

# A NEW RATIONALE FOR THE DOCTRINE OF PROVOCATION: APPLICATIONS TO CASES OF KILLING AN UNFAITHFUL SPOUSE

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## INTRODUCTION

The doctrine of provocation as a mitigating factor in criminal culpability has been the subject of considerable study in various countries.<sup>1</sup> Under this doctrine, criminal liability for intentional killing is reduced from murder to manslaughter where the act was a reaction to provocation.<sup>2</sup> This raises a series of essential jurisprudential and ethical questions: Is it truly appropriate to reduce the criminal liability of one who killed intentionally simply because the killing was a result of provocation? And if it is appropriate to reduce criminal liability, what ethical rationale supports this? What is the significance of this position vis-à-vis the value of sanctity of life? Finally, what is the ethical distinction between killing due to provocation and killing due to despair or unrequited love?

In the United States, criminal jurisprudence generally requires both that the killer com-

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1 See JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* (1992); Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 *BUFF. CRIM. L. REV.* 385 (2005); 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 (1994); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 *J. CRIM. L. & CRIMINOLOGY* 421 (1982) [hereinafter Dressler, *Rethinking Heat of Passion*]; Jennifer Dunim, *Superstition-Based Injustice in Africa and the United States: The Use of Provocation as a Defense for Killing Witches and Homosexuals*, 21 *WIS. WOMEN'S L. J.* 145 (2006); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 *CAL. L. REV.* 133 (1992); Susan D. Rozelle, *Controlling Passion Adultery and the Provocation Defense*, 37 *RUTGERS L.J.* 197 (2005); Michael A. Smyth, *Queers and Provocateurs Hegemony, Ideology, and the 'Homosexual Advance' Defense*, 40 *L. & SOC. REV.* 903 (2006).

2 See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* 491–94 (2003).

mitted the act while in a state of emotional turmoil due to unexpected provocation and that any reasonable person would have been provoked in such a situation in order to support a provocation defense.<sup>3</sup> That is, this defense is based upon a two-prong test, including both subjective and objective components.<sup>4</sup> The subjective requirement is that the provocation did, in fact, impair the defendant's ability to think rationally and resulted in a loss of self-control, such that the killing was performed with no thought as to consequences.<sup>5</sup> The objective inquiry considers whether a reasonable person would have experienced such a loss of self-control under those circumstances. This latter question, whether most people would have acted as the defendant did under the same circumstances, is not operative because it is clear that the answer will always be in the negative; rather, the question is whether the provocation was outrageous enough that a reasonable person's judgement would be so affected. That is, even if a reasonable person would not kill in such a situation but might react with some degree of violence, it is possible to at least understand the behavior of the defendant who did kill.<sup>6</sup>

Taking this one step further, in many states in the United States, a man<sup>7</sup> who killed his wife upon discovering that she had been unfaithful to him can rely upon the provocation defense so long as he can demonstrate that sudden discovery of the infidelity affected his subjective judgement.<sup>8</sup> That is, under United States criminal jurisprudence, a situation in

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3 Rozelle, *supra* note 1, at 198.

4 LAFAVE, *supra* note 2, at 494.

5 *Id.* at 506.

6 *Id.* at 494–95.

7 Violence is perpetrated and experienced by people of all genders but this article uses masculine pronouns for the perpetrator and feminine pronouns for the victim as case law and legal theory assume a male perpetrator and a female victim.

8 LAFAVE, *supra* note 2, at 498. LaFave demonstrates that a wife too “may be reasonably provoked into a heat of passion upon finding her husband in the act of adultery with another woman.” *Id.* at 498. For more about adultery as a provocation, see also *Davis v. State of Alabama*, No. 2:17-cv-01363, 2018 U.S. Dist. LEXIS 63672 (N.D. Ala. Mar. 15, 2018); *Knight v. State of Alabama*, 907 So. 2d 470, 477 (Ala. Crim. App. 2004); *People v. McDonald*, 77 N.E. 3d 26, 52 (Ill. 2016); *People v. Duenas*, C070823, 2014 Cal. App. Unpub. LEXIS 3607, at \*15 (Cal. Ct. App. May 21, 2014); *Gonzales v. State*, 546 S.W.2d 617 (Tex. Crim. App. 1977); Barret D. Broussard, *Principles for Passion Killing: An Evolutionary Solution to Manslaughter Mitigation*, 62 EMORY L.J. 179, 180–81 (2012) (“While many American jurisdictions have moved away from the rigidity of categorical approach, sexual infidelity remains a paradigmatic approach to manslaughter mitigation.”); Antonie Elise Miller, *Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion*, 17 WM. & MARY J. WOMEN & L. 249, 260 (2010).

which a woman has been unfaithful to her husband satisfies the objective element of something that would provoke a reasonable person to kill his or her spouse. This conclusion has been subject to sharp criticism from many scholars who claim, *inter alia*, that the lessening of criminal liability in the case of killing an unfaithful spouse stems from misunderstanding the rationale behind the provocation defense.<sup>9</sup> Other scholars argue that reducing criminal liability in such a situation is inconsistent with the understanding that a woman is not her husband's property.<sup>10</sup>

This essay proposes a different rationale for the doctrine of provocation, which negates the reliance on the provocation defense in the case of an unfaithful spouse. The proposed rationale is neither excuse, which focuses on reduced guilt due to the defendant's loss of self-control, nor justification, in that the victim was partly responsible for his or her own death. Rather, the rationale rests upon an understanding of why murder is prohibited and an examination of the protected values at the core of the offense of murder.

While the intuitive assumption is that criminalizing murder seeks to protect only the value of life itself,<sup>11</sup> I maintain that there are, in fact, three distinct values being protected: physical human life, the right of human beings not to be treated in a humiliating and belittling manner, and autonomy of society at large to live with a feeling of security, free of fear. I claim that killing due to provocation does not infringe upon all of these protected values, and for that reason reduced criminal liability is justified. However, in the case of murder due to infidelity, at least two of those values are threatened, and thus no reduction in criminal liability is warranted. I also maintain that the unique nature of this rationale paves the way to reworking the entire doctrine of provocation, which is so deeply embedded in criminal jurisprudence.

Part I describes the historical development of the doctrine of provocation in accepted jurisprudence and the bounds of this doctrine in England and the United States. Part II presents possible rationales supporting this doctrine and their relationships to the legal systems in question. The discussion will include critiques of the various rationales. Part III surveys legislation and case law of various states regarding the killing a spouse who was

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9 See Rozelle, *supra* note 1, at 227–29.

10 CAROLINE FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 178–94 (2000).

11 Despite the fact that the prohibition against murder has been accepted throughout human history, it is far from clear what the rationale for this prohibition is. See JEFF McMAHAN, *THE ETHICS OF KILLING* 189 (2002).

discovered to be unfaithful and the role of the provocation defense in such cases. This part includes a discussion of the positions of Victoria Nourse and Susan Rozelle, who oppose accepting a claim of provocation in cases of adultery. In Part IV, I will propose a new rationale for the doctrine of provocation and explore potential practical jurisprudential implications. I will conclude that the new rationale is ultimately inconsistent with a reduction in criminal liability for a man who has killed his unfaithful wife.

## I. The Provocation Doctrine in English and American Jurisprudence

### A. Development of the Doctrine of Provocation

The doctrine of provocation mandates that one who kills due to provocation is entitled to a reduction in criminal liability from murder to manslaughter, so long as the provocation resulted in a loss of self-control on the part of the killer.<sup>12</sup> The provocation defense came to be accepted in English jurisprudence in the seventeenth century.<sup>13</sup> In order to be entitled to this defense, a defendant had to prove two main elements: (1) The defendant killed the victim “in hot blood” and not when calm. A person who killed another “in cold blood” was not entitled to reduction in criminal responsibility even if the killing was a reaction to prior provocation by the victim. (2) The killing was a reaction to serious provocation.<sup>14</sup>

The law designated four categories of provocation: serious insult, witnessing an assault on a friend or relative, witnessing a British citizen’s freedom being taken unlawfully and witnessing one’s wife being unfaithful with another man.<sup>15</sup> In each of these cases, the behavior of the victim was considered an affront to human dignity, and therefore a severe reaction was appropriate. To protect one’s dignity, a person was expected to demonstrate courage by reacting physically and with rage to that infringement. The notion that a person whose dignity was compromised should react courageously was rooted in Aristotelian ethical thinking.<sup>16</sup> Nonetheless, a person who killed in the context of one of these scenarios was not completely exonerated; rather, the liability was partially reduced because the

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12 LAFAVE, *supra* note 2, at 292.

13 Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1035 (2011); HORDER, *supra* note 1, at 23; Mison, *supra* note 1, at 137–39.

14 Berman & Farrell, *supra* note 13, at 1035–36; HORDER, *supra* note 1, at 23–24.

15 HORDER, *supra* note 1, at 24; Mison, *supra* note 1, at 139; Rozelle, *supra* note 1, at 198.

16 Berman & Farrell, *supra* note 13, at 1036.

killing was not proportionate to the harm.<sup>17</sup> Anyone who killed and claimed provocation in a situation outside of these categories was not entitled to any reduction and could be convicted of murder.<sup>18</sup>

At this time, the provocation defense was considered a partial justification.<sup>19</sup> Although the defendant's action did not completely negate his criminal liability, it was considered less serious than murder. In other words, the value of life was an important protected value, but jurisprudence also recognized the value of human dignity. As a result, a person who killed in order to protect human dignity would only be convicted of murder in exceptional cases.

In the eighteenth century, a different attitude arose with regard to the rationale of provocation. That is, the reasoning behind reducing criminal liability from murder to manslaughter was no longer because the act of killing was considered less severe, but because the provocation induced a loss of self-control in the party who was provoked.<sup>20</sup> Under this analysis, provocation creates a situation where it is difficult for a person to act according to logical considerations that would guide him in the absence of the provocation.<sup>21</sup> As a result, the decision-making ability is impaired. Thus, the partial defense due to provocation is understood in terms of a partial excuse. The act of killing is not less serious; rather, the defendant bears less guilt. Consequently, a killer who is not legally competent is fully excused, while one who acts under the influence of provocation is partially excused due to his loss of self-control.<sup>22</sup>

Despite this shift in approach, English jurisprudence continued to stick with precise categories of provocation, but the thrust of the claim was now different. Rather than the four categories constituting infringements upon human dignity, these categories became evidence that the defendant's self-control had been affected.<sup>23</sup> Both legal scholars and judg-

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17 HORDER, *supra* note 1, at 52.

18 Berman & Farrell, *supra* note 13, at 1037; HORDER, *supra* note 1, at 52–53.

19 Berman & Farrell, *supra* note 13, at 1037; Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L. J.* 1331, 1339.

20 Berman & Farrell, *supra* note 13, at 1037–38; Nourse, *supra* note 19, at 1339.

21 Berman & Farrell, *supra* note 13, at 1038.

22 *Cf.* Nourse, *supra* note 19, at 1339.

23 Berman & Farrell, *supra* note 13, at 1038; *see* Dressler, *Rethinking Heat of Passion*, *supra* note 1, at

es realized, however, that a legal fiction was involved, in that it was possible for a person to suffer loss of self-control in situations that do not fall within these categories. This realization led to yet another change in the doctrine of provocation. It was now recognized that a person's ability to think clearly could be impaired even by minor provocation, but in such cases it was not appropriate to reduce a defendant's criminal liability. That is, in situations involving minor provocation, a person was expected to control himself or suffer the consequences of his actions.<sup>24</sup>

Under this approach, the four categories were no longer relevant. Consequently, an objective test was adopted. A defendant was entitled to a provocation defense if a reasonable man would have lost control as a result of the provocation in question.<sup>25</sup> However, despite this shift in what constitutes provocation, there remained an essential difference of opinion with regard to the rationale at the heart of the doctrine.

### B. The Current State of Jurisprudence in the United States and England

There is no consistent approach to the provocation doctrine in the United States with regard to either the circumstances to which it applies or the underlying rationale.<sup>26</sup> The Model Penal Code (MPC) constitutes one end of the spectrum in its opposition to the establishment of rigid categories of provocation, and it calls for a significant relaxation of the tests for this defense.<sup>27</sup> That is, the killing does not have to immediately follow the provocation, and there is no full-fledged reasonable man test. However, there is a requirement for some showing of reasonableness. This difference is not just a semantic one, as the MPC

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427 (explaining the proposition that the reasonable man test originally served as evidence of the defendant's loss of self-control).

24 Berman & Farrell, *supra* note 13, at 1038; Dressler, *Rethinking Heat of Passion*, *supra* note 1.

25 Berman & Farrell, *supra* note 13; Mison, *supra* note 1, at 140–41.

26 Nourse, *supra* note 19, at 1341–42.

27 As explained in the Model Penal Code:

Criminal homicide constitutes manslaughter when: . . .  
 b) 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.

appears to view reasonableness as including subjective factors.<sup>28</sup>

Most states in the United States have adopted the double prong test, including both the subjective and the reasonable man components, but implementation differs from state to state.<sup>29</sup> Some states explicitly require that a defendant pleading a provocation defense demonstrate that the emotional outburst that led to the killing was a sudden reaction to an unexpected event that constituted provocation. In other states, criminal liability may be reduced even if the emotional turmoil developed slowly, eventually peaking at the time of the killing.<sup>30</sup> In addition, in some states words alone are never considered to constitute provocation, while in others, words can indeed be considered provocation.<sup>31</sup> A few states require a defendant seeking reduction in criminal liability to prove that the provocation actually caused him to lose control to the extent that he acted without intent to kill. In most states, however, the reduction in criminal liability will be available even if there was intent to kill.<sup>32</sup>

Despite the fact that most states do include a reasonable man test, this prong has been attacked from all sides. For example, Mison argues that the defense perpetuates homophobia in that some provocation cases have involved defendants who have killed homosexuals who had kissed or caressed them.<sup>33</sup> According to Mison, this is rooted in heterosexuality being the dominant paradigm in all facets of life, including family, marriage, the visual

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28 Christina Pei-Lin Chen, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 208–09 (2000); Miller, *supra* note 8, at 259.

29 Miller, *supra* note 8, at 263 (“Due to these differences in the legal limitations and treatment of those convicted of voluntary manslaughter under the Model Penal Code and common law approaches, the standard adopted by each state may significantly affect how a voluntary manslaughter case proceeds in a given jurisdiction.”); Nourse, *supra* note 19, at 1341–42; *see also* Miller, *supra* note 8, at 259–63.

30 Nourse, *supra* note 19, at 1342.

31 Berman & Farrell, *supra* note 13, at 1039; LAFAVE, *supra* note 2, at 499–502; Nourse, *supra* note 19, at 1342. *Compare* *People v. Pouncey*, 471 N.W.2d 346 (Mich. 1991) (declining to hold categorically that words cannot serve as provocation), *with* *Stevens v. State of Indiana*, 691 N.E.2d 412, 426 (Ind. 1997) (holding that words cannot constitute provocation). Further, states differ as to whether the admission of a woman that she was unfaithful to her husband can serve as the basis of a provocation claim. *See* discussion *infra* Section III.

32 LAFAVE, *supra* note 2, at 493.

33 Chen, *supra* note 28, at 224–25; Mison, *supra* note 1, at 167–69; *see also* *Schick v. State*, 570 N.E.2d 918, 921–22 (Ind. Ct. App. 1991). For additional articles regarding the provocation doctrine in the homosexual context, *see* Dunim, *supra* note 1; Smyth, *supra* note 1.

arts, entertainment and literature.<sup>34</sup> Heterosexuality is viewed as the norm in society, in contrast to homosexuality, which is viewed as a deviation.<sup>35</sup> The term “homosexual” was coined only at the end of the nineteenth century, but was linked to the terms “disease” and “psychopathy.”<sup>36</sup> An individual defined as a homosexual became untouchable and contemptible.<sup>37</sup> As a result, from the beginning of the twentieth century and until 1973—the year in which homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders, known as the DSM, as a mental disorder—the claim of insanity or partial insanity was accepted in court in a case where an individual had killed another as the result of a homosexual advance made towards him.<sup>38</sup> The claim was that the advance toward the attacker caused an outburst of insanity resulting from the attacker’s latent homosexuality, which, in turn, led him to kill the victim.<sup>39</sup> Once homosexuality was no longer considered to be a mental disorder, the direction of the legal claim changed from the claim of an outburst of insanity that led to a psychotic reaction due to the killer’s suppressed homosexuality to the claim that the attacker was a reasonable person who acted out of a loss of self-control.<sup>40</sup> The acceptance of the claim of provocation in the case of a homosexual killed by a heterosexual due to a relatively minor advance towards him rests, therefore, on the belief that the heterosexual is a reasonable person and that the homosexual is a deviant.<sup>41</sup>

The acceptance of the claim of provocation in these instances not only reflects a view of homosexuality as something disgusting and frightening, but even reinforces it and grants it a place in the legal context.<sup>42</sup> In order to rectify this situation, it was claimed, among oth-

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34 Mison, *supra* note 1, at 147.

35 *Id.*

36 *Id.* at 148; *see also* Chen, *supra* note 28, at 199 (“Sigmund Freud, the most influential of the sexologists, and followers of his psychoanalytic theory of homosexuality have played a powerful role in the medical and popular characterization of homosexuality as a pathological mental illness . . . . It was not until 1973 that the American Psychiatric Association formally removed homosexuality from its official nomenclature in the Diagnostic and Statistical Manual of Psychiatric Disorders (DSM- 11).”).

37 Mison, *supra* note 1, at 148–49.

38 Chen, *supra* note 28, at 200–02.

39 *Id.* at 202.

40 *Id.* at 203.

41 Mison, *supra* note 1, at 148, 160; *cf.* Chen, *supra* note 28, at 225.

42 Mison, *supra* note 1, at 158; *see also* Chen, *supra* note 28, at 228 (“The provocation doctrine’s

er things, that the “reasonable man” test, a central component in the provocation defense, should not ask whether a reasonable person would have acted as the accused did, since that question only perpetuates homophobia by viewing the heterosexual as a reasonable man. Rather, the question should be whether it is *desirable* that a reasonable man would act in such a way. The change in the question clarifies that the justice system does not tolerate homophobia, particularly when it is manifested in physical violence.<sup>43</sup>

Another critique relates to the denigrating of or discriminating against women. According to this view, the provocation defense has been more readily accepted in cases involving a man who killed his wife because she had expressed a desire to leave him or because he thought she had been unfaithful. That is, the reasonable man test literally referred to the reasonable man (not woman), who would lose self-control in such a situation.<sup>44</sup> The claim is based on the fact that this type of killing is a “male crime,” since almost all cases of murder or manslaughter are committed by men against men.<sup>45</sup> Even when the victim is a woman, in the vast majority of cases the killer is a man and in many cases it is the victim’s husband or boyfriend.<sup>46</sup> On the other hand, women rarely kill and when they do, the killing is generally not carried out as a result of provocation as the term is understood in the courts, but rather out of fear of the husband.<sup>47</sup> Since most killings are committed by men, and when women kill they do not do so out of provocation, it is claimed that the provocation defense discriminates against women and that the main beneficiaries of this partial defense are men rather than women.<sup>48</sup>

Accordingly, it is claimed that the provocation defense in the case of a wife’s infidel-

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purpose and effect is to maintain male heterosexuality as the most privileged sex, gender, and sexuality. The doctrine is not just male-oriented or just heterosexist as evinced above. The provocation defense is sexist and heterosexist. It is male heterosexist.”).

43 *Id.* at 161.

44 *Cf.* Celia Wells, *Provocation: The Case for Abolition*, in *RETHINKING ENGLISH HOMICIDE LAW* 85, 87 (2000); Dorothy Appelbe, *The Theory of Justification and Excuse and its Implications for the Battered Woman*, 4 *CORK ONLINE L. REV.* (2005); Deborah W. Denno, *Gender, Crime and the Criminal Law Defenses*, 85 *J. CRIM. L. & CRIMINOLOGY* 80 (1994); Caroline Forell, *Homicide and the Unreasonable Man*, 72 *GEO. WASH. L. REV.* 597 (2004).

45 Chen, *supra* note 28, at 217–18 n.129; Miller, *supra* note 8, at 253–54.

46 Chen, *supra* note 28, at 219.

47 *Id.* at 220–21.

48 *Id.*

ity does not protect women, since most of the killings in the case of infidelity are carried out by men.<sup>49</sup> Moreover, it is claimed that since the woman has traditionally been viewed as the property of her husband (even after this view became normatively unacceptable)<sup>50</sup> and because a woman's infidelity causes more shame to the man than to a woman in the opposite situation, men who kill their wives as a result of infidelity are more easily able to invoke the provocation defense than women who have killed their husbands in similar circumstances.<sup>51</sup>

A further critique is that since most killings are carried out by men, the provocation defense reflects the motives that cause men to kill (whether the victim is a man or a woman) rather than the motives that cause women to kill, such as fear of the husband.<sup>52</sup> This claim is in line with the critique that criminal justice was developed by male judges and was made law by primarily male legislators. Furthermore, it was enforced by male law enforcers and interpreted by male judges. The doctrine of provocation is no different since both the term "major provocation" (primarily the infidelity of a wife or assault) and the term "reasonable man" were interpreted from the male perspective without taking into account the perspective of a reasonable woman.<sup>53</sup>

Consequently, the provocation doctrine has been viewed as infringing upon the rights of women, homosexuals, and other minority groups.<sup>54</sup> Such claims have wider acceptance in states that have adopted the MPC, which emphasizes the subjective loss of self-control and focuses less on the objective reasonable man test, divorced from the characteristics of a given defendant.<sup>55</sup> In practice, the existing situation in the United States has resulted in two main approaches to provocation. The first roughly accords with the MPC and facilitates the possibility of relying on the provocation defense, while the second emphasizes the

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49 Miller, *supra* note 8, at 266; Geris Serran & Philip Firestone, *Intimate Partner Homicide: A Review of the Male Proprietariness and the Self-Defense Theories*, 9 *AGGRESSION & VIOLENT BEHAV.* 1, 3 (2004).

50 Miller, *supra* note 8, at 255–66.

51 Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 *S. CAL. REV. L. & WOMEN'S STUD.* 255, 272–73 (1996); Miller, *supra* note 8, at 267.

52 Miller, *supra* note 8, at 253–54.

53 *Id.* at 254, 258.

54 See Alafair S. Burke, *Equality, Objectivity and Neutrality*, 103 *MICH. L. REV.* 1043, 1045 (2005) (non-white people consequently are not defined as "reasonable persons").

55 Rozelle, *supra* note 1, at 203; Nourse, *supra* note 19, at 1339–40.

reasonable man test and limits a defendant's ability to rely on this defense successfully.<sup>56</sup>

In England, the doctrine of provocation has undergone several iterations. In the past, the doctrine included the dual elements of subjective and objective provocation. Objective provocation became the pure reasonable man test, with no subjective component whatsoever.<sup>57</sup> This test, standing alone, was critiqued for the high threshold it created for use of the provocation defense. As an example, a man who killed a prostitute who had mocked his impotence was not able to claim provocation and was given the death penalty.<sup>58</sup> Consequently, the pure reasonable man test was replaced by a mixed test, such that subjective characteristics directly relevant to the degree of provocation could be taken into account.<sup>59</sup>

Unsurprisingly, this too did not last long, and eventually, in 2009, a law was passed that provided for a loss of control partial defense. This defense required that the defendant show the loss of self-control was caused by fear of serious violence resulting from something that was said or done in unusually serious circumstances, or that the defendant was given cause to think he had been the victim of serious injustice, or both. In addition, the defendant would have to demonstrate that in similar circumstances a person of the same age and gender with a normal amount of self-control would have reacted in the same way. As such, circumstances that affected this particular defendant would not be taken into consideration.<sup>60</sup>

## II. The Existing Rationale(s)

The doctrine of provocation is a partial defense. Thus, as opposed to manslaughter and assault, which are criminal offenses in their own right and distinct from the offense of murder, in many legal systems killing due to provocation is not a truly distinct offense.<sup>61</sup> That is, as opposed to assault and manslaughter, killing as a result of provocation requires the prosecution prove all of the elements of murder, even if due to circumstances, the criminal liability of the defendant may ultimately be reduced. Furthermore, in contrast with defenses such as self-defense, coercion, or necessity, which completely negate all criminal

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56 Broussard, *supra* note 8, at 184; Miller, *supra* note 8, at 262–63; Nourse, *supra* note 19, at 1342.

57 R. v. Lesbini [1914] 3 K.B. 1116 (Eng.).

58 Bedder v. D.P.P. [1954] 2 All E.R. 801 (Eng.).

59 Reg v. Camplin [1978] AC 705 (appeal taken from Eng.).

60 Coroners and Justice Act, 2009, c. 25, § 54–56 (Eng.).

61 Berman & Farrell, *supra* note 13, at 1035–37.

liability, provocation merely reduces the criminal liability from murder to manslaughter.<sup>62</sup>

The key philosophical question is what rationale underlies the provocation defense? That is, why should criminal liability be reduced from murder to manslaughter in situations of provocation? This is important to understand because the rationale helps to explicate the criminal jurisprudence and the connections and distinctions between various sections of the criminal law. Understanding the rationale also helps to delimit this doctrine: What ought to be considered provocation? Can the provocation defense stand even when the provocation was initiated by a third party rather than the victim? Is the provocation defense relevant where the killing did not follow immediately upon the heels of the provocation?

### A. Excuse Versus Justification

In the realm of criminal jurisprudence, defenses can be divided into two categories: excuses and justifications. An excuse presumes that there was no justification for infringing upon a protected interest and that the act was, therefore, wrong. However, the excuse posits that under the circumstances it would not be fair to attribute guilt to the defendant for the wrongful act because he could not have been expected to act in accordance with the law and refrain from offending.<sup>63</sup> One example of excuse is insanity. One who kills when insane should not be penalized, not because no harm was done or the act was justified in any way, but because one who is insane cannot be expected to act lawfully and cannot, therefore, be considered guilty. Such a defense focuses, therefore, on the agent rather than the act.<sup>64</sup>

On the other hand, justification presumes that the infringement upon the protected interest was justified. The message transmitted is that the defendant acted correctly in committing the offense,<sup>65</sup> usually because the person acted in furtherance of an interest of

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62 In some instances, the reduction is from First degree murder to Second degree murder. *See* 720 ILL. COMP. STAT. 5/9-2(a)(1) (2012); TEX. PENAL CODE § 19.02(1)(d) (2017) (provocation reduces the crime from a first degree felony to a second degree felony).

63 *See* Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 436–37. For different approaches regarding the character of exemption defenses, see Michael Moore, *Choice Character and Excuse*, 7 SOC. PHILOSOPHY AND POL'Y 29 (1990); JEREMY HORDER, *EXCUSING CRIMES* (2007).

64 Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 437.

65 The literature presents different approaches with respect to the categorization of justified behaviors in this context—whether the behavior must be ethically desirable, ethically permitted, or simply not unlawful. For a discussion of these approaches, see Joshua Dressler, *New Thoughts About the Concept of Justification*

greater value or importance than the interest protected by the offense. Thus, justifications focus on the act rather than the agent. Self-defense, for example, is considered the classic case of justification, in that under the circumstances it is more just that the aggressor die. The claim is that the killing is justified since the life of the aggressor, the ultimate victim, is in social terms, less valuable than the life of the person who was protecting his life.<sup>66</sup> In this context, the sum total of competing interests justifies the defense because the aggressor initiated an attack upon an innocent party, which he could have chosen not to do, while the potential victim acted to restore social order. In this sense, the message is that the potential victim acted correctly in killing the guilty party who was, ultimately, the victim.

### B. Provocation as Excuse

Many scholars believe that the rationale behind the reduction in criminal liability in cases of provocation is because it is a partial defense that is an excuse, and not a justification.<sup>67</sup> According to this view, the reason for the reduced criminal liability is due to impairment in the defendant's ability to exercise self-control and to his ability to exercise free choice and act rationally.<sup>68</sup> When someone is in a state of rage, caused by provocation, it is more difficult to act lawfully or ethically, as opposed to when someone has not been provoked and is not acting under the influence of rage or fear, but deliberately and with clarity of mind. As such, the former deserves a less severe penalty and criminal record.<sup>69</sup> The reasonable man test, under this rationale, seeks to determine whether another reasonable person would have reacted with such emotional turmoil to the act of provocation, regardless of whether that person would actually have killed. Consequently, the defense does not rest upon the idea that the *act* of killing was justified, even partially, but that the legal system demonstrates an understanding of human weakness when a person acts under the influence of rage caused by provocation. Just as, in general, the distinction between murder and manslaughter is not due to the fact that the killing was justified in a case of manslaughter but, rather, that the guilt of the defendant is less, so too the distinction between murder

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*in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 84–87 (1984); George Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1359–60 (1979).

66 Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 437.

67 For the perspective that provocation is an excuse, see LAFAVE, *supra* note 2, at 512–13; Dressler, *Rethinking Heat of Passion*, *supra* note 1 at 459–61; Timothy Macklem & John Gardner, *Provocation and Pluralism*, 64 MOD. L. REV. 815 (2001).

68 Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 464–65; Rozelle, *supra* note 1, at 208.

69 Rozelle, *supra* note 1, at 210.

and killing due to provocation is not because the act is in any way justified, but due to the lesser degree of guilt on the part of one who has been provoked.<sup>70</sup>

One of the main challenges faced by those who support this rationale relates to the reasonable man prong or, in fact, to any such normative requirement.<sup>71</sup> If criminal liability is reduced due to an impairment in the defendant's ability to choose freely and loss of self-control, why would there be any need to prove that the reasonable man would also lose self-control and/or that the reasonable man's ability to exercise free choice would be similarly impaired? All that ought to be required is to prove that the free choice of the specific defendant was impaired, along with the loss of self-control.

Dressler, who supports this exemption rationale claims that:

[P]rovocation is an excuse premised upon involuntariness based upon reduced choice-capabilities. If the doctrine is to be defensible, however, it must follow that the anger which undermines the choice-capability is itself formed under circumstances in which the actor cannot be fairly blamed for his anger. Otherwise, we have a case of voluntary anger, no more morally deserving of mitigation than voluntary intoxication.<sup>72</sup>

If the reasonable man would not have lost self-control or had his free choice impaired, it would not be appropriate to reduce the defendant's guilt because the impairment to his free choice and loss of self-control stem from his guilt. That is, he is guilty in that he brought himself to a state in which his ability to choose was impaired as a result of the provocation. However, in a case of provocation that would have caused impairment in the reasonable man's ability to choose, the defendant bears no guilt for his loss of self-control; as such, his overall guilt is reduced.

This approach, too, can be challenged by asserting that the reasonable man test is not really suited to prove whether the circumstances leading to the impairment in his self-control or ability to choose was his own fault or could have been avoided. A person can control, or even neutralize, some natural character traits, but other traits are very difficult or impossible to change. The reasonable man test does not reflect such traits even though they

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70 See Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 463–64 (describing the distinction between the partial defense of provocation that stems from the full defense of insanity and the necessity defense).

71 Cf. Berman & Farrell, *supra* note 13, at 1051.

72 Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 464.

are extremely relevant to the issue of loss of self-control due to provocation. As such, why should a given defendant who does not meet the reasonable man standard be convicted, while another who did not be convicted when the traits that led to the former's loss of the ability to choose were not within his control?

From a slightly different angle, one could say that the objective test seeks to apply an ethical analysis to the development of the impulse to kill. When a desire to kill arises from provocation, in the absence of an objective test, the ethical analysis leads to the conclusion that the defendant has no right to empathy from society via reduction in criminal liability. However, if this development of a desire to kill passes the threshold of the objective test, then society ought to show empathy towards the defendant.<sup>73</sup>

However, there may well be situations in which a defendant has developed an impulse to kill as a result of provocation that cannot pass the objective test, but that specific individual's self-control over the traits that led him to this impulse was severely limited. On the other hand, there are situations in which someone kills as a result of provocation that do pass the objective test, but that particular individual could have controlled himself. That is, if the only rationale is that of exemption, emphasizing a subjective impairment in self-control and one's ability to choose freely, the objective test, particularly the reasonable man test, does not appear to be relevant. Finally, impairment in the ability to think clearly can develop not only as a result of provocation, but also as a result of other factors, such as despair, unrequited love, etc.<sup>74</sup>

### C. Provocation as Justification

Others argue that the provocation defense constitutes a justification.<sup>75</sup> In contrast to the excuse-based rationale, a justification rationale to the provocation context means that the reduction in criminal liability from murder to manslaughter is justified because the act of

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73 Standing against the concept of "human weakness" are ethical considerations intended to prevent a reduced evaluation of guilt. Their importance requires strict scrutiny of the instances in which such reduction will be offered to one who has deviated from requirements of restraint. The main point is to understand that the perception of the one who is provoked regarding the provocation, the creation of the rage and impulse to kill, and the submission to this impulse are elements that express an internal cognitive process, which is subject to ethical analysis.

74 Cf. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 306 (1996).

75 See, e.g., Finbarr McAuley, *Anticipating the Past: The Defense of Provocation in Irish Law*, 50 MOD. L. REV. 133 (1987).

killing is less serious. At the heart of this approach is the notion that provocation constitutes an unjustified harm vis-à-vis the defendant, which makes the killing less serious.<sup>76</sup> In other words, killing due to provocation is less serious in light of the contributory guilt of the provoker. That is, if one person assaults another, and the other fights back and kills the attacker, the result is less serious than that of most instances of murder, and, consequently, the legal liability ought to be reduced from murder to manslaughter. Under this analysis, it makes sense to require an objective reasonable man test and to distinguish cases of provocation from other situations that involve loss of self-control.<sup>77</sup> Under this rationale, the reasonable man test is needed to indicate that society agrees that the provocation has adversely impacted the defendant in a manner that would be expected to cause such intense emotional turmoil that would interfere with ability to act rationally.

However, this rationale is also open to challenge. First, it is not at all clear why killing due to provocation that passes the reasonable man objective test is less serious than other killings. As a rule, killing someone is justified in certain situations for a variety of reasons, none of which are particularly relevant to the provocation scenario. The main justification is that in certain circumstances a person has a right to take the life of another. This is one of the things that justifies the right to self-defense; a person has the right to safeguard his own right to life by taking the life of another. With regard to provocation, however, this rationale is not relevant because the right the defendant protects is not his right to life, which was never at risk. Because the right being protected is of lesser value than the right to life of the provoker, it is not possible to claim that the defendant had a partial right to take the life of the victim because no such partial right exists, as evidenced by the fact that the defendant is ultimately convicted of manslaughter.

Another justification for killing relies on the notion that a victim has given up his right to life. As noted above, some claim that this is true in the case of self-defense. However, this too is not so clear in the case of provocation, because it is hard to argue that a person has relinquished his right to life when he assaults another. Once again, the fact that such a defendant is convicted of manslaughter indicates that the one who provoked another did not completely give up this right. That is, were this argument valid, such a defendant would be entitled to a full defense, not a partial one.

A third justification sometimes suggested is that in certain situations homicide does not

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76 *Id.* at 137.

77 *Cf.* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 245 (2003).

constitute harm or is considered to be a lesser harm in comparison to the value protected by the killing. This claim, too, appears not particularly relevant in the provocation context, as the provoker's value of life cannot be said to have decreased as a result of the provocation.<sup>78</sup>

Assuming provocation is considered a justification, it is also difficult to explain where the requirement that the killer lost control fits in. If the reason for reduced criminal liability is that the provocation created a situation in which the killing is less serious, why the need to prove that the defendant killed in "hot blood," as a result of loss of self-control and the ability to choose freely?<sup>79</sup>

Kahn and Nussbaum claim that the reason for the reduction in criminal liability is not due to loss of self-control on the part of the defendant because if it were, it would be appropriate to grant a partial defense in situations other than provocation. In their opinion, the reason for the reduction is the fact that the defendant's act indicates a person striving for ethical good. However, it is difficult to argue, for example, that a person who kills his wife as a result of her being unfaithful to him strives for any ethical good. Furthermore, even if this stance explains why there is a need for an objective test—that is, only in such a case is it proved that the acts of the defendant reflect broad ethical principles held by society—it is still not consistent with the requirement that the person acted in hot blood through loss of self-control.

#### **D. Retribution or Utility**

Is the doctrine of provocation, whereby criminal liability is reduced in cases of provocation, based on considerations of utility, such as deterrence or prevention, or in terms of retribution, such that a defendant must be penalized in proportion to the severity of his action and his degree of guilt regardless of whether or not there are any utilitarian benefits?

The previous discussion assumed that the provocation defense is based on the principle of retribution. With regard to the excuse rationale, one who is provoked is entitled to a reduction in criminal liability because he acts while his self-control is impaired and is thus less responsible for his actions and carries less guilt. With regard to the justification rationale, one who is provoked is entitled to the reduction in criminal liability because there is a partial defense to his action due to the provoker's contributory guilt.

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78 Cf. Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 458.

79 Cf. Berman & Farrell, *supra* note 13, at 1064–65.

In sharp contrast, the utilitarian approach does not seek to ascertain the appropriate penalty in the case of provocation, taking into account the action and the degree of guilt involved, but rather considers what penalty will deter the defendant and society at large from committing similar acts in the future.<sup>80</sup> From this perspective, if the rationale of the provocation doctrine is rooted in impairment to self-control, the reduction in criminal liability is fundamentally flawed. Under the utilitarian approach, it is important to send a message of deterrence to those who have never killed as a result of loss of self-control. As such, the penalty in situations of provocation ought to be that which applies to any murder.<sup>81</sup>

Furthermore, because a person's ability to control himself in such a situation is impaired but not completely negated, while it is difficult for such a person to obey the law, it is not completely impossible. That being the case, utilitarian logic based on deterrence would conclude that the sentence should send a strong message to potential defendants to not assume that the penalty will be reduced because of provocation, but to realize that criminal liability for killing after being provoked will be identical to criminal liability for any murder.<sup>82</sup> Such a message may cause the potential defendant to attempt to learn how to control himself when provoked and how to react more appropriately and within the law in such situations.<sup>83</sup> That is, the deterrent message might actually be effective even with regard to those who have difficulty controlling themselves when provoked but have not yet killed.

Even if the deterrence message does not cause some to refrain from killing, perhaps the penalty ought to still be heightened not due to considerations of deterrence, but because of a different utilitarian goal, prevention.<sup>84</sup> Because such people will not be deterred and may act the same way in a similar situation in the future, their penalty ought to be heightened in order to keep them out of normative society.<sup>85</sup> Thus, if the distinguishing factor of provocation is loss of self-control, then from a utilitarian perspective, a case can be made for a more severe criminal penalty rather than a less severe penalty, whether to communicate a very sharp message of deterrence or to prevent further such killings. Consequently, Dressler argued that the provocation doctrine rests only upon the concept of retribution and not that of

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80 Rozelle, *supra* note 1, at 210.

81 *Id.* at 211.

82 Cf. Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 964 (2002).

83 *Id.* at 966.

84 Rozelle, *supra* note 1, at 212–13.

85 *Id.*

utility. The only reason for the reduction in criminal liability for provocation is the loss of self-control of the defendant. In such a situation, the guilt of the defendant is reduced and his responsibility for the criminal act is less than it would be in the usual murder scenario.

Rozelle points out that if the provocation defense is based on an excuse rationale of loss of self-control, the retribution approach and the utility approach work at cross purposes, with fairness supporting a partial defense and utility rejecting any such partial defense. Because the two are incompatible in the excuse context, Rozelle concludes, as opposed to Dressler, that the appropriate rationale is that of justification, where the reason for reduction in criminal liability lies in the contributory guilt of the one who provoked and not in the loss of self-control on the part of the one provoked.<sup>86</sup> Within this framework, considerations of both retribution and utility support a reduction in criminal liability of one who kills due to provocation.<sup>87</sup>

Rozelle's approach has two pitfalls. First, it is not at all clear that from the utility perspective it would not be appropriate to heighten the penalty for a defendant who kills in the wake of being provoked. Specifically, under the justification approach, which does not emphasize loss of self-control, potential defendants ought to be, and can be, deterred from killing due to provocation. Second, even if the principle of utility is inconsistent with an excuse approach, the legislature could determine that in such cases considerations of retribution trump other considerations, as is the case with other defenses.

### **III. Killing in the Wake of Infidelity—Should a Provocation Defense be Available?**

#### **A. United States Jurisprudence**

The Model Penal Code, which focuses on the excuse rationale based on loss of self-control, emphasizes only the question of whether the provocation caused emotional turmoil for the defendant and resulted in loss of his self-control with regard to the killing. This rationale does not relate at all to the question of the reason for the loss of self-control. As such, there is no distinction between a situation in which a man killed his wife's rapist and that in which a man killed his wife because she left him or he saw her being unfaithful to him with another. The question is whether he lost self-control, not why.<sup>88</sup>

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86 *Id.*

87 *Id.*

88 Nourse, *supra* note 19, at 1390.

Even though not all states have fully adopted the MPC's broad approach to provocation, the jurisprudential stance most prevalent in the United States is that infidelity of one's spouse may constitute provocation which results in a reduction of criminal liability from murder to manslaughter.<sup>89</sup> The difference among states is not whether infidelity can serve as the basis for a claim of provocation, but under what conditions infidelity will be considered provocation.

For example, in *People v. Chevalier*,<sup>90</sup> the controlling Illinois precedent with regard to provocation, a man suspected that his wife had been unfaithful to him. He confronted her, and the woman admitted that she had been unfaithful and went on to mock his sexual prowess. The man then shot his wife and killed her.<sup>91</sup> The court found that in Illinois, "The only categories of serious provocation which have been recognized are 'substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.'" <sup>92</sup> Based on the fact that it held that infidelity could be considered provocation, the court found that infidelity rises to provocation only when a husband actually sees his wife *in flagrante delicto* or immediately prior to or following the act.<sup>93</sup> Moreover, without exception, mere words do not constitute provocation. Consequently, the court found that despite the fact that Chevalier's wife admitted her infidelity and even goaded her husband, this could not be considered provocation. As such, the man was convicted of murder.<sup>94</sup>

In *People v. Viramontes*,<sup>95</sup> the defendant discovered that his wife had been unfaithful to him by intercepting text messages and nude photos that she had sent to her lover. The defendant confronted his wife, and she admitted that she had been unfaithful. As a result, he hit and killed her.<sup>96</sup> The court found that his reading the text messages and seeing the photos, even along with the victim's admission, could not be considered provocation because,

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89 Broussard, *supra* note 8; Rozelle, *supra* note 1, at 199.

90 *People v. Chevalier*, 544 N.E.2d 942 (Ill. 1989).

91 *Id.* at 943.

92 *Id.* at 944.

93 *Id.*

94 *Id.*

95 *People v. Viramontes*, 20 N.E.3d 25 (Ill. App. Ct. 2014), *aff'd*, 87 N.E.3d 364 (Ill. App. Ct. 2017).

96 *Id.* at 30.

as stated above, mere words cannot rise to provocation.<sup>97</sup> Moreover, the court in *Sutton*,<sup>98</sup> also an Illinois case, held that a claim of provocation will only be entertained if the couple is married at the time of the killing and not simply involved in a sexual relationship or even engaged to be married.<sup>99</sup> In contrast to Illinois, which has narrowed the range of situations in which a claim of provocation will be accepted, Ohio courts have accepted provocation claims even when infidelity has been discovered through a woman's admission. Furthermore, there is no requirement that the couple be married at the time of the killing.

In another example, *State of Ohio v. Shane*,<sup>100</sup> which is considered controlling on this matter in Ohio, a defendant strangled his wife after she admitted to him that she had been unfaithful and that she no longer wished to continue living with him. The defendant claimed, "I have never felt more upset and more mad with anyone [in] my entire life."<sup>101</sup> In its analysis of the provocation doctrine, the court found that a claim of provocation may be accepted so long as the defendant acted due to sudden rage resulting from significant provocation. It held that it is necessary to prove both objective provocation, that is, a reasonable man was likely to have used lethal force in such a situation, and subjective provocation, that is, this specific defendant acted under the influence of extreme emotion caused by the provocation.<sup>102</sup>

The court in *Shane* rejected the categorical stance that words could never be the basis for a claim of provocation, but did find that usually words alone would not suffice.<sup>103</sup> There the woman had not come to Shane and admitted the infidelity, thus sparking his rage. Rather, Shane had awakened her and forced her to confess. As such, the court found that the objective test was not met, that is, his anger had existed prior to her admission, so her words could not be considered provocation for his rage. Moreover, the fact that the claim of provocation in *Shane* was not rejected because the couple was not married, but rather because the provocation was not sufficiently serious, indicates that this court viewed provocation

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97 *Id.* at 34–35.

98 *People v. Sutton*, 818 N.E.2d 793 (Ill. App. Ct. 2004).

99 *Id.* at 802–03.

100 *State of Ohio v. Shane*, 590 N.E.2d 272 (Ohio 1992).

101 *Id.* at 272.

102 *Id.* at 276.

103 *Id.* at 278.

was applicable even in the context of an unmarried couple in a romantic relationship.<sup>104</sup>

Similarly, in *State of Ohio v. Williams*,<sup>105</sup> the defendant killed Darian Polk, his ex-wife's lover, after he saw them in bed together.<sup>106</sup> Williams unsuccessfully attempted to claim provocation. The court indicated that the main reason his provocation claim was rejected was because he had been aware of the relationship between Polk and his ex-wife for quite some time. As such, this was not a case of sudden provocation causing loss of self-control resulting in the killing; rather, this was premeditated murder.<sup>107</sup> The court, thus, did not rely on the fact that the couple was no longer married.

Finally, Minnesota courts have not made any distinction between words and actions with regard to provocation. A woman's admission of infidelity can, indeed, be considered provocation. Moreover, it appears that there is no requirement that the couple be married or even living together at the time of the killing. In *State v. Hussein*,<sup>108</sup> for example, the defendant killed his wife about a month after she left him, having told him that she was sexually involved with someone else. Although the court did not accept Hussain's provocation claim, this was not because the couple had already separated or because the claimed provocation was mere words, but because it was demonstrated that the defendant had acted deliberately and not due to loss of self-control.<sup>109</sup> The position that words can be considered provocation exists in Minnesota statutory law as well in the definition of manslaughter: "A person is guilty of first-degree manslaughter if the person intentionally causes the death of another person in the heat of passion provoked by such *words or acts* of another as would provoke a person of ordinary self-control under like circumstances."<sup>110</sup>

## B. Objections to Applying Provocation Doctrine in the Context of Infidelity

According to Nourse, we instinctively distinguish between a provocation claim in the case of a rapist being killed by the victim's husband (at some point subsequent to the rape)

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104 *Id.*

105 *State of Ohio v. Williams*, 2009-Ohio-3162, 2009 WL 1856743 (Ohio Ct. App. June 30, 2009).

106 *Id.* at 15.

107 *Id.* at 22.

108 *State of Minn. v. Hussein*, No. C3-00-580, 2000 WL 33261028 (Minn. Ct. App. Apr. 10, 2001).

109 *Id.* at 7–8.

110 MINN. STAT. § 609.20(1) (1998) (emphasis added).

and such a claim in the case of a husband killing his wife because she was unfaithful or planned to leave him.<sup>111</sup> It seems appropriate to accept the claim in the case of killing the rapist, but not in the case of killing the unfaithful wife.<sup>112</sup> This distinction, Nourse explains, is due to the fact that in the case of killing the rapist, the emotional outburst against the rapist is consistent with the law itself, in that the law mandates that rapists be penalized. This reflects the fact that the law allows for one's rage and anger on the part of society as well as the specific victim. In this sense, the emotions of the husband of the victim are consistent with the fact that the law imposes criminal liability and severe penalties upon the rapist. However, with regard to a woman who decides to leave her husband or a woman who has been unfaithful to her husband, there is no such match of the emotional outburst of the husband with the law. Although society comprehends and sympathizes with the husband's feelings, the law does not impose criminal liability on the woman.<sup>113</sup> Thus, were criminal liability reduced in cases where the act of provocation is not a crime, such reduction is an inherent contradiction to the law because the implication of the absence of criminal liability is that the law does not wish to protect the feelings of rage of the attacker, and the reduction in liability indicates an acceptance of such rage.<sup>114</sup>

According to Nourse, a reduction in criminal liability implies acceptance of the rage, not justification of the act itself.<sup>115</sup> The difference between Nourse's position and the theory of provocation as partial justification lies in the fact that justification justifies the act itself, in light of the prior act of the provoker. In contrast, Nourse refers to justification of the emotions that cause the act of killing. The partial justification approach requires that the provocation be analyzed via the objective reasonable man test. According to Nourse, the objective test is not relevant and it is enough to demonstrate that a killer suffers a loss of self-control as a result of provocation that is prohibited by law. Nonetheless, even for Nourse, the fact that a law has been broken does not necessarily suffice. A traffic violation cannot serve as the basis for a provocation claim.<sup>116</sup> Nourse resorts to an objective test at least to some extent, in addition to requiring that the provocation be unlawful.

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111 Nourse, *supra* note 19, at 1392.

112 *Id.*

113 *Id.*

114 *Id.* at 1393.

115 *Id.*

116 *Id.* at 1396 n.381.

It is not clear, however, why Nourse is of the opinion that the killing must have been caused by a defendant's loss of self-control in the wake of the provocation. Even if the act of killing is not due to loss of self-control but, rather, attributable to a desire for revenge on the part of a rape victim's husband, why is it not appropriate to reduce the criminal liability of the husband? Perhaps Nourse does, in fact, consider the reason for the reduction in criminal liability to be the impairment to the defendant's ability to reason, but Nourse believes that it is necessary to determine the cause of such impairment. That is, if the act of provocation would have been subject to penalty in any event, the law itself allows for the defendant's emotions, and we can allow empathy for the killer's emotions to be reflected in a reduction in criminal liability. On the other hand, if the act of provocation is not penalized under law, the law does not allow room for the defendant's emotions, and it is therefore not appropriate to reduce criminal liability even if the defendant has suffered a loss of self-control.<sup>117</sup>

Furthermore, infidelity is indeed a crime in some states. Is Nourse of the opinion that in those states a provocation claim ought to be accepted in instances of infidelity?

Finally, the fact that a penal code does not prohibit infidelity does not prove that the law does not recognize the feelings of rage and frustration of a husband whose wife has been unfaithful. Perhaps the law does not prohibit infidelity because it does not wish to enter the realm of intimacy between spouses or it has chosen not to limit the freedom of the individual in such cases. Therefore, reducing criminal liability in situations of infidelity may not be inconsistent with the law which, as stated, may wish to express empathy for the betrayed husband's feelings, albeit stopping short of criminalizing the act of infidelity.

Rozelle, too, opposes a reduction in criminal liability in instances of killing in the wake of infidelity. In her opinion, the doctrine of provocation rests neither on an excuse rationale based on loss of self-control<sup>118</sup> nor on a justification rationale based on contributory guilt.<sup>119</sup> Rather, she believes that a provocation defense ought to be available only where the law actually permits the victim of an attack to protect himself through use of force, but the defendant uses too much force and kills the provoker. Such a situation involves both emotion justification and partial act justification for the act of the one who has been provoked.<sup>120</sup> As

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117 It may be possible to understand Nourse in this manner. Nourse, *supra* note 19, at 1398.

118 Rozelle, *supra* note 1, at 226.

119 *Id.* at 227.

120 *Id.*

such, if A is about to injure B, and B kills A in the midst of an emotional outburst, B will have available a provocation defense and may be convicted of manslaughter rather than murder.<sup>121</sup> This is because not only is there justification for B's feelings, there is also partial justification for his act. The law permits B to injure A, but not to kill him, as this is not a proportional response.

Thus, according to Rozelle, when someone kills his wife because she was unfaithful, the provocation defense is not relevant because even if the law does recognize the emotional response, the law does not permit a person to use violence in such a situation.<sup>122</sup> Consequently, Rozelle limits use of the provocation defense to a greater extent than Nourse, as Rozelle would not even accept a claim of provocation in a situation where a person, after the fact, kills someone who has raped his wife or murdered his son. In such cases, the legislature has not permitted any use of force, and there is thus no partial justification for this action. As we saw, Nourse would indeed permit a provocation defense in such a case, as the law mandates that rapists and murderers be penalized, and therefore the emotions of the one provoked are justified.

#### **IV. A New Rationale for the Provocation Defense—Interests Protected by the Criminalization of Murder**

##### **A. Presentation of the Rationale**

###### **1. Society's Right to Autonomy—Living Without Fear**

The proposed rationale focuses on the reason murder is prohibited and, specifically, on those protected values at the heart of the offense of murder that are broader than the value of life alone. In order to glean insight into these interests and values, we must consider what the world would look like in the absence of prohibitions against homicide (negligent homicide, manslaughter, murder). Many have posited that in the absence of such offenses, society would regress into ongoing hostility and constant fear of injuries or death. Thus, even those who would succeed in preserving their lives would suffer a significant infringement upon their autonomy, living in constant fear and under threat of death. Such fear would also impact human autonomy in that under such conditions it is difficult for a person to actualize his ambitions and plan his life in any reasonable manner. As an aside, "autonomy" is not used here in the Kantian sense of one who is rational and capable of enacting

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121 *Id.*

122 *Id.* at 228.

ethical laws that can be used as general principles, a person who bows his will to the ethical laws of reason.<sup>123</sup> In this context, “autonomy” includes two elements: a person’s ability to live a life free of constant hostility and fear of death and a person’s ability to make plans for his life and carry out those plans. This accords with Raz’s position that an autonomous man is a man able to write his own destiny.<sup>124</sup>

As Hobbes describes, in the “natural state” (albeit it is not a given that we would actually reach such an extreme state):

And from this diffidence of one another, there is no way for any man to secure himselfe, so reasonable, as Anticipation; that is, by force, or wiles, to master the persons of all men he can, so long, till he see no other power great enough to endanger him . . . . Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.<sup>125</sup>

In a situation where anyone may kill another, life is not life. There is no humanity, no culture, no creativity, and, worst of all, man is constantly subject to fear of imminent death.

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123 IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 53–58 (Allen W. Wood trans., Yale Univ. Press 2002) (1785). For a critique of the concept of Kantian autonomy, see JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW – HARM TO SELF* 94–96 (1986). Feinberg rejects Kant’s understanding with regard to autonomy as being detached from concrete man. Rather, for Feinberg, the significance of human autonomy lies in giving significance to man’s choices and desires, not rationales and abstract autonomy, connected to the concept of “man” in general but detached from the concrete individual.

124 JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369–70 (1986). It is important to emphasize that even according to Raz, man’s ability to live free of fear is a central aspect of his ability to write his own destiny, that is, his ability to be autonomous. *Id.* at 373–76.

125 THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL* 95–97 (Oxford at the Clarendon Press 1967) (1651).

The problems that would exist in the absence of the criminalization of homicide would not be limited to the fact that people would constantly be fighting each other and dying. The fear itself would constitute a significant infringement upon man's autonomy, and as a result, human development would be adversely impacted.<sup>126</sup>

Furthermore, even if we never actually fall into the extreme state of nature described by Hobbes, there is still concern that in the absence of homicide offenses, some would attempt to attack, injure, or kill others (out of hatred, benefit, survival instinct, etc.), and this fact creates significant fear of such attacks. Moreover, even if people do not actually attack each other, many may still live in fear that such attacks will occur.

Robert Nozick, too, describes a society without laws prohibiting homicide, assault, and rape, among other violent crimes: "A system that allowed assaults to take place . . . would lead to apprehensive people, afraid of assault, sudden attack, and harm . . . . To avoid such general apprehension and fear, these acts are prohibited and made punishable."<sup>127</sup> It follows that homicide offenses do not seek to protect life alone, but also society's autonomy and a citizen's right to live in peace free of hostility and fear.

This analysis relates to what the world would be like in the absence of prohibitions against homicide, but in order to proceed, we must focus the discussion on the specific crime of murder, which is where provocation comes in. However, the efficacy of homicide offenses in protecting autonomy is cumulative, as each type provides partial protection. Were murder a criminal offense but manslaughter and negligent homicide not offenses, people would still live in fear of rash or negligent killings. Taking it a step further, even if both murder and manslaughter were offenses, there would still be a need to be on guard against the negligent acts and omissions of others. The opposite is true as well; were negligent homicide and manslaughter the only relevant offenses, autonomy would only be protected to a limited extent because the fear of deliberate acts of murder would still exist in the absence of a more significant offense and corresponding penalty specifically directed toward this serious deliberate act. When reckless killings and deliberate killings are treated alike, deterrence is not optimal, and the infringement upon autonomy can be quite significant, and man's ability to live free of fear and hostility is compromised. The greatest fear is of deliberate killings, not rash or negligent ones.

In light of this analysis, there is a significant difference between murder and killing as

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126 See GREGORY S. KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* 81–82 (1999).

127 ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 66 (1974).

a result of provocation. When one kills because of provocation, he does indeed infringe upon an important value that is protected by the criminalization of murder, that of human life. In this sense, it is no different from any other murder. And it is not the case that the value of the life of one who provoked another is worth less than that of anyone else. Nor is there partial justification for the killing because of contributory guilt.<sup>128</sup> Rather, the second protected value, the autonomy to live in peace without fear of deliberate killings is affected quite differently in cases of provocation. When death is caused by murder, the feeling of security of society at large is infringed upon because everyone believes that such a murder may happen to him. Therefore, murder must be severely penalized and carry heightened criminal liability. On the other hand, when someone is killed after seriously provoking another, the general autonomy of members of society is not compromised or is less compromised because the murder was not random, but based on an act on the part of the victim. Consequently, the innocent citizen knows that he has control over his fate; as long as he is careful not to provoke anyone, he will not be killed. Thus, killing in the wake of severe provocation is less serious, and it is appropriate to reduce criminal liability from murder to manslaughter. Although such killing infringes the rights of the victim in that he has been killed, it does not create a feeling of fear among society at large, at least not as much fear as other murders do, because society attributes the death to the act of provocation.

Note that the claim is not that criminal liability ought to be reduced because the one who provoked was responsible for his own death (contributory guilt), but because the act of provocation created a situation where the death does not infringe upon the feelings of security of society. That is, the reason for the reduction from murder to manslaughter is due to the reduction in the infringement upon society, not to justification of the act.

This rationale offers an explanation for why we cannot suffice with a subjective test for provocation that caused loss of self-control on the part of the defendant. Were we to rely on the subjective test alone, citizens would indeed still be left in fear of deliberate killings because any action on the part of someone could trigger someone else to kill. As such, this does not provide a basis for reducing murder to manslaughter because all protected values have been harmed.

The analysis here is consistent with an idea presented by Rawls, albeit in a very different context.<sup>129</sup> Rawls addresses the question of the ethical justification for a duty to save one in danger. He points out that a law establishing such a duty has significant impact upon

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128 GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 245–46 (178); Dressler, *supra* note 82, at 969–70.

129 JOHN RAWLS, *A THEORY OF JUSTICE* 297–98 (Rev. ed. 1999).

a citizen even before he requires such assistance. The great value of a duty to save is not a function of the number of occasions people are actually in danger and then saved, but in the knowledge that when one is in need of assistance, he will receive it. As such, there is much value to such a law in one's day-to-day life, even if one never finds himself in a situation where he requires assistance. For Rawls, it is enough to contemplate how society would operate were there no legal duty to save others. In such a scenario, everyone would live in constant fear that were he to need such assistance, he would not receive it.<sup>130</sup> Although Rawls does not discuss the criminal offense of murder, it appears that the Rawlsian approach would view the enactment of a prohibition against murder as not merely intended to prevent deaths, but also to enable society to live in peace, without fear. The offense of murder impacts the day-to-day life of the citizen, in that he can live without being concerned about deliberate killings, even if he personally has never been in a situation in which his life was threatened. And it would appear that the Rawlsian approach would arrive at the same conclusion presented above, that the fear of deliberate, premeditated killings, is greater than the fear of killings due to provocation, and it is thus appropriate to reduce criminal liability in cases of provocation.

One question that may arise is why the reduction in criminal liability in cases of provocation exists only with respect to murder rather than any criminal offense involving a specific victim who may be triggered by provocation. It would appear that any such crime committed due to provocation infringes upon society's autonomy to a lesser degree, and, therefore, criminal liability ought to be reduced. This question is not only relevant in the context of the proposed rationale, but with respect to all rationales discussed above. More to the point, however, although it is indeed appropriate to reduce criminal liability and/or impose less severe penalties in all cases in which someone injures another due to provocation, nevertheless it is particularly important that provocation be explicitly specified in legal codes in order to reduce liability from murder to manslaughter, whether by including lack of provocation as a prerequisite for the mens rea of murder or by providing that provocation be a mitigating factor or a partial defense. This is because many jurisdictions have statutory minimum penalties for murder that do not allow for judicial discretion. As a result, were provocation not specified in the law as a mitigating factor, in many jurisdictions a court would be obligated to impose a mandatory life prison sentence upon a defendant who had killed due to provocation. With regard to other offenses, however, the law usually mandates a maximum penalty, but not a minimum penalty, and the court is able to consider such factors as provocation when exercising its discretion in sentencing.

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130 *Id.*

## 2. Human Right to Dignity

The question remains: Why is it necessary to prove the subjective prong of provocation, that the killing occurred due to loss of self-control? As mentioned above, the reason for the reduction in criminal liability is due to the fact that people attribute the killing to the provocation, and thus their sense of security is less shaken than by other murders. If this is the only reason for the reduction in criminal liability, why does it matter whether the killing occurs when the defendant has lost self-control? Let us return to the question of why murder is prohibited. As discussed above, murder is prohibited because it infringes upon the value of human life as well as society's sense of security. However, there is an additional reason, as can be demonstrated by turning to an example brought by McMahan, in a somewhat different context:

A runaway trolley is careering down the mainline track. If it continues along this track, it will crash into the station, killing hundreds of people . . . it can be diverted onto one or the other of two branchline tracks. You are a bystander who happens to have access to the switch that can divert the trolley. You see that there is an innocent bystander on each of the branchline tracks: Young is on the track to the left, and Old is on the . . . right . . . neither will be able to get out of the way of the trolley if you divert it.<sup>131</sup>

Let's assume we would conclude, as do many, that it is better to divert the trolley toward the older person rather than the younger, does that mean that murdering an older person is less serious than murder of a younger man? According to McMahan:

The common view . . . is that the wrongness of killing persons does not vary with such factors as the degree of harm caused to the victim, the age . . . Our understanding of the wrongness of killing should reflect our belief in the fundamental moral equality of persons.<sup>132</sup>

McMahan concludes that in addition to the harm caused to a victim by cessation of life, murder is prohibited because it humiliates and belittles the ethical status of man.<sup>133</sup> That is, murder embodies an injury to human dignity and therefore there is no distinction between the murder of a young man and the murder of an old man; in both cases, the killing harms

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131 McMahan, *supra* note 11, at 237.

132 *Id.* at 235.

133 *Id.* at 246.

human dignity and ethical status.<sup>134</sup> It appears that McMahan's conclusion is not actually related to the injury to the victim.<sup>135</sup> Even were the victim to agree to be viewed in this belittling manner, it would not be permitted to murder him because the obligation is incumbent upon the actor to refrain from adopting this humiliating and belittling attitude toward the ethical status of man, without connection to the victim's interests.

In contrast, the approach developed by Benbaji<sup>136</sup> and Statman<sup>137</sup> views murder as a direct infringement upon the victim's dignity.<sup>138</sup> Every person has the right to be treated with dignity, and the main significance of this right is that his interests be taken into consideration by others.<sup>139</sup> Human dignity is expressed mainly in honoring the right of a person to fulfill himself and write his own destiny per his own worldview. Murder is prohibited, under this analysis, not merely because of the concrete harm caused to the person in that his life was cut short, but because the murderer injured the dignity of the victim in that the victim's interest was not taken into consideration by the murderer.<sup>140</sup> As such, the right to defend oneself against a guilty aggressor (as opposed to an innocent aggressor) stems not only from the victim's right to protect his physical life, but also from his right not to be treated in a manner that humiliates him and infringes upon his dignity.<sup>141</sup> A guilty aggressor humiliates and belittles the victim in that he does not take his interests into account, and the right of a potential victim to defend himself stems, at least in part, from his right to protect his dignity.

One can see how important human dignity is to the right to self-defense by considering the following: X is driving a truck and wishes to kill Y. X pulls out a machine gun and aims it at Y with intent to kill. Y is also armed and will be able shoot and kill X, but this will not save Y's life because the truck will still crush him to death in the next instant.<sup>142</sup> If the right

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134 *Id.* at 242.

135 Yitzhak Benbaji, *Culpable Bystanders, Innocent Threats, and the Ethic of Self-Defense*, 35 *CANADIAN J. OF PHIL.* 585, 609 (2008).

136 *Id.*

137 Daniel Statman, *On the Success Condition for Legitimate Self-Defense*, 118 *ETHICS* 659 (2008).

138 Benbaji, *supra* note 135, at 609.

139 *Id.* at 610.

140 *Id.* at 609.

141 *Id.* at 610.

142 *Id.* at 597.

to self-defense comes only from the right to protect one's physical life, in this scenario Y would not be permitted to shoot X because he will, nonetheless, be crushed by the truck. However, because the right to self-defense against a guilty aggressor derives from the right to avoid being treated in a humiliating and belittling manner, even in this scenario, Y has the right to kill X notwithstanding the fact that he will die immediately thereafter.<sup>143</sup>

It is not difficult to apply this to the context of provocation and the rationale at its root. The infringement upon human dignity when a person kills deliberately without being provoked is greater than the infringement upon human dignity in a situation of spontaneous killing due to provocation without consideration and due to loss of self-control. When a person kills deliberately, he is well aware of the victim's interests; he considers them and nonetheless decides that they do not concern him. On the other hand, when someone kills due to provocation and loss of self-control, this indicates that he has not even thought about the interests of the victim because his emotional state has not allowed him to do so. It is possible that were he to be operating under full self-control, he would have considered the interests of the victim and chosen not to kill. The infringement upon human dignity is greater when a person understands what those interests are and nonetheless chooses to belittle them than in a situation where a person kills another due to loss of control without having thought about those interests. This distinction is valid both according to McMahan, as the treatment afforded the victim by the actor is more belittling when the murder was premeditated, and according to Benbaji and Statman, because the injury to the victim is greater in the case of deliberate murder absent provocation than in the case of killing performed due to loss of self-control as a result of provocation.

It follows, therefore, that as opposed to the approach that views provocation as a partial excuse and therefore considers the subjective requirement of provocation to be the basis for reduction in guilt for the one provoked, the subjective requirement of loss of self-control, I would argue, transforms the killing into something less severe because it is a lesser infringement upon the dignity of the victim.

In sum, the reason for the reduction in criminal liability in cases of provocation stems from the fact that some of the values at the heart of the offense of murder—society's sense of security and even the victim's dignity—are less harmed than in other situations of murder. It must be emphasized that in order to reduce a crime from murder to manslaughter, it must be shown that both protected values were harmed less, not only one.

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143 *Cf. id.* at 597–98.

### 3. Various Ramifications

The complex rationale presented above provides an explanation for one of the challenges to provocation and to the excuse rationale that is based on loss of self-control: Why do we reduce criminal liability with regard to killing that was spurred by provocation, but not killing spurred by despair or unrequited love despite the fact that these, too, might cause loss of self-control? The answer is that were we to permit a reduction in criminal liability where the victim had no control whatsoever over the situation, not only would the value of human life be infringed, but also society's autonomy, as each person would live in constant fear of being killed in the wake of some impulse to kill that is unrelated to his actions.

This rationale sheds light on an additional aspect of the provocation doctrine. For the most part, United States courts have not granted the partial defense of provocation where it was not the victim who provoked the attack.<sup>144</sup> Were the only relevant factor the defendant's loss of self-control and impairment in his decision-making ability, why would it matter who caused the provocation? For example, let's assume John, upon witnessing his daughter crushed under a vehicle driven by Smith, loses self-control and approaches Smith in order to confront him, but Chris attempts to stop John, and John turns and shoots and kills Chris. John is not entitled to a reduction in criminal liability due to provocation because Chris is not the one who provoked him. The rationale presented above explains this conclusion. The killing of Chris does, indeed, strike at the values protected by the offense of murder. That is, not only did the killing infringe upon Chris's right to life, it also infringed upon society's sense of security, in that it occurred in the absence of any provocation on the part of Chris, and, as a result every individual will, indeed, fear that such a murder may happen to him even if he does nothing to provoke it. Thus, the correct level of criminal liability in such a scenario is murder rather than mere manslaughter.

#### B. Application in the Context of Infidelity

Finally, the proposed rationale explains why the United States' approach regarding infidelity is problematic. As noted above, many states consider a woman's infidelity to be a valid basis for a provocation claim. When a person sees his wife being unfaithful, he becomes entitled to a reduction in criminal liability so long as at the time of the killing he was in a state of rage caused by the infidelity. The rationale presented here would not support a provocation claim in such a situation.

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144 LAFAVE, *supra* note 2, at 511.

As noted above, the protected values at the heart of the offense of murder is the ability to live and to go about one's lawful business without fear. When a person lives in a state of fear, he cannot exercise his autonomy. When a person murders, he infringes upon society's sense of security and thus infringes upon the autonomy of the entire society. On the other hand, when a person kills as a result of being provoked, he does not infringe upon society's sense of security, and thus, the autonomy of members of society is not harmed or at least less so.

However, in order to allow man to exercise his autonomy as desired, there must be a clear demarcation of when an act will be considered provocation. In the absence of such a clear line, man will hesitate to act in many situations when it would be perfectly lawful to do so, out of fear that such act may provoke someone else. This also constitutes a significant infringement upon a person's autonomy.

As a starting point, it is appropriate to allow people the freedom to perform any lawful act without fear that such an act will be considered provocation. Thus, people will be able to exercise autonomy fully, without fear. Because engaging in an extramarital sexual relationship is legal, and even in states where laws against such activities are still on the books, they are not enforced and can be said not to exist in practice, it is not appropriate to reduce criminal liability when a man has killed his wife because of her infidelity. Such a killing infringes upon both of the protected values at the heart of murder, sanctity of life and autonomy of society to act lawfully without fear. A reduction in criminal liability in the case of killing due to infidelity tramples this autonomy. If we accept a provocation claim in a case of infidelity that is lawful, there is no reason not to accept such a claim in other situations where the victim acted lawfully. The autonomy protected by the offense of murder is therefore seriously adversely impacted when infidelity is considered an acceptable form of provocation.

It is possible to argue that society's sense of security is not seriously affected when a person kills his wife who has been unfaithful because women can still feel confident that so long as they are not unfaithful to their husbands they run no risk of being killed. However, people ought to be permitted to act freely so long as their actions are lawful. This is what characterizes human autonomy and freedom. As such, killing someone in the wake of a lawful action creates fear and hesitation on the part of others to perform actions that are indeed lawful lest they be considered provocation. As a result, society's autonomy to act lawfully is indeed harmed. Thus, reduced criminal liability in such a case is not appropriate. That is, every person ought to be confident that he has full protection to perform any lawful act, even if that act is frowned upon as unethical by society. Consequently, even if a woman

has acted unethically in being unfaithful to her husband, so long as this is not illegal, there should be no reduction of criminal liability if she is murdered as a result of her infidelity.

The proposed rationale differs from Nourse's analysis described above. According to Nourse, the very fact that infidelity is not a crime indicates that the law does not accept the husband's rage and thus permitting a provocation claim in such a situation constitutes an inherent contradiction with the law itself. My argument is different in that it asserts that because infidelity is lawful, even if unethical, murder in the wake of infidelity harms the protected values at the heart of the offense of murder: sanctity of life and the ability of society at large to act autonomously within the law with no fear. As such, murder in the wake of infidelity is murder in all respects.

### **C. Minimalist Definition of Provocation—Rejection of the Reasonable Man Standard**

In light of the above, the reasonable man test is not relevant to the provocation defense because it relates to the issue of loss of self-control and impaired ability to choose. However, the excuse rationale is expressed only with regard to the subjective element, that is, whether the specific defendant suffered loss of self-control and an impaired ability to choose. As discussed above, loss of self-control will not suffice to reduce criminal liability; it is also required to demonstrate that the killing caused by provocation will not trample the autonomy of others by causing them to live in fear of being deliberately killed. The reasonable man test is thus not useful for this purpose. Under the reasonable man analysis, one who murders his wife whom he has caught being unfaithful should be convicted of manslaughter because a reasonable man may well suffer loss of self-control in such a situation to the extent that he would kill. However, under the proposed analysis, the fact that the reasonable man would suffer a loss of self-control is simply not relevant because the question is whether killing in the wake of infidelity would harm human autonomy. Because, as already noted, the answer is that it would, it is not appropriate to reduce liability for such a killing from murder to manslaughter.

Moreover, even acts that are technically illegal but where the harm caused is not significant should not be considered provocation, because this, too, could lead to loss of autonomy. A person ought not to be fearful that a minor error, even an unlawful one, can lead to his death. As such, actions that ought to be considered provocation should be limited to serious offenses because it is within everyone's control to ensure serious offenses are not committed. Thus, people will not fear that they may commit such an offense by accident. In other words, use of a provocation defense in instances involving serious offenses will

not cause others to live in fear and therefore does not infringe upon people's autonomy to act and live lawfully.

### CONCLUSION

The doctrine of provocation is deeply rooted in criminal jurisprudence. Nonetheless, countries and scholars disagree regarding the rationale for the doctrine and, therefore, its role in the legal system. Reduction in criminal liability in cases of provocation creates dissonance between the principle of guilt and the value of sanctity of life, as well as social struggles in various contexts. As such, the doctrine is viewed as support for homophobia because of cases in which criminal liability of a defendant has been reduced merely because the person killed was a homosexual who tried to kiss or caress him. Similarly, the doctrine has been viewed as supporting male chauvinism because of cases where criminal liability has been reduced for a man who killed his wife because he found her being unfaithful to him.

I have proposed a new rationale for the doctrine of provocation along with a redefinition of what constitutes provocation and why it is inappropriate to recognize a provocation defense in situations of murder in the wake of spousal infidelity. This rationale rests upon the identification of the protected values at the heart of the offense of murder. I claim that in cases involving provocation, only the value of life is harmed, not the value of the autonomy of society at large to live and act lawfully and free of fear. Furthermore, in cases of provocation, the right to human dignity suffers less harm, in that the victim is not dealt with in a humiliating manner.

The proposed rationale not only explains why murder in the wake of infidelity ought not to be considered provocation, but also addresses several of the questions often raised with regard to provocation. That is, it explains why specifically in cases involving provocation criminal liability is reduced, while this is not the case in other instances of loss of self-control, such as despair or disappointment. It also explains why a provocation defense will not be accepted in cases where a third-party bystander, who does not provoke, is the one killed.

I have suggested that we reject the objective reasonable man prong of provocation analysis because it relates to the question of the reasonable man's loss of his ability to reason, and what matters in this context is subjective. The normative aspect must be aimed at the question of which killings infringe less upon the protected values at the core of the offense of murder. As demonstrated, these values include both sanctity of life and auton-

my of society, the ability to live free of fear. As such, instances of provocation that ought to result in a reduction in criminal liability would include only instances where the provocation includes a serious offense directed at the defendant. In such cases, autonomy of others is not harmed because it is clear that in these severe cases, which are within a person's control, a defendant is entitled to a reduction in criminal liability.