

CONTROLLING PASSION:
ADULTERY AND THE PROVOCATION DEFENSE

*Susan D. Rozelle**

TABLE OF CONTENTS

I. INTRODUCTION	197
II. FALL FROM GRACE.....	201
III. COMPETING RATIONALES.....	205
A. <i>Provocation as a Partial Excuse</i>	208
B. <i>Provocation as a Partial Justification</i>	208
C. <i>Retribution Versus Utilitarianism</i>	210
IV. THE NATURE OF PROVOCATION	214
A. <i>The Failure of Excuse</i>	215
1. We Should Assume People Have Control over Their Actions Despite Provocation	217
2. People Do, in Fact, Have Control over Their Actions Despite Provocation.....	220
B. <i>The Imperfect Success of Justification</i>	227
V. CRITICISM AND RESPONSE	229
VI. CONCLUSION	232

I. INTRODUCTION

“If she slept with someone else, I’d kill her.” For most of us, this would be hyperbole. For those who would literally kill, it is one of the most time-honored reasons for a reduced sentence. Despite this lengthy tradition, we should not permit adultery to mitigate murder to voluntary manslaughter. That we permit it to mitigate now results from fundamental

* Assistant Professor of Law, Capital University; J.D. *magna cum laude*, Duke University 1999; B.A. in Philosophy *summa cum laude*, University of Central Florida 1994. Special thanks to Professors Michael L. Corrado, Joshua Dressler, Donald A. Hughes, Jr., Stephen J. Morse, Mark P. Strasser, and Dean Jack A. Guttenberg for their thoughtful insights, and to Professors Mark A. Godsey, Steven Huefner, and the other members of the Ohio Legal Scholarship Workshop who thoroughly vetted an earlier draft of this Article. Thanks also to Dr. Howard Sokolov for graciously sharing his expertise with me, and to Jayme Fountain and Benjamin Partee for their excellent research assistance. Any errors, omissions, or otherwise embarrassing gaffes are my own.

misunderstandings about controlling passion and the nature of the provocation defense.

Voluntary manslaughter is a killing committed in an actual heat of passion, based on a sudden provocation, which was legally adequate to provoke a reasonable person.¹ In other words, provoked killings occur when: (1) the defendant was awash with emotion; (2) the emotion was a reaction to a sudden, upsetting event; and (3) the upsetting event is the kind of thing that would provoke a reasonable person.²

Traditionally, only a handful of provocations qualified as “legally adequate”: mutual combat, violent assault, unlawful arrest, and witnessing one’s wife³ in the act of adultery.⁴ These “nineteenth century four”⁵ reduce to

1. RICHARD J. BONNIE ET AL., CRIMINAL LAW 804 (2d ed. 2004).

2. This last prong is the subject of some debate. After all, the thought is incomplete: the kind of thing that would provoke a reasonable person to do what? Be angry? Kill someone? For insightful discussion of this point, see, for example, Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 466-67 (1982) [hereinafter Dressler, *Rethinking*] (stating that for nature of partial defense to make sense, provocation must be “so great that the ordinarily law-abiding person would be expected to lose self-control to the extent that he could not help but act violently, yet would still have sufficient self-control so that he could avoid using force likely to cause death or great bodily harm”); and Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 998-99 (2002) [hereinafter Dressler, *Why Keep*] (stating mitigation is appropriate if the provocation “might cause a reasonable [ordinary] person, of average disposition, to lose self-control and act rashly and without due deliberation”).

The word “reasonable” also is subject of some debate, since reasonable people do not kill. *E.g.*, MODEL PENAL CODE § 210.3 cmt. at 56 (1980).

Some courts . . . use the term “ordinary” person. The latter term avoids the oddity of describing a “reasonable person” as one who acts on occasion in a rage, rather than with due deliberation. On the other hand, use of the word “reasonable” reinforces the important point that the objective standard contains a normative component and is not merely descriptive.

Dressler, *Why Keep*, *supra*, at 973 n.65. Following Professor Dressler’s lead, this Article, too, uses “reasonable person” and “ordinary person” interchangeably.

3. The adultery provocation originally was available only to men, growing as it did out of the violation of his property (i.e., his wife). WAYNE R. LAFAYE, CRIMINAL LAW 779 & n.39 (4th ed. 2003) (citing *Holmes v. Dir. of Pub. Prosecutions*, [1946] A.C. 588). As time passed, however, courts broadened the defense’s availability to include women who killed in response to their husbands’ adultery, as well. *Id.*

4. Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1341 (1997).

5. *Id.*

two paradigmatic contexts, still the paradigms today: (1) the defendant, faced with a violent but non-deadly assault, responds to his⁶ attacker in the heat of passion with excessive, deadly force; and (2) the defendant, arriving home early one day to discover⁷ his wife in bed with another man, in the heat of passion kills one, the other, or both.

Contemporary scholars naturally have questioned the continued viability of the paradigm of infidelity killings in a society that no longer embraces the view that women are property.⁸ Although this *is* the more troubling of the two paradigms, the real trouble with it lies deeper than its sexist tradition. The infidelity paradigm rests on a fundamentally flawed and inadequately examined premise: the provocation defense nonchalantly asserts, and the dominant scholarship regarding the defense accepts, that to a certain extent we simply cannot expect people to control themselves when faced with the sight of a faithless spouse. This is not true. We should, and in fact do, have more control over our passions than the defense and the prevailing scholarship assume.

6. This Article's hypothetical defendants will be men throughout, not to minimize the reality of female murder and manslaughter defendants, but simply because the vast majority of those who kill are men. Over the last several years, the proportion has held steady at 90%. See FBI, Uniform Crime Reports, <http://www.fbi.gov/ucr/ucr.htm> (last visited Dec. 21, 2005), for a compilation of the Uniform Crime Reports ("UCR") from the past decade, which provide, among other things, statistics on the gender ratio of murder victims and offenders; compare table 2.6 of the 2001 UCR, with table 2.6 of the 2002 UCR, and table 2.5 of the 2003 UCR. These numbers include all murders and non-negligent manslaughters. *Id.* Although provocation is not listed separately, "romantic triangle" is one of the circumstances tallied. *Id.* Unsurprisingly, wives and girlfriends are killed overwhelmingly more frequently than husbands and boyfriends. *See id.* (providing the relevant statistics in table 2.12 of the 2001 UCR, table 2.12 of the 2002 UCR, and table 2.11 in the 2003 UCR). The killers of these wives and girlfriends are necessarily men, because homosexual relationships are not included in these categories. *See id.* Instead, the FBI counts each of those victims as an "acquaintance." *See*, for example, table 2.11 of the 2003 UCR.

7. Because the original common law of provocation established that words alone were insufficient to establish the defense, only "ocular observation" of the adultery would do. LAFAVE, *supra* note 3, at 779-80. As the traditional approach to provocation relaxed, however, *see infra* text accompanying notes 24-26, many jurisdictions abandoned that rule and now will send the evidence to the jury for a determination of the adequacy of the provocation. LAFAVE, *supra* note 3, at 780-81. Consequently, although "ocular observation" remains the classic example, alternatives such as suddenly being told about a wife's infidelity could establish the defense in many jurisdictions, as well. *Id.* at 779-81.

8. *See, e.g.*, CAROLINE FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 178-94 (1999); Dressler, *Why Keep*, *supra* note 2, at 967-68.

In Part II, this Article sketches the history of the provocation doctrine and its waxing and waning popularity. Part III describes the competing rationales behind the provocation defense: justification versus excuse, and retribution versus utilitarianism.⁹ Part IV explains provocation's place in a system that promotes both retributive and utilitarian perspectives and demonstrates that, both as a philosophical matter and as an empirical one, the provocation defense cannot find its home in excuse. Instead, it is properly conceived of as a justification defense.

The difference matters. In the guise of excuse, the defense has snuck past its original borders. By revealing provocation's true nature, this Article seeks to do more than send provocation back to its beginnings. It seeks to control the defense more tightly still, permitting it only to those defendants who were legally entitled to use some amount of force when they killed.

This proposal has the virtue of providing the intuitively right answers to cases of imperfect self-defense (do mitigate) and jealous spouses (do not mitigate)¹⁰ without resorting to creation of any exceptions from the general rule.¹¹ But it has the vice of giving what intuitively may feel like the wrong answers in what are perhaps the most sympathetic circumstances of them all: this proposal would not mitigate to manslaughter for the father who kills his child's murderer, or the husband who kills his wife's rapist.¹² Part V of this

9. E.g., Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 728-29 (1995) [hereinafter Dressler, *When "Heterosexual" Men Kill "Homosexual" Men*].

10. This proposal similarly denies the defense in the separation scenario, see Nourse, *supra* note 4, at 1342-43, the homosexual advance scenario, see Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 133 (1992), and any other "provocations" the law does not recognize as situations in which any amount of force may be used, see discussion *infra* Part IV.B.

11. The preference for a single, coherent theory over one we must accompany with various disclaimers is intimated in Professor Dressler's suggestion that Robert Mison would have been better served to attack the provocation defense "wholesale," rather than "singling out one category of cases for special treatment." Dressler, *Why Keep*, *supra* note 2, at 961. This preference is often taken for granted, but it has motivated advances in many fields. When classical, Newtonian physics failed to explain phenomena observed at the atomic level, for example, quantum physics took hold. Of course, this same reasoning also works in reverse: "[T]he real test of a theory is whether . . . abstract evaluations can be cashed out in detail, as answers to particular questions." Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97, 121 (2002) [hereinafter Huigens, *Homicide*].

12. Of course, the dilemma about whether or not to mitigate in such a case will arise only: (1) in jurisdictions where deadly force may not be used to stop a fleeing felon; (2) if the

Article considers this objection and concludes that withholding mitigation in these circumstances is the right result after all: vengeance killing is murder and ought not be mitigated to manslaughter.¹³

II. FALL FROM GRACE

Randall Dixon and his fiancée went out with friends to celebrate their engagement, but because his bride-to-be danced with another man at the party, Dixon beat her to death.¹⁴ He first attacked her at the celebration, then followed her to her sister's house, where he beat her until she stopped breathing.¹⁵ He revived her with mouth-to-mouth resuscitation, then took her home and continued the assault. When the beating stopped at 5:00 a.m., his fiancée again lay unconscious.¹⁶ This time she never woke up.¹⁷ She remained on a respirator until she died, twelve days after the party.¹⁸ The Arkansas jury was instructed that it could find Dixon guilty of only manslaughter, rather than murder, if it believed he acted "under the influence of extreme emotional disturbance for which there is reasonable excuse."¹⁹ The jury voted manslaughter.²⁰ We cannot know for certain why the jury convicted Dixon of manslaughter rather than murder,²¹ but the point remains:

prosecutor chooses to press murder charges; and (3) when the defendant would not qualify for an insanity defense, thereby being completely excused. *See* discussion *infra* Part V.

13. This view may prove unpopular—witness Michael Dukakis's politically fatal statement that he would continue to oppose the death penalty even for a hypothetical defendant who had raped and killed his wife, *Transcript of the Second Debate Between Bush and Dukakis*, N.Y. TIMES, Oct. 14, 1988, at A14—but it follows inexorably from a belief in the rule of law, not of men. *See* discussion *infra* Part V.

14. *Dixon v. State*, 597 S.W.2d 77, 78 (Ark. 1980).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 79 (citing Ark. Stat. Ann. § 41-1504 (repealed 1977)).

20. *Id.*

21. In addition to the usual uncertainty that accompanies any jury verdict, the jury here also was instructed that it could convict of manslaughter rather than murder if it determined that it was not the defendant's purpose to kill or seriously injure, but that he instead caused her death recklessly. *Id.* (citing Ark. Stat. Ann. § 41-1503(1) (repealed 1977)). Given the facts of the case as reported in the decision, however, it seems unlikely the jury would have concluded that Dixon lacked the intent, if not to kill, then at least to seriously injure his victim. He beat her in two separate locations before she fell unconscious. *Id.* at 78. He resuscitated her himself, and therefore knew that he had seriously physically injured her already. *Id.* That he

a judge concluded that a reasonable jury could decide that, if a woman danced with another man at her engagement party, then her behavior was a reasonable excuse for the anger that prompted him to kill her by beating her from that evening through five o'clock the following morning, and it merits a reduction in sentence.²²

Randall Dixon's Arkansas is among those few jurisdictions that followed the Model Penal Code's expansion of the traditional provocation doctrine to its "extreme mental or emotional disturbance" rule ("EED").²³ Traditionally, the provocation mitigation of murder to voluntary manslaughter was available to the defendant who killed in response only to one of those "nineteenth century four": mutual combat, violent assault, unlawful arrest, and witnessing his wife in the act of adultery.²⁴ Then came the expansion of the "rigid common law categories of 'adequate provocation' . . . to the view that the issue [of the adequacy of the provocation] is one for the jury to decide."²⁵ Juries were asked to pass on the reasonableness of the provoking event regardless of whether it fit any sort of predetermined category of provocations. The Model Penal Code took this expansion even farther, declaring that the reasonableness of the defendant's emotional reaction is to be determined "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."²⁶ Under this definition, the kinds of provocations that might establish mitigation grew beyond those of the hypothetical reasonable person. They also included those of that particular defendant, regardless of whether he shared the viewpoint of a reasonable person.

continued to beat her after this point "evidenced his intent to cause her serious physical injury." *Id.* at 80. Recklessness seems less plausible on these facts than extreme emotional disturbance.

22. *Id.* at 78. Letting the jury decide is more than abstention on the judge's part. "The very act of sending a case to a jury requires some kind of normative judgment, some choice about those cases in which a rational jury could find a 'reasonable' explanation for rage." Nourse, *supra* note 4, at 1372.

23. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962) ("Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.").

24. Nourse, *supra* note 4, at 1341.

25. Dressler, *When "Heterosexual" Men Kill "Homosexual" Men*, *supra* note 9, at 733.

26. MODEL PENAL CODE § 210.3(1)(b).

This liberalization of the traditional provocation defense meant that defendants like Randall Dixon might qualify for mitigation, whereas under the traditional formula, which requires an objectively reasonable provoking event, they never would. It was cases like Dixon's that led Professor Victoria Nourse to argue that the Model Penal Code's reform was a mistake.²⁷ She is by no means alone. This broadening of provocation beyond its traditional borders means that sentences could be lessened for a man who kills under additional "provocations" that many argue should be insufficient as a matter of law: from seeing "his" woman dance with another man or leave the relationship²⁸ to being propositioned by another man for a homosexual encounter.²⁹ Sadly, such cases really do occur:

David Thacker met Douglas Koehler in a bar and invited him to his apartment. There, Koehler allegedly attempted to kiss Thacker, who became enraged and insisted that Koehler leave. Later in the evening, still angry, Thacker recruited his roommate to help him track Koehler down. When they found him, Thacker shot Koehler in the face, killing him. Outraging gays, prosecutors permitted Thacker to plead guilty to manslaughter, and the judge sentenced him to a mere six years. Explaining his lenient sentence, the judge stated that the unusual circumstances of the killing made it "a one-time tragedy" and that he was "confident Mr. Thacker would not kill again."³⁰

Of course, the fact that judges sometimes make bad decisions does not necessarily mean there is a problem with the law. Sometimes, the law is exactly as it should be, but judges nevertheless manage to misapply, misunderstand, or even ignore it. The illustrations above simply highlight the fact that where the focus is on the subjective emotional disturbance of the individual defendant, the potential for mitigation in cases that do not seem to merit it is greatly increased.

Perhaps as a result, there have been recent signs that support for the provocation defense has waned. Interestingly, though, these signs show more

27. Nourse, *supra* note 4, at 1332-33 & n.10, 1362-66.

28. *Id.* at 1342-45 (distinguishing infidelity scenarios from separation scenarios).

29. Mison, *supra* note 10, at 136.

30. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 272 (1996) (citing *Killer's Sentence Too Light, Says Family of Gay Victim*, SALT LAKE TRIB., Aug. 16, 1994, at C1; *Judge Draws Protest After Cutting Sentence of Gay Man's Killer*, N.Y. TIMES, Aug. 17, 1994, at A15).

than a simple desire to retreat back from the Model Penal Code's expansion. They indicate a dislike even for provocation's more restricted, traditional common law form. For example, in Kentucky (an EED state),³¹ a juror told a judge "she believed that people should be in control of themselves when dealing with a domestic partner. . . . [A]s an example[, w]hile she might get mad at her husband, she would never hit or kill him as a reaction to her anger," and that if the facts showed the defendant killed under such circumstances, she would consider it murder.³² And a district court judge in New York (also an EED jurisdiction)³³ recently announced, while discussing the earlier case of *People v. Berk*,³⁴ that because mitigation to manslaughter requires that the "defendant's reaction . . . be 'an understandable human response deserving of mercy' . . . a defendant who witnessed his estranged wife engaged in sexual activity with another man did not have a sufficient ground" for this defense.³⁵ These incidents show a rejection, not just of the Model Penal Code's expansion, but also of witnessing adultery as a defense—one of the most venerable members of the list of legally adequate provocations. The fact that these rejections occurred in EED jurisdictions, too, is significant. It indicates a desire to cabin in the provocation defense even more radically than the old common law rubric did, in some of the very places that have expanded the provocation defense the most.

Neither of these examples demonstrates a sea change by any means. The New York court's characterization of *Berk* as declaring that witnessing one's wife committing adultery is not sufficient ground for mitigation was a bit overzealous; *Berk* decided only that the jury's rejection of manslaughter in favor of a murder conviction in this context was supported by the evidence.³⁶ And since that Kentucky juror effectively announced her intention to disregard the law on this point, the trial judge's failure to dismiss her for cause earned that defendant a new trial.³⁷ Nevertheless, these examples show that at least some people (or rather, some people besides law professors) are beginning to think that fewer defendants should benefit from the mitigation

31. See KY. REV. STAT. ANN. § 507.020 (West 2004).

32. *Gihon v. Commonwealth*, No. 2003-SC-0820-MR, 2004 WL 2129619, at *1 (Ky. Sept. 23, 2004).

33. See N.Y. PENAL LAW § 125.25 (McKinney 2004).

34. 629 N.Y.S.2d 588 (App. Div. 1995).

35. *Shiwlochan v. Portuondo*, 345 F. Supp. 2d 242, 266 (E.D.N.Y. 2004) (quoting *People v. Casassa*, 49 N.Y.2d 668, 680-81 (1980)).

36. 629 N.Y.S.2d at 590.

37. *Gihon*, 2004 WL 2129619, at *1-2.

to voluntary manslaughter, even in its most restrictive, “nineteenth century four” manifestation.³⁸

This Article supports that conclusion. The primary criticisms of the provocation doctrine have focused on two concerns: privileging male violence, and blaming female victims.³⁹ This Article suggests that these difficulties and others⁴⁰ arise as a result of a misconception. If heat of passion provocation is understood as a partial justification defense, rather than mischaracterized as a partial excuse defense, its reach can be vastly—and properly—controlled.

III. COMPETING RATIONALES

Why punish voluntary manslaughter differently than murder? First, we punish murder, voluntary manslaughter, and any kind of criminal behavior for that matter, in order to accomplish several different goals.⁴¹ These are commonly listed as retribution, deterrence, incapacitation, and rehabilitation.⁴² In this sense, punishment, like human behavior generally, is

38. The debate over the proper breadth—or proper existence at all—of a traditional provocation or EED-style mitigation to voluntary manslaughter has raged vigorously in academia. For a small sampling, see generally JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* (1992); CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003); A.J. Ashworth, *The Doctrine of Provocation*, 35 *CAMBRIDGE L.J.* 292 (1976); Dressler, *Rethinking*, *supra* note 2; Dressler, *Why Keep*, *supra* note 2; Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 *J. CRIM. L. & CRIMINOLOGY* 1 (1984) [hereinafter Morse, *Undiminished Confusion*]; Nourse, *supra* note 4.

39. See, e.g., Dressler, *Why Keep*, *supra* note 2, at 961 & n.9 (citing Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 *EMORY L.J.* 665, 667-78 (2001), as a sample of the predominantly feminist critiques of provocation law). While these are valid concerns (given cases like Randall Dixon’s), they seem an incomplete list (given cases like David Thacker’s). See generally Mison, *supra* note 10.

40. See, e.g., Mison, *supra* note 10.

41. Professor Huigens points out the common conflation of theories of punishment (justifications for it) with functions of punishment (what it accomplishes). Huigens, *Homicide*, *supra* note 11, at 97. This Article, too, is guilty of “thinking about punishment in terms of justification by consequences,” *id.* at 104, as illustrated by following up the question: “Why do we punish?” with a recitation of punishment’s effects.

42. E.g., BONNIE ET AL., *supra* note 1, at 2. “Denunciation” sometimes appears in this list, as well, though “[u]pon a closer look . . . denunciation turns out to be a hybrid” of the other theories. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 18 (3d ed. 2001) [hereinafter DRESSLER, *UNDERSTANDING*].

overdetermined. While each of the purposes of punishment would be sufficient to prompt us in its own right, in fact we are prompted by them all. Sensible grading of offenses against each other to determine appropriate relative severity of punishments, then, takes each of these goals into account.⁴³

At the most fundamental level, we use the principles of retribution, in the sense of just deserts as opposed to the sense of vengeance, to rank crimes in order of heinousness. We do this along two different axes: (1) along the actus reus axis, where, for example, killing is worse than injuring, which is worse than scaring, and so we punish one who kills more harshly than one who only scares his victim;⁴⁴ and (2) along the mens rea axis, where, generally speaking, killing with purpose is worse than killing through negligence,⁴⁵ and so we punish the intentional killer more harshly than the merely careless one. As between murder and provoked manslaughter, however, the actus reus and mens rea are each at the top of the hierarchy. Both involve a killing, and in jurisdictions in which premeditation and deliberation may be formed in the proverbial blink of an eye,⁴⁶ these crimes on their face appear to merit the

43. Unfortunately for jurists, sometimes these goals indicate conflicting outcomes. Heat of passion manslaughter is one such instance, where retribution may be seen to indicate one direction for punishment, while utilitarian goals indicate another. Specifically, should the person who is “out of control” be punished less harshly because less culpable, or more harshly because more dangerous? See discussion *infra* Part III.C.

44. Killing generally will be at the apex of the actus reus hierarchy, though a swift, painless killing is not necessarily worse than slow, horrific torture that leaves its victim alive and in great pain. Fortunately, there is no need to debate that here.

45. The caveat “generally speaking” recognizes that these rankings also do not hold in every circumstance. For example, it arguably may be worse to act from passion than from judgment: in both scenarios, the actor intends to kill, but in one, he does not even think about it, whereas in the other, he gives it consideration before acting. Perhaps believing that killing someone is not worth thinking about is even worse. See, e.g., JAMES FITZJAMES STEPHEN, 3 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 (1883), cited in BONNIE ET AL., *supra* note 1, at 789-90 (comparing premeditated mercy killing to impulsive pushing of boy off bridge for no reason); see also Dressler, *Why Keep*, *supra* note 2, at 965 n.29 (describing one who impulsively throws child into street as more dangerous than one who premeditates euthanasia).

Perhaps the explanation for this upsetting of the usual hierarchy lies in society’s approval—or not—of the defendant’s motives. Cf. Nourse, *supra* note 4, at 1390-93 (proposing legal treatment differentiate among defendants based on societal approval or disapproval of their emotions). Professor Nourse’s proposal builds on the work of Professors Kahan and Nussbaum, which argues in favor of an evaluative, rather than mechanistic, view of emotions. See *supra* note 30, at 273-74.

46. See, e.g., LAFAVE, *supra* note 3, at 767.

same rank: first-degree murder.⁴⁷ Even in jurisdictions that treat the terms “premeditation and deliberation” more meaningfully,⁴⁸ the provoked killer still acts with the malice necessary to support a second-degree murder conviction. Enraged as he is when he strikes out, he surely intends to or knows he will kill; intends to or knows he will cause grievous bodily injury; or acts with the kind of extreme recklessness that manifests a depraved indifference to the value of human life.⁴⁹ So why punish voluntary manslaughter differently than murder? Because the provoked killer has a defense.

Defenses come in two varieties: justification and excuse.⁵⁰ Professor Kent Greenawalt some years ago offered a pithy description of the difference between the two, using the example of *A*'s intentional shooting of *B*: “If *A*'s claim is that what he did was fully warranted—he shot *B* to stop *B* from killing other people—*A* offers a justification; if *A* acknowledges he acted wrongfully but claims he was not to blame—he was too disturbed mentally to be responsible for his behavior—he offers an excuse.”⁵¹ In other words, justified actions are not condemned as criminal at all, and therefore no punishment is appropriate. Excused actions are criminal, but the actor is not responsible. Although society clearly condemns the action, punishing these actors would be at best pointless and at worst inhumane.⁵² The provocation doctrine has found its home in both of these camps.⁵³

47. At least as far as a just deserts analysis is concerned.

48. For a concise overview of the differing approaches to premeditation and deliberation, see DRESSLER, UNDERSTANDING, *supra* note 42, at 508-11.

49. These three, plus felony murder, are the four types of “malice” that mark causing another’s death as murder rather than manslaughter. *Id.* at 503.

50. See, e.g., Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1897 (1984).

51. *Id.* But see Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 4 (2003) (arguing that this consensus concerning the difference between justification and excuse among academics is wrong).

52. DEBRA NIEHOFF, THE BIOLOGY OF VIOLENCE: HOW UNDERSTANDING THE BRAIN, BEHAVIOR, AND ENVIRONMENT CAN BREAK THE VICIOUS CIRCLE OF AGGRESSION 27 (1999) (“[S]ome people are so delusional or incapacitated that punishing them seems worthless at best and inhumane at worst.”).

53. See, e.g., LEE, *supra* note 38, at 245 (discussing both excuse and justification aspects of provocation).

A. Provocation as a Partial Excuse

Explained as a partial excuse, provocation mitigation is a concession to “human frailty.”⁵⁴ The requirement that the defendant have committed the killing while in an actual heat of passion grows out of the belief that, when swept away by such strong emotions, people’s capacity for choosing how to respond is impaired in a way that it is not when they are calm, cool, and collected.⁵⁵ Thus, we mitigate from murder to manslaughter out of a recognition that although we would like people to be more virtuous than they are, they are only human, and to a certain extent, people provoked so strongly cannot be expected to behave any differently.⁵⁶ This is not a complete defense, since it is recognized that not all those so strongly provoked kill, and therefore there must be *some* ability to control left intact. But because the ability to control is impaired, it is argued, it is only fair (again under the retributive or “just deserts” sense of fairness)⁵⁷ to punish such defendants less harshly than those whose ability to control their behavior was not so impaired.⁵⁸

B. Provocation as a Partial Justification

Explained as a partial justification, provocation mitigation arises from the time-honored sentiment: “He needed killin’.”⁵⁹ The requirement that the

54. WILLIAM BLACKSTONE, 4 COMMENTARIES *191, cited in Mison, *supra* note 10, at 138 n.23; Dressler, *Why Keep*, *supra* note 2, at 973.

55. Dressler, *Why Keep*, *supra* note 2, at 974.

56. *Id.* at 1001-02.

57. *Id.* at 962 (“The provocation doctrine is founded on just deserts grounds; the cases for and against the defense ought to be fought on *that* level.”).

58. *Id.* at 974.

59. See, e.g., MARK TWAIN, PUDD’NHEAD WILSON AND THOSE EXTRAORDINARY TWINS 91 (P.F. Collier & Son Co. 1922).

“Oh,” said Luigi, reposefully, “I don’t mind it. I killed the man for good reasons, and I don’t regret it.”

“What were the reasons?”

“Well, he needed killing.”

Id. To be fair, Luigi’s killing is later shown to be defense of another, *id.* at 93, but because the explanation appears two full pages removed from the quote, it is understandable how the quote could be remembered for its out-of-context implication instead. A better example of the phenomenon appears in the movie *The Appaloosa*, starring Marlon Brando as the consummate Western film hero, Matt Fletcher: “I’ve killed a lot of men and sinned a lot of women. But the

provocation be of a kind legally adequate to provoke a reasonable person grows out of the belief that some victims (partly, at least) asked for it or had it coming; therefore, killing them is less heinous than killing someone else would have been, and (again, under the just deserts theory) should be punished less harshly.⁶⁰ Although, as noted earlier, a few jurisdictions have followed the Model Penal Code in adopting its extreme emotional disturbance (or something similar) as a substitute for traditional provocation,⁶¹ the majority of jurisdictions in this country continue to require that the traditional objective prong be met, as well: that the upsetting event be one that would provoke a reasonable person.⁶² Even the EED formula, which takes the viewpoint of an actor in the defendant's situation as the defendant believed it to be, entails an element of justification in limiting the operant emotional upset to one for which there is reasonable explanation or excuse.⁶³ Society must share the defendant's judgment, at least insofar as agreeing that the defendant somehow was wronged or aggrieved. To be

men I killed needed killin' and the women wanted sinnin', and well, I never was one much to argue." *THE APPALOOSA* (Universal Studios 1966).

60. See, e.g., LEE, *supra* note 38, at 245 ("[T]he focus on the victim's wrongdoing, the misdirected retaliation rule, and the requirement of legally adequate provocation all suggest a normative concern over whether the defendant's acts were appropriate in relation to the circumstances," in other words, justified.); Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 *BUFF. CRIM. L. REV.* 385, 414 (2005) ("The fact that the law asks not only how badly the actor was distressed but also *why* he was so badly distressed implies that the rationale for the defense lies in the *source* of provocation, not merely the actor's disturbed state of mind.").

61. E.g., ARK. CODE ANN. § 5-10-104 (2005); CONN. GEN. STAT. §§ 53a-54a (2005); DEL. CODE ANN. tit. 11, § 641 (2005); HAW. REV. STAT. § 707-702 (2004); KY. REV. STAT. ANN. § 507.020 (West 2004); N.Y. PENAL LAW § 125.25 (McKinney 2005); N.D. CENT. CODE § 12.1-16-01 (2005).

62. BONNIE ET AL., *supra* note 1, at 804.

63. See MODEL PENAL CODE, *supra* note 23. The phrase "explanation or excuse" is an unfortunate word choice because the requirement that the explanation or excuse be reasonable shifts provocation out of the realm of pure excuse. If a defendant's explanation for his emotional upheaval is reasonable, then by definition that explanation is not condemned by the criminal law; it is not an "excuse." Rather than admonishing ("We disapprove of your sentiments, but because you are impaired, we will not punish you."), society empathizes ("We approve; your feelings are the correct ones."). Cf. Nourse, *supra* note 4, at 1370-71 (noting that the element of reasonableness is what differentiates provocation from diminished capacity, a pure excuse defense).

clear: this societal approval is of the *emotion*, not the action. We do not agree with the killing, but with the sentiment that led to it.⁶⁴

Here, too, provocation is not a complete justification; otherwise, such defendants would not be convicted of anything at all. Voluntary manslaughter typically garners many years in prison,⁶⁵ so condemnation of the act clearly is present.⁶⁶ But if there were no element of justification at all, then any enraged defendant who killed would be guilty of the lesser crime of manslaughter rather than murder, regardless of the reason for his passion.⁶⁷ Instead, the justification ground of the provocation doctrine ensures that the victim be one we approve, if not of killing, then at least of wanting to kill. Like each victim of the singing women on *Chicago's* death row, "He had it coming."⁶⁸

C. Retribution Versus Utilitarianism⁶⁹

The discussion thus far has presumed a retributive perspective, linking punishment to desert. The partially excused defendant merits mitigation because he is less responsible; the partially justified because his action was less blameworthy. Utilitarian analysis of heat-of-passion manslaughter points in a different direction. Rather than measuring just deserts, the utilitarian would punish offenses in such a way as to deter their commission,⁷⁰ whether

64. See, e.g., LEE, *supra* note 38, at 262-69 (distinguishing "emotion reasonableness" from "act reasonableness," and proposing both be required for provocation mitigation).

65. E.g., ALA. CODE §§ 13A-5-6, 13A-6-3 (2004) (up to twenty years); IND. CODE ANN. §§ 35-42-1-3, 35-50-2-5, 35-50-2-4 (West 2004) (up to twenty years, or up to fifty if committed with a deadly weapon); MISS. CODE ANN. §§ 97-3-25, 97-3-35 (2005) (up to twenty years); see also Dressler, *Why Keep*, *supra* note 2, at 960-61 ("[C]ritics . . . can hardly claim that the 'defense' treats provoked homicide as a minor offense.").

66. See Bergelson, *supra* note 60, at 419 ("That does not mean that it is right to kill a provoker, only that it is less wrong to kill a provoker than to kill an innocent victim.").

67. Naturally, the EED jurisdictions bring us closer to this result with their reasonableness inquiry taking into account the situation of the defendant in the circumstances as he believes them to be. Under those rubrics, even more objectionable cases—like those of Randall Dixon or David Thacker, see *supra* Part II—could receive manslaughter verdicts.

68. *Cell Block Tango*, on CHICAGO (MUSIC FROM THE MIRAMAX MOTION PICTURE) (Sony 2002).

69. The pictures of retribution and utilitarianism painted here are rudimentary for the sake of brevity. For fuller exposition, see the variety of philosopher's works collected in WHAT IS JUSTICE? CLASSIC AND CONTEMPORARY READINGS (Robert C. Solomon & Mark C. Murphy eds., 2000).

70. See generally BONNIE ET AL., *supra* note 1, at 2.

by setting an example from which others might learn (general deterrence), by teaching the individual offender a lesson (specific deterrence), by reforming the offender to no longer desire to commit crimes (rehabilitation), or by physically preventing the individual from reoffending (incapacitation). In order to accomplish these goals, utilitarianism advocates sending a message that society requires people to express their emotions in legal ways—for example, by not killing one another.

Demonstrating that persons who express their anger by killing will be punished as harshly as any other intentional killer may, by increasing the disincentive to kill, convince those who have the ability to channel their anger in other ways to do so. Of course there are limits to the rational cost-avoider theory to explain criminal behavior, not the least of which is the power of denial:

[C]riminals . . . all seem to have a common characteristic—surprise.

They can't believe they've been caught. I've been pondering the possible reasons for this phenomenon, and I think the answer is quite simple: people think they're invisible. . . . With this mind-set, people begin perpetrating the most outlandish criminal activities, without any heed to their obviousness or to the likely consequences if the perpetrators are caught.

Of course, many criminals do go undetected—our law enforcement resources can only stretch so far. But the reactions from those who are snared by the authorities are always the same: "I can't believe I was caught."⁷¹

Naturally, if the perpetrator does not believe he will be caught, then he will not weigh the consequences of being caught against the satisfaction to be had in committing the crime, and no increase in punishment will have any effect. But if an increase in the punishment convinces any potential killers at all to refrain from killing, then the effort would not be wasted.⁷²

71. Mitch Neurock, *Invisibility and Success Don't Mix*, FED. LAW., Aug. 2002, at 7.

72. There is an inherent utilitarian limit on exactly how much the punishment could be increased without infringing on other values, however. Punishment itself is a harm, and therefore anything that increases punishment must be sufficiently offset by the good accomplished through crime prevention. Additionally, for example, death penalty opponents would not advocate for capital punishment even if the increased incentive to behave might deter someone else from committing a crime, because the harm to society of the state's killing

Perhaps more persuasively, “[t]he virtuous person is made, not born,”⁷³ in part through a process of internalizing societal norms as communicated by the legal system.⁷⁴ Therefore, the question is not solely one of an admittedly flawed economic model, but includes a recognition of the role of inculcated virtue.⁷⁵ Professor Kyron Huigens illustrates this point by confessing that he does not commit robbery because he has no desire to commit robbery, rather than because of any semblance of weighing incentives to rob or not rob each time he walks past a bank or a convenience store.⁷⁶ Through the messages it sends, partially via what it declares criminal and how harshly it punishes various crimes, society contributes to its members’ own internal values systems.⁷⁷ In this way, potential exists to influence people’s behavior indirectly, as well.

To the extent that persons who commit heat-of-passion killings suffer from an impaired ability to control themselves, however, the message society sends about how severely the crime will be punished, perhaps no matter how powerful, will do them little good. Those people may be fully aware of the most dire possible circumstances, but if they are swept away, then they are swept away, and it seems likely that all the warning of dire consequences in the world would not stop them. Indeed, if such people killed once in the heat of passion, suffered those most dire consequences, and were once again faced with provocation, the odds are good they would kill again. By definition, their ability to control themselves is impaired.

If this is the case, then incapacitation and rehabilitation necessarily become the overarching concerns for the utilitarian. If faced with another provoking event,⁷⁸ this out-of-control, impulsive killer is more dangerous and more likely to strike again—hence, more in need of greater rehabilitation

its own members would outweigh the benefit of any potential deterrence such a practice might effect.

73. Huigens, *Homicide*, *supra* note 11, at 106.

74. *Id.* at 101-02.

75. *Id.* at 104.

76. *Id.* at 106.

77. *Id.* at 106 & n.24 (quoting ARISTOTLE, NICOMACHEAN ETHICS 295-96 (Martin Ostwald trans., Bobbs-Merrill Co. 1962)).

78. See Dressler, *Why Keep*, *supra* note 2, at 965 (acknowledging a “rage killer” is more dangerous than a calm one “if there is any meaningful risk that his anger will rise again”). Sadly, life is full of provocations for those who allow themselves to be provoked. “Although many believe that recidivism is unlikely in these circumstances, there are well-known examples of defendants who manage to find the same situation again and kill.” Nourse, *supra* note 4, at 1373, and cases cited.

or, failing that, incapacitation—than the controlled, cool-headed one, who might be persuaded to change his mind. Under this analysis, the defendant whose partial excuse would provide for a shorter sentence under a retribution theory would merit a longer sentence under a utilitarian theory. The partially justified killer, in contrast, should be punished less harshly under utilitarianism, just as we saw he should be under retribution: having killed someone we approve (a little) of killing, this defendant is less in need of incapacitation and reformation than one who killed a more sympathetic victim.

All else being equal, then, the partially justified killer would receive a reduced sentence under both retribution and utilitarian theories, while a partially excused killer would be treated differently depending on which punishment goal predominates. If retribution is considered the more important goal, then the partially excused killer would receive a lighter sentence. If utilitarian concerns predominate, then a partially excused killer would require a longer sentence than someone who was more fully in control of his faculties, to ensure that he does not re-offend. Again, human behavior is over-determined. Sometimes the goals of retribution and utilitarianism converge, and sometimes they are at odds. The best solution is one that takes into account both competing sets of concerns and strikes a balance in light of the particular circumstances of that individual. Both goals can be met in a system that considers each defendant as an individual, as well as considering his place in the system as a whole.⁷⁹ For example, while pure utilitarianism would advocate punishing a defendant's innocent children if that were the most effective way to change the defendant's behavior, such a move is constrained by the retributivist notion that the children do not deserve to be punished. Similarly, although pure retribution mandates punishing more serious crimes more harshly than less serious crimes, if the defendant is a young adult who could be reformed into a contributing member of society by a more lenient punishment, but hardened into a permanent criminal by a more severe one, the retributivist's philosophy is properly constrained by our utilitarian desire to keep society safer, at a lesser cost.

The pure utilitarian perspective also notes that the mere existence of any defense at all offers prospective criminals the hope (well-grounded or not) of

79. See Huigens, *Homicide*, *supra* note 11, at 102-04 (discussing the compatibility of a single given theory of punishment with multiple functions of punishment); Michael S. Moore, *A Taxonomy of Purposes of Punishment*, in *FOUNDATIONS OF CRIMINAL LAW* 60, 64 (Foundation Press 1999) (describing a mixed theory of punishment with retribution popularly conceived of as limit on utilitarianism).

escaping punishment simply by hoodwinking a jury into believing they qualify for one of those defenses; or, in the case of the provocation doctrine, the hope of receiving a lesser sentence simply by hoodwinking a jury into believing they were out of control with rage. Not merely a hypothetical concern, such defendants do exist: "In more than one case, defendants have admitted that they were willing to serve the 'five to seven' years 'to get rid of' a partner or to eliminate a rival. In fact, defendants have, on occasion, expressed their confidence that they will be exonerated by claiming emotional instability."⁸⁰ Nevertheless, this cannot be a reason for reform. If mere potential for abuse were a compelling rationale to jettison defenses, then we should jettison them all.⁸¹ Instead, society properly rejects straight utilitarianism's proposed denial of any and all defenses, because such a course of action would be unfair to those who legitimately *do* deserve either a complete defense or a mitigation of their punishment.

Thus we see that our justice system has always intertwined its retribution with its utilitarianism, and vice versa. Rather than simply meeting retributive concerns at the expense of utilitarian ones, the best rationale for punishment in a given case raises both, and balances them in the way that yields the optimal outcome overall.

IV. THE NATURE OF PROVOCATION

Even if we accept that as a general proposition both retributive and utilitarian goals merit attention, the problem remains that in the provocation context, the proper punishment may differ depending on whether provocation is based on justification or on excuse. If based on a theory of justification, provocation merits a reduced sentence both for retributivists (because less punishment is deserved) and for utilitarians (because less punishment is needed). If based on a theory of excuse, however, retributivists would claim provocation merits a reduced sentence (again, because less punishment is deserved), while utilitarians would claim it merits an increased sentence (because more punishment is needed to effect deterrence and rehabilitation, or to ensure incapacitation).

In an article supporting the provocation defense against its critics, Professor Joshua Dressler simply dismisses utilitarian concerns about the proper punishment for provoked killers, stating that provocation is a

80. Nourse, *supra* note 4, at 1374 (citations omitted).

81. See Dressler, *Why Keep*, *supra* note 2, at 966 & n.30; Bergelson, *supra* note 60, at 402 ("It is . . . important to distinguish a rule from an abuse of that rule.").

retributivist doctrine.⁸² If provocation is based on excuse, as he argues it must be,⁸³ then he is correct. Not only would pure utilitarians not mitigate murder to manslaughter for a heat-of-passion killing, they would actually *increase* the sentence. But wholesale dismissal of utilitarian concerns as irrelevant cannot be the best explanation. The fact of mitigation does have incentive properties. To ignore the utilitarian aspects of the doctrine means not only wasting the opportunity to influence behavior that utilitarianism offers,⁸⁴ but to risk actively sending the wrong message, influencing behavior in an anti-social direction, as the provocation doctrine traditionally has. This is unnecessary, since (as outlined above) utilitarianism is readily, commonly, and appropriately limited by the principles of retribution, and vice versa.

Rather than prompting dismissal of utilitarian concerns as irrelevant to the provocation doctrine, the clash between the utilitarian response and the retributive one may be better viewed as a sign that we must reexamine provocation's grounding. This clash should prompt us to consider whether the proffered explanation—that provocation's mitigation rests in excuse (at least partially, according to some scholars,⁸⁵ and wholly, in the case of some others⁸⁶)—is the correct one.

A. *The Failure of Excuse*

Excuse beckons as a much more palatable explanation for provocation mitigation than justification does. As a justification defense, provocation is repugnant in most of its manifestations. To differentiate among victims—who asked for it, or who had it coming—smacks of the “blame the victim” mentality, which has been so roundly criticized elsewhere; and even partially

82. Dressler, *Why Keep*, *supra* note 2, at 966.

83. *Id.* at 962; *see also* Dressler, *Rethinking*, *supra* note 2, at 459.

84. Even defendants who would be substantially impaired or swept away by provocation (and therefore are not deterrable in the heat of the moment) might be reached before the fateful event transpires. If such people know of their tendencies, they might be convinced, for example, to attend anger management classes or to stop drinking. They might choose not to carry a gun. They might begin to avoid those people, places, and events ripe for provocation. In other words, they might act to gain control of their tempers preemptively.

85. *E.g.*, Nourse, *supra* note 4, at 1337-38, 1397-98 (propounding a theory of “warranted excuse” based in “a merger of excuse and justification”).

86. *E.g.*, Dressler, *Why Keep*, *supra* note 2, at 974 (arguing provocation is wholly based in excuse).

condoning vigilante justice entails dispensing entirely with such vital concepts as “innocent until proven guilty” and “due process of law.”⁸⁷

Much has been written on the odiousness of differentiating among victims. In the capital punishment literature, for example, the correlation between the likelihood the defendant will be sentenced to death and his race is not nearly so strong as the correlation between the likelihood the defendant will be sentenced to death and the race of his victim.⁸⁸ In other words, black victims’ lives are worth less than white victims’ lives. Similarly, the price for raping a woman wearing a short skirt historically has been less than the price for raping one dressed more demurely. Indeed, if the defendant chose a victim wearing sufficiently “inviting” clothing, the action might not be considered rape at all.⁸⁹ And opponents of much “victim’s rights” legislation, which permits members of the victim’s family to address the court or the jury at sentencing, have long decried the practice as favoring defendants who prey on the poor, the homeless, or those otherwise less likely to have effective advocates, at the expense of those whose victims were wealthier or more well-connected.⁹⁰

87. See Mison, *supra* note 10, at 170-71 (discussing the tendency of juries to place more weight on victims’ conduct than on defendants’ reactions); see also Dressler, *Why Keep*, *supra* note 2, at 969 (“[T]he suggestion that a person forfeits his right to life (or, incoherently, forfeits part of his life), or that a private aggrieved individual may unilaterally determine that another human being ‘sort of’ deserves death or that his life does not count as much as another’s [is] morally objectionable.”). *But see* Bergelson, *supra* note 60, at 389 (“[V]ictims may reduce their right not to be harmed.”); Douglas Husak, *Comparative Fault in Criminal Law: Conceptual and Normative Perplexities*, 8 *BUFF. CRIM. L. REV.* 523, 523 (2005) (“[A]nyone who contends that victim fault is and ought to be irrelevant in all cases simply does not know what he is talking about.”).

88. See, e.g., Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 *J. LEGAL STUD.* 363, 373-75 (2003) (analyzing nationwide Bureau of Justice Statistics data and finding that “[p]erpetrators who kill blacks are much less likely to receive stiff sentences than perpetrators who kill whites”); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 *J. CRIM. L. & CRIMINOLOGY* 754, 761 (1983) (discussing studies of data collected in Florida as well as in South Carolina).

89. The Advisory Committee Notes to Federal Rule of Evidence 412, for example, specifically prohibit admission of evidence concerning an alleged rape victim’s attire to “safeguard[] the victim against stereotypical thinking.” See *FEDERAL RULES OF EVIDENCE HANDBOOK* 61 (LexisNexis 2004).

90. See Paul H. Robinson, *Should the Victims’ Rights Movement Have Influence over Criminal Law Formulation and Adjudication?*, 33 *MCGEORGE L. REV.* 749, 757 (2002) (“Both our notions of the equality of individuals and our notions of justice demand that the murder of the homeless beggar ought to be treated as seriously as the murder of a loved family member.

While we might achieve consensus that it is worse to kill Mother Teresa than Adolf Hitler, there is something highly disquieting about judging how virtuous a given victim was compared to other victims, and using that judgment to measure the defendant's guilt.⁹¹ "So," Professor Dressler says, "I am quite willing to agree that if forfeiture or some lesser social harm justificatory theory is the true and only basis for the provocation doctrine, the defense should be abandoned."⁹²

Professor Dressler goes on to explain that he does not in fact advocate abolition because he grounds the defense in excuse rather than in justification.⁹³ But as a philosophical and empirical matter, excuse does not satisfy, while (at least with respect to the imperfect self-defense paradigm) justification does. If the provocation doctrine is to remain in our criminal law jurisprudence in any form, it must find its home as a justification, rather than as an excuse.

1. We Should Assume People Have Control over Their Actions Despite Provocation

The legitimacy of provocation as an excuse defense rests in the answer to a simple question: To what extent do ordinary, reasonable, law-abiding people have the ability to control their behavior when faced with provoking events? If they cannot control themselves, then we ought not hold them responsible at all, and they should be fully excused. If they can control themselves but choose not to do so, then they are fully responsible, and an excuse defense does not apply. Professor Dressler explains the provocation

The punishment in a case ought not depend upon whether the victim happens to have a family that has the means and the interest to actively press for greater punishment.").

91. As U.S. Supreme Court Justice John Paul Stevens once wrote:

Because our decision in *Lockett* . . . recognizes the defendant's right to introduce all mitigating evidence that may inform the jury about his character, the Court suggests that fairness requires that the State be allowed to respond with similar evidence about the victim. . . . This argument is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance.

Payne v. Tennessee, 501 U.S. 808, 859 (1989) (Stevens, J., dissenting) (emphasis omitted). *But see* David D. Friedman, *Should the Characteristics of Victims and Criminals Count?: Payne v. Tennessee and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 752 & n.50 (1993) (positing high-value and low-value victims, "adopting the view the court rejected—that punishment should vary with the value of the victim's life").

92. Dressler, *Why Keep*, *supra* note 2, at 970.

93. *Id.* at 966.

defense as staking out a middle course: If their ability to control themselves is substantially impaired, as this argument posits it is when they are overcome by emotion, then we should hold them partially responsible. They should be partially excused and receive less punishment than those whose full faculties were available to them.⁹⁴

The answer to this simple question—How hard is it, really, for ordinary, reasonable, law-abiding people to control themselves when provoked?—has proven tricky. As Professor Stephen Morse wrote years ago:

Although there exists little systematic epidemiological study of such questions, it is clear from clinical practice that many persons report extremely strong “deviant” urges that are often a source of misery to them. Yet most persons do not engage in the urged behavior; indeed, many seek assistance from clergymen, doctors, counselors, and psychotherapists in order to defeat the urge. Holding that the urge is not overwhelming in such cases, but that it is overwhelming in the cases of those who give in, is tautological reasoning: the urge must be overwhelming because the person gave in. In terms more familiar to lawyers, we are faced with the difficulty of distinguishing between the irresistible impulse and the impulse not resisted.

There is no scientific measure of the strength of urges. Nor is there evidence of what percentage of people who experience various urges of various strengths act on those urges. Even if such measures and data were available, as they may be someday, the measured strength of the urge would not answer the question of whether the urge was irresistible. Such data may help us to identify how predisposing, in a statistical sense, the urge might be, but they would not answer the question of moral and legal responsibility. Where to draw the cutting point would clearly be a moral and legal determination. In the future, behavioral science may provide more precise information to help draw the line, but science alone cannot draw the line of legal responsibility.⁹⁵

94. *Id.* at 974-75.

95. Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 584 (1978) (footnotes omitted). This passage was written at a time when Professor Morse rejected partial excuses generally, as well as the provocation doctrine in particular. Though he recently has argued for a generic “partial responsibility” defense, he “continue[s] to believe . . . that traditional provocation/passion doctrine is

Even today, experts simply cannot say whether an impulse could have been resisted or was not.⁹⁶ This inability need not deter us, however:

The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will. . . . Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.⁹⁷

If we proceeded on the opposite theory, that we are unable to control our behavior, there would be nothing to prohibit the government from locking us up preemptively to protect us from our inevitable transgressions.⁹⁸ Indeed, whatever anyone did, including preemptively locking people up, would be preordained, and it would be fruitless to protest.

Assuming we have control over our actions creates a backdrop against which our willingness to accept blame for our lack of self-control is a necessary correlate to our eagerness to accept credit for any excellence we show in that realm:

unwise." Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 290 (2003).

96. Interview with Howard H. Sokolov, M.D., forensic psychiatrist, Ohio State University Medical Center and Ohio Department of Mental Health's Office of Forensic Services, in Columbus, Ohio (July 23, 2004).

97. HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1968); *see also* Board of Trustees, *Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony*, 251 JAMA 2967, 2978 (1984), *cited in* Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 791 (1985) [hereinafter Morse, *Excusing*] ("[F]ree will is an article of faith, rather than a concept that can be explained in medical terms . . .").

98. The movie *Minority Report* illustrates society's objection to preemptively locking people up. *MINORITY REPORT* (Twentieth Century Fox & Dreamworks Productions 2002). In the film, "precogs" (persons with the power of precognition) foretell crimes, allowing police to arrest would-be wrongdoers before they can harm anyone. *Id.* Tom Cruise plays the head of the police Pre-Crime Unit who finds himself predicted to kill a man he has never met. *Id.* Thinking this must be a set-up, he evades arrest. *Id.* In the climactic scene, Cruise discovers photographs showing that man to have killed Cruise's son. *Id.* Just then, the man appears, and as Cruise pulls out his gun the audience sees the precogs' vision coming true. *Id.* The music crescendos, Cruise struggles mightily with his conscience, and finally he begins reciting, "You have the right to remain silent. . . ." *Id.* The precogs were wrong, and punishing Cruise would have been unjust. *Id.*

[W]e have thought of ourselves as capable, where animals are not, of making, creating, among other things, ourselves. . . . [Treating criminal behavior as a sickness over which we have no control deprives us of the] peculiarly human satisfactions that derive from a sense of achievement. For these satisfactions we shall have to substitute those mild satisfactions attendant upon a healthy well-functioning body.⁹⁹

Finally, the existence of laws at all presumes that people can control their actions. If people cannot, then the laws themselves would be pointless.

It is certainly true that sometimes, some people are unable to control themselves. Those people therefore are not responsible for their actions in the way the rest of us are, and should be treated differently (e.g., afforded an insanity defense).¹⁰⁰ This analysis applies regardless of whether their impairment in volition is complete or only “substantial.” But this cannot be the way of things for the ordinary, reasonable, law-abiding person—the person to whom provocation ostensibly applies—without fundamentally changing our view of ourselves as autonomous individuals.

2. People Do, in Fact, Have Control over Their Actions Despite Provocation

No doubt those who prefer empirical study to philosophical musings have long resigned themselves to the natural order of things: the law frequently makes assumptions about how people will act, and it is up to psychology to prove or disprove it.¹⁰¹ Although the psychiatrists have been

99. Herbert Morris, *Rehabilitation and Dignity*, in PRINCIPLED SENTENCING 17 (Andrew von Hirsch & Andrew Ashworth eds., 1992); see also Morse, *Excusing*, *supra* note 97, at 801 (“Unless one wishes the law to stop treating persons as persons—as beings deserving of praise and blame—and wishes the law, instead, to treat them as machines that need only to be adjusted, criticism of the law’s assessment of mental states is misguided.”).

100. “A disadvantaged defendant driven sufficiently crazy by circumstances will be excused because that defendant is crazy, not because the crazy behavior is caused and the defendant is disadvantaged.” Morse, *Excusing*, *supra* note 97, at 790.

101. Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. (forthcoming 2005) (manuscript at 84 & n.483, on file with author), available at <http://ssrn.com/abstract=497842>.

Professor Blumenthal focuses on demonstrating our consistent overestimation of the intensity of our emotional responses (e.g., we consistently predict that negative events will cause us greater unhappiness for longer periods of time than is the case). *Id.* (manuscript at

none too enthusiastic about their eventual success in this arena,¹⁰² we have abundant evidence that many people do, in fact, control themselves in the face of great provocation. Thus, it is no stretch to conclude that they can.¹⁰³

For example, “[a]s Richard Hernstein puts it, when husbands and wives start throwing dishes at each other, they do not usually throw the fine china.”¹⁰⁴ To the extent that this wry observation is accurate, it demonstrates that even in the throes of passion, people maintain sufficient control to choose how they express their anger, and to refrain from doing anything they might regret too strongly. If people can choose not to break the fine china (as they no doubt can—like many jokes, this one is only funny because it rings true), then naturally it follows that they can choose not to kill. The disincentives for breaking fine china pale in comparison to those for killing.

There are no verifiable statistics on how many people have managed to *refrain* from killing their adulterous spouses—after all, “[w]ho knows what evil lurks in the hearts of men?”¹⁰⁵—but with perhaps 40% of married women and 50% of married men admitting to having sex with someone who was not their spouse,¹⁰⁶ and with the number of murder and non-negligent manslaughter convictions involving a “romantic triangle” ranging from 98 to 130 per year,¹⁰⁷ odds are good that many people have discovered their

13-19). If so, then people in fact are less angered, hurt, and so on, by any given provocation than we expect or believe they must be. As a result, it would seem they are more in control, and therefore less deserving of a mitigation on the basis of excuse.

102. See AM. PSYCHIATRIC ASS’N, STATEMENT ON THE INSANITY DEFENSE 5 (Dec. 1982) (“The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.”), *quoted in* A.B.A. Criminal Justice Standards Comm., A.B.A. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 341 n.49 (1989).

103. *But see generally* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971) (asserting human behavior is determined by combination of genetics and environment, and the only prospect for change in behavior lies in change to environment).

104. JAMES Q. WILSON, THINKING ABOUT CRIME 127 (rev. ed. Vintage Books 1985) (1975).

105. “Only The Shadow knows.” The Shadow was the lead character in a long-running radio show of the same name (1936-1954), a nice biography of which is available at <http://www.pulps.westumulka.com/shadow/> (last visited Dec. 22, 2005).

106. Lorraine Ali & Lisa Miller, *The Secret Lives of Wives*, NEWSWEEK, July 12, 2004, at 48.

107. The Uniform Crime Reports provide that 118 occurred in 2001; 130 in 2002; and 98 in 2003. See FBI, Uniform Crime Reports, *supra* note 6 (providing the relevant statistics in table 2.12 of the 2001 UCR, table 2.12 of the 2002 UCR, and table 2.11 of the 2003 UCR). These numbers are over-inclusive for purposes of the comparison drawn: they represent the unmarried as well as the married, and murders and reckless manslaughters as well as

spouses to be committing adultery¹⁰⁸ and yet refrained from killing them. Similarly, the number of bar fights versus the number of provoked killings that result from them surely must tend to argue that most people manage to avoid killing their attackers when confronted with non-deadly force, as well.

As a rule, clinicians treat even mentally ill patients as if they could control their behavior,¹⁰⁹ and studies of the effectiveness of various therapies tend to show that patients who have participated in treatment significantly improve their behavior.¹¹⁰ Anger treatments have been shown to work for all populations: adults, adolescents, and children; males and females; and spouse abusers in particular.¹¹¹ These are not token or fleeting changes: such treatments have been shown to make large-magnitude changes that last with time.¹¹² There is an entire industry built around “anger management,” with tens of thousands of people either ordered into treatment by a court or agreeing to go each year.¹¹³

If we did not believe that people had the ability to express their anger in more socially appropriate ways instead of through violence, this would be a colossal waste of resources, and an unconscionable risk to society at large. On the whole, studies have shown that society’s faith and resources have been well-placed. These efforts *do* work.¹¹⁴ Not surprisingly, however, real

provocation killings. Therefore, whatever the true number of married, “romantic triangle,” provocation killings each year, it is very small—particularly in comparison to the number of knowingly cuckolded spouses.

108. Presumably most have discovered it in some way other than by walking in on the lovers in action, but “[t]he modern tendency” has been to dispense with the requirement of “ocular observation.” LAFAVE, *supra* note 3, at 780-81.

109. See, e.g., Seymour L. Halleck, *Clinical Assessment of the Voluntariness of Behavior*, 20 BULL. AM. ACAD. PSYCHIATRY & L. 221, 223 (1992) (“[Clinicians] assume that patients have considerable control of their behavior.”); Blumenthal, *supra* note 101, at 85.

110. Raymond DiGiuseppe & Raymond Chip Tafrate, *A Comprehensive Treatment Model for Anger Disorders*, 38 PSYCHOTHERAPY 262, 263 (2001).

111. *Id.*

112. *Id.*

113. Kevin Cullen, *Keeping Their Cool*, J. & COURIER, Aug. 25, 2004, at 12D.

114. This is true for the basically healthy, see DiGiuseppe & Tafrate, *supra* note 110, as well as for the mentally ill, see AM. PSYCHIATRIC ASS’N, *supra* note 102, at 6 (stating the law’s assumption that personality disorders impair control is incorrect); cf. Doris L. Mackenzie, *Criminal Justice and Crime Prevention*, in *Preventing Crime: What Works, What Doesn’t, What’s Promising*, in U.S. DEP’T OF JUSTICE OFFICE OF JUSTICE PROGRAMS RESEARCH REPORT PREPARED FOR NATIONAL INSTITUTE OF JUSTICE (1997) (“There is now substantial evidence that rehabilitation programs work.”) (discussing rehabilitation generally), cited in Brief for the American Psychiatric Ass’n & American Academy of Psychiatry and the Law as

success in anger management requires a willingness to change¹¹⁵—only further evidence that people do indeed have the capacity to control themselves.

It may be argued that this is like saying that because people can be taught to read, they must be held accountable for knowing how before they have been shown. Some people surely have been raised in environments where the only model for behavior they ever saw was one of unrestrained violence, and there is no doubt that such persons are at a disadvantage. But the criminal law has adopted a standard of behavior that all people must meet: everyone need not know how to read, but everyone must know how to control his violent actions, even if he has never been shown.¹¹⁶ The criminal laws

do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command. If they fall on any one class harder than on another, it is on the weakest. For it is precisely to those who are most likely to err by temperament, ignorance, or folly, that the threats of the law are the most dangerous.

Amici Curiae in Support of Respondent at 25 n.12, *Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957), 2001 WL 873316.

115. Jerry L. Deffenbacher, *Cognitive-Behavioral Conceptualization and Treatment of Anger*, 55 JCLP/IN SESSION: PSYCHOTHERAPY IN PRACTICE 295, 300, 309 (Mar. 1999).

116. Odds are that he has been shown, even if not nearly as often as those raised in other environments. “Even the most impoverished environments in our society provide enough opportunities so that few agents can claim, when the balance of evils is *negative*, that they meet the moralized criteria for duress or internal coercion.” Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1653 (1994) [hereinafter Morse, *Culpability and Control*]. Professor Morse goes on to note that the admitted unfairness of blaming and punishing persons raised in such environments comes not from any excuse in such an actor, but from the lack of moral authority in such a society. *Id.* (“[I]t is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, ‘Behave—or else!’” (internal quotation marks omitted) (quoting David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 401-02 (1976))).

. . . [An individual] is required to have [the quality of ordinary prudence] at his peril.¹¹⁷

Nature and nurture both play a role, of course, in shaping how people will react to stressors. Together with the influence of free will, the psychological community refers to the total conglomeration of influences on human behavior as the “bio-psycho-social model.”¹¹⁸ For instance, genes, temperament, sex, and socialization all influence behavior.¹¹⁹ Infants begin to manifest anger at about four months,¹²⁰ and the way they do so can be molded and trained from the beginning. Parental reactions can reinforce or discourage anger tendencies.¹²¹ This probably explains the sex difference observed in expressions of anger. Typically, boys are socialized with approval and expectations of violent, angry outbursts; girls are socialized with disapproval of such outbursts and an expectation of expressing anger very differently, if at all.¹²²

Although nature explains a certain amount of our behavior, and nurture explains a lot, as well, as long as we believe in free will, we must recognize the role of character and self-actualization.¹²³ A highly determined individual can overcome quite a lot of both nature and nurture, even when the goal is tremendously daunting. Consider Erik Weihenmayer, who overcame the physical limitations of blindness, as well as the social signals he surely received regarding what sorts of physical activities were appropriate for a blind man, and despite it all, achieved the incredibly difficult goal of summiting Mount Everest.¹²⁴ The demands of the criminal law here are far more modest: refrain from killing people.

117. OLIVER WENDELL HOLMES, *THE COMMON LAW* 49-51 (47th prtg. 1923); *see also* Morse, *Excusing*, *supra* note 97, at 820 (“The law should require such persons to restrain themselves, even if it is hard for them to do so.”).

118. Sokolov, *supra* note 96.

119. *See, e.g.*, NIEHOFF, *supra* note 52, at 32-33, 168.

120. Elizabeth Lemerise & Kenneth Dodge, *The Development of Anger and Hostile Interactions*, in *HANDBOOK OF EMOTIONS* 594, 596 (2d ed. 2000).

121. *Id.* at 597.

122. *Id.*

123. Kyron Huigens, *Virtue and Inculcation*, 108 *HARV. L. REV.* 1423, 1461-62 (1995) (describing the dynamic interrelationship between individual and society); *see also* NIEHOFF, *supra* note 52, at 30 (asserting that the “gap between nature and nurture has been bridged by the brain”).

124. Karl Taro Greenfeld, *Blind to Failure*, *TIME MAGAZINE*, June 18, 2001, at 52. Reaching the top of Mount Everest is an extremely formidable achievement, even for a

The fact that people get angry is independent of what they decide to do with their anger. As Professor Dressler wrote in an exchange with Professor Richard Delgado regarding a brainwashing defense, “The defendant could have vented his anger in many non-criminal ways: by throwing an object at the wall of his house, screaming or running around the block. Instead, he exercised an independent and personal choice [to commit a violent crime].”¹²⁵

It is one of the commonplaces of criminal law that a policeman at the elbow will deter most crimes,¹²⁶ and certainly “[t]here is some inherent logic in assuming that behavior that can be environmentally controlled can also be internally controlled.”¹²⁷ But it is a mischaracterization to contrast environmental or external controls like policemen at the elbow with “internal controls.” Unless the policeman is physically restraining the subject, the decision to refrain from committing the crime is still an internal one. The subject considers his desire to commit the act, considers the likely consequences, and makes his choice. The presence of a policeman does not alter the fact that the subject makes the decision internally; it only changes his evaluation of the downside to action.¹²⁸

sighted person with unconditional support from all corners. Some 29,000 ft. high, only ten percent of those who attempt the summit succeed, and many have died trying. *Id.* at 57, 63. Erik summited on May 24, 2001, with a team sponsored by the National Federation of the Blind. *Id.* at 62-63.

125. Joshua Dressler, *Professor Delgado’s “Brainwashing” Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335, 346 (1979). This may sound flippant. It is undoubtedly easy for the unruffled academic (and in my case, a female one at that, raised in a socio-economically advantaged environment with all the powers of socialization brought to bear on learning appropriate ways to express anger at her disposal since infancy) to observe that the provoked person can simply choose to count to ten, or leave the room, or scream and shout and jump up and down, rather than choosing to kill. But like the runway model with the preternaturally fast metabolism who tells dieters they would lose weight if only they ate less and exercised more, the offensive presumptuousness of the messenger does not change the fundamental truth of the message.

126. See, e.g., Christine Michalopoulos, *Filling in the Holes of the Insanity Defense: The Andrea Yates Case and the Need for a New Prong*, 10 VA. J. SOC. POL’Y & L. 383, 394 (2002) (describing the “Policeman at the Elbow” test as “whether the person was so unable to control his behavior that he would have committed the act even with a policeman standing right beside him”).

127. Halleck, *supra* note 109, at 234.

128. As Professor Morse explained:

Even the commonsense basis for judging control problems is often a disguised rationality criterion. For example, the “policeman at the elbow” test, which is usually

In any event, it does not take a policeman at the elbow to convince most people to refrain from killing. According to Dr. Howard Sokolov, a forensic psychiatrist with both the Ohio State University Medical Center and the State of Ohio's Department of Mental Health's Office of Forensic Services, volitional control is a bell curve, with most ordinary, reasonable, law-abiding people exercising a certain amount of control, and a smaller number on either end of the spectrum exercising more or less. For most people, he allowed, even the sight of their spouses committing adultery would not prompt them to lose control.¹²⁹ Some of those who do would qualify for an insanity defense: perhaps the incident triggered a psychotic break, for example. However, if the criminal law requires that everyone exercise the same level of restraint as the ordinary, reasonable, law-abiding person, then it is worth noting that the ordinary, reasonable, law-abiding person facing "ocular observation" of adultery—surely the most provocative form of this traditional provocation scenario¹³⁰—would control himself.

Philosophically, the provocation defense should not rest on an excuse ground, and empirically, it does not. "Reasonable people don't kill" is a truism;¹³¹ it is time for the criminal law to reflect that truth. If it is true that people do, in fact, have control over their manner of emotional expression, then the excuse explanation of provocation does not satisfy.

understood as a volitional standard, is, I think, better interpreted as a rationality test. Those who offend in the face of certain capture have either rationally decided for political or other reasons that the offense is worth the punishment, as in cases of civil disobedience, or they are irrational. We generally tend to conclude that intense internal coercion was operative if conduct was so irrational that we cannot make any sense of it; otherwise, why would the person do it? Again, however, rationality is the real issue.

Morse, *Culpability and Control*, *supra* note 116, at 1659.

129. Sokolov, *supra* note 96.

130. *See supra* note 7.

131. *See, e.g.*, MODEL PENAL CODE § 210.3 cmt. at 56 (1980) (stating a reasonable person does not kill); Morse, *Undiminished Confusion*, *supra* note 38, at 33 ("Reasonable people do not kill no matter how much they are provoked, and even enraged people generally retain the capacity to control homicidal or any other kind of aggressive or antisocial desires." (footnote omitted)); Nourse, *supra* note 4, at 1372 n.260 ("[M]ost men do not kill on even the gravest provocation . . ." (alteration in original) (internal quotation marks omitted) (quoting Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937))).

B. The Imperfect Success of Justification

Although justification is repugnant as an explanation for mitigation in the sexual jealousy context because of the intimation that the victim somehow deserved death, or had it coming, justification fits our societal judgment precisely in the first paradigm of imperfect self-defense. The difference lies in the distinction between *act* justification and *emotion* justification.

The imperfect self-defense paradigm marries both act justification and emotion justification. The heart of the self-defense doctrine is straightforward: people are permitted by law to defend themselves against unlawful force with the same level of force that is being used against them. In other words, non-deadly force may be met with non-deadly force, and deadly force may be met with deadly force.¹³² So long as the unlawful force is countered by the same level of force in self-defense, the defensive use of force is completely justified. No criminal punishment is merited or forthcoming, because defending oneself appropriately is not criminal. The determination of how much force is necessary to defend oneself is an objective one; people are permitted to defend themselves with the amount of force that is reasonable.¹³³

Sometimes, however, people use more force than is reasonable to defend themselves, as when they use deadly force to counter non-deadly force. This is called “imperfect self-defense.”¹³⁴ Although it meets the definition of murder—it is causing the death of another, and those who cause such deaths certainly intend to cause death, or at least serious bodily injury, to those who attack them, rather than suffer themselves—imperfect self-defense traditionally is mitigated to manslaughter.¹³⁵

The reason for the mitigation seems clear: the person under attack by non-deadly force is justified in using non-deadly force in return. Any amount of force in excess of non-deadly force, however, is not permitted by law, and therefore is punishable. Presuming the actor who killed his non-deadly

132. LAFAVE, *supra* note 3, at 540-41.

133. *Id.* at 542.

134. *Id.* at 550. If, instead, the defendant was unreasonable in assessing the need for force at all—as when he honestly, though unreasonably, killed to save himself from the swashbuckling “pirate” waving a sword at tourists in Walt Disney World’s Pirates of the Caribbean—then he would be offering an excuse defense, rather than a justification. No amount of force is permitted in such circumstances, and so he would not be a candidate for provocation mitigation under this Article’s proposal.

135. *Id.*

attacker did so, not because of any preexisting plan to kill, but in the heat of the passion aroused by the attack, then this is an example of emotion justification. We agree that the attacked person is justified in feeling angry, afraid, and so on, in the face of being attacked. This is also an example of act justification. To punish the actor for murder in killing his attacker would be unfair: the actor was permitted to use *some* of the force he used. Therefore, in calculating the proper punishment, we begin with the total force used (murder) and then subtract the force the actor was permitted to use (non-deadly) to arrive at a manslaughter conviction. This punishes such actors, not for the full value of the deadly force they used, but for that amount, discounted by the non-deadly amount that they were permitted to use.¹³⁶

Resisting unlawful arrest and coming to the defense of another generally work the same way. The use of an unreasonable amount of force in the heat of the moment is a candidate for mitigation in these situations as well, because a reasonable amount of force is permitted.¹³⁷ These, too, marry emotion justification (as to the anger and fear behind the additional, unsanctioned force) with act justification (as to the lawful amount of force). Subtracting the amount of force permitted from the amount of force actually used results in a manslaughter conviction.

Any other kind of provocation, however—whether it be the sight of a spouse committing adultery, or any other event that a jury might consider to be reasonably provoking or “emotion-justified”¹³⁸—does not come with any *act* justification. The law does not authorize any force in these other kinds of cases at all. While judges and juries might agree that a jealous spouse’s emotions are justified, the legislature has not agreed that such a spouse may use any amount of force to express that jealousy. Similarly, while judges and juries might agree that the homophobia of a man propositioned by another man is justified, the legislature has not agreed that such a man may use any amount of force to express that homophobia. In other words, there is no act justification—not even for some part of the act. Contrast this with the imperfect self-defense paradigm. Not only might judges and juries agree that

136. Bergelson, *supra* note 60, at 466 (“[A] person who, while acting in self-defense, applied more force than reasonably necessary, is responsible only for that ‘extra’ force . . .”).

137. LAFAVE, *supra* note 3, at 549-51. The caveat “generally” is necessary because some jurisdictions limit the defense of another to cases where the good Samaritan was correct in assessing the need to use force. *Id.* at 551-52.

138. Again, “emotion-justified” here means societal agreement that a person in those circumstances would be justified in feeling wronged or aggrieved—no doubt something that itself often will be controversial.

a non-deadly-attack victim's fear and anger are justified, but the legislature has also agreed that such a victim may use non-deadly force to express that fear and anger. This analysis applies whenever the legislature has authorized some use of force. Where no amount of force is permitted, however, there is nothing with which to discount punishment for the amount of force used. Therefore, no mitigation is appropriate.¹³⁹

The most coherent system of provocation mitigation is one that rests not only on emotion justification, but also on act justification. As a justification defense, and one that requires act justification in particular, it permits mitigation to manslaughter only for those defendants who were privileged under the law to use some amount of force. Thus, the imperfect self-defense paradigm and related scenarios in which some amount of force is permitted would still merit mitigation; the jealous spouse paradigm and other scenarios lacking any element of act justification would not.

V. CRITICISM AND RESPONSE

How would this Article's proposal handle what may be the most sympathetic cases for provocation? The standard example of this genre is a parent's nightmare: A father arrives home in time to see his child's murderer finish off the job and begin to run away. The father, too late to save his child (and in no danger himself, as the villain is now fleeing), gives chase and kills him rather than, for example, holding him until police arrive. A husband might arrive home in time to see his wife's rapist, with subsequent events unfolding in the same fashion to create a similarly compelling alternative.

139. This approach differs from Professor Bergelson's. She argues that the validity of a provocation justification turns on whether the defendant had a legal right that the victim not do the provoking act. Bergelson, *supra* note 60, at 456. So, for example, wearing sexy clothes cannot mitigate rape because the defendant has no legal right that the victim dress more demurely. *Id.* at 473-74. Her thesis falters when it comes to adulterous spouses, however. While acknowledging "very little legal ground" to object to a spouse's adultery, Bergelson refuses to deny a provocation defense in those circumstances, instead saying that a provocation claim there would be based on an excuse rationale. *Id.* at 476. Why an excuse rationale cannot save a defendant who was honestly overcome by his victim's miniskirt is left unaddressed.

Professor Husak, in his response to Professor Bergelson's piece, notes that there must be "something other" that "has yet to be identified" to explain what it is that mitigates the defendant's crime. Husak, *supra* note 87, at 536-37. I submit that this "something other" is not whether the defendant has a legal right that the victim refrain from the provoking action, but instead whether the defendant has a legal right to use force.

As these cases are described, however, provocation probably need not come into play at all. First, it is entirely possible that in these cases, the father or husband would be pushed completely over the edge, and qualify for the full defense of insanity.¹⁴⁰ Failing that, there are jurisdictions—albeit fewer than there used to be—in which citizens are permitted to use deadly force to stop a dangerous, fleeing felon.¹⁴¹ In those jurisdictions, there is no need to mitigate punishment because the father or husband would have committed no crime. And this presumes that a prosecutor who was faced with facts as sympathetic as these would choose to press charges. In a world of limited resources, the sympathetic cases described here seem likely candidates for prosecutorial discretion.¹⁴²

Should none of the above intervene, however, this Article's proposal also would mitigate for these fathers or husbands, even in jurisdictions permitting only non-deadly force to capture fleeing felons.¹⁴³ Because citizens in such circumstances are permitted to use some amount of force, the amount of force actually used (deadly) would be discounted by the amount permitted to be used (non-deadly), to arrive at the desired manslaughter verdict, just as in the imperfect self-defense cases described earlier.¹⁴⁴ Here, too, would be not only emotion justification, but also act justification: perfect candidates for a provocation defense.

In the more usual course of events, though, the father or husband does not happen upon the scene of the crime in time to see the felon finish off the job. How would this proposal apply to the man who kills his child's murderer or wife's rapist a month, a week, or a day after the fact? As before, insanity or prosecutorial discretion may preempt the question.¹⁴⁵ If not,

140. Cf. Morse, *Undiminished Confusion*, *supra* note 38, at 34 & nn.117-18. Professor Morse in this piece advocates for the abolition of the provocation defense, but proposes that a parent who returns home to discover that his child has been brutally attacked by a perpetrator who is now running away merits a complete excuse because "where the provocation and consequent lack of rationality [are] both so great[,] . . . it would be unjust to punish the defendant at all." *Id.*

141. LAFAVE, *supra* note 3, at 562-63. For a history of the law of fleeing felons, see generally A.W. Simpson, *Shooting Felons: Law, Practice, Official Culture, and Perceptions of Morality*, 32 J.L. & SOC'Y 241 (2005).

142. These cases are also, of course, likely candidates for jury nullification—not that this frank recognition should be understood as advocating for such a result.

143. See *supra* note 141 and accompanying text.

144. See *supra* Part IV.B.

145. Again, jury nullification is also a possibility. See *supra* note 142 and accompanying text.

however, under this proposal, such a man would be guilty of murder. Here lies what may be the strongest ground for objection: many feel that any coherent theory of provocation simply must offer mitigation in these circumstances.¹⁴⁶

There is no question that, even without the trauma of coming upon the crime scene, these remain sympathetic facts. Readers who would grant provocation on these facts may wonder why they should trade the distasteful outcomes involving the Randall Dixons and David Thackers of the world (resulting from our current understanding of the provocation doctrine) for the distasteful outcomes involving the late-acting fathers and husbands here (resulting from this Article's proposed understanding of the doctrine). Pragmatically speaking, the trade-off probably is a good one simply in terms of numbers. Distasteful outcomes under the current theory arise every time the law prohibits the use of force completely, and yet the defendant kills. It would seem that by far this would be the lion's share of provocation cases: the reasons for passion are infinite, while those justifying force are few. So most provocation cases under our current understanding are troubling. By contrast, under the theory proposed here, the distasteful outcomes suggested in criticism arise only with the closest of loved ones and the most horrifying of crimes, in situations where the fleeing felon doctrine does not apply. If the decision to accept or reject the proposed theory of provocation balances on whether it reduces the number of troubling outcomes,¹⁴⁷ the proposed theory appears to be in the lead.

More to the point, a criminal justice system such as ours requires the same outcome demanded by this proposal.¹⁴⁸ If people are legally sane, it is not asking too much that they refrain from killing.¹⁴⁹ If no amount of force is

146. As Professor Norse writes:

The most persuasive scholarly defenses of provocation have all invoked examples, like these, in which the defendant's emotion reflects the outrage of one responding to a grave wrong that the law otherwise punishes. Commentators frequently use examples of men killing their wives' rapists or children who kill abusive parents as clear cases of provoked murder.

Nourse, *supra* note 4, at 1390 (citing PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 102, at 479 (1984 & Supp. 1997)).

147. Although surely not the only consideration, the "answers to particular questions" a given theory provides are a strong indicator of the value of the theory. Huigens, *Homicide*, *supra* note 11, at 121.

148. *Cf. id.* at 143 (calling the man who kills his wife's rapist the next day a "more appealing case [for] provocation" but concluding that it is still murder).

149. See discussion *supra* Part IV.A.

permitted, then there is no act justification with which to discount the amount of force used. Timing matters. The protagonists here would have been justified in using force had they come upon the scene in time to prevent or stop the crime's commission,¹⁵⁰ or in time to halt the fleeing felon.¹⁵¹ If it is too late for that, though, then the harm has been done, and there is no longer a justification for using force. The law does not permit citizens to use force to exact vengeance.

This is not to denigrate consideration of the defendant's grief. Certainly, there is a place for that.¹⁵² Even so, this proposal may seem a cold rule. But it is a necessary one, if we believe that people are innocent until proven guilty and entitled to a fair trial, with punishment to be meted out by the state, not individuals. And if we are committed to the ideal of proportionate punishment, then the sentence of life or death ought not be determined by the temper of a given victim's loved ones. It may be, in practice; it should not be, in justice.

Although avenging a loved one's rape may be among the most compelling reasons for a vengeance killing, rape is not a death-qualifying offense.¹⁵³ And even murderers constitutionally must be afforded the opportunity to offer evidence in mitigation, to plead for a life sentence rather than a death sentence.¹⁵⁴ Commitment to these principles requires that vigilantism be recognized for what it is: murder.

VI. CONCLUSION

There is no denying that the heat of passion provocation doctrine as presently understood has permitted mitigation to manslaughter in circumstances that simply do not merit it. This Article has hoped to show these cases to be the result of the misconception that provocation is at heart an excuse defense, rather than the justification defense it truly is.

Provocation cannot be an excuse defense, because as a philosophical matter, it is better to structure our penal system on the premise that provocations can be resisted—at least up until the point at which a full insanity defense would be triggered—and as an empirical matter, it appears that this more desirable premise is accurate. The ordinary, reasonable, law-

150. LAFAVE, *supra* note 3, at 563-65.

151. *See supra* notes 141-45 and accompanying text.

152. *See supra* note 145 and accompanying text.

153. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977).

154. *See Lockett v. Ohio*, 438 U.S. 586, 608 (1978).

abiding person can prevent himself from killing, even in the face of the paradigmatically legally adequate provocation of seeing his wife committing adultery.

The provocation defense instead is properly grounded in justification. The mitigation from murder to manslaughter makes perfect sense in cases where the law permits some amount of force to be used (e.g., self-defense, defense of others, and resisting unlawful arrest). It would be unjust to punish one who killed for the full value of the force used (the murder) where some of the force used was permissible. Therefore, we offset the punishment for the full value of the force used by the amount the law permitted to be used. In this way, we arrive at the compromise verdict of voluntary manslaughter.

In the case of the infidelity paradigm, the law does not permit any level of force. A wife committing adultery is in no danger from her paramour, nor is the paramour in danger from her. There is no dangerous felony that must be prevented, no attack on the cuckold he must deflect to save his own life. It is true that he will be emotionally hurt, and probably angry, but no force is necessary, and therefore, none is permitted. Similarly, no force is permitted to stop a fiancée from dancing with someone else at her engagement party, nor to retaliate against a homosexual advance. As a result, in these cases there is no deduction to be made from the defendant's culpability for the entire, deadly amount of force used. Presuming he does not qualify for an insanity defense, he should be found guilty of murder.

Though understanding the provocation defense to be grounded in justification rather than excuse means there will not be mitigation for a subset of the sympathetic defendants portrayed in Part V, either, the trade-off is worth it. It is worth it both in terms of sheer numbers, and, more importantly, because that result is consistent with our insistence on due process and the rule of law.