

On Getting the Reasonable Person Out of the Courtroom

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Will the reasonable person please stand up, and get out of this courtroom! The common law is obsessed with reasonable people. These people are pinnacles of virtue—courteous, placid, gentle, timely, careful, perceptive—in short, complete figments of our imagination. Yet they are permitted to perform a hideous function within the criminal law. Although no one is really like them, they set the standard for judging our frailties. If we do not match their glorious perfection, we are cast into the shadow of ignominy and damnation. It is time to say: Off with their heads!

In *Responsibility Determination as a Smokescreen: Provocation and the Reasonable Person in the Israeli Supreme Court*, Orit Kamir suggests an approach to understanding the provocation defense that avoids these impertinent reasonable people. In particular, she proposes two cumulative examinations: “a preliminary, explicitly normative one; and a secondary, purely subjective one.”¹ The preliminary examination requires a court to decide from a normative viewpoint whether a case involves provocation. If the answer is affirmative, the court should then proceed to the secondary examination and determine from a subjective viewpoint whether the defendant did in fact kill as a result of the provocation. I could not agree more. The difficulty I see facing her appeal is finding an adequate objective definition of the provocation defense. It is to this task that I would like to devote my comments. More precisely, I would like to find an objective normative criterion that avoids any use of the reasonable-person standard, a standard that Kamir rightly criticizes as opening the floodgates for courts to engage in normalizing.

I shall take the approach that provocation is a partial excuse. It reduces the blame normally attributable to a criminal offender. It is not a justification because we do not say that the conduct was not wrongful if provoked. Instead, we say that the actor understandably lost self-control. Because the actor did not have full self-

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¹ Orit Kamir, *Responsibility Determination as a Smokescreen: Provocation and the Reasonable Person in the Israeli Supreme Court*, 2 OHIO ST. J. CRIM. L. 547, 568 (2005).

control at the time of committing the provoked act, he is not as blameworthy as someone who did have that control. In other words, the actor did not act in cold, but rather in hot, blood, and he acted under circumstances that might heat up anyone's blood.²

I propose a three-pronged test of provocation. The first prong asks whether the provocation called forth justified ire. The second asks whether the provocation and the consequent justified ire called forth the actor's intent to commit the criminal act. The third prong compares the wrong inherent to the provoked act and the wrong inherent to the provocation, and requires a reduction of blame accordingly. None of these elements of the provocation defense requires us to rely on any reasonable person lurking in our courtroom.

I. JUSTIFIED IRE

The word "provocation" is misleading. It means "to call forth," but to call forth what? Emotions in general? The Model Penal Code's focus on "extreme mental or emotional disturbance" seems to suggest so. The German Penal Code focuses on a specific reaction that is called forth, namely "*Zorn*." "*Zorn*" can be translated as "ire," "wrath," or "anger." Although "ire" is generally used poetically, I use it here because it is less violent, and less gender specific, than "wrath." It is also the direct English translation of the Latin "*ira*," which Thomas Aquinas uses when discussing this effect in his reception of Aristotle. Furthermore, it is a reaction that Aristotle and Aquinas see as potentially positive or negative. It thus provides a more neutral tool for analysis.

Aristotle analyzes ire in terms of degree—too little, too much, and appropriate ire. He states: "The man who is irate at the right things and with the right people, and further, as he ought, and as long as he ought, is praised."³ Aristotle criticizes phlegmatic persons:

[T]hose who are not irate at the things they should be irate at are thought to be fools, . . . for such a man is thought not to feel things nor to be pained by them, and since he does not get irate, he is thought unlikely to defend himself; and to endure being insulted and to put up with insult to one's friends is slavish.⁴

² I greatly benefited from Joshua Dressler's work on provocation and in particular from his *Criminal Law: Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982) and *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002) [hereinafter Dressler, *Why Keep the Provocation Defense?*].

³ ARISTOTLE, *NICOMACHEAN ETHICS*, Bk. IV, 5 (W. D. Ross trans., Clarendon Press 1908). Ross uses "angry" for what I have as "irate."

⁴ *Id.*

At the opposite end of the spectrum is the choleric, who is always enraged over everything, and the wicked person, who additionally is enraged more strongly and longer until he can wreak revenge and inflict pain.⁵

Aquinas distinguishes ire from iracundity, the former being neutral and the latter excessive.⁶ Furthermore, he distinguishes between ire that accords with, and ire that contradicts, right reason (*ratio recta*), remarking that the former is not a sin.⁷ Ire that accords with right reason (*ira per zelum*), or zealous ire, is ire that neither hinders nor prevents rational justice (*judicia rationes*). Ire that contradicts right reason (*ira per vitium*), or vicious ire, is a vice.⁸ Aquinas also speaks of “holy ire.”⁹ One thinks of Moses’ breaking of the stone tablets in response to his people’s infidelity, or Jesus’ destroying of the money changers’ booths in the Temple in response to their sacrilege. Aquinas notes that ire is provoked by a feeling of injustice.¹⁰ Important to emphasize is that Aristotle and Aquinas are discussing when it is just or justified to become irate, and not when an act out of ire is justified. Just, as opposed to unjust, ire, however, is a useful concept for designing an objective normative definition of the provocation defense. The first test should be whether the ire itself was a justified response to the provocation. The answer to that question should depend on whether the provocation was wrongful.¹¹ If the provocation was wrongful, one can say that the actor may have responded to the provocateur’s injustice with justified ire.

Indeed, the provocation defense may appear to be justification-based, because the actor’s ire seems justified in light of the victim’s wrongful conduct. A parent becomes irate at the neighborhood bully because he pushed her ten-year-old off his bicycle. A hobby gardener becomes irate because the neighbor let his dog dig up the gardener’s prize roses. In such cases we feel that the ire was justified, because the object of the ire has acted wrongfully and deserves it. In contrast, the dog-lover’s ire at a pedestrian because she told him to leash his Doberman, or the train traveler’s ire at a fellow passenger because she told him to turn down his Walkman are cases where we feel the ire is unjustified. The pedestrian has a right to walk

⁵ *Id.* at 11.

⁶ AQUINAS, *SUMMA THEOLOGICA*, II^a II^{ae} Q 158 art. 8, Obj. 2 or C.

⁷ *Id.* at II^a II^{ae} Q 158 art. 1, Obj. 3 or C.

⁸ *Id.* at II^a II^{ae} Q 158 art. 2, Obj. 3 or C.

⁹ *Id.* at II^a Q 15 art. 9, Obj. 3 or C.

¹⁰ *Id.*

¹¹ I do not agree with Victoria Nourse’s limitation on the availability of the provocation defense to those cases in which the act of provocation is *criminally* wrongful. See Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L.J.* 1331 (1997). It seems to me that many acts which society considers to be torts but not crimes are good candidates for a response of justified ire, e.g., direct interference with the marriage relation under *RESTATEMENT (SECOND) OF TORTS* §§ 683, 684 (1974). Cf. Dressler, *Why Keep the Provocation Defense?*, *supra* note 2, at 979–84.

the streets without being afraid of canine attack, and the passenger has a right to travel without music blaring in her ears.

II. CALLING FORTH ACTOR'S INTENT

The next requirement I am proposing is that the provocation and the actor's responding justified ire called forth the actor's intent to attack the provocateur. This step is important to exclude from the provocation defense those cases in which the actor, although fully unaffected by anything the provocateur-victim did, simply seizes an opportunity to attack him. In provocation cases, as in excuse cases generally, the criminal law focuses on the actor's mental or emotional state at the time he acted, to determine whether to impute blame to him for his wrongful act. If the circumstances caused the actor to experience exceptional mental or emotional distress, the law provides an excuse. In contrast, if the actor was unaffected by the surrounding circumstances, we see no reason to excuse him. Similarly, in a provocation case we see no reason to give any benefit to the actor if he was unaffected by the victim's conduct.

To test whether the provocation called forth the actor's intent to attack, I suggest applying the German criminal law test to determine whether a person should be punished as a solicitor. German law defines the solicitor as: "One who intentionally determines another to commit an intentional wrongful act."¹² The German Federal Court of Justice defines "determining another to commit an intentional wrongful act" as "calling forth (*hervorrufen* or "provoke" in English) the principal's decision to act,"¹³ regardless of the means used, e.g., through encouragement, threats, gifts, or promises. The test is one of but-for causation.¹⁴ It is inessential that the means the solicitor used would have been sufficient to call forth the decision to act in another (reasonable) person.

Admittedly differences exist between solicitation and provocation. One is that the solicitor incites the actor to commit a crime against a third party, whereas the provocateur incites the actor to commit a crime against the provocateur himself. Another is that the provocateur does not usually intend to incite the provoked actor to attack, but under German law the solicitor must intend to incite the principal to act. A third is that solicitation under German law requires the principal to be fully responsible for the crime he commits, meaning that he commits it without excuse. In contrast, in provocation cases, the provoked actor acts with a partial excuse.

All three differences, however, relate to the fact that solicitation itself is a crime. Consequently, certain requirements must be met in order to justify

¹² § 26 StGB.

¹³ BGHSt 2, 279 (281).

¹⁴ 1 LEIPZIGER KOMMENTAR ZUM STRAFGESETZBUCH §§ 1-31, § 26 margin no. 2 (Hans-Heinrich Jescheck et al. eds., 10th ed. 1985).

punishing the solicitor. The first requirement,¹⁵ namely that the solicitor incite the actor to commit a crime against a third party and not against the solicitor himself, is imposed because a person cannot be held criminally liable for harming his own legally protected interest, or soliciting someone else to do so.¹⁶ The second requirement, namely that the solicitor intend to incite the principal, is imposed as the *mens rea* requirement for solicitation. Even so, German law does not require the solicitor to act with direct intent (*dolus directus*). Instead, it is sufficient that he act recklessly (*dolus eventualis*), which German law treats as a form of (conditional) intent.¹⁷ Finally, the third requirement, namely that the principal be fully responsible for the crime he commits—meaning that he commit it without excuse—is imposed because of a distinction German law draws between the solicitor and the indirect actor (*mittelbarer Täter*). Under German law, the indirect actor in a homicide case is liable for the homicide, whereas the solicitor is liable for soliciting (homicide). Accordingly, one must distinguish between the two roles these parties play. The difference turns on whether the person performing the criminal act is fully responsible. If he is not, then someone taking advantage of that defect is really the principal. If he is fully responsible, then the person in the background is the solicitor.

I, however, am not suggesting using the test applied in solicitation cases to determine whether the provocateur is criminally liable for provoking the attack. Using the German test for solicitation in provocation cases thus does not depend on these requirements, because the purpose of applying the test is simply to determine whether the provocateur called forth the principal's decision to act. If German law can determine whether the solicitor "called forth the principal's decision to act" without using a reasonable-person standard, the common law must be able to determine similarly whether the provocateur called forth the actor's decision to attack.

III. REDUCING BLAME

If the actor responded to the provocation with justified ire, and the justified ire called forth the actor's determination to attack the provocateur, then the last remaining issue is whether we should partially excuse the actor for the attack. To solve that problem without resorting to the reasonable-person test, I would suggest considering Kant's approach to the imputation of blame:

¹⁵ For German law, see LACKNER, KÜHL, STRAFGESETZBUCH MIT ERLÄUTERUNGEN 162, commentary preceding § 25 (2001); for United States law, see MODEL PENAL CODE § 2.06(6) (1985).

¹⁶ 1 LEIPZIGER KOMMENTAR ZUM STRAFGESETZBUCH, *supra* note 14, at §§ 1–31, pre-§26 margin no. 2.

¹⁷ BGHSt 2, 279 (281).

Subjectively, the degree to which an action *can be imputed* (*imputabilitas*) has to be assessed by the magnitude of the obstacles that had to be overcome. . . . [T]he less the natural obstacles and the greater the obstacle from grounds of duty, so much more is a transgression to be imputed (as culpable). Hence the state of mind of the subject, whether he committed the deed in a state of agitation or with cool deliberation, makes a difference in imputation, which has results.¹⁸

The natural obstacles Kant speaks of are the actor's sensual drives or motivations. These drives make the act appear desirable, whether they are drives toward pleasure or drives away from pain. The obstacle from grounds of duty is that the actor is aware that he has a duty not to commit the act.

Legislation, be it in law or in ethics, attaches a motivation to the duties it imposes to subjectively unite the actor's choice to act in a certain way with the actor's awareness of the law. In ethics this motivation is the idea of the duty itself, but in law the motivation is external. The motivation attached to duties in the criminal law is the threat of punishment for breaching the duty. The threat of punishment provides the actor with a motivation to obey the law that should counteract any motivation he might have to violate it, or any natural obstacle to obeying the law that might be confronting him. Kant discusses the so-called Plank of Carneades case in this context:

[T]here can be no *penal law* that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning). Hence the deed of saving one's life by violence is not to be judged *inculpable* (*inculpabile*) but only as *unpunishable* (*impunibile*), and by a strange confusion jurists take this *subjective* impunity to be *objective* impunity (conformity with law).¹⁹

Joachim Hruschka has shown²⁰ that for Kant *inculpabile* means justified, and *impunibile* means excused. Accordingly, Kant is saying here and in his comments on the imputation of blame that one must compare the motivation provided by law

¹⁸ IMMANUEL KANT, *METAPHYSIK DER SITTEN*, Akademie-Ausgabe vol. VI, 228 (Mary Gregor trans., Cambridge Univ. Press 1991).

¹⁹ *Id.* at 235–36.

²⁰ Joachim Hruschka, *Rechtfertigungs- und Entschuldigungsgründe: Das Brett des Carneades bei Gentz und Kant*, 1–10 (Goldammer's Archiv 1991).

to the motivation provided by the actor's sensual drives in the situation. The greater the sensual drives (natural obstacles to fulfilling the duty) and the lower in comparison the motivation given by the law to obey it, the less we impute blame. In the Plank of Carneades case, therefore, the natural obstacle is per definition greater than any obstacle the law can legitimately provide. At that point we impute no blame but rather excuse completely.

In provocation cases, we can also compare the obstacle the law imposes to prevent the provoked attack to the natural obstacle the actor's ire imposes motivating him to violate the law. The obstacle the law imposes is the amount of punishment threatened for committing whatever offense the actor committed. The natural obstacle the actor's ire imposes should depend on the wrong the provocation inflicts. The wrong the provocation inflicts can be measured by the consequences the law imposes for doing whatever the provocateur did to provoke the attack. The greater the wrong inherent to the provocation and the lower the amount of punishment threatened for committing the offense the provoked actor commits, the less should be the blame we impute to him and vice versa.

I would like to emphasize that we do still impute blame and hold the provoked actor responsible to some degree for the crime he has committed. I am not using a utilitarian calculus to justify him, because what he did, even though he was justly irate, was wrong. Still, when imputing blame, it seems appropriate to balance the natural obstacle interfering with the actor's motivation to obey the law against the motivation the law attaches to the duties it imposes.

This approach has merit in that it generalizes the provocation defense so it can apply to all criminal offenses. Indeed, it also has merit in that it can apply to all cases of partial excuse and not just to provocation cases. This approach further has merit because we already have a scale for balancing the harm imposed by the provocation and the harm imposed by the actor's response, namely the consequences the law imposes for the harms caused. The most significant merit to this approach is that it banishes the reasonable person from the common law courtroom.

As model legislation for provocation cases I would suggest:

One who is justly irate in response to another person's wrongful act of provocation and whose justified ire calls forth his determination to commit a wrongful act against that person may be partially excused. The extent of the partial excuse shall be measured by comparing the wrong inherent to the act of provocation and the wrong inherent to the actor's wrongful act. The greater the wrong inherent to the act of provocation and the lesser the wrong inherent to the actor's wrongful act, the less blame shall be imputed to the actor. The lesser the wrong inherent to the act of provocation and the greater the wrong inherent to the actor's wrongful act, the more blame shall be imputed to the actor.