes that blacks should never speak to a white man on any matter whatsoever unless spoken to first, and that it is the highest form of insult to a white man for a black to break this rule of social intercourse. The "provocation" put in evidence by Terreblanche is that a black he passed in the street, let us say, said "Good Morning" to him, before Terreblanche had said anything to him.

Terreblanche, even though he has responded with fatal violence to the "provocation", is clearly not suffering from any disease of the mind, simply in virtue of the fact that the nature of the values that he holds led him to make the judgment of wrongdoing that he did, and hence to respond in anger as he did, despicable though those values may be. He is responsible for the state of his moral character, and is hence responsible for the sets of and hierarchy of values that are a part of his moral character, and hence for the judgments of right and wrong that follow from holding such values.

He is not only, though, like the son in Ashworth's hypothetical example given above, responsible for his moral character; he is to blame for it, or for that part of it that is constituted by the kinds of values that he holds where blacks' role and behaviour are concerned, for he lives, as he should know, in a society in which

such values are regarded as morally abhorrent. It follows that he is much more to blame for his reaction that the son in the previous example, because there is much more to blame in his judgment of wrongdoing, and in his moral character and in the values from which that judgment and his reaction flowed.

So previous analyses of the foundations of the doctrine of provocation have not just been distorted by inaccurate second-order conceptions of anger, the conception of anger as irresistible impulse and the "optimistic Hobbesian" conception of anger. The major defect in these conceptions of anger, the failure to attend to the judgment of wrongdoing, undermines the major first-order basis of the understanding of the doctrine adopted in many previous analyses in the attempt to explain and justify the refusal of the law to condescend to trivial provocation, namely the distinction between provocation and personality as a cause of an angry reaction.

If a provoked reaction in cases of grave just as much as in cases of trivial provocation is based on a judgment of wrongdoing (and in the case of anger as righteous indignation, on a judgment of appropriate response as well), then it is not "caused" in the sense given to that term by Hart and Honore, Ashworth, or Dressler, because the reaction will be based on evaluative as well as factual criteria. A provoked reaction in cases of grave provocation, moreover, is just as much a reflection of (a part of) moral personality and character, of the kinds of values which defendants hold, as in Ashworth's example of the son who kills his violent father, as it is in cases of trivial provocation, as in the example given of the defendant who kills a black for speaking to him

without first being spoken to. An analysis of the element of moral justification in provocation cases cannot, thus, be complete without being tied to a conception of moral character.

3. Moral Justification, Anger, and Moral Character

When Aristotle defined good moral character, he defined it as[1]:

> "that sort of habit from which men have a tendency to do the best actions, and through which they are in the best disposition towards what is best; and best is what is in accordance with right reason, and this is the mean between excess and defect relative to us."

Despite the apparent stress on action rather than feeling in this passage it is clear, as we saw in the first interlude, that Aristotle regarded good moral character not only as the disposition or tendency to act in the right way, but also as the disposition to feel in the right way, for virtue concerns both feeling and action in accordance with reason[2].

The modern criminal law, however, is concerned only with acting in the right way, and not with promoting virtue in the true sense as such[3], and hence we can and should understood good moral character, for the purposes of the criminal law, and in order to understand the doctrine of provocation in particular, as acting in a mean or proper way, and the extent of failing of moral character as the extent of departure in action from the mean. It is no concern of the law of homicide that faced with a particular provocation, defendants acted in a mean or proper way only through controlling the desire to go beyond the mean in their reaction, and not because they desired to act in accordance with the mean as well as in fact acting in this way, their passions being in accordance

with reason. The law draws no distinction in point of mitigation, in other words, between the virtuous person and the self-controlled person, for both act in the same (right or mean) way. For the purposes of the criminal law, good moral character includes not only the disposition to feel and act as virtue requires, but also the powers self-control to act in this way, in accordance with the mean.

We will thus henceforth focus, when speaking of good "moral character", on acting in accordance with the demands of right reason, which as Aristotle says, entails acting in accordance with a mean with respect to a virtue, relative to us. If this is what we are taking good moral character to mean, then a display of good moral character in acting angrily, acting angrily in accordance with the mean, will involve retaliating in anger on the grounds with the person at the time and in the way that right reason prescribes[1], even if, as will be the case with the self-controlled as opposed to the virtuous person, more retaliation than this is in fact desired. Good moral character will, though, be manifested in action in anger through adherence to the mean with regard to different virtues, according to which kind of anger is experienced, anger as righteous indignation or anger as a loss of self-control.

As we saw in chapter two, a feeling of anger in accordance with reason is a mean or proper display of the virtue of even-temperedness. The display of the virtue of even-temperedness involved the making of a correct judgment of wrongdoing, in the wake of which followed a commensurate desire for retaliation. As we saw in the interlude following chapter three, both conceptions of anger involved the making of this judgment and hence involved a

display of even-temperedness as a virtue. As far as anger as a loss of self-control is concerned, though, the judgment of wrongdoing is the only judgment made in anger, and hence even-temperedness is the only virtue capable of being displayed, because the desire for retaliatory suffering experienced upon the making of a judgment of wrongdoing leads people willy nilly to inflict the retaliation desired.

Where anger as righteous indignation is concerned, however, it is not the judgment of wrongdoing, a reflection of the virtue of even-temperedness, that ultimately determines what kind of action in anger is taken, for mediating the feeling of anger and the retaliation taken is a judgment of appropriate response. A judgment of appropriate response is a reflection of the virtue of retributive justice, and hence it is this virtue that is displayed when people act rightly upon righteous indignation. In virtuous people alone, of course, will the virtue of even-temperedness also be displayed in such circumstances, for self-controlled people make an incorrect (excessive) judgment of wrongdoing, and hence depart from the mean with regard to even-temperedness, even though their powers of self-control enable them to display the virtue of justice in the (mean or correct) way virtuous people do.

Even though correct responses in anger are manifestations of different virtues, where the two different conceptions of anger are concerned, whichever conception is in issue, a correct response in anger is thus a display of good moral character as that has been defined, namely as conformity to the mean with regard to a virtue. This establishes an important connection between moral justification and a display of good character.

An act is morally justified, in the sense accepted here, when there is a good or acceptable moral reason for acting in that way in the circumstances, even if the outcome is legally wrong[1]. In criticising the conception of the extent of moral justification as the extent to which it can be said that victims "asked for it", it was pointed out that we would regard action in anger as having as much moral justification where victims offered only trivial provocation, but defendants thought they had offered grave provocation, and responded in anger accordingly, as where victims had in fact offered provocation having the gravity that defendants understood it to have, where the victims were also "asking for it", in other words. The example illustrates that moral justification, where action in anger is concerned, is focused not on the conduct of victims as such, but on the reasons for becoming angry and retaliating in anger in a particular way to which defendants saw the victims' conduct as having given rise, and which led them in fact to act in the way that they did.

This being so, questions of moral justification, where anger is concerned, are questions concerning the moral worth of reasons for action in anger. The moral worth of reasons for action in anger is measured by the degree of conformity to or departure from the mean with regard to the virtues associated with anger, in the circumstances as angry people saw them[2]. This being so, questions of moral justification are questions about the good moral personality or character, the quality of inner resources displayed by the defendants in their reactions, for to act in accordance with the mean with regard to a virtue is the essence of good moral character, as we have defined it.

Let us go back to, and expand on distinctions drawn in chapter two, in the discussion of Holt C.J.'s understanding of the doctrine of provocation. Where actions in anger are a mean or correct response, then the actions will be completely morally justified, being a display of good moral character. For defendants have made correct judgments of wrongdoing and/or appropriateness (depending on which kind of anger they experienced), in a particular set of circumstances, those judgments being correct concrete expressions of the good or acceptable moral reasons for action that reflect a good moral character.

Where the action in anger goes somewhat beyond the mean, where defendants overreact, then the action will be only partially morally justified, because it is a display of a moral failing. Defendants whose reactions go somewhat beyond the mean, who overreact, have failed to make a correct moral judgment concerning the gravity of the provocation, or the amount of retaliation appropriate. They have thus failed to act on the kind of moral reasons that would have been, in the circumstances facing them, the mark of good moral character.

The moral failings of such defendants, however, are not great; their overreactions go only somewhat beyond the mean, in circumstances in which reasonable people might have done as they did, as the modern law has it[1]. It is otherwise where defendants' actions in anger go way beyond the mean, where they grossly overreact. In such circumstances, the action in anger will be almost completely without moral justification[2], a glaring failure to reflect good or acceptable moral reasons for action in mean or correct concrete moral judgments of wrongdoing and\or appropriate

response, and hence in action. Such a failure verges on a display of warped or bad moral character, and hence warrants conviction for murder.

What we have explored in this section is the true nature of moral justification in provocation cases as it relates to the conceptions of anger as these have been defined. The extent of moral justification (if any) is the extent of the display of good moral character by defendants in responding in anger as they did. This is gauged by reference to whether their judgments of wrongdoing and/or appropriateness, on which their anger and action in anger were based, were a correct or mean concrete expression, in the circumstances, of the moral reasons for action that reflect a morally good character. The question of justification is the question of whether their actions were in accordance with virtue, as Aristotle puts it[1], "in accordance with right reason...[a] mean between excess and defect". The extent of the departure from the mean is the extent of moral (and hence legal) culpability.

Now of course it could still be claimed that even if the presence or absence and the degree of moral justification (as that has been defined) for an expression of anger, whether that anger takes the form of a loss of self-control or of righteous indignation, set the parameters for the moral judgment of expressions of anger, moral judgment of anger should not feature in an assessment of the desert of mitigation in provocation cases. This is Smith and Hogan's claim[2].

Smith and Hogan concede that the law as expressed in the Homicide Act regards it as its business to lay down standards of self-restraint for the operation of the doctrine of provocation

similar to the standards of fortitude and resolution which are required by the law in the defence of duress and in blackmail. They nonetheless think that because the effect of a successful plea of provocation is not no criminal liability but only mitigation of the offence, there is a case for confining the focus of mitigation to the presence or absence of anger alone, at the time of the retaliation, ignoring the presence, absence, or degree of justification for the anger.

This suggestion, however, fails to convince because it gives no good reason why, just because we are concerned with mitigation of the offence rather than a possible complete acquittal, the law should condescend to trivial provocations. As Ashworth says, in criticism of this suggestion[1]:

> "What, for example, is the proper attitude to cases involving policemen or children? It is arguable that citizens have a duty to retain their self-control when being detained by a police officer acting within his lawful powers, and that therefore someone who loses control and attacks a policeman in such circumstances should not be able to succeed on provocation. It is also arguable that no one should be provoked into a violent rage by a young child...The objective test respects these moral distinctions: a purely subjective test could not."

I conclude that the law's requirement that an element of moral justification be satisfied, in the shape of grave provocation received, or believed to have been received, is a legitimate requirement. In answer to the question raised in the introduction, furthermore, I conclude that that element of moral justification does concern good or acceptable moral reasons for action, as it does in other contexts, and that this is not inconsistent with the requirement that defendants have acted in anger. This is because both anger as righteous indignation and anger as a loss of self-

control can in principle involve moral judgments - judgments more or less in accordance with the mean with regard to the virtues connected with anger; and it is moral judgments that are the foundation of good or acceptable moral reasons for action.

4. Moral Justification, and the future of the provocation defence

In this chapter, I have accepted that there is a moral justification for action in anger, founded on what is taken to be the moral nature of the virtues connected with action in anger, even-temperedness and retributive justice. If, as some have suggested[1], though, there is no necessary moral element involved in the display of these virtues, then there can be no moral justification for action in anger, and any condition of mitigation by way of provocation that hinges on a supposed element of moral justification, as the present law does, would appear to be unjustified.

Few commentators, however, have ever suggested that the doctrine of provocation should be abolished, on the grounds that there is no moral justification for action in anger. I would suggest that in the light of Moore's powerful case (referred to earlier) for the moral nature of anger and retributive justice, the onus still lies on those who are uneasy with the notion that there can be moral justification for angry retaliation to prove their case, as a means of undermining the philosophical foundations of the doctrine of provocation. There is, though, a slightly different kind of objection to the operation of the doctrine. This concerns the offence for which a plea of provocation is, and those for which it might be, available in point of mitigation.

In chapter two[1], I suggested that the logic of accepting the validity of evaluating retaliatory action in anger in terms of the doctrine of the mean with regard to the virtues connected with anger, entailed accepting the following consequence. It entailed accepting, as we saw that Holt C.J. did in Mawgridge, that as a matter of logic it must be supposed that there could be a provocation so exceptionally grave that even a blow intended to be fatal could be completely morally justified, as being in accordance with the mean with regard to retributive justice.

Logic, though, has never played a decisive role in the determination of criminal responsibility, and this point gives us cause to reflect on the degree of retaliatory violence commonly thought, in society as it is today, to be in some sense morally justified, and hence worthy of the law's condescension. In its present form, the doctrine of provocation presupposes, if the argument I have offered in this chapter is correct, that killing in response to grave provocation is going merely somewhat beyond the mean in point of retributive justice - hence the mitigation of the offence. Yet this is entirely out of step with the position on the sanctity of life adopted with regard to other defences.

Where people are threatened with death unless they themselves kill, the fear that leads them to inflict rather than suffer that harm is at least if not more understandable than the rage that leads people to kill in anger. Yet the law offers the former no partial or complete defence[2]. The law would in this regard thus seem to agree with Aristotle that[3]:

> "[N]ot every action nor every passion admits of a mean; for some have names that already imply badness, eg...in the cases of actions...murder; for...suchlike things imply by their names that they are themselves bad...It is not possible, then,

> ever to be right with regard to them; one must always be wrong."

If this is the law's view where unlawful intentional killings stemming from fear are concerned, there would seem to be no justification for taking a different view where such killings stem from anger.

What is more, although there is no space to explore the question in any detail here, I would argue in this regard that it is high time for a revolution in our moral thinking on the issue of the degree of violence thought worthy of mitigation, as going only somewhat beyond the mean. Even if one accepts that there can be moral justification for retaliation in anger, is it not normally only verbal retaliation, retaliation through facial expression, or sometimes a trivial slap, or the like, that is commonly thought of as in this regard partially or completely justified?

As Ashworth has pointed out[1], aggressive behaviour is merely one of a range of possible reactions to provocation. Others may include not letting the provoker "get to" one, simply digesting one's anger, anxiety, or even blaming oneself for having been the object of the provoking conduct. The law's condescension in cases of homicide upon provocation seems to be based in part on the view that it is angry retaliation that, amongst these reactions to provocation, is the most natural and inevitable, and that there is no logical limit to the degree of violence that, given sufficiently grave provocation, will hence be worthy of indulgence. This is evident from Lord Diplock's claim that[2]:

> "[t]he average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon."

It is suggested that, given that aggressive behaviour is merely one amongst a range of reactions to provocation, to understand the scope of even partial justification to include retaliatory acts in response to provocation such as the infliction of grievous bodily harm or killing in anger, seems to be to adopt as one's perspective for assessing desert of mitigation not the even-tempered person possessed of reasonable powers of self-control, but the violently irascible person, Aristotle's akrates. This is completely out of step with the standards the law sets for ordinary people to observe in other areas of the law[1].

I would suggest, thus, that killing in anger should be regarded as a gross overreaction, as action going far beyond the mean, and hence deserving of conviction for murder. A humane system of criminal law should not give credence to the view that there can ever be even partial moral justification for deliberately inflicting a fatal blow, notwithstanding that the retaliation was in the face of the gravest provocation. In as much as the doctrine of provocation suggests as much, then it is, as Lord Diplock has said, an "anomaly in English Law"[2], and should be abolished as a partial defence to murder. In cases of provoked intentional killings, the influence of provocation should be a matter for the executive to take into account, as duress and necessity are, in murder cases[3].

What, though, of the relationship between a defence of provocation, and lesser degrees of unlawful violence than homicide, for which there may, as suggested above, be moral justification? The traditional approach to this relationship is to say that it would be completely impractical to allow a defence of provocation

to operate in mitigation, where violent offences other than homicide are concerned, as a matter of substantive law. How could a plea of provocation ever be accommodated within the law relating to criminal assault, for example, it is argued, when there is no lesser crime to which to reduce the defendant's offence if their plea is successful?

The answer to this age-old problem is to conceive of action in anger, as I have been doing, in terms of conformity to and departure from the mean with regard to the virtues connected with anger. So to conceive of it, as I have shown, is to accept that moral judgments of retaliatory action in anger are judgments of more and less, judgments of degree, ranging from complete moral justification, through partial moral justification, to complete lack of moral justification.

This being so, it is possible to conceive of some (chiefly minor) acts of retaliation, such as a psychic assault or a trivial battery, as being completely morally justified in the face of very grave provocation[1]. If this is accepted, then the age-old problem disappears, because in such cases the right verdict is not conviction of some lesser offence of which, ex hypothesi, there is none, but complete acquittal. Provocation could thus become a complete defence to assault, where the provocation preceding it was so very grave that the assault was completely morally justified, in much the same way that duress and necessity are in certain circumstances complete defences to that and other crimes of violence.

Such a proposal for a change in the law follows logically from the analysis of action in anger in terms of conformity with and

departure from the mean with regard to the virtues connected with anger. The objection to it is practical. If provocation were available as a complete defence to minor offences of violence, the amount of time taken up in trials for such offences would be vastly increased, to the detriment of the criminal justice system as a whole.

Even if this is not a telling objection, it counsels against the present rule that wherever there is evidence that the defendant was provoked into angry retaliation, the issue of provocation must be left to the jury[1]. For each minor crime of violence[2], the judge could be given a power to direct the jury that they may acquit of any such offence if the provocation was so exceptionally grave that the retaliatory action taken in anger seems to them to have been completely morally justified[3]. What would count as "exceptionally" grave provocation would then naturally depend on the kind of retaliation taken. What would count as provocation sufficient completely morally to justify a psychic assault might be very much less than that which would completely morally justify the infliction of a battery.

We briefly discuss reform of the law further in the next chapter, having considered the first-order foundation of provocation in excuse. To this latter end, for reasons which will become apparent, it will be necessary to keep clearly separate for the purposes of analysis two kinds of case in which provocation may under the present law, and would under my proposals above for minor offences of violence, be successfully pleaded.

The first kind are those that arise under the present law, in which there was only partial moral justification for the

retaliation, because the defendants went somewhat beyond the mean in point of their retaliation: they overreacted. The second kind are those in which there is complete moral justification for the retaliation, that retaliation being in accordance with the mean. As we shall see, the nature of excuse differs significantly according to which of these kinds of reaction is in issue, as well as according to the kind of anger which led defendants to react in the way that they did.

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[1]. Nagel E., The Structure of Science (1961) R.K.P., 483.

[2]. The "evaluative" crterion is, of course, the requirement in section three of the Homicide Act that the jury ask themselves whether a reasonable person would have done as the defendant did, a reasonable doubt concerning whether a reasonable person would not have so done being a condition of the defendant's acquittal, on the grounds of provocation. The evaluative criterion, naturally, is focally concerned with ensuring that only killings in response to grave provocation are deemed worthy of mitigation. There will be no space here to address the difficult question of what "grave" provocation means in a culturally plural society. I ask the reader simply to assume for the sake of argument that there is something one can loosely refer to as grave provocation to someone with the accused's characteristics, as DPP v Camplin envisages.

[3]. Mitigation is also dependent, of course, on having acted in the heat of blood. On this requirement, see chapter five infra. Ashworth, in Ashworth (1976), was the first lawyer to provide a systematic analysis of the link between the need for grave provocation and the element of moral justification in the doctrine of provocation.

Page 209

[1]. Ashworth (1976), 317.

[2]. ibid., 307.

[3]. ibid., 307.

[4]. ibid.,307-308.

[5]. See now Sharp [1987] Q.B. 853.

[6]. Ashworth (1976), 307.

Page 210

[1]. Ashworth (1976), 308.

Page 211

[1]. NE1135b26-28, in fact cited by Ashworth, at Ashworth (1976), 282.

[2]. NE1135b29.

Page 212

[1]. For a similar view, see Macauley (1987), 140-141; Brudner

Page 212 (cont.)

(1987), 364-365. What we would conclude about the extent of moral justification for defendants' anger in an example such as this second one may be in part, of course, determined by whether we think it was reasonable to make the mistake that led to the assumption that grave provocation had it fact been offered, quite apart from the question of whether there was moral justification for responding in the way that the defendants did to the provocation they mistakenly assumed they had received. It would involve too long a detour to explore the ramifications of this aspect of moral justification here.

Page 213

1. Ashworth (1976), 317.

2. ibid., 307.

3. For his alternative second-order account, see section two.

4. Ashworth (1976), 315, and 315 note 12.

Page 214

1. Ashworth (1976), 306.

2. ibid., 305.

3. ibid., 305-306.

4. ibid., 306 note 77.

5. ibid., 304 notes 63\64\65\66\69\74.

6. cited by Ashworth at ibid., 306 note 74.

7. Ashworth (1976), 305-306.

Page 215

1. DC25.9.

2. ibid.

3. ibid.

4. Professor Raz's phrase, in Waldron, ed. (1984), at 189.

5. L268.

Page 216

1. For support for this view in law, see the dicta of Shaw L.J. in Bancroft (1981) 3 Cr.App.R. (s) 119, at 120.

Page 216 (cont.)

[2]. Irwin, in Rorty, ed. (1980a), at 130.

[3]. Ashworth (1976), 306.

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[1]. On this, see MacIntyre (1981), chapter 15, esp.190-197.

[2]. For a discussion of Aristotle's views on this point, see Kosman in Rorty, ed. (1980a), chapter 7.

[3]. See chapter 3, section 1 ante.

[4]. Scruton in Rorty ed. (1980b), at 524\525.

[5]. See Brett (1970), 634.

[6]. Ashworth (1976), 304-305.

Page 218

[1]. See NE1125b32-36; Von Hirsch and Yareborg in Schoeman, ed. (1987) chapter ten, section iv.

Page 219

[1]. Von Hirsch and Yareborg, in Schoeman, ed. (1987), 250.

[2]. page 218, note 1 ante, and Scruton in Rorty, ed. (1980b) at 522-23.

[3]. NE Book 4 v.

[4]. ibid., and see Aristotle's discussion in the passage referred to in the next note.

[5]. MM1202b20-21.

[6]. See chapter one ante.

Page 220

[1]. Williams (1978), 480.

[2]. Ashworth (1976), 307.

[3]. Moore, in Schoeman, ed. (1987), chapter 8.

[4]. ibid., at 201-202; see also Moore (1982), 1061-1156.

Page 221

[1]. Moore, in Schoeman, ed. (1987), at 210-211.

Page 221 (cont.)

[2]. ibid., at 208-213.

[3]. NE1135b29.

[4]. For an instructive account of Aristotle's views on this issue, see Urmson, in Rorty, ed. (1980a), chapter 9.

Page 222

[1]. MM1202b20-21.

[2]. NE1102b28.

Page 223

[1]. Recent support for this approach is to be found in McAuley, (1987) 133, at 145-146. See also Dressler (1988), 472-476.

Page 224

[1]. East 1 P.C. 214-215.

[2]. Ashworth (1976), at 294-295.

[3]. ibid., at 311; see also ibid., at 308.

Page 225

[1]. Alexander (1913) 109 L.T. 745.

[2]. Ashworth (1976), 311-314.

Page 226

[1]. See page 223 note 1 ante.

[2]. The contrast drawn here between "cause" and "setting" is taken, of course, from the case of Smith [1959] 2 Q.B. 35, at 42-43.

[3]. Ashworth (1976), 319.

Page 227

[1]. Ashworth (1976), 311-314; McAuley (1987), at 145-146. For criticism of this distinction in its application to the Homicide Act 1957, see Horder (1987) 655, at 656.

[2]. This may have been the kind of reasoning employed by Darling J. in Alexander (1913) 109 L.T. 745.

[3]. Ashworth (1976) 311-314; for a similar view see Williams (1954), 743.

[4]. Ashworth (1976), at 318.

Page 227 (cont.)

[5]. ibid.

Page 228

[1]. ibid., at 308 note 85.

[2]. Hart and Honore (1985), at 58. The account that they give of causation in provocation cases is unchanged from the first edition on which Ashworth relies.

[3]. Hart and Honore (1985), at 58.

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[1]. For support for such a view, see Smith and Hogan (1988), at 43; S. v. Arnold (1985) 3 S.A.L.J. 256.

[2]. On this see infra, 235-245.

Page 230

[1]. Ashworth (1973), at 161-162.

Page 231

[1]. DC25.9\HN12.4.

[2]. Ashworth (1976), at 308.

[3]. Dressler (1988).

Page 232

[1]. It would be different, of course, if they had been predictably rather than unexpectedly startled, as in Ryan (1967) 40 A.L.J.R. 488., discussed by Elliot, (1968) 497.

[2]. See eg. Howard (1970), 323.

[3]. A-G of Ceylon v. Perera [1953] A.C. 200.

Page 233

[1]. Dressler (1988), at 475.

[2]. ibid., at 471\472.

[3]. ibid., at 472.

[4]. ibid.

Page 234

[1]. See Bancroft (1981) 3 Cr.App.R. (s) 119, at 120.

Page 234 (cont.)

[2]. Dressler (1988), at 472.

[3]. ibid.

Page 235

[1]. Williams (1983), at 416.

Page 236

[1]. Dressler (1988), at 475.

Page 237

[1]. ibid., at 472.

Page 239

[1]. NE Book 3.v.

[2]. Scruton, in Rorty, ed. (1980b), at 525.

[3]. Hart and Honore (1985), 4-15, esp. 10-11.

Page 241

[1]. For arguments to this effect where judgments concerned with feelings are concerned, see generally Kosman, in Rorty ed. (1980a) chapter 7, and Scruton, in Rorty ed. (1980b) chapter 22.

[2]. Ashworth (1976), at 314.

[3]. NE Book 3.v.

[4]. Ashworth (1976), at 312.

Page 242

[1]. On this see eg. Morris, in Schoeman, ed. (1987), chapter 9.

[2]. Ashworth (1976), at 318.

[3]. In the case of anger as righteous indignation, of course, the reaction would be flowing ultimately from the judgment of appropriate response, but this this judgment is a much the product of moral character in the man who experiences anger as righteous indignation as the judgment of wrongdoing is in the man who loses his self-control.

Page 243

[1]. See eg. Williams (1954), at 743.

Page 245

[1]. EE1222a7.

[2]. See eg. Hutchinson (1986), at 110.

[3]. See eg. Kant, MEJ 13-14\18-21; Hegel, PR addition to sect.94; and see section 91.

Page 246

[1]. NE1125b32-36.

Page 248

[1]. Se eg. Von Hirsch and Yareborg, in Schoeman, ed. (1987), at 246; Brudner (1987), at 364.

[2]. See eg. NE1106b16-1107a8, and first interlude ante.

Page 249

[1]. Homicide Act 1957, section 3.

[2]. "Almost" here indicates that even the defendant who grossly overreacts still acts for what can be recognised as a right reason, namely a provocation. It is just that he responds to that provocation in entirely the wrong way. See Scruton in Rorty, ed. (1980b), 525.

Page 250

[1]. NE Book 2.vi.

[2]. Smith and Hogan (1988), at 341.

Page 251

[1]. Ashworth (1976), at 318-319.

Page 252

[1]. See eg. Lacey (1988), at 21, discussing retributive justice.

Page 253

[1]. See chapter 2, section 5.

[2]. Howe [1987] 1 All E.R. 771.

[3]. NE1107a9-26.

Page 254

[1]. Ashworth (1976), at 303-304.

Page 254 (cont.)

[2]. Phillips v R [1969] 2 A.C. 130, at 137.

Page 255

[1]. On this see Smith and Hogan (1988), at 341.

[2]. DPP v Camplin [1978] 2 All E.R. 168, at 170.

[3]. See page 255 note 1 ante.

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[1]. For an discussion of an example of such a case, see chapter five infra.

Page 257

[1]. Homicide Act 1957, section three, and see DPP v Camplin [1978] 2 All E.R. 168.

[2]. By minor offences of violence I mean offences up to and including the infliction of a battery. Excluded, of course, are violent sexual offences. A plea that an insult or other provocation provoked a sexual assault has no moral purchase in our society: see Kosman in Rorty, ed. (1980a), at 109.

[3]. Being a power to direct the jury on provocation, and not a mandate to do so, it could be made clear that judges were only to use that power in cases where the provocation was extreme, thus reducing the practical problems that would be posed by routine use of the provocation plea in run-of-the-mill cases of non-fatal offences against the person.

> "[E]ven in extreme evils there are degrees: so this instance of your offence is not of the highest strain; for if you had sought to take away a man's life for his vineyard as Ahab did, or for envy as Cain did, or to possess his bed as David did, surely this offence had been more odious."[1]

The defence of provocation cannot be concerned merely with the extent, if any, of moral justification for retaliation taken in the face of provocation. If that were all with which the doctrine were concerned, then the doctrine could in principle be concerned with the mitigation of or the provision of a complete defence for retaliation taken in revenge. The doctrine of provocation is not, though, concerned to reduce from murder to manslaughter or to provide a complete defence for killings in cold-blooded revenge, even in circumstances in which it could be plausibly claimed that reasonable people might have done likewise[2].

The reason for this is clear. If the doctrine were concerned to mitigate or provide a complete defence for such killings, this would be to concede that the infliction of punishment is a matter not only of public right and duty, attendant upon the holding of public office alone, but of private right and duty, stemming from citizenship alone, a position abandoned in England in medieval times.

This being so, there must be not only moral justification for provoked killngs, if mitigation or a complete acquittal is to be warranted, but there must also be excuse. In the provocation context, this has been universally understood to mean that the the defendant must have retaliated in anger. It is only if they acted in anger, it is supposed, that the doctrine of provocation can lay claim, as it always has, to be a concession to human

infirmity, in a way a concession to actions taken in cold-blooded revenge would not be.

What is it, though, about acting in anger that enables defendants to ground their claims to mitigation in excuse as well as in moral justification? This requires reflection not only on the nature of anger but on the nature of an excusing condition. We have to decide not only what we think makes acting in anger different from acting in cold blood, but what we think excusing conditions are, such that we can say action in anger falls in principle within the scope of such conditions in a way action in cold blood does not. As we will see, as suggested in the introduction, the different conceptions of anger that I have isolated do not necessarily fall within the same kind of excusing condition.

1. Excusing conditions - an outline of a theory

Where excuses are claimed, it is admitted that a wrongful act or acts in law have been done by defendants[1]. What is claimed, as the basis of excuse, however, is one of two things. The first is that for the agents concerned, the empirical conditions in which they could have been expected to act in accordance with the law by not committing the actus reus were not present, or that the absence of those conditions had made conformity with the law in this respect a matter of exceptional difficulty. This is what we may call the "narrow" conception of excusing conditions[2], and explains such existing excuses as mistake, involuntary intoxication, insanity and diminished responsibility.

In the case of mistake, for example, the empirical conditions not present which, if present, might have made avoidance of the

actus reus something we expect, are something in the circumstances that should have alerted defendants to the possibility that they might be committing or were about to commit the *actus reus* in question. In cases of insanity, involuntary intoxication, and diminished responsibility, the empirical conditions negating our expectation that defendants will avoid committing the *actus* reus obviously relate to the mental condition afflicting them, for which they are not to blame[1].

There are, of course, differences between the way in which these pleas fall within the narrow conception of an excusing condition. A plea of mistake falls within the narrow conception *via* an appeal to natural human fallibility; a plea of involuntary intoxication *via* an appeal to natural human infirmity; and a plea of insanity or diminished responsibility *via* an appeal to abnormal human infirmity. As we shall see, these subtle differences are of importance in understanding the way in which action in anger may fall within the narrow conception of an excusing condition. Nonetheless, all such pleas share the common characteristic that they are a claim that certain empirical conditions, existing at the time of the offence, negate any claim that conformity to the law should have been expected. As we shall see, some kinds of action in anger worthy of excuse fall within this narrow conception of an excusing condition.

There is, however, a second basis for excuse. Those who base their claims in this second, "broad" conception of excusing conditions[2], concede not only that a legal wrong was committed, but that empirical conditions were present in which conformity with the law could be expected[3]. What they claim as their excuse, however,

is that the moral conditions in which conformity with the law could be expected were absent. These conditions are absent when the principle or maxim on which defendants act is one with which ethically well-disposed people[1] can identify, in their capacity as moral agents[2]. Defendants claim that, in that capacity, ethically well-disposed people would regard the principle on which they acted as, in the circumstances, a good or acceptable moral reason for action in breach of the law.

It is this broad conception of excusing conditions that, as we shall see, explains the foundations of the defences of duress and necessity, where those defences are available for defendants who chose between two roughly equivalent or incommensurable evils[3]. In such cases, their claim is that ethically well-disposed people would have regarded the principle on which they acted, in deciding to cause rather than suffer harm, as an acceptable moral reason for acting as they did, as a reason for action with which, in the circumstances, ethically well-disposed agents could identify. I shall henceforth refer to such cases, in a short form, simply as duress and necessity cases.

Action in righteous indignation is, as we know, action based on a moral maxim or principle, and is thus in this sense like action in duress and necessity cases. As we shall see, the broad conception of an excusing condition accordingly explains the foundations in excuse of some kinds of action in anger stemming from righteous indignation.

There are five kinds of reaction and overreaction in anger to fit within one or other of the conceptions of an excusing condition:

1. Mean or right reactions in anger stemming from a loss of self-control.

2. Overreactions in anger as a loss of self-control due to a hasty judgment of wrongdoing.

3. Mean or right reactions stemming from anger as righteous indignation.

4. Overreactions in anger as righteous indignation due to weakness of will.

5. Overreactions in anger as righteous indignation due to a hasty judgment of appropriate response.

In the course of the next three sections, we shall be concerned to explain the basis of all of these in excuse. In section two we will deal with case 1, showing how it falls within the narrow conception of excusing conditions. In section three, we will deal with case 3, explaining how it falls within the broad conception of excusing conditions. In section three our concern will be to show how cases 2, 4, and 5 fall within the narrow conception of excusing conditions, but do so for different reasons to case 1.

2. Excusing mean actions in anger due to a loss of self-control

I explained in the last chapter how it was possible to conceive of provoked retaliation as on occasions being a mean response in anger to an exceptionally grave provocation. An example would be, perhaps, where a mother is told by a man that he has raped her young daughter, and that he is proud of the fact. Her immediate response in anger is to slap him, or shake her fist at him. I would suggest that there is complete moral justification for at least the latter response.

On what basis, though, is such a reaction to be excused as well as morally justified? Using this example as a reference point, in

the next two sections I shall consider the basis of the mother's claim to an excuse in law. In this section I will focus on her reaction on the assumption that it resulted from a loss of self-control, rather than being a display of righteous indignation.

Is action in anger ever excused because it falls within the narrow category of excusing conditions? Action in anger due to a loss of self-control would seem to be a candidate for this category. The experience of anger as a loss of self-control involves, as we saw in chapter three, the subjection of the will to the passions, and the consequent temporary eclipse of reason as a guiding force influencing action. This being so, it would seem plausible to contend that when we excuse action in anger resulting from a loss of self-control, we do so precisely because the eclipse of the power of reason to hold the passions in check is the removal of an essential empirical pre-condition for conformity to the law to be expected.

Theorists who have sought to locate the foundations of provocation in the narrow conception of excusing conditions have often done so through an analogy with diminished responsibility[1]. In cases of diminished responsibility, it is said, an abnormality of mind substantially impairs "the ability to exercise will power to control physical acts in accordance with...rational judgment"[2]. Defendants' abnormalities of mind, in other words, are disabling conditions or infirmities which turn them into virtual slaves to their desires, empirical conditions that make conformity with the law almost impossible.

The conception of an excusing condition governing provocation cases is likewise the narrow one, on this analogy, because the kind

of inroads made by loss of self-control in the face of provocation on the empirical conditions in which conformity with the law can be expected, are thought to be essentially as substantial as those made by an abnormality of mind in cases of diminished responsibility. As Hart succinctly puts it[1]

> "In cases exemplified... in "provocation" and "diminished responsibility", if we punish at all we punish <u>less</u>, on the footing that, although the accused's capacity for self-control was not absent its exercise was a matter of abnormal difficulty."

This analogy with diminished responsibility, whilst being an attractive one, is misleading as an explanation of how action in anger attributable to a loss of self-control is excusable within the narrow conception of an excusing condition. The attractiveness of the analogy stems, of course, from the supposed fact that in both cases of diminished responsibility and provoked loss of self-control, defendants are rendered slaves to their passions, and the power of reason to control actions is eclipsed by the compelling force of those passions. The misleading character of the analogy stems from two sources.

First, whilst it may be true that we punish less in cases of diminished responsibility because the ability of reason to control actions has been substantially impaired, that is not true of provocation cases. We punish less in provocation cases because both the element of excuse <u>and</u> the element of moral justification have been satisfied in any given case. No one thinks it sensible to ask if an element of moral justification has been satisfied in cases of diminished responsibility. Do we, then, altering Hart's terminology to allow for this point, <u>excuse</u> in cases of diminished responsibility and provocation because of the substantial

impairment of reason to control actions?

As we shall see in section four, it is only true of one kind of angry response, an overreaction due to weakness of will, that its foundation in excuse is an exceptional and understandable difficulty in controlling passion through the use of reason. So the analogy with diminished responsibility, if it were at all attractive, could only explain the foundation in excuse of case 5 above. There is, though, a further and fatal objection to the analogy with diminished responsibility.

The concept of diminished responsibility covers not only the inability of reason to control the passions, but the diminution of moral responsibility in a much broader sense. If, for example, a defendant were, in response to a provocation, to rape a woman as a result of which she died, he might well be able to claim that the offence was manslaughter on the grounds of diminished responsibility. He would hardly be likely, though, to succeed in a plea of provocation, however grave the provocation was. As we saw in chapter three, building on the analysis of chapter two, there is a rational relationship between anger and retributive retaliation of a certain familiar kind, such as "looking daggers" or striking[1], even where self-control has been lost, which underpins the doctrine of provocation in a way it does not underpin the doctrine of diminished responsibility. This relationship rules out a purely sexually motivated form of "retaliation" where a provocation plea is in issue as something the reasonable person would never have done.

Diminished responsibility, unlike provocation, is designed to cover irrational responses to stimuli. It is a concession to

abnormal human fallibilities, frailties or infirmities that remove the empirical conditions that make conformity with the law something we expect. Provocation is a concession to normal human emotion[1], and we should accordingly reject an analogy that asks us to accept that we excuse defendants such as the hypothetical provoked mother above, for essentially the same reason that we excuse sexual psychopaths like Byrne[2]. We must thus seek the foundations of loss of self-control in the narrow conception of excusing conditions elsewhere.

I am assuming that our hypothetical mother's claim is that she inflicted retaliation in anger experienced as a loss of self-control. She claims just to have "snapped" on hearing the provocation, and hence just "found herself" slapping the man in the face, the typical claim of those who in anger lose their self-control[3]. The proper analogy to draw here, I would suggest, is with an example given by Elliot in his discussion of Ryan v. The Queen[4]. Ryan shot a garage attendant during an attempted robbery. He claimed that this happened when the attendant suddenly moved when he (Ryan) was tying up the attendant, causing him (Ryan), surprised by the sudden movement, to discharge his gun accidentally, killing the attendant. Ryan's appeal against conviction for murder was dismissed, but what is of most interest, for our purposes, is the justification for the conviction given by Elliot, in his discussion of the case. Elliot supports the dismissal of the appeal on the following grounds[5]:

> "Two factors distinguished Ryan's reaction from cases of involuntary action. He was not unconscious when he discharged the rifle; he fired impulsively, on the spur of the moment. Moreover, his act was "a consequence probable and foreseeable of a conscious apprehension of danger". His reaction was like the sudden movement of a tennis player retrieving a difficult

shot; not accompanied by any conscious planning, but certainly not involuntary."

The key feature explaining why Ryan's case deserved no mitigation, and explaining the tennis player's "reflex" volley, is of course that both could be taken to have expected an event to occur of a kind which might lead them to do the very thing that they did. In provocation cases, this is only true of self-induced provocation. Suppose, to give a slightly different example, as I am walking along the street someone unexpectedly throws something at me. In panic, I naturally immediately duck or put my hand up to protect myself. These reactions have the same properties as Ryan's and the tennis player's actions: they are impulsive reactions on the spur of the moment, not accompanied by conscious planning. Indeed, being impulsive, they are not the product of reason at all, but only the intentional product of a desire to protect oneself that has been translated into immediate action.

This serves to differentiate such actions from other kinds of actions which are often said to be done on the spur of the moment, without thinking, such as rushing to someone's aid on seeing an accident, heedless of one's own safety. Such actions would not appear to be instinctive or impulsive in quite the same way as peoples' actions in raising a hand on suddenly seeing a projectile thrown at them. The actions of "instinctive" rescuers would seem to be based on a moral maxim or principle[1], and thus to bear more of a family resemblance to action upon anger experienced as righteous indignation, in a way that the self-protective actions just mentioned are and do not. We discuss the actions of impulsive rescuers further in the next section.

What is most significant about the protective actions just

mentioned, is that if they are indeed the intentional products not of reason but of desire translated immediately into action, then they would seem to have the same properties as loss of self-control due to impetuosity, the kind of self-control that is embodied in the "modern" theory. The protective actions are not only the immediate and impulsive product of desire rather than reason, but they are rationally related to the perceived threat in a broadly similar way to the way in which the retaliation inflicted following a loss of self-control is proportionable to the judgment of wrongdoing. Peoples' impulsive protective response to someone unexpectedly throwing a paper dart in their direction might be someone less drastic than their impulsive response to the sudden realisation that masonry is falling towards them from on high. In the same way, such peoples' retaliatory action following a loss of self-control, upon being trivially insulted, is liable to be much less drastic than retaliatory action following a loss of self-control upon grave provocation.

If this analogy seems more convincing than the analogy with diminished responsibility, then what is its foundation in the narrow conception of excusing conditions? In justifying Ryan's conviction at a theoretical level, Elliot focused on two key features of Ryan's action. First, it was a voluntary action, a product of the will, even though it was an impulsive, spur of the moment action. This characteristic it shares with action in anger conceived as a loss of self-control. Secondly, though, Ryan was or most certainly should have been aware of the likelihood that he might perform just such an action, and was therefore not only responsible for action, but to blame for it as well. This is not

true, ex hypothesi, of those whose reaction following a loss of self-control is a mean response to a provocation, the kind of case presently under discussion.

This enables us to focus purely on the impulsive character of actions stemming from a loss of self-control. Action stemming from a loss of self-control, like the kind of sudden protective actions taken out of panic discussed above, are the product of a judgment (of a certain degree of wrongdoing and of a certain degree of danger respectively) 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. This serves to distinguish them not only from the kind of action taken by the impulsive rescuer, who acts on a maxim or principle, but also from the person who, to give the facts of an example used by Smith and Hogan[1], on discovering his wife in the act of adultery, calmly loads his gun and shoots her there and then. He acts, in a sense, on the spur of the moment, but he also acts on a maxim or principle, and his action thus does not share the kind of impulsive character that marks out action stemming from a loss of self-control[2].

Given that actions stemming from a loss of self-control are products of desire and not reason, in the sense in which I explained that idea in chapter three, there would seem to be good grounds for suggesting that they, like the impulsive self-protective actions mentioned, fall within the narrow conception of excusing conditions. All such actions are voluntary, but in as much they are not the product of reason, they cannot be said to have occurred in empirical conditions in which conformity with the law

through avoidance of the actus reus could be expected[1], which is the key defining feature of an act excused under the narrow conception of excusing conditions.

The act of the woman who slaps the rapist in the face on hearing his confession is thus not only morally justified, in that her action is the ultimate product of a judgment of wrongdoing that was a good moral reason to act as she did, but her act is also excused under the narrow conception of an excusing condition. She lost her self-control, following a judgment of wrongdoing, and thus her consequent actions were not taken in empirical conditions in which conformity with the law could have been expected. Like concessions to action taken as a result of involuntary intoxication, her actions in anger thus fall within the narrow conception of excusing conditions.

Is this analysis of the basis of loss of self-control in the narrow conception of excusing conditions sufficient to ground the excuse not only of someone like her, who acts in a mean or right way in anger, but also the person who overreacts following a loss of self-control, case 2 above? It is not. When people overreact, following a loss of self-control, it is their judgment of wrongdoing that is at fault. They judge that more wrong has been done to them than has in fact been done, and this leads to the experience of a desire to retaliate and hence willy nilly to retaliatory action greater in degree than is warranted by the gravity of the provocation. What has therefore to be excused, in cases of an overreaction not going too far beyond the mean, is not only a loss of self-control, but the making of a wrong judgment of wrongdoing.

Defendants' appeals in case of overreactions are thus as much to human fallibility as they are to human infirmity. We consider the possible basis of the making of wrong judgments of wrongdoing in the narrow conception of excusing conditions in section four. We must now turn to consider the foundation in excuse of mean or right retaliatory responses stemming from righteous indignation, case 3 above.

3. Excusing mean retaliation stemming from righteous indignation

At the beginning of the chapter, it was indicated that a distinction is ordinarily drawn between the narrow conception of excusing conditions, within which loss of self-control was explicable as founded in excuse, and a broader conception of excusing conditions. The focus of the "broad" conception of excusing conditions is not a claim that defendants' decisions to commit a crime rather than suffer threatened consequences were, in the circumstances, made in empirical conditions in which conformity with the law could not be expected. It is admitted that the empirical conditions were present in which conformity with the law could have been expected[1]. It is claimed, however, that a decision to commit the crime was taken in moral conditions in which conformity with the law could not be expected. For it is claimed the defendants' acts which constituted the wrongs were based on maxims or principles with which ethically well-disposed agents could identify, in their capacity as moral agents, and which were hence morally acceptable reasons for action.

Defences at present thought to fall within the scope of the broad conception are those of necessity and duress, in the kinds of

cases outlined in the first section[1]. In such cases, the nature of excuse centres on the claim that ethically well-disposed people, possessed of a reasonable measure of fortitude, would have regarded the maxim or principle on which the defendant acted as an acceptable moral reason for action, not deserving of the stigma of a criminal conviction. In this section, it will be shown that mean retaliation inflicted in anger conceived as righteous indignation is also excused on the grounds that it falls within the broad conception of excusing conditions.

Our starting point is Brudner's recent explanation for the foundation of the defences of duress and necessity in his version of a broad conception of excusing conditions. In duress and necessity cases, claims Brudner, the law[2]:

> "concedes attributability but denies that a man of ordinary firmness would have acted differently...[for it is thought that] he...[would] not <u>by his act</u> [have] empirically differentiated himself from the human community, and forbearance really would have been praiseworthy in the circumstances."

This cannot, though, <u>pace</u> Brudner, be a complete explanation of why we excuse under the broad conception of an excusing condition, even if it is an important part of such an explanation. If the test for the satisfaction of the broad conception of excusing conditions were simply whether defendants, in acting on the maxim or principle that they did in the circumstances, had empirically differentiated themselves from the human community, then we might have to consider, in principle, excusing revenge killers such as Smith and Hogan's hypothetical cuckold.

What is lacking from Brudner's statement, is thus an account of the necessary <u>and sufficient</u> conditions for an excuse under the

broad conception. It will be the argument of this section that when concessions to actions on principle in breach of the law are made, such as concessions to actions in duress and necessity cases, or to actions in provocation cases where the defendant acted in righteous indignation, the reason why the actions fall within the broad conception of an excusing condition is that their guiding principles or maxims stem from an emotion, with the expression of which, in the circumstances, ethically well-disposed agents can identify, in their capacity as moral agents.

On this theory, our starting point in considering excuse, in cases of duress and necessity, is certainly that ethically well-disposed people would, in the circumstances, have regarded the principle or maxim on which defendants acted as an acceptable moral reason for action. The reason we excuse, however, is because that maxim or principle stemmed from an emotion, fear, with the experience of which ethically well-disposed people can identify, in the circumstances facing the defendant.

By parity of reasoning, our starting point in considering excuse, in cases where defendants have acted in a mean or right way in righteous indignation, is that ethically well-disposed agents would, in their capacity as moral agents, have regarded the principle or maxim on which the defendants acted as an acceptable moral reason for action. The reason we excuse, however, is because ethically well-disposed people would, in the circumstances, have identified with the defendants' experience of righteous indignation, as a motivating force behind the retaliation.

Returning to our example of the woman who slaps the self-confessed rapist, let us now suppose that that action stemmed not

from a loss of self-control but from righteous indignation. If she acted out of righteous indignation, her claim to excuse is based on the fact that her action was on a maxim or principle rooted in the experience of an emotion of a kind which, in the circumstances, an ethically well-disposed person might likewise have experienced and acted on. This serves to distinguish her action in point of excuse, from the actions of Smith and Hogan's hypothetical cuckold, whose maxim or principle does not stem from the experience of such an emotion[1].

What we must now provide is a more detailed account of how and why cases of duress and necessity, and of provocation where that evoked righteous indignation, fall within the broad conception of an excusing condition through being concessions to actions on principle which are displays of emotions, of fear and anger respectively. We will do this in what might seem something of a roundabout way, namely by discussing what Bernard Williams has called obligations of "immediacy" and of "reliability"[2]. The framework for this discussion is conveniently provided by his discussion of "Morality, the Peculiar Institution"[3].

The obligation not to kill forms one of a network of what Bernard Williams calls obligations of reliability[4]. Obligations such as the obligations not to kill, assault, steal, defraud, and so forth, command and should command "a virtually absolute priority"[5] in our moral thinking, because observance of them is what makes ethical life possible[6]. In ethically well-disposed agents, courses of action inconsistent with the obligations of reliability are normally ruled out in practical reasoning, such that it never even occurs to such an agent to contravene them. As

Bernard Williams points out[1], it is not characteristic of the ethically well-disposed that in considering how to deal with political or business rivals they say, "Of course, we could have them killed, but we should lay that aside right from the beginning".

The obligations of reliability constitute a structure of ethical considerations, within which practical reasoning takes place, that we may call the ethical outlook or perspective of "abstract", as Aristotle has it[2]. That is to say, the obligations of reliability are what one (morally) thinks in terms of, or which (in the ethically well-disposed) simply provide the unreflective basis for practical reasoning, when one considers what it would be right to do in the absence of the influence of or abstracted from the influence of particular desires and emotions in particular circumstances[3]. The obligations of reliability constitute, in other words, the structure of ethical considerations to which the ethically well-disposed give "virtually absolute priority" when deliberating about what they ought to do, or ought to have done in the cold light of day, as it is sometimes put, when they are not swayed by strong desires or emotions[4].

Even in ethically well-disposed agents, though, says Williams[5], the obligations of reliability do not always command the highest priority in practical reasoning. The structure of ethical considerations guiding practical reasoning which they comprise is liable in certain circumstances to be outweighed by, or simply given no consideration within, other structures of ethical considerations that may guide practical reasoning on particular occasions. What kind of structures of ethical considerations could,

even in the ethically well disposed, ever outweigh or simply displace for the purpose of guiding practical reasoning, the ethical perspective of the abstract, the obligations of reliability?

One example of such a structure of ethical considerations are what Bernard Williams calls obligations of immediacy, the obligations to assist that he believes arise when one is faced by a fellow citizen in immediate peril, despite the fact that the citizen is a stranger, when one is in fact in a position to help[1]. The obligations arise, and are moral, says Bernard Williams, because[2]:

> "A general recognition of people's vital interests is focused into a deliberative priority by immediacy, and it is immediacy to <u>me</u> that generates <u>my</u> obligation, one I cannot ignore without blame." (Williams' emphasis)

Bernard Williams' point here is that ethically well-disposed agents, faced by the need to break the law in order to assist a fellow citizen in peril, will give no thought to the usual priority to be given to the obligations of reliability[3]. They will rightly follow spontaneously the demands of the structure of ethical considerations whose focus is the manifestation of a concern to protect people's vital interests (or if they do give thought to the obligations of reliability, they will regard them as on this occasion outweighed by the obligations of immediacy).

In circumstances where agents can assist a fellow citizen in immediate peril, the practical reasoning of ethically well-disposed agents will be guided by the structure of ethical considerations which <u>on this</u> (kind of) <u>occasion</u> has greater moral purchase, as it were, on practical reasoning. This is the structure of ethical considerations relating to the protection of others' vital

interests. It is the need for immediate action to avert the peril facing the fellow citizen, as Williams points out, that generates the moral obligation to assist, even where that obligation conflicts with the obligations of reliability[1].

What is of present interest about the notion that there can be a structure of ethical considerations that, in the heat of the moment, is regarded by ethically well-disposed people as at that moment properly displacing or outweighing the obligations of reliability? It is that among such ethical structures within which principles guiding action are explained, is arguably included not only a desire to assist a citizen in peril, but emotions such as fear, and anger conceived as righteous indignation.

This being so, the definition of an excuse falling within the broad conception of an excusing condition is a set of circumstances in which defendants can explain their breach of the obligations of reliability by reference to structures of ethical considerations appertaining to certain kinds of emotion. The defendants' claim is that their actions were prompted by the experience of an emotion that, from the point of view of the ethically well-disposed agent, understandably displaced or outweighed the normally absolute priority given in practical reasoning to the obligations of reliability, to the ethical perspective of the abstract. Their claim is thus that this displacing or outweighing by the emotion removed the moral conditions in which conformity with the law, with an obligation of reliability, could have been expected.

In order to make out this claim, something more must be said about the nature of emotions. We must, first, understand how ethical distinctions are drawn between different kinds of emotion,

and how some emotions can constitute a structure of ethical considerations. We will then consider how emotions, viewed as structures of ethical considerations, displace or outweigh the obligations of reliability, in such a way as to remove the moral conditions in which conformity with the law can be expected.

Few philosophers would now share Kant's claim[1] that the principles or maxims on which people act, when influenced by emotions, lack moral content. It seems undeniable that when we criticise people for being greedy, envious, jealous or vain, or praise others for being patient, generous or compassionate, we are drawing moral distinctions, distinctions between emotions that do, and emotions that do not have moral worth[2]. It follows that when we seek to explain criticism or praise of principles or maxims rooted in the experience of emotions that led people to act as they did, we are explaining moral judgments of two different kinds.

When we criticise actions stemming from emotions such as greed and envy, our criticism is founded on a denial that such actions can ever be morally right or understandable, because the emotions motivating them have no moral worth. The law takes account of this, in providing no conditions for excuse, within the broad conception, under which defendants may claim in mitigation that they were "overcome" by greed or envy, and hence committed the crime in question. Such an admission, indeed, would be a aggravating rather than a mitigating circumstance, because it is an admission that the considerations thought by such defendants to have outweighed the obligations of reliability were base considerations, manifesting an ugly side to human nature, rather than moral considerations, worthy of the law's condescension.

When we criticise actions stemming from emotions such as compassion, fear, and anger, our criticism takes a different form. We admit that such emotions have moral worth, and hence that they provide a structure of ethical considerations for action on principle. Our criticism relates instead to the way in which the emotions were displayed in action in particular circumstances. We say, for example, that in the circumstances a defendant overreacted out of fear or anger, or had no grounds for fear or anger. This is a qualitatively different kind of criticism to that made of greedy or envious actions, which are always wrong, and never simply displayed more or less appropriately in particular circumstances[1].

So emotions can have moral worth, and can hence constitute a structure of ethical considerations within which actions on principles or maxims motivated by such emotions are explained and judged as more or less appropriate in particular circumstances[2]. Although it does so less than it should[3], the law takes account of emotions that have moral worth through some of its most important defences: duress, necessity and provocation, and we must now consider the way in which it does so through the broad conception of an excusing condition.

Where retaliatory action stems from anger as righteous indignation, such action is action based on a principle or maxim[4], and is explicable and is judged in terms of a structure of ethical considerations appertaining to the moral worth of retribution for wrongs[5]. Where self-preservatory action stems from fear, it need not stem from the kind of instinctive panic reaction, referred to in the second section, but can take the form of action based on a principle or maxim, action stemming from what we may call "dread",

to distinguish it from panic[1]. Action stemming from dread, as where having been threatened with the immediate infliction of bodily harm if one does not oneself immediately inflict it on an innocent, one goes on to inflict it, is likewise action on principle explicable and judged in terms of a structure of ethical considerations[2]. These are considerations appertaining to the moral worth of self-protection in particular circumstances.

What we must now consider is how a structure of ethical considerations appertaining to emotions with moral worth, such as fear and anger, can ever come to displace or outweigh the obligations of reliability. A good starting point is the way that Bernard Williams believes that what he called obligations of immediacy can come to displace or outweigh the obligations of reliability.

Let us consider, by way of example, hypothetical cases in which people, seeing others about to jump to their deaths, rush up and takes hold of them, thus preventing them from committing suicide. Everyone has the right to commit suicide, and assuming that no conceivable danger could have been posed to others by the jumps in question, it would thus seem that to take hold of someone in such circumstances is a battery. There should, though, arguably be a complete defence to the charge of battery, because for ethically well-disposed people, imminent danger invites immediate rescue.

For Bernard Williams, in ethically well-disposed people, the spontaneous desire to assist a citizen in imminent danger will be explicable within a structure of ethical considerations appertaining to the protection of vital interests[3]. For the duration of the emergency, furthermore, this desire will have what

he calls[1] a temporary "peculiar importance" to ethically well-disposed people. The desire in them will seem morally to require, in other words, urgent and immediate satisfaction such that it leads them either to give no thought to the obligations of reliability, or to think them to be outweighed in the circumstances, as a guide for practical reasoning. The ethical propriety of this state of mind and the consequent action is what underpins the sympathy we feel for the rescuers in the hypothetical case just given, and would be the basis of the rescuers' excuse[2].

What we must now do is to show how analogous arguments explain the law's condescension and the foundations of excuse in cases of duress and necessity, and in cases of mean retaliatory action in anger as righteous indignation. In the kinds of duress and necessity cases under discussion, defendants are faced by a choice of equally unpalatable evils, such as whether to suffer grievous bodily harm themselves, or inflict it on an unconsenting innocent. The law, of course, prohibits the infliction of harm upon unconsenting innocents in such circumstances, and from the ethical perspective of the abstract, morality mirrors this prohibition[3].

Nonetheless, a complete excuse is available to defendants if they inflict the bodily harm, but only if they do so as a result of the threat[4]; only if they do so, in other words, out of what we have been calling dread. Why is this restriction placed on the reasons for which defendants can choose to cause rather than suffer harm? The answer has two parts.

First, the experience of dread gives a peculiar importance (to use Bernard Williams' term) to self-protective action, that for the duration of the experience of the emotion displaces from the

process of practical reasoning or seems to outweigh in the process of such reasoning the obligations of reliability, here the obligation not to harm another. This is a familiar feature of the experience of strong emotion more generally, and is explained by the modern ethical theorist De Sousa thus[1]:

> "For a variable but always limited time, an emotion limits...the set of live options among which [people] choose...Emotions are a species of determinate patterns of salience among objects of attention, lines of enquiry, and inferential strategies...In this way emotions can be said to be judgments, in the sense that they are what we see the world in terms of."

Secondly, though, and most importantly, the weight that the experience of dread lends to the course of self-protection is moral weight. For fear in the form of dread, unlike, say, a spiteful feeling, is an emotion of moral worth.

The "duressee" who acts out of dread, when faced with the choice of causing or suffering serious harm, and hence causes harm, can thus explain this choice within a structure of ethical considerations (appertaining to self-preservation) in a way the person who in similar circumstances causes harm out of spite cannot. The duressee, unlike the spiteful person, thus acts on a principle or maxim associated with an emotion with which ethically well-disposed agents can identify, in their capacity as moral agents.

This can be put in terms of the earlier definition of an excuse falling within the broad conception of excusing conditions. This definition was, it will be recalled, circumstances in which the moral conditions in which conformity with the law can be expected are not present, because there is some good or acceptable moral reason to follow a course involving breach of a legal obligation;

some moral reason for action with which ethically well-disposed agents can identify, in their capacity as moral agents.

Duressees' claims fall within this definition in the following way. Duressees claim that in the circumstances facing them, the moral principles for action stemming from dread displaced or outweighed the conflicting principles for (in)action dictated by the obligations of reliability, and that they might well so have done for ethically well-disposed agents. This is, quite straightforwardly, another way of saying that there was, in the circumstances, an acceptable moral reason to break a legal obligation.

This being so, the moral conditions in which conformity with the law could have been <u>expected</u> were not present. The criminal law should generally require no more than that people act for moral reasons on which ethically well-disposed agents could equally have acted, in that they are reasons with which such agents could have identified, in the circumstances. Although possibly correct on its facts[1], if <u>Howe</u> suggests otherwise, it is based on a false premise.

All that has just been said here of dread is equally true of righteous indignation. Anger is a strong emotion that gives a peculiar importance or strong pattern of salience to the object of the emotion, retaliation. This may lead, for the duration of the emotion, to the temporary displacing or outweighing in the process of practical reasoning of the normally absolute priority given to the obligations of reliability, and the ethical perspective of the abstract.

Greed and envy, too, may temporarily blind us to the importance of the obligations of reliability. The difference between these

emotions and anger, though, is that the weight which anger lends to the path of immediate retaliation is moral weight[1], as it is moral weight which dread lends to the path of self-preservation. This means that people who act in anger are able, in principle, to explain their actions within a structure of ethical considerations (appertaining to retribution) in a way greedy or envious people are not.

It follows, accordingly, that where people act in anger conceived as righteous indignation, they are able to explain their actions in terms of acceptable moral reasons for action, because they are reasons connected with a moral end, retribution, with which ethically well-disposed agents can identify, in their capacity as moral agents. This being so, the moral conditions in which conformity with the law can be expected are absent, in that righteously indignant people have an acceptable moral reason to act in a way which conflicts with conformity with the law.

None of this, it should be stressed, means that the person who acts in righteous indignation is automatically entitled to mitigation, any more than the parallel argument in respect of people who act out of dread entails that if they do so act, they are automatically entitled to exculpation. Acting out of righteous indignation or dread simply brings one within the scope of the broad conception of an excusing condition. As I earlier said[2], of criticism of actions stemming from emotions of moral worth, even if they are explicable within a structure of ethical considerations appertaining to an emotion of moral worth, there remains the question of the way in which those emotions in fact issued in action in the particular circumstances. There remains, in other

words, the question of moral justification, the question of whether defendants feared and faced the right thing in the right way at the right time, or became angry and acted in anger with the right person at the right time in the right way, and so on.

Having a moral reason simply to act in anger or out of dread, the focus of the broad conception of an excusing condition, by no means entails that one will go on in fact to express those emotions in the right way, the focus of moral justification. The law requires in provocation cases, if mitigation is to be warranted, that the jury satisfy themselves not only that defendants have acted in anger but that reasonable people would have done as defendants did. The law likewise requires, as a condition of complete exculpation in duress and necessity cases, that the jury satisfy themselves not only that defendants have acted out of dread, but that there were good grounds for the dread, and that people of reasonable fortitude would have done as the defendants did.

This brings me to the desire to be revenged. This desire would seem to pose particular problems for the broad conception of excuse, as I have understood it. Let us focus on Smith and Hogan's hypothetical cuckold, who kills his wife the very moment that he finds her in bed with someone else, but never at any time loses his self-control, or becomes righteously indignant. Why should he receive no excuse? We need to delve a little more deeply into the range of his possible motives for acting if we are to understand the reason why he should receive no mitigation of his offence.

The first possibility is that he acts simply for reasons of malicious pleasure, enjoyment of her suffering, or out of some

other form of wantonness. If this is so, then the reason for offering him no mitigation is, as we earlier said, that the law has no duty to condescend to crimes born of desires or emotions that have no intrinsic moral value, such as malicious pleasure; for they are not desires or emotions with which, in a capacity as a moral agent, the ethically well-disposed agent identifies. The desire for retaliation stemming from a judgment of wrongdoing, anger, does have moral value, and that is, as Aristotle noted, the reason for regarding retaliation inflicted as a result of it as less blameworthy than retaliation inflicted out of malicious pleasure[1].

Let us now suppose that the hypothetical cuckold understandably desired to be revenged, or felt it to be his moral duty to revenge the adultery. Is the reason just given for refusing to condescend to action taken out of malicious pleasure sufficient reason to refuse to condescend to retaliation inflicted from a desire to, or a sense of duty that one must be revenged? No. There is a good case for supposing that the desire to be revenged is a desire of moral value, a desire that is part of the character of ethically well-disposed agents[2]. If that is true, then the reason for refusing to mitigate the offence in cases of revenge killings must be sought elsewhere.

One possibility might be that desires for revenge, like desires for pleasure, do not have the kind of peculiar importance or salience to most ethically well-disposed agents that spur-of-the-moment emotions like anger do. This being so, it could be argued, the desire for revenge would never in practice really seem to the ethically well-disposed agent to displace or outweigh the

obligations of reliability in any situation, and thus desires for revenge would in practice fall outside the broad conception of excusing conditions as I have interpreted them.

I do not think that this is ultimately an appealing solution. No doubt, as Aristotle remarks[1], it is only bitter people for whom the desire for revenge typically has a continuing "peculiar importance" amongst their objects of attention; but do we not all sometimes have understandable moral reasons to be bitter about something?

If we are to understand the real reason for the refusal to mitigate the offence in cases of revenge killings, I think we must go back to the point made right at the start of the chapter. Even if we accept that a desire for revenge can give moral reasons for action, those moral reasons are trumped by the fact that, in modern societies, it is the state that claims an all-embracing authority to act on these sorts of moral reasons, moral reasons relating to the justification for the deliberate infliction of considered punishment and retribution. Ethically well-disposed agents regard themselves as having surrendered their moral right to act for these sorts of reasons, except where a temporary peculiar importance is given to them by the experience of righteous indignation, when an excuse based on a compassion for the display of an emotion of moral value is ethically acceptable.

An analogy may assist here. There are, I take it, moral reasons for every law-abiding citizen to seek to apprehend those they reasonably suspect to have committed an offence. If, though, the person apprehended has in fact committed no offence, then even if there were good grounds to suspect that the person apprehended was

the perpetrator, the citizen commits a civil wrong against the person apprehended.

The law can be justified on the basis of a view of what moral rights it is thought that citizens have surrendered to the state. They have surrendered nearly all the moral rights we are assuming to exist to take a full and active role in law enforcement, which is action regarded as an incident of well defined rights and duties of public officials alone. This means that where some conflict arises between what citizens regard as their moral rights to apprehend those they suspect of committing offences, and the order secured by law for this purpose, ethically well-disposed citizens will regard the duty to conform to the latter (eg. by only reporting their suspicions to the authorities) as trumping whatever moral reasons they may think they have to act in accordance with the former[1].

4. Excusing overreactions in anger

We now have grounds for supposing that the nature of the excusing condition in cases of provoked anger differs according to the kind of anger out of which the defendant acted. Anger as a loss of self-control falls within the narrow conception of an excusing condition. Anger as righteous indignation, however, because it involves action on principle, must be explained within the broad conception of excusing conditions. In discussing both kinds of anger I have focused, though, only on mean displays of action in anger, using the example of a mother who in anger slaps and thereby assaults a man who proudly confesses to having raped her daughter. Why have I focused only on mean displays of action in anger?

It is commonly supposed that if anger involves a loss of self-control, and if losses of self-control (as we have argued that they do) fall within the scope of an excusing condition, then that is sufficient to excuse all forms of loss of self-control[1]. This cannot be right.

As I have argued, and as the law insists[2], loss of self-control is not the same thing as going berserk. The retaliation inflicted as a result of a loss of self-control is proportionable to the judgment of wrongdoing made. That being so, when someone overreacts following a loss of self-control, that is not because they have gone beserk, but because they have judged that the wrong done to them is deserving of greater retaliation than it in fact is: because they have gone wrong in their judgment of wrongdoing. That being so, it is not only their loss of self-control that needs excuse, but their wrong judgment of wrongdoing. Going wrong in one's judgment of wrongdoing needs some foundation in excuse just as much as the loss of self-control that follows it, and hence we must argue for a different foundation in excuse of case 2 above.

The same is true of case 5 above, an overreaction in anger conceived as righteous indignation. In such cases, defendants make a wrong judgment of appropriate retaliation. They judge that more retaliation is appropriate than is in fact warranted by the gravity of the provocation. This error thus needs excuse just as much as the fact that the peculiar importance given to the infliction of retaliation in their practical reasoning by the experience of righteous indignation displaced and would have displaced for the ethically well-disposed agent, or seemed to them and would have seemed to the ethically well-disposed agent to outweigh the

obligations of reliability and the ethical perspective of the abstract.

Cases 2 and 5 involve errors of moral judgment, of judgments of wrongdoing and/or of appropriate retaliation. This being so, given that the doctrine of provocation is a concession to overreactions, to cases such as 2 and 5, it must thus be understood as a concession to human fallibility, to people's tendency occasionally to leap before they look, as well as to human infirmity, and to valued human emotions, as it is where mean displays of anger as a loss of self-control and anger as righteous indignation respectively are concerned. Normally, however, with the exception of cases in which the claim "I leapt before I looked" is a denial of some definitional element of the crime[1], the law requires that people look before they leap. It will not now avail defendants to claim that they were not reckless, for example, because they acted on the spur of the moment without thinking, and hence took action exposing a victim to a risk in circumstances in which the reasonable person would not have acted in that way[2]. In cases where, for example, defendants are charged with reckless driving in that they went the wrong way down a one-way street, a plea that they did not think what they were doing, and turned down the street on impulse, will not avail them, because one ought always to have the rules of the road in mind when driving.

There are, though, circumstances in which the law all but excuses what one might call errors of judgment due to hasty decisions, and that is in situations where it was reasonable for the agent to make a hasty judgment on which action was based. Let us consider cases where, for example, people take action out of

dread which they believe to be necessary in self-defence, having been unexpectedly attacked. In these circumstances, the law comes close to suggesting that even if they inflict more force than is reasonably necessary, due a hasty and mistaken judgment in dread of what is necessary, they will be nonetheless excused. As Lord Morris put it in Palmer v R[1]

> "If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken."

Something of a sham is involved in suggesting that what people think of as appropriate action in moments of unexpected anguish is potent evidence of what reasonable action in such moments would have been. This all but destroys the distinction between mean actions and overreactions, and would, in the provocation context, lead to the conclusion that the fact that the defendant thought particular retaliation appropriate in anger is the most potent evidence that that action was a mean retaliatory response, a suggestion whose implausibility is demonstrated by Terreblanche's case.

The law should more candidly admit, then, that in moments of unexpected anguish, a hasty and mistaken judgment in panic or dread of what it is necessary to take by way of appropriate protective action is excused, because human fallibility, the tendency to leap before looking, is less morally reprehensible when panic or dread is being experienced than when it is not, as when someone "absentmindedly" turns down a one-way street. This being so, by parity of reasoning, the law should excuse overreactions due to mistaken judgments in anger, because anger, like panic or dread, is

just the kind of emotion that is liable to be based on or lead to a hasty judgment, and thus one which may well be mistaken. As Aristotle says[1]:

> "Anger seems to listen to reason to some extent, but to mishear it, as do hasty servants who run out before they have heard the whole of what one says, and then muddle the order, or as dogs bark if there is but a knock at the door, before looking to see if it is friend; so anger by reason of the warmth and hastiness of its nature, though it hears, does not [properly] hear an order, and springs to take revenge. For reason or imagination informs us that we have been insulted or slighted, and anger, reasoning as it were that anything like this must be fought against, boils up straight away..."

If this is as true of anger as the law all but concedes that it is true of panic and dread, then there is as much reason to excuse mistaken-because-hasty judgments made in anger as there is to excuse mistaken-because-hasty judgments in panic or dread. Just as the law does not require people to weigh to a nicety the exact measure of defensive action necessary in the face of an uplifted knife, so it should not require a precisely measured judgment of wrongdoing or of appropriate retaliation in the face of a grave provocation; for both fear and anger are, as Aristotle points out in the passage just cited, emotions whose associated judgments are often by nature hastily made, even in the ethically well-disposed.

In as much as it is a concession to overreactions, the doctrine of provocation turns out, thus, to be a concession to human fallibility as well as to human infirmity and to valued human emotions. This concession falls, I would suggest, within the narrow conception of excusing conditions, the conception concerned with cases where, through no fault of the defendants own, the empirical conditions in which conformity with the law would have been expected are absent.

In cases where there has been a mistaken-because-hasty judgment of excessive wrongdoing, defendants lack the information which would have enabled them to conform their conduct to the law by inflicting no, or much less retaliation; that lack of information is the empirical condition whose absence explains their failure to comply with the law's demands. They lack this information, of course, because as Aristotle indicates in the passage just cited, it is often in the nature of anger to lead one to leap before looking, to retaliate before[1] "waiting to hear whether [one] ought or ought not, or not so vehemently". Most importantly, though, they lack this information through no great fault of their own, because it is not very blameworthy to act in haste when angry[2]; it is something even the ethically well-disposed person might do[3]. This being so, there are good grounds for excusing overreactions due to mistaken-because-hasty judgments within the narrow conception of excusing conditions.

What, though, of cases where defendants' overreactions stem not from hasty-and-thus-mistaken judgments of wrongdoing, but from weakness of will, case 4 above? The kind of cases I have in mind here are ones which can only really concern anger as righteous indignation[4]. They involve situations where defendants:

a) make a mistaken judgment of wrongdoing leading to a desire for excessive retaliation;

b) are capable of controlling this desire through their judgment of appropriate response;

c) know what amount of retaliation, if any, ought to be inflicted in the light of the gravity of the provocation;

d) but nonetheless succumb in the heat of the moment to their desire to inflict an excessive amount of retaliation.

This is an example much discussed in the context of the classic

problem of akrasia[1]. As Aristotle remarks, an overreaction in such circumstances is most certainly more blameworthy than one which results from a mistaken-because-hasty judgment in anger[2]. Nonetheless, the law draws no distinction between people who through human infirmity overreact due to the temptation to succumb to a desire to inflict a degree of retaliation they know to be wrong, and people who overreact by inflicting that same degree of retaliation as a result of a mistaken judgment of wrongdoing and\or appropriateness made due to the inherent "warmth and hastiness" of anger. It follows that we must seek some first-order theoretical basis for excusing in such circumstances that accounts for the law's condescension in cases of a human infirmity whose focus is not loss of self-control, as is the case with the human infirmity at issue in case 1, but whose focus is succumbing to temptation due to weakness of will.

English law provides no defence based on the kind of human infirmity whose focus is succumbing to temptation. The law rejects, for example, any general defence of entrapment[3]. It is no defence to a rape charge to claim, as Wells puts it[4], that one was "unluckily trapped by uncontrollable passion". It will not avail defendants who have been attacked to claim that as a result of the attack, they succumbed to the temptation to inflict retaliation, even though the attack was over when they did so[5]. More generally, as Brudner puts it[6]:

> "Of one thing we may be certain. It cannot be the peculiar strength of the inclination toward breach of duty that renders the latter imperfect. My duty not to steal the crown jewels is a legal rather than a purely moral one, and remains so even if I come across them one day in a deserted street."

It would thus perhaps be more consistent with general principles of

criminal liability if, in provocation cases, judges were to say to juries that if they find that defendants simply succumbed to a temptation born of great desire in anger to inflict greater retaliation than was merited, even though the defendants knew what measure of retaliation was appropriate, and could have controlled themselves, this should be fatal to their provocation pleas, even though reasonable people might in similar circumstances have succumbed to the temptation. After all, perhaps many reasonable people might steal the crown jewels on finding them in a deserted street; yet, as Brudner points out, this cannot in and of itself be a reason to provide an excuse in law.

As I have said, though, the doctrine of provocation does not draw a distinction in point of mitigation between those who succumb to temptation born of great desire in anger to inflict excessive retaliation, and those who inflict such retaliation due to a mistaken judgment of wrongdoing and/or of appropriate response. What, then, could be the basis of the excuse in provocation cases concerned with temptation?

I think that a distinction can be drawn between the temptation cases mentioned in which the law provides no defence, and the temptation in anger to inflict greater retaliation than the amount known to be warranted. In the cases of entrapment, and of stealing by finding, no defence based on temptation is justified for essentially the same reason that no mitigation is held out to the man who due to wantonness or out of spite calmly shoots his wife on discovering her committing adultery. He acts for reasons relating to selfish pleasure or caprice, motives on which the state has no duty or reason to look with benignity[1]. The same is true of the

people entrapped (assuming no pressure taking the form of duress has been applied to them), and of people who steal upon finding. In them, the desire or preparedness to conform to legal duties is subordinated to the preparedness to indulge selfish desires, an attitude of mind which, no doubt, we are occasionally all subject to, but which the state has no reason to regard as an attitude of mind worthy of mitigation.

There are, by way of contrast, reasons to think that succumbing in anger to the temptation to inflict greater retaliation than is known to be warranted is not the indulgence of a purely selfish pleasure or of wantonness. The reasons are captured in the somewhat cryptic remarks of Aristotle on the difference between the person who gives in to anger and the person who gives in to the desire for pleasure[1]:

> "For weakness of will due to anger is a pain (for no one feels anger without being pained), but that which is due to appetite is attended with pleasure, for which reason it is more blameworthy. For weakness of will due to pleasure seems to involve wantonness."

Aristotle's case is that where anger is concerned, the experience of great anger is an experience of a great pain or burden, and hence the desire to alleviate it due to weakness of will, in circumstances where it is known that that is not a proper course of action, may rightly be regarded with understanding and compassion. Such an understanding and compassion are not appropriate, by way of contrast, in a case where it is the desire to give in to wantonness or selfish pleasure that has been indulged in circumstances in which it is known that it should not have been.

This should be regarded as the ground of the distinction between succumbing to the temptation in anger to inflict greater

retaliation than is known to be excessive, and succumbing, for example, to the temptation to rape a woman due to the experience of "uncontrollable passion". The decision to succumb to the desire for sexual satisfaction demonstrates a willingness to indulge wantonness or selfish pleasure to which the law has no reason to show mercy. The desire for sexual satisfaction is not, and should not be regarded as a great pain or burden, in respect of which a desire to alleviate it in circumstances in which it is known that it would be wrong to do so is properly regarded by the law with understanding and compassion.

An analogy with the mitigation provided for overreactions in anger due to weakness of will, is perhaps with cases where defendants, greatly exasperated by some sudden frustrating event, vent their frustration or exasperation by some act of violence, usually against property. An example is provided by the case of Parker[1]. In this case, the defendant slammed down the receiver of a public telephone, breaking it, being exasperated that the telephone did not work. The traditional analysis of such cases has involved consideration of whether defendants who act in this way are reckless or not[2]. It makes as much sense, though, to ask whether we regard their acts with (at least a measure of) understanding and sympathy because the impulse to alleviate the pain or burden of exasperation or frustration in such circumstances, even where it is known that the means adopted are wrong, is natural and forgivable, and not merely a display of some much more unworthy motivation such as wantonness, greed, or selfish pleasure[3].

If there are or could conceivably be grounds on which we might (partially) excuse those who on the spur of the moment act to

relieve frustration or exasperation, because they act to relieve pain and not to indulge whim, caprice or selfish pleasure, then this would seem to be a ground for partially excusing those who overreact in anger, even when they know this is wrong. Such people likewise act to relieve a great pain or burden, and not to indulge more base emotions or desires, and their actions are accordingly more worthy of understanding, and at least partial forgivenness.

If this is the right way to understand the foundation in excuse of the condescension of the law in cases where an overreaction is due to weakness of will, then the excuse in such cases falls within the narrow conception of excusing conditions for the same reason that diminished responsibility does, namely empirical conditions making conformity with the law exceptionally difficult, and thus not expected. The empirical conditions naturally differ for each defence. Whereas in cases of diminished responsibility one is concerned with an empirical condition whose focus is an abnormality of mind, in cases of overreaction due to weakness of will, one is concerned with an empirical condition whose focus is a great pain or burden that made the temptation to inflict greater retaliation than is known to be warranted almost irresistible[1]. In a limited number of cases, it is thus true, as Ashworth has said[2], that:

> "[The defences of provocation and diminished responsibility represent...the only concession to...difficulties [in restraining oneself] which are sometimes felt."

Aristotle regarded weakness of will, even in anger, as blameworthy, and we may assume that he would not have approved of the law's condescension in cases of overreaction due to weakness of will[3]. We need not, though, be morally quite so rigourous, for as we saw above, it is possible morally to distinguish people who

succumb to the temptation to inflict greater retaliation than they know to be warranted both from those who are entrapped or steal by finding, and from those who succumb to the temptation to satisfy their sexual desires even when they know they should not.

5. Directions to the Jury on Excuse

We have now explored, at a first-order level, the nature of excuse in provocation cases, understanding it, as we did the nature of moral justification in chapter five, in terms of the two second-order conceptions of anger that were discussed in previous chapters. We must now consider the implications for the law of the discovery that the foundations of the doctrine of provocation in excuse vary according to kind of anger experienced by defendants, and according to whether defendants act in a mean or right way in anger, or overreact in response to a provocation.

We should start such a discussion on the footing that the less complicated a direction to the jury on the question of provocation is, the better that direction will be. There is, in my view, little need for the jury to be treated to a discourse on the differing nature of the element of excuse when they are assessing the effect of a plea of provocation. This being so, it will be sufficient that some term or phrase is used that covers the requirement that the defendant have acted after a loss of self-control or out of righteous indignation.

It is clear that the term "loss of self-control" ought to be replaced, since that term covers only one conception of anger when there are two such conceptions. This not to suggest that many, if any, defendants who acted out of righteous indignation may have

been deprived of the defence. Juries will doubtless have understood the term loss of self-control to cover both forms of anger, and mitigated the offence, where warranted, whichever kind of anger was actually experienced. Nonetheless, if there is more than one conception of anger, that should be reflected in the law.

What are the contenders fit to replace the term "loss of self-control? Rage is a close contender for the right term, but is in the end, I think, either too close to righteous indignation to cover loss of self-control, or too evocative of going beserk to capture the spirit of either conception of anger. The use of the term "anger" coupled with some epithet such as "great" or "extreme" is tempting, but fails to capture the notion of loss of self-control as that is understood under the "modern" theory. As we said in chapter four, the "modern" theory rejects the view that there are degrees of loss of self-control. Loss of self-control, when it occurs, is total, but the degree of retaliation desired and hence inflicted is proportionable to the degree of the provocation; that is what marks out a temporary loss of self-control from going beserk. The notion of "great" or "extreme" anger seems, by way of contrast, to conjure up a picture of people conscious of a more or less strong desire to retaliate, and that is a picture which fits righteous indignation, but not loss of self-control.

What about "loss of temper"? The dictionary definition of "temper" is a "due or proportionate mixture or combination of elements or qualities", a "proper or fit condition". One of its dictionary transferred meanings is thus "moderation in or command over the emotions". Given this definition, what "loss of temper" signifies is the temporary loss of the command over one's emotions,

and that is a psychological state that characterises only loss of self-control, and not righteous indignation. In any event, in as much as loss of temper is meant to signify a temporarily warped or distorted mixture or combination of elements or qualities within the soul, it fails to reflect the sense that when anger is displayed in a mean or proper way, it is, as we have said, a correct concrete manifestation of inner resources or good qualities within the soul.

This leaves us with no alternative but to use the term "anger" itself, since terms such as "wrath" and "ire", or "dudgeon" are somewhat antiquated. The advantage of using the term "anger" is clearly that it is neutral as between the two conceptions of anger, but is a reasonably clear indication that the defendant must act in the heat of blood, and not having had time for reflection. It may well be that in common parlance the term "anger" covers not only temporary losses of self-control and righteous indignation, but a desire for revenge (just as the notion of "provocation" in "the doctrine of provocation" could in principle cover provoked desires for revenge as well as the two provoked psychic states of loss of self-control and righteous indignation). Nonetheless, the law gives a restricted meaning to the term "anger" that excludes the possibility that it could cover a desire for revenge, and the judge, as Devlin J. did in Duffy[1], should point this out to the jury in appropriate cases.

The disadvantage of the term "anger" might seem to be that it does not appear to indicate, in a way that "rage" or "great anger" would, that if defendants are merely mildly irritated by a provocation but kill the victim in response to the provocation,

they should not be entitled to mitigation. There are two possible scenarios involved here, which we must consider in order to understand why this is in fact no disadvantage at all.

The first is that the reason for only mild irritation is that only a trivial provocation has been received. In these circumstances, if defendants kill in response to the provocation, they will in any event be denied mitigation, not because they may not have acted in anger but on the grounds that they grossly overreacted. The second scenario is the more interesting. What if defendants receive a provocation they regard as grave, by which they are only mildly irritated, but to which they respond with fatal violence? Should they receive mitigation on the basis that (questions of justification apart) they acted in anger rather than in a fit of rage or temper? I think it is a mistake to say that those who are irritated are angry, just as it is wrong to say that those whose anger has been translated into a reflective desire for revenge are still angry, or that those who have gone beserk are still angry. At best these are merely penumbral meanings of the term "angry". Focal, where the notion of anger is concerned, is losing one's self-control, or having retaliation temporarily given a peculiar importance or salience in moral thinking by the judgment of wrongdoing and the ensuing heat of blood sensation: experiencing anger as righteous indignation. It follows that in the unlikely event that a scenario of this latter kind occurred, judges should, as at present they are permitted to do, withdraw the question of provocation from the jury on the grounds that there was no evidence that the defendant acted in anger.

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[1]. Solicitor General Bacon, speaking of the actions of Lord Sanguire in hiring men to kill in cold-blooded revenge one Turner. Turner was a former opponent of Sanguire's in a duel, in the course of which he had put out Sanguire's eye, leading Sanguire to hold a grudge against him - see (1612) 2 St.Tr. 743.

[2]. See eg. Ibrams (1981) 74 Cr.App.Rep. 154.

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[1]. Brudner (1987), at 344-352.

[2]. For other discussions and conceptualisations of the distinction between the narrow and the broad conception of excusing conditions, see Brudner (1987), at 344-352; Fletcher (1978), at 798-817.

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[1]. The distinction I will be drawing between "empirical" and "moral" conditions will doubtless raise eyebrows, but it is intended to be only a rough working distinction. Its basis is as follows. The key question to ask, in deciding whether a plea falls within the narrow or the broad conception of excusing conditions, is whether the judgment that leads one to the conclusion that conformity with the law through the avoidance of the actus reus could not have been expected is a factual or a moral judgment.

If, for example, defendants are found to have been insane at the time the offence was committed, it is this fact that leads to the conclusion that an acquittal should follow. Likewise, where a defendant claims automatism resulting from involuntary intoxication, it is this fact, if accepted, that leads to the conclusion that an aquittal should follow. In cases of duress, for example and by way of contrast, a finding that defendants acted under duress does not lead directly to such a conclusion. In order to conclude that conformity with the law through avoidance of the actus reus could not have been expected, this finding of fact merely provides, in this regard, the factual foundation for the key issue: a moral assessment of defendants' acts. Were those acts those of people of reasonable firmness?

Mistake, conceived as a defence, falls within the narrow conception of excusing conditions if it need only be honest. For if it need only be honest, then one is led to the conclusion that conformity with the law could not have been expected as a result of a finding of fact alone: whether the defendant acted under an honest mistake. If a mistake needs to be reasonable, then the defence of mistake falls within the broad conception of excusing conditions, in that a factual finding of honest mistake provides nothing more than the factual foundation for the key moral question, one concerning what defendants ought to have in mind when contemplating the kinds of activity in question, the answer to

Page 269 (cont.)

which leads one to the conclusion that conformity with the law could or could not have been expected. See, further, note 3 below.

[2]. See page 268 note 2 ante.

[3]. Brudner (1987), at 347\8. In note 1 above, it was claimed that the provision of an excuse for reasonable mistakes falls within the broad conception of an excusing condition. In as much, though, as it is a denial of the mens rea rather than a "confession and avoidance", unlike duress and necessity, it is an excuse within the broad conception that does not involve a concession that the empirical conditions were present in which conformity with the law could be expected; for to admit that as a matter of fact one knew what one was doing (as one does in duress cases) is to admit that one was, ex hypothesi, not labouring under a mistake.

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[1]. The phrase "ethically well-disposed agent" is borrowed from Bernard Williams (1985). It is used as a substitute for the more customary "reasonable person", because a phrase is required which captures the sense in which the criminal law expects people to be emotionally continent as well as careful to use their powers of ratiocination.

[2]. The stipulation that ethically well-disposed agents must be able, in their capacity as moral agents, to identify with defendants' acts, is designed to rule out specious claims running along lines such as, "If X can plead mitigation on the grounds of the overpowering influence of anger, why can't I claim mitigation on the grounds of the overpowering influence of greed and envy?". The answer to this is that whilst ethically well-disposed agents understand very well the temptation occasionally to act on greed, envy, spite, and so on, they do not identify with these motivations in their capacity as moral agents, and hence resist their temptations, in as much as they are tempted at all, when considering what they ought to do. See infra, section three.

Why, it might be asked, do we adopt the perspective of the ethically well-disposed agent at all, in formulating a theory of excuses? The answer to this is that ethically well-disposed agents are motivated to act only for reasons that have moral value. The importance of this, I would suggest, is that the state has no duty, when considering what excuses to hold out to those who have harmed others by reducing or destroying their autonomy, to condescend to motivations for so harming others that have no moral value, like greed, envy, spite, and so on. It has only reason to condescend, by way of excuse, to motivations for harming others which do have moral value, which form part of a morally worthwhile life, such as anger, fear, compassion, and so on. This argument is based on those of Raz: see Raz (1986), chap. 15.

[3]. As will become apparent during the discussion in section three, the reason for concentrating on these kinds of duress and necessity

Page 270 (cont.)

cases is that they involve a requirement that the defendant have acted out of fear. Where necessity and duress cases operate as a complete and legal justification, there is no such requirement. Examples of the latter would be where defendants must damage property in order to save their own or others' lives; see Brudner (1987), 360-365.

Page 272

1. See eg. Ashworth (1976), at 315; Hart (1968), at 153; Bancroft (1981) 3 Cr.App.R. 119, at 120.

2. Byrne [1960] Q.B. 396, at 403.

Page 273

1. Hart (1968), at 153.

Page 274

1. See Kosman, in Rorty, ed. (1980a), at 109; Hampshire (1960) in Glover, ed. (1976).

Page 275

1. Ashworth (1976), at 312.

2. See page 272 note 2 ante.

3. See the third interlude ante.

4. Ryan (1967) 40 A.L.J.R. 488; discussed by Elliot, (1968).

5. Elliot (1968), 497, at 500.

Page 276

1. See Kant GMM, 10. However, most modern ethical theorists would claim, pace Kant, that the maxims or principles on which people act in such circumstances are moral ones: see Scruton, in Rorty, ed. (1980b), 525; Williams (1973), 207.

Page 278

1. Smith and Hogan (1988), at 335.

2. For further discussion of Smith and Hogan's example, and of impulsive rescuers, see section three infra.

Page 279

1. For judicial examination of other fact situations that I would allege fall within the narrow conception of an excusing condition in virtue of being impulsive actions stemming from desire and not

Page 279 (cont.)

reason, see Hill v. Baxter [1958] 1 QB 277, at 283\286.

Page 280

1. Brudner (1987), at 348.

Page 281

1. Brudner (1987), at 348-352.

2. ibid., at 358.

Page 283

1. For discussion of the various motives that Smith and Hogan's cuckold might have see infra

2. Bernard Williams (1985), 181.

3. ibid., chapter 10.

4. ibid. at 185.

5. ibid.

6. Williams (1985), 185.

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1. ibid.

2. NE1110a18.

3. Brudner (1987), at 349-350.

4. It might be, exceptionally, that even ethically well-disposed agents would not give priority to the obligations of reliability when deliberating about what to do, such as when they are confronted with grave injustice on the part of the government responsible for setting out those obligations: see Honore, (1988). This is a problem, though, that is more the concern of political and legal theory that it is the concern of ethics.

5. Bernard Williams (1985), 187.

Page 285

1. For an extensive discussion of the obligations arising in this kind of case, see Ashworth (1989).

2. Bernard Williams (1985), 186.

3. See the discussion infra of examples in which people assault would-be suicides in attempting to stop them from going ahead.

Page 286

[1]. See page 285 note 3 ante.

Page 287

[1]. See page 276 note 1 ante.

[2]. Scruton, in Rorty, ed. (1980b), 525-527.

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[1]. NE1107a9-26.

[2]. Scruton, in Rorty, ed. (1980b), 525.

[3]. See Horder (1988).

[4]. See the second interlude ante.

[5]. See the discussion of justice as a virtue in chapter two ante.

Page 289

[1]. For the recognition that defendants in duress and necessity cases act on principle, see Howe [1987] 1 All E.R. 771, at 777.

[2]. For the law's understanding of these ethical considerations, see the description of the objective condition in Graham [1982] 1 All E.R. 801, at 806.

[3]. Bernard Williams (1985), at 186.

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[1]. Bernard Williams (1985), at 187.

[2]. Bernard Williams (1985), at 180-187.

[3]. For discussion of whether abstract morality requires that one suffer injury or death oneself rather than inflict it, and the various situations in which that requirement may be varied, see eg. Thomson (1985).

[4]. See eg. Valderrama-Vega [1985] Crim.L.R. 220.

Page 291

[1]. De Sousa (1987), at 195\196. Cross gropes towards a similar kind of analysis of the rationale for excusing within the broad conception of excusing conditions: see (1967), at 225-226, although his analysis confuses conceptions of anger and fear that should be kept distinct.

Page 292

[1]. In that the absolute sanctity of life may perhaps legitimate the refusal to condescend to those who kill under duress, even where other ethically well-disposed agents might have done likewise.

Page 293

[1]. See the discussion of justice as a virtue in chapter two.

[2]. See page 288 ante.

Page 295

[1]. See eg. MM1202b25-28.

[2]. Moore in Schoeman, ed. (1987), and chapter two ante.

Page 296

[1]. NE1126a19-27.

Page 297

[1]. The general right to arrest those who are committing or have committed an offence, or whom one reasonably believes to be the person guilty of the offence is in the P.A.C.E. Sec.24 (4)\(5). This right should be regarded as effecting a kind of compromise between vindicating the moral rights of the citizen, and the desirability of ensuring that the administration of justice is carried out by public officials according to recognised procedures.

Page 298

[1]. See Smith and Hogan's implicit criticism of any proportionality requirement: Smith and Hogan (1988), at 342.

[2]. Phillips v R [1969] 2 A.C. 130, at 137.

Page 299

[1]. See Beckford v R [1987] 3 All E.R. 425.

[2]. See Caldwell [1981] 1 All E.R. 961, at 967.

Page 300

[1]. Palmer v R [1971] 1 All E.R. 1077, at 1088.

Page 301

[1]. NE1149a25ff; see also MM1202b10ff.

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[1]. MM1202b20-21.

Page 302 (cont.)

2. NE1149b1-3.

3. NE1109b17. See Horder, "Cognition, Emotion, and Criminal Culpability", forthcoming in the L.Q.R., April 1990.

4. This is because it is only when desire for retaliation is not immediately translated into retaliatory action that one is aware of any conflict between the injunction of reason to stay one's hand, or to inflict less retaliation, and the desire to inflict greater retaliation. Weakness of will only influences action in these sorts of situations, and so people who always lose their self-control when angry, and are never righteously indignant, cannot suffer from weakness of will in the sense that is here under discussion (see page 303 note 1 infra); for they experience no conflict between reason and desire, because the power of reason to influence action has been eclipsed by the force of the passions when self-control is lost.

Page 303

1. See Davidson (1980), at 27-29.

2. MM1202b21-28.

3. Sang [1980] A.C. 402.

4. Wells (1982), at 213.

5. See Palmer v R [1971] 1 All E.R. 1077, at 1088.

6. Brudner (1987), at 354.

Page 304

1. See page 270 note 2 ante.

Page 305

1. See MM1202b26-28; see also NE1126a19-21.

Page 306

1. Reg. v. Parker (Daryl) [1977] 1 WLR 600.

2. ibid., at 604.

3. This view may underlie the provision in the Model Penal Code: s.210.3(1)(b), which reduces homicides from murder to manslaughter if they are "committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." See Dressler (1988) 467 at 473 note 29.

Page 307

1. Ashworth (1973), at 292-293.

2. Ashworth (1976), at 315.

3. MM1203a30-b11.

Page 310

1. Duffy, cited by Lord Goddard at [1949] 1 All E.R. 932.

CONCLUSION

> "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 impulse or passion in me, so that it wasn't truly or merely me acting of my own accord (excuse)? Or is it rather that, he having done me such an injury, I was entitled to retaliate (justification)? [Austin (1956), 3]

I would suggest that my investigation in this thesis has gone some way towards resolving what Austin here refers to as the genuine uncertainty or ambiguity over what we mean when we plead provocation in mitigation. The ambiguity or uncertainty, neatly illustrated by Austin's vagueness in this passage over what acting in anger involves, stems from a failure to attend at a second-order level to the nature of feeling and acting in anger, before attempting to shed light on the first-order foundation of the mitigation provided by a defence of provocation in moral justification and/or excuse.

In the course of this thesis, through extensive historical analysis, we have seen that there are two kinds of anger, anger as righteous indignation and anger as a loss of self-control. The former involves action on principle, the latter does not, but both involve action based on a moral judgment, a judgment of wrongdoing and\or of appropriate retaliatory response. These insights provide the second-order foundation on which a first-order analysis of the doctrine can and should be built.

As action stemming from both kinds of anger involves a moral judgment, both may be analysed in terms of moral justification. That is to say action stemming from both kinds of anger may be analysed in terms conformity to and departure from a mean with regard to a virtue, in terms of whether and if so to what extent

the moral judgments in fact made provided a good or acceptable moral reason for action, a reason which reflects a good or acceptable moral character. What is more, as I argued at the end of section three of chapter four, the law should require at least some moral justification for angry retaliation before mitigation is made available, on the grounds of provocation.

As I argued in chapter five, though, the nature of the first-order foundation of provocation in excuse differs with the kind of action in anger concerned, and with whether what is in issue is an overreaction in anger, or a mean display of angry retaliation. Mean actions in anger due to a loss of self-control fall within the narrow conception of an excusing condition, as do, in different ways, overreactions in anger. Both are kinds of action taken in empirical conditions in which conformity with the law cannot be expected. Mean actions in anger conceived as righteous indignation, however, being actions on principle must be excused within the broad conception of an excusing condition, like actions under duress, namely on the grounds that the moral conditions in which conformity with the law could be expected were absent.

The picture is thus not a neat and tidy one. It is, however, a picture that steers clear of both the "Scylla" of continued confusion, ambiguity and uncertainty, and the "Charybdis" of oversimplification. Both of these must inevitably result from a failure to realise the vital importance of an analysis of the nature of anger and action in anger to an understanding of the defence of provocation.