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### Provocation as Partial Justification and Partial Excuse

Mitchell N. Berman

*University of Pennsylvania Carey Law School*

Author ORCID Identifier:

 [Mitch Berman 0000-0001-9531-9425](https://orcid.org/0000-0001-9531-9425)

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# Provocation as Partial Justification and Partial Excuse

Mitchell N. Berman \*

Ian P. Farrell †

*The partial defense of provocation provides that a person who kills in the heat of passion brought on by legally adequate provocation is guilty of manslaughter rather than murder. It traces back to the twelfth century, and exists today, in some form, in almost every U.S. state and other common law jurisdictions. But long history and wide application have not produced agreement on the rationale for the doctrine. To the contrary, the search for a coherent and satisfying rationale remains among the main occupations of criminal law theorists.*

*The dominant scholarly view holds that provocation is best explained and defended as a partial excuse, on the grounds that the killer's inflamed emotional state so compromised his ability to conform his conduct to the demands of reason and law as to render him substantially less blameworthy for his conduct. In contrast, a small minority of scholars have maintained, without significant argumentative support, that provocation is best understood as a partial justification, on the ground that the provoked killing is less wrongful than is an unprovoked killing, ceteris paribus. Recently, other commentators have argued that provocation mitigation is neither partial excuse nor partial justification.*

*Against all of these familiar positions, we argue that partial excuse and partial justification are necessary and sufficient conditions for provocation manslaughter. In our view, an intentional killing deserves to be punished and labeled as manslaughter rather than murder only when, because of provocation, this particular killing is significantly less wrongful than is the standard intentional killing and when, because of the actor's partial lack of control, he is less blameworthy for committing an act that remains all-things-considered wrongful. In elaborating and defending our account, we rebut the oft-repeated but rarely challenged propositions that justification and excuse (even in partial forms) are mutually exclusive, and that the very notion of partial justification is incoherent. We also draw forth implications for how the sentencing ranges for murder and for manslaughter should be related.*

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\* Richard Dale Endowed Chair in Law, Professor of Philosophy (by courtesy), the University of Texas at Austin. mberman@law.utexas.edu.

† Visiting Assistant Professor and Fellow, Emerging Scholars Program, the University of Texas at Austin. ifarrell@law.utexas.edu. [acknowledgements to come]. Draft of February 7, 2010.

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## INTRODUCTION

The partial defense of provocation provides that a person who intentionally kills another in the heat of passion brought on by legally adequate provocation is guilty of manslaughter rather than murder. The doctrine has both deep roots and widespread limbs: the influence of provocation on the common law of homicide has been traced back to the Twelfth Century, and some version of the provocation defense is part of the law in almost every U.S. state and other common law

jurisdictions.<sup>1</sup> But long history and wide application have not translated into agreement on the rationale for the doctrine.

The search for a rationale for the provocation defense has resulted in a scholarly debate lasting several decades, but yet to bear satisfactory fruit. The provocation debate is a scion of a broader discussion concerning the character of defenses that has consumed a generation of criminal law theorists. Defenses are generally classified as either justifications or excuses. While the precise nature of the distinction is disputed, justification defenses are generally said to apply when the actor's conduct is not wrongful, whereas excuse defenses are said to apply when the actor engages in wrongful conduct but is not liable, particularly because not blameworthy.<sup>2</sup> Self-defense is usually considered a paradigm example of a justification defense, and insanity a paradigm of excuse. Roughly speaking, a person who kills in self-defense has done something of which the law does not disapprove, while an insane killer is considered not responsible for his or her actions and therefore not properly blamed or punished for them.

Provocation differs from the examples of self-defense and insanity in several ways, and as a result has proven particularly obdurate to classification. First, a successful plea of provocation does not preclude a conviction for the killing. Rather, the offense is reduced from murder to manslaughter, with the available punishment options reduced accordingly. While self-defense and insanity are complete defenses, provocation is a partial defense. The debate about provocation's rationale has therefore focused on whether provocation is a *partial justification* or a *partial excuse*. By analogy, partial justifications would apply when an actor's conduct was *less wrongful* than if justifying conditions were not present, but was still, on balance, wrongful. Partial excuses would apply when the actor was *less blameworthy* than if excusing conditions were not present, but still liable for some punishment.

Second, some elements of the doctrine—such as the requirement of “adequate” provocation—suggest that provocation should be treated as a partial justification. Other elements—notably the need for “heat of passion”—point towards a rationale of partial excuse. Like European zoologists confronted with the warm-blooded but egg-laying platypus for the first time, criminal scholars have struggled to produce a coherent rationale that adequately captures those features of the provocation doctrine that seem to pull in opposite directions.

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<sup>1</sup> The majority of U.S. states retain the common law doctrine of provocation. A substantial minority of states have replaced common law provocation with a partial defense based on the Model Penal Code's analogue of killings resulting from “extreme mental or emotional disturbance.” The relationship between the partial defense at common law and under the Model Penal Code is discussed in Part I. In several U.S. states, such as Illinois and Texas, provocation results in a lower category of murder rather than manslaughter. See ILL. COMP. STAT. 5/9-2(1) (defining provocation as second degree murder); TEX. PENAL CODE ANN. §19.02(1)(d) (defining provocation as a felony of the second degree).

<sup>2</sup> This brief statement of the distinction is, of course, unrefined. For example, to say that conduct is not (criminally) wrong does not entail that it involves no moral wrong. See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 4 (2003); Douglas N. Husak, *Partial Defenses*, 11 CAN. J. L. & JURIS. 167, 170 (1998). We will address the distinction in greater detail in the body of our Article.

Scholars have responded in several ways. The dominant contemporary view is that provocation is best understood as some version of partial excuse. A small minority of scholars have claimed to the contrary that provocation manslaughter is, or should be, some kind of partial justification. Yet another group of commentators dissents from both these positions, claiming that provocation is neither a partial justification nor a partial excuse. These scholars argue that the justification/excuse framework is an inapposite mechanism for making sense of provocation. What all these scholars have in common, however, is resistance to the obvious possibility that the rationale for provocation is grounded in *both* partial excuse and partial justification. The near-consensus opinion is that a partial defense cannot be coherently grounded in both partial justification and partial excuse.<sup>3</sup> While the doctrine of provocation is acknowledged to exhibit the *appearance* of both justificatory and excusing characteristics,<sup>4</sup> most scholars treat this as the puzzle to be resolved, not the key to understanding the doctrine's rationale.<sup>5</sup> The apparently dual nature of provocation is usually considered an unfortunate artifact of the common law's ad hoc development, a sign of confused thinking by judges and legislatures,<sup>6</sup> and evidence of the need to abolish or amend the defense.<sup>7</sup>

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<sup>3</sup> A notable exception to this rule is A.J. Ashworth, who has argued that a combination of partial excuse and partial justification provides the normative basis of English provocation law as well as describing its key features. A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292 (1976). We could find no other whole-hearted advocacy for such a position apart from that of the Law Reform Commission of Ireland. The Law Reform Commission of Ireland, *Consultation Paper on Homicide: The Plea of Provocation*, LRC CP 27-2003, 141. We address these views Part II.B.2. *infra*, in which we argue that Ashworth and the Irish Commission notwithstanding, no one has advanced a compelling theoretical framework for a combined account of provocation, nor provided refutations of the main criticisms of such combined accounts.

<sup>4</sup> See, e.g., Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 149 (“provocation has both justification and excuse dimensions”); Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 418 (2005) (“In sum, the partial defense of provocation includes *elements* of both excusatory and justificatory rationales.” (emphasis added)); Robert Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 146 (1992) (“The common law categories of sufficient provocation are best explained by justification analysis, while the concept of excuse *appears* to be behind the requirement that the defendant act in anger.” (emphasis added))

<sup>5</sup> See, e.g., J.L. Austin, *A Plea for Excuses*, reprinted in PHILOSOPHY OF ACTION 20 (Alan White ed. 1968) (“[W]hen we plead, say, provocation, there is genuine uncertainty or ambiguity as to what we mean—is he partly responsible, because he roused a violent impulse or passion in me, so that it wasn't truly or merely me acting 'of my own accord' (excuse)? Or is it rather that, he having done me such injury, I was entitled to retaliate (justification)?”); Reid Fontaine, *Adequate (Non)Provocation*, at 10 (“American common law has been inconsistent in its treatment of the doctrine as one of justification or excuse.”); see also Marcia Baron, *Killing in the Heat of Passion*, in SETTING THE MORAL COMPASS: ESSAYS BY WOMEN PHILOSOPHERS 357 (Cheshire Calhoun ed., 2004) (“[A] closer look at [provocation] reveals that it is not purely an excuse; it is, somewhat confusedly, partly a justification.”).

<sup>6</sup> Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 480 (1988) (“Confusion surrounds the provocation defense. . . . It is likely that some of the confusion surrounding the defense is inherent to the situation, but it is also probably true that English and American courts were insufficiently concerned about the justification-excuse distinctions while the law developed.”).

<sup>7</sup> Baron, *supra* note 5, at 358 (“That the heat of passion is not purely a partial excuse or purely a partial justification suggests that the defense needs to be abandoned or modified, or at least reconceptualized.”).

Even the small handful of scholars who have demonstrated appreciation for provocation's justificatory dimension as well as its excusing dimension nonetheless do not frame their positions as a combination of partial justification and partial excuse.<sup>8</sup> Instead, the orthodox view remains that the act of killing in provocation is partially excused, but *not* partially justified. This position is routinely grounded in the oft-repeated but rarely challenged proposition that justification and excuse are mutually exclusive, as well in that proposition's regular stable mate, the claim that partial justification is an incoherent notion.

The orthodox view is wrong. A coherent and cohesive rationale for provocation can be crafted from the dual bases of partial excuse and partial justification. Put simply, partial excuse and partial justification are necessary and sufficient conditions for provocation manslaughter. Neither partial excuse alone, nor partial justification alone, provides sufficient mitigation for an intentional, wrongful killing to be treated as manslaughter rather than murder. An intentional killing deserves to be treated as manslaughter rather than murder—and deserves to be punished accordingly—only when both justifying and excusing conditions apply.

We argue that such a rationale is preferable to existing theories of provocation along both descriptive and normative dimensions. The rationale we propose not only makes more sense of the contours of the doctrine, but also appropriately distinguishes those intentional killings that deserve to be treated as manslaughter from those that deserve to be treated as murder. Indeed, we argue that many of the problems associated with the modern application of the provocation doctrine<sup>9</sup>—and especially those associated with its Model Penal Code reformulation—result from a failure to fully appreciate the need for partially justifying conditions in provocation cases.

This Article proceeds in four parts. Part I presents an overview of the provocation manslaughter doctrine. Part II critically assesses accounts or theories of provocation advanced thus far in the scholarly literature. Part III briefly introduces our competing account according to which mitigation from murder to manslaughter is warranted only when actor is both partially justified and partially excused. Part IV adds further flesh to that skeletal presentation in the context of anticipating and rebutting possible objections.

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<sup>8</sup> See, e.g., Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997); Timothy Macklem & John Gardner, *Provocation and Pluralism*, 64 MOD. L. REV. 815, 819 (2001); Andrew von Hirsh and Nils Jareborg, *Provocation and Culpability*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 241, 253 (Ferdinand Schoeman ed., 1987).

<sup>9</sup> See, e.g., Nourse, *supra* note 8, at 332 (1997) (criticizing the application of the passion defense to numerous cases of intimate homicide in which the victim merely indicated a desire “to leave a miserable relationship”); Laurie Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-defense*, 33 UCLA L. REV. 1679, 1679 (1986) (claiming “the legal standards that define adequate provocation and passionate ‘human’ weaknesses reflect a male view of understandable homicidal violence,” making it difficult for women to secure manslaughter verdicts); Susan Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 197 (2005) (arguing that “we should not allow adultery to mitigate murder to voluntary manslaughter”); Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, *supra* note 4.

## I. THE DOCTRINE OF PROVOCATION

### A. *Historical Development*

While the influence of provocation on English homicide law can be traced back to the decisions of Twelfth Century judges and juries,<sup>10</sup> the doctrine of provocation began to take a form recognizable to modern scholars during the Seventeenth Century.<sup>11</sup> Two requirements for a killing to be treated as manslaughter due to provocation rather than murder crystallized during this period. First, the killing must have occurred while the killer was “in the heat of blood.” A killing in cold-blooded revenge, even if it was in response to provocation, was murder.<sup>12</sup> Second, the heat of blood must have been brought about by provocation that was *adequate*, that is, sufficiently grave. The law came to recognize four distinct—and exhaustive—categories of provocative conduct “considered sufficiently grave to warrant the reduction from murder to manslaughter of a hot-blooded intentional killing.”<sup>13</sup> The categories were: (1) A grossly insulting assault; (2) Witnessing an attack upon a friend or relative; (3) Seeing an Englishman unlawfully deprived of his liberty; and (4) Witnessing one’s wife (and, obviously, another person) in the act of adultery.<sup>14</sup>

Horder argues that, at their inception, both the heat of passion requirement and the categories of adequate provocation reflected the “touchy, quixotic concern for honour”<sup>15</sup> that was prevalent in early modern England. According to this social code, disdainful or contemptuous conduct was considered an “affront,” an intentional attempt to undermine a man’s (presumptively virtuous) reputation. To protect his honor, a man had to retaliate: he had to respond physically, and with anger.<sup>16</sup> Only a passionate and physical response demonstrated that the affronted man possessed the Aristotelian virtues of courage and “spirit.” But such virtues were, by definition, the mean between extremes. The retaliation, while passionate, had to be proportionate to the gravity of the affront.<sup>17</sup>

The four categories of adequate provocation captured circumstances that were considered affronts serious enough to warrant a violent response, but not serious enough to warrant a lethal response, in order to re-establish an honorable reputation.<sup>18</sup> A man who killed in response to provocation falling within one of the four categories “departed from the mean in point of retributive justice by inflicting excessive retaliation, although, given the gravity of the provocation, it is not greatly excessive.”<sup>19</sup> As the killer’s actions were an over-reaction—but not a gross over-reaction—manslaughter rather than murder was considered the

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<sup>10</sup> JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY*, 1-22 (1992). The following section draws heavily on Horder’s thorough and lucid investigation of the evolution of provocation in English law.

<sup>11</sup> *Id.* at 23.

<sup>12</sup> *Id.* at 23-24.

<sup>13</sup> *Id.* at 24.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.* at 27.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 52.

<sup>19</sup> *Id.*

appropriate offense. If the provocation was so extreme that killing in anger was considered an appropriate response, no criminal liability was imposed.<sup>20</sup> On the other hand, if the provocation was less grave than that which the four categories of adequate provocation covered, killing in anger was grossly excessive and therefore considered murder.<sup>21</sup>

According to Horder then, the early provocation doctrine was centered on partial *justification*. A gravely-affronted man was justified in responding physically and angrily. A proportionate response was fully justified, but an excessive response was only partially justified. Seen through the lens of honor, anger or outrage was an integral component of the (fully controlled) righteous response of the wronged man.<sup>22</sup> Both the heat of blood requirement and the adequate provocation requirement were grounded in partial justification. Crucially, in this early period of the provocation doctrine's development, no mention was made of loss of self-control.<sup>23</sup> There was no suggestion that the wronged man had lost control, and therefore no inference that he was not responsible for his conduct. In short, notions of excuse did not play a role in deeming a provoked killing to be manslaughter.

During the seventeenth and eighteenth centuries, however, "a new conception of anger"<sup>24</sup> gained ascendancy. Anger and other emotions were seen as capable of interfering with, even overwhelming, reason. Sufficient anger was therefore understood to cause a loss of self-control.<sup>25</sup> As one commentator of the time put it, great anger "rendereth the man deaf to the voice of reason."<sup>26</sup> This loss of self-control, this inability to conform your actions to the dictates of reason, became the basis for *partially excusing* those who killed in the heat of blood. The categories of adequate provocation were retained. For a time they were important for "evidentiary reasons"<sup>27</sup>: such grave provocation gave rise to a legal presumption "that the defendant was in fact carried to revenge by the irresistible influence of ungovernable passion."<sup>28</sup> Those who killed as a result of conduct that did not fall within the four categories of adequate provocation were presumed not to have lost their capacity for self-control. The cause of the killing was therefore traced to the defendant's malignant design.<sup>29</sup>

This presumption was, of course, a legal fiction.<sup>30</sup> It was possible that a person (of particularly bad temper, say) could show that he genuinely lost self-control as a result of minor provocation—that is, provocative conduct not captured by the four categories. The courts and commentators acknowledged this fiction,

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<sup>20</sup> "Honour theorists" asserted "a right to administer proportional requital personally, precisely because they felt that the law offered no or no adequate means of redress for what men of honour took to be serious affronts against honour." *Id.* at 50.

<sup>21</sup> *Id.* at 52-53.

<sup>22</sup> *Id.* at 42.

<sup>23</sup> *Id.* at 42.

<sup>24</sup> *Id.* at 73.

<sup>25</sup> *Id.* at 75.

<sup>26</sup> *Id.* at 76 n.28 (quoting Foster).

<sup>27</sup> *Id.* at 89.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 96-100; see also Ashworth, *supra* note 3, at 292-293.

<sup>30</sup> *Id.* at 94.



and the importance of adequate provocation morphed once more. Lack of adequate provocation was taken not as evidence that the defendant *could not* have lost self-control, but rather that the defendant *ought not* have lost self-control, or *ought not* “to have vented it to the extent [he] did in the circumstances.”<sup>31</sup> Underlying the categories of provocation, as Ashworth puts it, “was more than a hint that people *ought not* to yield to certain types of provocation, and that if they did the law should offer no concession to them.”<sup>32</sup> The strict categories of adequate provocation were gradually softened and eventually the categorical approach was replaced by a standard of reasonableness. Rather than being restricted to a predetermined set of situations, adequate provocation was determined by reference to whether in the relevant circumstances any reasonable person would have been so subject to passion as to temporarily lose control.<sup>33</sup>

### B. The Current Doctrine of Provocation

The majority of U.S. jurisdictions retain a version of the common law defense of provocation. In these states, the criminal codes have incorporated, either explicitly or implicitly, the principles developed by common law.<sup>34</sup> The doctrine has not, however, developed identically in the jurisdictions that retain the common law defense. The states differ, for example, as to whether mere words<sup>35</sup> or wrongs done to a third party<sup>36</sup> can amount to adequate provocation, and as to whether a time delay between the provoking act and the killing that would allow a reasonable man time to cool off precludes the defense.<sup>37</sup> As a result of these divergences, it is common to declare that provocation “enjoys no canonical definition.”<sup>38</sup> These differences notwithstanding, it is possible to identify key features of the provocation doctrine that are common to all the jurisdictions that retain the common law defense. Our goal in this Article is to present a rationale that explains these central, common features of the provocation doctrine. We do not attempt to provide a rationale that explains doctrinal rules that have been accepted by some, but not all, common law jurisdictions. Indeed, to the extent that such rules cannot be explained by our theory, we would consider this as grounds for arguing for abandonment of the rules.<sup>39</sup>

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<sup>31</sup> *Id.* at 99.

<sup>32</sup> Ashworth, *supra* note 3, at 295.

<sup>33</sup> HORDER, *supra* note 10, at 99. The reasonable person standard has found its way into statutes and case law in England and many U.S. states. See, e.g., Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 3 (Eng.); *R. v. Duffy*, [1949] 1 All E.R. 932; Illinois, ILL. COMP. STAT. 5/9-2 (provocation must be “sufficient to excite an intense passion in a reasonable person”); see generally, WAYNE LAFAVE, CRIMINAL LAW 448, 777 (4th ed. 2004). There is some controversy surrounding whether the relevant standard is (or should be) a reasonable person or *the* reasonable person, a reasonable *man* or a reasonable *person*, and whether the emotion, loss of control or the actual killing or violence has to be reasonable. See, e.g., Nourse, *Passion’s Progress*, *supra* note 8, at 1403; LAFAVE, CRIMINAL LAW, *supra*, at 777, and the discussion at note 194, *infra*.

<sup>34</sup> For a description of the different textual devices employed in the state codes for defining provocation, see Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982), at 430-31.

<sup>35</sup> See, e.g., LAFAVE, CRIMINAL LAW, *supra* note 33, at 780-781; Nourse, *Passion’s Progress*, *supra* note 8, at 1342.

<sup>36</sup> See, e.g., LAFAVE, CRIMINAL LAW, *supra* note 33, at 782-783.

<sup>37</sup> See, e.g., LAFAVE, CRIMINAL LAW 448, *supra* note 33, at 786-787.

<sup>38</sup> Stephen P. Garvey, *Passion’s Puzzle*, 90 IOWA L. REV. 1677 (2005), at 1691.

<sup>39</sup> A full exploration of which peripheral doctrinal features ought to be abandoned is beyond the scope of this Article. But as a preliminary matter, we consider the “reasonable cooling off period”

In eleven states, the common law defense of provocation has been subject to significant statutory reform. The legislatures in these jurisdictions have enacted statutes that include language mirroring the “extreme mental or emotional disturbance” provision of the Model Penal Code.<sup>40</sup> The resulting defense is broader than its common law cousin,<sup>41</sup> and the differences between the two defenses make it at least debatable whether they share a common rationale.

1. *The common law.*—In states that retain the common law defense of provocation, an intentional killing that would otherwise be murder is reduced to manslaughter if, at the time of the killing, the defendant was subject to heat of passion caused by adequate provocation.<sup>42</sup> From this statement of the doctrine, which accords with that given by most commentators, we can isolate three central features of the provocation defense:

- (1) The actor must have killed while in the *heat of passion*;
- (2) The heat of passion must have been brought about by *adequate provocation*;
- (3) Provocation is a *partial defense*. The defense reduces the offense from murder to manslaughter. Provocation does not exonerate a defendant, but neither is it merely a mitigating factor considered in determining the appropriate sentence.

The first two features—heat of passion and adequate provocation—are the requirements of the doctrine that a defendant must establish in order for the defense to apply. The third feature—the partial nature of the defense—describes the legal effect of the doctrine.

This statement of the doctrine’s key features differs from those some commentators provide. In most cases, the differences are merely of expression, rather than reflecting substantive disagreement. For example, Wayne LaFave states that there are four obstacles, rather than two, that a defendant must overcome in order to establish the defense:

- (1) There must have been a reasonable provocation.
- (2) The defendant must have been in fact provoked.
- (3) A reasonable person so provoked would not have cooled off in the interval of

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rule to be a potential candidate for rejection. On our theory, a person who kills while still in the heat of passion, and due to reasons that decrease the wrongfulness of the killing, satisfies the both the partial excuse and partial justification requirements of provocation – notwithstanding the fact that a reasonable person would have “cooled off” in the interim. Similarly, we are sympathetic to the claim that the provocation defense ought to be available to victims of domestic abuse who kill their abusers (though we make no claim that provocation is the best way for the law to deal with such situations). That the person killed was the killer’s abuser partially justifies the act of killing, and the existence of some emotional state (whether anger, fear, or some other emotion) affecting cognitive capacity satisfies the requirement of partial excuse.

<sup>40</sup> MODEL PENAL CODE § 210.3(1)(b).

<sup>41</sup> See, e.g., PAUL ROBINSON, CRIMINAL LAW (1997), at 711-712.

<sup>42</sup> See, e.g., LAFAVE, CRIMINAL LAW, *supra* note 33, at 775 (voluntary manslaughter consists of an intentional homicide where “the defendant, when he killed the victim, was in a state of passion engendered in him by an adequate provocation”).

time between the provocation and the delivery of the fatal blow. And (4), the defendant must not in fact have cooled off during the interval.<sup>43</sup>

LaFave's first two "obstacles," however, are simply other ways of stating what we call the *adequate provocation* and *heat of passion* requirements. LaFave uses adequate provocation and reasonable provocation interchangeably,<sup>44</sup> and a defendant who was "in fact provoked" is one in whom the provocation in fact caused the heat of passion.<sup>45</sup> LaFave's third obstacle is best understood as an aspect of the adequate provocation requirement: provocation is adequate if it would have induced heat of passion in the reasonable person *at the time* the killing occurred.<sup>46</sup> LaFave's fourth obstacle is likewise best treated as an aspect of the requirement that the killing occur *while* the killer is in the heat of passion: a defendant who has cooled off in the period between the provoking incident and the act of killing is no longer in the heat of passion when the killing occurs.

Other commentators refer to provocation as consisting of a subjective requirement and an objective requirement (or, in some cases, a descriptive component and an evaluative component). Again, these elements map onto the requirements we refer to as *heat of passion* and *adequate provocation*. Whether the defendant was in fact subject to the heat of passion at the time of the killing is commonly described as the doctrine's subjective component, while the question of adequacy of provocation (usually by reference to whether a reasonable person would have been provoked) is referred to as the objective component. We have chosen to use the heat of passion and adequate provocation terminology, rather than subjective and objective, for a number of reasons. *Heat of passion* and *adequate provocation* are the more commonly used terms, and are more transparent and evocative of the requirements to which they refer.<sup>47</sup>

In a recent article, Stephen Garvey describes the provocation defense as having three requirements, namely the *adequate provocation* requirement, the *passion* requirement, and the *reasonable loss of self-control* requirement.<sup>48</sup> This classification of the elements of provocation, we suggest, is not the most useful way of analyzing the defense. The third of Garvey's requirements conflates two elements best kept separate—namely that the defendant actually lost self-control, and that this loss of self-control was reasonable. Moreover, Garvey's requirement that the defendant actually lost self-control is merely an alternate way of

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<sup>43</sup> LAFAVE, *CRIMINAL LAW*, *supra* note 33, at 777.

<sup>44</sup> LaFave defines adequate provocation as "a provocation which would cause a reasonable man to lose his normal self-control." *Id.* at 775.

<sup>45</sup> *Id.* at 776 (describing provocation as inducing "emotional disturbance (in earlier terminology, while in a 'heat of passion')").

<sup>46</sup> To the extent that reasonable cooling off period is a separate requirement of provocation, it nonetheless ought not be treated as a central feature of the doctrine as not all jurisdictions limit provocation to circumstances in which a reasonable person would have not have had time to "cool down." *See id.* at 786.

<sup>47</sup> Using the terms "subjective" and "objective" for the requirements of provocation also runs the risk that we will be misunderstood as endorsing the view that justifications are purely objective while excuses are purely subjective—a view we do not hold.

<sup>48</sup> Garvey, *Passion's Puzzle*, *supra* note 38, at 1677. Garvey describes these three requirements as constituting "the core elements of the defense itself." *Id.* His list of the doctrine's basic elements also includes the legal effect of the defense, "which is to mitigate, not exonerate." *Id.*

describing the passion requirement: the “passion” required for the defense to apply is emotion of a kind and to a degree that interferes with the defendant’s ability to exercise self-control.<sup>49</sup> The requirement that this loss of self-control be reasonable is, likewise, simply another way of framing the requirement of adequate provocation: provocation is adequate if it would have provoked an “ordinary,” “reasonable,” or “average” person.<sup>50</sup>

The most useful framework for understanding the elements of provocation is in terms of the dual requirements of *heat of passion* and *adequate provocation*. Together with the partial nature of the defense and its limitation to the offense of murder, these constitute the features that a theory of provocation must account for. Other rules that flesh out the doctrine are best understood as falling under the umbrella of either *heat of passion* or *adequate provocation*.<sup>51</sup> We have deliberately chosen this nomenclature to be neutral with respect to the disagreement about what provocation counts as “adequate” and the precise relationship between the requisite emotional disturbance and self-control.

2. *The Model Penal Code*.— The Model Penal Code mitigates a killing from murder to manslaughter if it “occurred under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”<sup>52</sup> Eleven states currently have statutes containing this provision of the Code, in full or in part.<sup>53</sup> While this provision has not been incorporated into state law to the same extent as some other parts of the Code, and some jurisdictions that enacted the Code’s formulation soon reverted to the common law version of provocation,<sup>54</sup> it is nonetheless a significant alternative to common law provocation.

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<sup>49</sup> While the requirement is often stated in terms of *loss* of self-control, this is misleading. A better understanding of the required passion is that it *impairs* the defendant’s ability to conform his actions to the balance of reasons applicable in the circumstances, that the emotional disturbance makes it more difficult—but not impossible—to act in the correct manner. The effect of passion on self-control is discussed in detail *infra* Part II.B.

<sup>50</sup> The appropriate standard is inconsistently described in the cases on provocation, with these terms and numerous others used interchangeable. See Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, *supra* note 34, at 433. We have therefore chosen to use “adequate provocation” as a way of describing this requirement while remaining agnostic as to whether the standard is that of an *ordinary man* rather than a reasonable man or a reasonable person, and so on.

<sup>51</sup> Other rules that flesh out these two essential features of provocation in at least some jurisdictions include the requirement that the provocation be *sudden*, that the provocation be more than *mere words*, that the provocation must consist of a wrong to the defendant rather than a third party; and that the emotion caused by the provocation must be *anger* or *resentment*. See LAFAVE, *CRIMINAL LAW*, *supra* note 33, at 775-88; Garvey, *Passion’s Puzzle*, *supra* note 38, at 1687 n.35, 1689 n.38; Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, *supra* note 34, at 432-434.

<sup>52</sup> MODEL PENAL CODE § 210.3(1)(b).

<sup>53</sup> Nine states have enacted the Code’s formulation in full: Arkansas, ARK. CODE ANN. § 5-10-104(a)(1); Connecticut, CONN. GEN. STAT. ANN. §§ 53a-54a(a); Delaware, Del. Code Ann. §§ 632(3), 641; Hawaii, Haw. Rev. Stat. Ann. § 797-702(2); Kentucky, KY. REV. STAT. ANN. §§ 507.020(1)(a), 507.030(1)(b); Montana, MONT. CODE ANN. § 45-5-103(1); New York, N.Y. PENAL LAW § 125.20(2); North Dakota, N.D. CENT. CODE § 12.1-16-01(2); and Oregon, OR. REV. STAT. §§ 163.115(1)(a), 163.118(1)(b), 163.135. Two states have enacted part of the extreme emotional disturbance provision: New Hampshire, N.H. REV. STAT. ANN. § 630:2; and Utah, UTAH CODE ANN. § 76-5-205(1)(b).

<sup>54</sup> Dan Kahan & Martha Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996), at 323.

The “extreme mental or emotional disturbance” (EMED) formulation represents a substantial reform of the provocation defense. The EMED defense is not restricted to loss of self-control caused by passion stemming from adequate provocation. The disturbance undermining self-control may be mental as well as emotional, and the emotional or mental disturbance need not arise from provoking conduct at all.<sup>55</sup> When there is provocation, the EMED defense may apply regardless of whether the person killed was the provoker, or whether the provocation was directed at the defendant or a third party. The Model Penal Code does require that the excuse or explanation for the actor’s distress be reasonable, but the reasonableness of the excuse or explanation is “determined from the viewpoint of a person in the actor’s situation under the circumstances as he believed them to be.”<sup>56</sup>

Because of these differences between the common law defense of provocation and the Model Penal Code’s EMED defense, the theory that best explains the features of common law provocation may not offer the best explanation for the EMED defense, and vice versa. In this article, we present a theory of common law provocation, with a relatively brief discussion of the implications of this theory for the Model Penal Code’s EMED defense.

## II. THEORIES OF PROVOCATION

### A. *Overview of Defenses*

All commentators seem to agree that provocation is best conceptualized as a partial defense.<sup>57</sup> (We call this the *Partial Defense Thesis*.) We agree. Provocation is not merely a mitigating factor relevant to determining the severity of a sentence; generally, it results in conviction for a separately denominated offense, namely voluntary manslaughter.<sup>58</sup> Nor is provocation manslaughter merely a different offense from murder, like assault or involuntary manslaughter. As with other defenses such as insanity or self-defense, and unlike involuntary manslaughter or assault, a provoked killing satisfies all the elements of murder, but

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<sup>55</sup> See, e.g., Garvey, *Passion’s Puzzle*, *supra* note 38, at 1690.

<sup>56</sup> MODEL PENAL CODE, § 210.3(1)(b).

<sup>57</sup> The term “defense” is used ambiguously in criminal law. Broadly understood, a “defense” is any doctrine that precludes the defendant from being convicted. For example, the principle that a defendant cannot be convicted of an offense in the absence of proof of every element in the offense definition is sometimes referred to as the “absent-element” or “failure of proof” defense. See, e.g., Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213-216 (1982) (defenses consist of five sorts: absent-element defenses, offense modifications, justifications, excuses, and nonexculpatory defenses); LAFAVE, CRIMINAL LAW *supra* note 33 (using the term “failure of proof” to refer to “absent-element” defenses). However, this principle is better conceived as a normal rule of liability rather than as a defense properly understood. See, e.g., ROBINSON, CRIMINAL LAW, *supra* note 41, at 379-380 (1997). We therefore use the term “defense” narrowly to mean doctrines that preclude conviction for an offense, due to the existence of extenuating circumstances, despite all the elements of the offense definition being satisfied. The consensus among commentators is that provocation is a partial defense in this narrow sense of “defense.”

<sup>58</sup> In a small minority of states, the defense of provocation results in conviction for a lower degree of murder. See, e.g., ILL. COMP. STAT. 5/9-2(1) (defining provocation as second degree murder); TEX. PENAL CODE ANN. §19.02(1)(d) (defining provocation as a felony of the second degree).

in circumstances that make a murder conviction inappropriate. Unlike with *complete* defenses such as insanity or self-defense, where the extenuating circumstance is provocation, conviction for a lesser crime—voluntary manslaughter—is still appropriate, making the defense of provocation *partial* in nature.

Most commentators, moreover, agree that there are three—and only three—basic species of defense: (1) justifications, (2) excuses, and (3) non-exculpatory defenses.<sup>59</sup> (We call this the *Exhaustive Classification Thesis*, and understand it to be capacious enough to allow for combinations of the basic forms.) If this orthodox view is correct, provocation manslaughter would be a partial version of one or more of these types of defense. No one believes that provocation is a non-exculpatory defense. This category covers defenses related to public policy considerations independent of the culpability of the defendant, such as statutes of limitation for criminal prosecution.<sup>60</sup> This leaves justification and excuse as the remaining candidates. Almost everyone concludes—or, perhaps more accurately, assumes—that provocation must be in the nature of excuse (albeit partial) or in the nature of justification (albeit partial).<sup>61</sup> In the following section, we describe and critique the existing accounts of provocation, focusing primarily on the predominant view of partial excuse, but also addressing contrary views that claim provocation to be either a partial justification or (in denial of the exhaustive classification thesis) partial forms of neither justification nor excuse.

## B. *Critical Overview of Existing Accounts of Provocation*

Over the years, criminal law theorists have contributed scores of accounts aimed to describe and rationally reformulate the theoretical underpinnings of provocation doctrine. Some of these efforts are difficult or contestable to classify, for we often find ourselves resisting the author’s own characterization of her theory. Our overview, then, proceeds as follows. The dominant view is that provocation is a partial excuse. If it is a partial excuse, then some sense must be made of the adequate provocation prong. Roughly speaking, some partial excuse theorists believe that prong should be abandoned, some view it as requiring that the heat of passion itself be excused, the remainder view it as requiring that the heat of passion be justified. A second position views provocation as partially justified. A third view sees it as a combination of partial excuse and partial justification. As best we can tell, this position has been endorsed by just two scholars over the past fifty years. It is the view that this Article will develop and defend. The final position rejects the excuse/justification framework.

1. *Partial excuse.*—The dominant view holds that provocation is in the nature of a partial excuse.<sup>62</sup> As Timothy Macklem and John Gardner observe, “by

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<sup>59</sup> See, e.g., Berman, *Justification and Excuse, Law and Morality*, *supra* note 2, at 6 & n.8.

<sup>60</sup> LAFAVE, *CRIMINAL LAW*, *supra* note 33, at 448.

<sup>61</sup> There are notable exceptions to this position, theorists such as Kahan and Nussbaum, who claim provocation sounds in neither justification nor excuse. We address these theories in Part II.B below.

<sup>62</sup> The most prominent advocate of a partial excuse rationale for provocation is Joshua Dressler. See generally Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, *supra* note 34; Dressler, *Why Keep the Provocation Defense?*, 86 MINN. L. REV. 959 (2002); Dressler,

common consent, provocation is a (partial) excuse for murderous actions.”<sup>63</sup> Partial excuse theories treat the heat of passion requirement as the key element of provocation doctrine. The central idea is that heat of passion impairs a person’s agency. A person who is affected by extreme anger finds it more difficult to exercise self-control than a person in a cooler emotional state. Proponents of partial excuse theories of provocation refer to our “common experience”<sup>64</sup> as demonstrating that anger undermines our ability to make appropriate choices, and therefore makes us “less *able* to respond in a legally and morally appropriate fashion.”<sup>65</sup> A defendant who kills while under the influence of heat of passion is therefore considered less blameworthy than had the killing occurred when the defendant’s choice-making capabilities were unimpaired, and hence deserving of conviction of a lesser offense and the concomitant lesser punishment. From this perspective, provocation manslaughter is a “concession to human frailty.”<sup>66</sup> It is a concession to a particular kind of human frailty: our susceptibility to being overborne by strong emotions. Like complete excuses such as insanity, the partial defense of provocation is premised upon respect for individuals as “choosing beings.”<sup>67</sup> Provoked killers are entitled to lesser punishment because heat of passion diminishes a person’s choice-making capability.

The phrase *loss of self-control* is commonly used to explain the effect of heat of passion. This is misleading. In provocation, the notion is that heat of passion interferes with, but does not completely destroy, an actor’s capacity to control conduct. The claim is not that the provoked killer *couldn’t* control his conduct, but that in the circumstances such control was more difficult—phenomenologically speaking.<sup>68</sup> When a person is completely unable to control his behavior then the appropriate response, at least in principle, is to hold him criminally blameless—that is, to treat the person as completely excused.<sup>69</sup> Heat of passion is a *partial* excuse because the actor’s choice-making capacities are so substantially undermined that it would be unfair to treat the actor as fully blameworthy, although his choice-making capacities are not completely extinguished.<sup>70</sup>

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*Provocation: Partial Justification or Partial Excuse?*, *supra* note 6. Other accounts of provocation manslaughter that sound in partial excuse include Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89, 96 (1986); SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENSE JUSTIFICATION OF HOMICIDE, 13-14 (1994); Uma Narayan & Andrew von Hirsch, *Three Concepts of Provocation*, in CRIM. JUST. ETHICS, Winter/Spring 1996, at 18-19; Macklem & Gardner, *supra* note 8; Baron, *Killing in the Heat of Passion*, *supra* note 5.

<sup>63</sup> Macklem & Gardner, *Provocation and Pluralism* *supra* note 8, at 819.

<sup>64</sup> Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 463.

<sup>65</sup> *Id.* at 464.

<sup>66</sup> The judgments and commentaries that refer to manslaughter are legion. The most commonly cited early authorities include WILLIAM BLACKSTONE, 4 COMMENTARIES 191 (1791); *R. v. Hayward*, 6 C & P 157, 159 (1833) (“the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only”); *People v. Maher*, 10 Mich. 212 (1862) (the law designates provocation as manslaughter “out of indulgence to the frailty of human nature”).

<sup>67</sup> See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 24, 33 (1968).

<sup>68</sup> In the provocation manslaughter literature, self-control is generally understood as a psychological, experiential, or phenomenological concept, not as a contra-causal one. Like other participants to the debate, we wish to bracket worries touching on the metaphysics of free-will.

<sup>69</sup> Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 464.

<sup>70</sup> See, e.g., Dressler, *Why Keep the Provocation Defense?*, *supra* note 62, at 983 (“It is precisely because we believe that the provoked party’s capacity for self-control is not completely undermined that the defense is partial.”).

We do not challenge this understanding of the relationships among anger, rational choice-making capacity, blameworthiness, and criminal liability. We accept: that anger can interfere with our abilities to make appropriate choices about conduct;<sup>71</sup> that degree of control is relevant to moral blameworthiness; and that persons should not be punished in excess of what their blameworthiness warrants.<sup>72</sup> Indeed, we accept that partial excuse provides a rationale for the provocation doctrine's heat of passion requirement. However, the orthodox view of provocation as partial excuse must also explain the doctrine's adequate provocation requirement. This has proven a more difficult task.

Individual theories of provocation as partial excuse vary regarding the adequate provocation requirement. Some theorists argue that the adequate provocation requirement should be abandoned, that heat of passion alone should suffice to reduce an offense from murder to voluntary manslaughter. On this view, the only relevant enquiry is the subjective question of whether the defendant in fact had, to the requisite degree, lost self-control.<sup>73</sup> Note that this position is similar to, but more extreme than, that of the MPC's EMED defense, which "subjectivizes" (or "particularizes"), but does not eliminate, the requirement that the mental or emotional distress be reasonable.<sup>74</sup>

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<sup>71</sup> This is not to say that we accept it is natural to "lose control" in specific situations, such as a husband witnessing his wife's adultery. Contrast H.L.A. Hart's statement that "common sense generalizations" about "human nature" tell us that men are "capable of self-control when confronted with an open till but not when confronted with a wife in adultery." HART, PUNISHMENT AND RESPONSIBILITY, *supra* note 67, at 33, quoted in Nourse, *Passion's Progress*, *supra* note 8, at 1369. Nor are we denying that our emotions themselves have a cognitive component, nor that people are often capable of restraint while under the influence of great anger. See Kahan & Nussbaum, *Two Conceptions of Emotion in Criminal Law*, *supra* note 54 (proposing the evaluative conception of emotion as superior to the mechanistic conception); Rozelle, *Controlling Passion*, *supra* note 9, at 225 (suggesting that "a policeman at the elbow" usually enables a person to control her actions, despite emotional turmoil). None of these views is incompatible with the claim that heat of passion can make self-control more difficult. Anyone who has been deeply wronged, or even cut off in traffic, will have experienced that maintaining self-control while angry requires greater psychic effort. For a recent critique of the connection between capacity for self-control and criminal responsibility, see Pillsbury, *Misunderstanding Provocation*, *supra* note 4, at 149-159.

<sup>72</sup> The extent of the contemporary embrace of this last proposition, often running under the heading of "negative retributivism" or "side-constrained consequentialism," is discussed in Mitchell N. Berman, *Are We All Consequentialists Now?*, in R.A. DUFF AND STUART GREEN, *THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* (forthcoming 2010). Of course, that undermined choice-capacity reduces blameworthiness and thus demands a reduction in criminal punishment, all else being equal, does not itself say anything about the class or title of offense for which one should be convicted. As will be made plain below, we believe that undermined choice-capacity alone is not the best explanation or justification for treating a provoked killing as manslaughter rather than murder.

<sup>73</sup> See, e.g., J.C. SMITH & BRIAN HOGAN, *CRIMINAL LAW* 215 (1st ed. 1965); Peter Brett, *The Physiology of Provocation*, 1970 CRIM. L. REV. 634, 638; Alec Samuels, *Excusable Loss of Self-Control in Homicide*, 34 MOD. L. REV. 163, 170 (1971); Jack K. Weber, *Some Provoking Aspects of Voluntary Manslaughter Law*, 10 ANGLO-AM. L. REV. 159, 160 (1981); Richard Singer, *The Resurgence of Mens Rea: I-Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. REV. 243 (1986).

<sup>74</sup> Nourse, *Passion's Progress*, *supra* note 8, at 1339-40; see also GEORGE FLETCHER, *RETHINKING CRIMINAL LAW*, § 4.2.1, at 246 (1978).



Most contemporary scholars, however, including most proponents of partial excuse, resist this purely subjective approach. Most believe that the provocation defense ought not be available to all actors who killed while under the influence of heat of passion. A defendant whose partial loss of control was brought about by a trivial slight deserves to be convicted of murder, not manslaughter. The majority of partial excuse theorists therefore supports retaining the adequate provocation requirement, and generally argue that it properly serves to ensure the emotional state that undermines self-control is itself either excused or justified.

(a) *Excused emotion.* Joshua Dressler explains the adequate provocation requirement as ensuring that the defendant's heat of passion (that is, the emotional state) is itself excused.<sup>75</sup> According to Dressler:

[P]rovocation is an excuse premised upon involuntariness based upon reduced choice-capacities. 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>76</sup>

In Dressler's view, provocation is excuse all the way down. And for Dressler, the rationale for excuse is interference with choice. Excuse generally involves situations where an actor is not blameworthy, or not fully blameworthy,<sup>77</sup> because the actor's "ability to make meaningful choices is dramatically reduced."<sup>78</sup> But if the actor is responsible for *choosing* an emotional state which makes control of conduct more difficult, we are entitled to blame the actor for the emotional state—and therefore to blame the actor for the wrongful conduct that eventuates. The actor is only entitled to mitigation when the actor's emotional state is itself *involuntary*, by which Dressler means that "the actor's choice-making capabilities have been so undermined that the actor cannot be justly blamed" for the emotional state.<sup>79</sup>

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<sup>75</sup> Dressler seems to have modified his views on this point in his more recent scholarship, but not to a degree that affects his underlying claim. In his earlier work, Dressler expressly denied that anger resulting from adequate provocation was justified; it was merely blameless, that is, excused. See Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 465. However, he has more recently admitted that some provocation entitles a person to feel anger, so that "we may characterize the emotion as, in some sense, justifiable." Dressler, *Why Keep the Provocation Defense?*, *supra* note 62, at 972. But Dressler continues to insist that, while provoked anger *may* be justified, it *need* not be justified in order for provocation to apply. In other words, that the anger be justified is not a requirement of the provocation defense; that the anger is "excusable" suffices. *Id.* at 973.

<sup>76</sup> Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 464. That a person who has become voluntarily intoxicated cannot avoid responsibility for a criminal offence by arguing that he lacked the requisite mental state is an example of a *forfeiture rule*. The defendant forfeits his claim because he voluntarily created the conditions that he is relying on to avoid blame. Dressler's approach is therefore sometimes described as treating the adequate provocation requirement as a forfeiture rule. See, e.g., Garvey, *Passion's Puzzle*, *supra* note 38, at 1709 & 1710 n.98.

<sup>77</sup> Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 460.

<sup>78</sup> *Id.* at 461.

<sup>79</sup> *Id.*

The adequate provocation requirement fulfills the role of distinguishing between heat of passion for which the actor is to blame, and heat of passion for which the actor is excused. The defendant is to blame for anger in the absence of adequate provocation—that is, if “the ordinary law-abiding person would not become angry [in that] particular provocative situation.”<sup>80</sup> Thus, on Dressler’s account, whether a person chose to be angry is determined by whether an ordinary or reasonable person would have been angry in the relevant circumstances. If an ordinary person would have been angry (that is, if there was reasonable provocation), then the actor is treated as not responsible for the anger, and therefore less blameworthy for the deadly conduct. But if an ordinary person would not have been angry, then the actor is treated as becoming angry voluntarily, and is therefore completely blameworthy for the act of killing.

We find this account implausible. Assuming *arguendo* that we ought to draw a line between anger for which the actor is responsible, and anger for which the actor is not responsible, the requirement of adequate provocation does not achieve this distinction, for the correlation between whether an individual’s anger is voluntary (in Dressler’s sense of voluntary), and whether a reasonable person would have become angry in the same circumstances is simply too weak. We all know people who are more easily angered than the average person (just as we know people with an unusually high ability to remain calm).<sup>81</sup> To some extent, this may be due to a failure of will-power: we may say of such people that they indulge their anger. But it is also surely due to those standing dispositions that we call character: resisting anger, and maintaining self-control, is simply more difficult for some people than others. Now, the degree to which we are responsible for our own character, and therefore to blame for our bad character, is a difficult question. We cannot adequately answer that question here. Suffice it to say that our characters are formed by some combination of innate tendencies, upbringing, and choices we make about how we live and act. While we bear *some* responsibility for our characters, they are not simply the product of our conscious choices. The mere fact that a defendant was more easily angered than an ordinary person does not demonstrate that the defendant is more responsible, and therefore more blameworthy, for his anger.

If we are concerned, as Dressler is, about whether a defendant is to blame for his or her emotions, the current doctrine’s inquiry into the adequacy of provocation is the wrong approach. A more appropriate inquiry would look to whether the defendant had inculcated habits of emotional discipline, or had been subjected to inappropriate influences or trauma during his or her emotional development. The adequate provocation requirement is simply not directed towards factors that distinguish between whether a defendant is to blame for his or her emotional state, and therefore whether the heat of passion experienced ought to be excused.

(b) *Justified emotion.* Some commentators who claim that provocation is a partial excuse explain the adequate provocation requirement by arguing that the

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<sup>80</sup> *Id.* at 464.

<sup>81</sup> The authors believe that at least one of them falls in the latter category.

defendant's heat of passion is *justified* rather than excused.<sup>82</sup> Scholars who take this approach argue that a person who kills in the heat of passion is entitled to have his *act* of killing partially excused only if his *emotion* – heat of passion – was justified. Hence the requirement of adequate provocation: anger is justified only if it is in response to adequate provocation. Anger in response to trivial provocation, or no provocation at all, is not justified.

Despite the element of justified emotion, advocates of this approach characterize their accounts as excuse theories.<sup>83</sup> Nonetheless, this approach concedes that while the usual conception of excuse due to loss of self-control can explain provocation's heat of passion requirement, it cannot account for the adequate provocation requirement. So the concept of justification is recruited, in a limited capacity, to fill this explanatory gap. Justified emotion theorists seek to rely on excuse to explain the heat of passion requirement, and justification to explain the adequate provocation requirement. But most justified emotion theorists insist that only the *emotion* is justified; they deny that the *act* of killing is even partially justified.<sup>84</sup> By restricting the application of justification to the emotion, not the act, they claim to avoid two criticisms that their theories would otherwise attract – namely the charge that an act cannot be both partially excused and partially justified,<sup>85</sup> and the claim that provoked *killings* should not be considered partially justified.<sup>86</sup>

The difficulty for justified emotion theories of provocation is how to explain why, if the killing is partially excused (but still wrong) because the actor's self-control is impaired, the defense is available only if the debilitating emotion was justified. A defendant hasn't lost control to any lesser degree by virtue of the fact that his heat of passion was unwarranted in the circumstances. To put it another way, if mitigation is available despite the fact that *killing* is entirely unjustified, why does the fact that the defendant's *emotion* is unjustified preclude mitigation? If a person who kills for the wrong reasons can receive mitigation, why not a person who gets angry for the wrong reason?

Justified emotion theories fail to overcome this difficulty. Despite being characterized as theories of (partial) excuse, they turn out not to be excuse theories at all – not on the traditional understanding of excuse. The partial loss of self-control plays no role in theories of justified emotion: the role of anger is transformed from undermining volition to providing justified reasons for acting via

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<sup>82</sup> See, e.g., Baron, *Killing in the Heat of Passion*, *supra* note 5, at 366-69; Macklem & Gardner, *Provocation and Pluralism*, *supra* note 8, at 819; SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 141 (1998); at 141; Pillsbury, *Misunderstanding Provocation*, *supra* note 4, at 148n15; Nourse, *Passion's Progress*, *supra* note 8; HORDER, *supra* note 10 at 156, 160; von Hirsch and Jareborg, *Provocation and Culpability*, *supra* note 8, at 248.

<sup>83</sup> See, e.g., Nourse, *Passion's Progress*, *supra* note 8, at 1338 n40 (declaring that on her account, provocation "remains a partial excuse").

<sup>84</sup> See, e.g., *id.* at 1394-95 ("It is by focusing on the emotion, rather than the act, that my proposal distinguishes itself quite easily (both in theory and practice) from the traditional model of provocation as partial justification."); von Hirsch & Jareborg, *supra* note 8 at 248 (emphasizing that on their account of provocation, it is only the defendant's "*anger* that is warranted, not the deed that results from it.").

<sup>85</sup> See, e.g., Nourse, *Passion's Progress*, *supra* note 8, at 1394.

<sup>86</sup> See, e.g., *id.* at 1395 & n.374.

its cognitive component.<sup>87</sup> Justified emotion theories are in fact properly understood as theories of partial justification: under these theories, the act of killing should be understood as partially justified. By invoking justified emotion, they explain the adequate provocation requirement – but only at the expense of no longer being able to explain the heat of passion requirement.

On justified emotion accounts of provocation, all the mitigating work is done by the defendant's reasons for acting. The relevance of heat of passion is only that some instances of heat of passion embody a justified judgment – namely that the defendant has been grievously wronged. The quantity or intensity of the emotion is irrelevant; interference with self-control plays no role. Emotion *per se* is therefore unnecessary for a defendant to deserve the provocation defense, because she can hold the justified belief that she has been wronged in the absence of heat of passion. Consider Parent, whose child has been killed by Villain. Justified emotion theories cannot distinguish between the case in which Parent kills Villain in the heat of passion after witnessing the killing, and the case in which Parent calmly kills Villain months later during Villain's trial. In both cases Parent can hold the same (justified) judgment that Villain committed a grave wrong against her (or her child), and kills for that reason. The cognitive component of anger is not the only avenue through which one can have a justified belief that one has been seriously wronged. One can have that belief – and be justified in having that belief – in the absence of emotion. Justified emotion theories consequently provide no rationale for restricting the provocation defense to cases in which the heat of passion requirement is satisfied.

2. *A heretical view: partial justification.*—A small handful of scholars reject the orthodox view and argue that provocation functions as a partial justification.<sup>88</sup> In contrast to the views so far discussed, partial justification

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<sup>87</sup> See, e.g., Nourse, *Passion's Progress*, *supra* note 8, at 1390 (arguing that the adequately provoked defendant's "excuse" is provided by "the reasons for the emotion," and hence the "reasons why the defendants claim they have killed," not "[t]he quantity or intensity of the emotion.") (emphasis in original); Pillsbury, *Misunderstanding Provocation*, *supra* note 4, at 143 ("I disagree that emotionally-related cognitive dysfunction should mitigate punishment regardless of reasons for emotion."); Macklem & Gardner, *Provocation and Pluralism*, *supra* note 8, at 819-20 (arguing that in making the partial excuse of provocation, the defendant admits his action was unjustified, but relies on the fact that the "cognitive component" of his anger was justified). Macklem and Gardner's theory of provocation has many nuances, and draws on Gardner's complex and non-traditional theory of defenses that he presented in two earlier papers. See John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 578-79 (1998); John Gardner, *Justification and Reasons*, in A.P. SIMESTER & A.T.H. SMITH, HARM AND CULPABILITY (1996), at 119. A full analysis of this theory is beyond the scope of this paper. For present purposes, it is enough to observe that Macklem and Gardner's theory of provocation cannot account for the heat of passion requirement.

<sup>88</sup> The most prominent supporter of this view is Finbarr McAuley. See Finbarr McAuley, *Anticipating the Past: The Defense of Provocation in Irish Law*, 50 MOD. L. REV. 133, 150 (1987) (concluding that "provocation functions is a partial justification rather than a partial excuse"); Finbarr McAuley, *The Theory of Justification and Excuse: Some Italian Lessons*, 35 AM. J. COMPARATIVE LAW 359 (1987). Some commentators have argued that, while provocation in its current form is *not* a partial justification, it *should* be. See, e.g., Rozelle, *Controlling Passion*, *supra* note 9, at 200 (proposing a reform of provocation that would permit the defense "only to those defendants who were legally entitled to use some amount of force when they were killed"). Douglas Brown recently attributed a partial justification theory to the Law Commission of England's 2003 report on partial defenses. Douglas J. Brown, *Disentangling Concessions to*

theories argue that a provoked killing warrants mitigation because such a killing is *less wrong* than an unprovoked killing. These theorists also argue that partial justification is the *only* rationale for provocation: that is, that partial justification alone explains all the elements of the provocation doctrine.

Partial justification as a rationale for provocation has been subjected to two sets of criticisms. The first set of criticisms rejects the claim that provoked killings are partially justified.<sup>89</sup> These criticisms include the claim that the notion of partial justification is incoherent, and alternatively that provocation cannot be a partial justification because provoked killings are just as wrong as unprovoked killings. As the presentation of our own account (in Parts III and IV) will make clear, we disagree with the substance of these criticisms: on our view, an adequately provoked killing *is* less wrong than the paradigm intentional killing. Importantly, however, we agree with the critics that existing proponents of the partial justification conception have not adequately defended this pivotal claim.<sup>90</sup> We aim to do better in Part IV, where we defend our thesis against objections.

The second set of criticisms is that, while partial justification theories can explain the adequate provocation requirement, they fail to explain the heat of passion requirement.<sup>91</sup> We agree. Restricting the provocation defense to killing in the heat of passion cannot be explained on the basis of partial justification. Indeed, Finbarr McAuley, the most prominent proponent of the partial justification approach admits as much. McAuley declares that on a partial justification theory of provocation, “a defendant who can show that he killed in the face of substantial

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*Human Frailty: Making Sense of Anglo-American Provocation Doctrine Through Comparative Study*, 39 N.Y.U. J. INT’L L. & POL. 675, 695 (2007), referring to LAW COMM’N, PARTIAL DEFENSES TO MURDER: FINAL REPORT (LAW. COM. NO. 290), 2004, Cm. 6301 (2004). This attribution is dubious. The Law Commission do not explicitly endorse any theory in the Report, but the best reading of their position is as a justified-emotion version of partial excuse. They say, e.g., that provocation requires that “the defendant’s *sense of being wronged* should have been justified.” *Id.* at 45 (emphasis added). They do not say that the *act* should have been justified.

<sup>89</sup> See our discussion in Sections IV.B. and IV.C. below.

<sup>90</sup> McAuley’s argument rests rather squarely on the fact that mitigation manslaughter is unavailable for the “loss of control brought on by panic or bad news,” McAuley, *Anticipating the Past*, *supra* note 88, at 137. Of course, this is just the starting point of the inquiry, acknowledged by all commentators. Yet, from this observation, McAuley requires only one paragraph to reach his conclusion: “Thus while the defence of provocation may well be a concession to the natural human failings that are the lot of every defendant, it is submitted that its true basis is to be found in the contribution of the victim, in the fact that his wrongful conduct was the cause of the defendant’s violent outburst.” *Id.* McAuley never makes clear why the contribution by the victim is the defense’s “true basis” given his acknowledgement that the defense is a contribution to human frailty, and his earlier recognition “that there are natural limits to an individual’s capacity for self-control which the law cannot afford to ignore.” *Id.* at 136. McAuley seems to rely on equating the requirement of adequate provocation with wrongful conduct on the part of the deceased. Provocation is adequate, says McAuley, if it “was sufficiently grave to override the ordinary powers of human resistance.” *Id.* at 137. He further submits that “any conduct which is likely to produce [a violent response] is wrong in the relevant sense.” *Id.* at 138. From this, McAuley concludes that the provocation defence “implies that the defendant was partially justified in reacting as he did because of the untoward conduct of his victim.” *Id.* at 139. But McAuley provides no argument whatsoever for how or why the untoward conduct of the victim partially justifies the defendant’s actions, which is, of course, the crucial step in establishing the theoretical bona fides of a theory of partial justification.

<sup>91</sup> See, e.g., Garvey, *Passion’s Puzzle*, *supra* note 38, at 1694, 1697; Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 458.

provocation should, *on this ground alone*, be entitled to the defence.”<sup>92</sup> Whatever the merits or demerits of McAuley’s position as a matter of reform, to the extent that he is purporting to provide a descriptive theory of provocation, his statement amounts to an admission of defeat. A theory of provocation that cannot explain the heat of passion requirement fails to describe the doctrine of provocation in its current form. Moreover, we will argue in Section III.B that substantial considerations do in fact support the doctrine in its current form.

3. *Partial justification and partial excuse.*— A handful of theorists prior us have flirted with the idea of treating provocation as both a partial excuse and a partial justification.<sup>93</sup> This is not surprising, given the routine acknowledgement by members of the academy that provocation exhibits the *appearance* of both excusatory and justificatory elements.<sup>94</sup> But even these scholars stop well short of providing a theoretical rationale for (or even fully endorsing) provocation as partial excuse and partial justification.<sup>95</sup> We know of only one descriptive theory of provocation based on the view that a provoked killing is properly considered both partially excused and partially justified: that of English scholar Andrew Ashworth.<sup>96</sup> But not even Ashworth provides a comprehensive rationale for and defense of the hybrid position.

In an article written during the provocation debate’s infancy, Ashworth contends that “the doctrine of provocation . . . rests just as much on notions of

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<sup>92</sup> McAuley, *Anticipating the Past*, *supra* note 88. McAuley nonetheless states that, “*Undoubtedly*, a defendant who kills after he has regained his composure, or when the effects of the provocation have more or less worn off, is not entitled to the defence.” *Id.* (emphasis added). The reason for this restriction, McAuley claims, is that the composed killer “can hardly claim that it was the provocation which caused his violent outburst.” *Id.* This strikes us as untenable. Recall the case of Parent, who calmly Villain, the murderer of Parent’s child, after a significant time has elapsed. It seems perfectly sensible for Parent to claim that Villain’s wrongful conduct was the cause of her violent response.

<sup>93</sup> See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 227-28 (2003) (arguing that neither justification nor excuse alone can explain both the heat of passion and adequate provocation requirements); Bergelson, *Victims and Perpetrators*, *supra* note 4, at 418 (asserting that “the partial defense of provocation includes elements of both excusatory and justificatory rationales”).

<sup>94</sup> See *supra* notes 4-7 and accompanying text.

<sup>95</sup> Lee asserts that treating a provoked killing as partially justified is “morally objectionable” and concludes that, “Provocation is best understood as a partial excuse, but its justificatory elements should not be ignored.” LEE, *supra* note 93, at 229. Bergelson, for her part, describes the dual characteristics of provocation as the result of the ad hoc nature of common law development, rather than the basis for a coherent and cohesive rationale. Bergelson, *supra* note 4, at 412-13.

<sup>96</sup> The Law Reform Commission of Ireland has recently proposed that provocation *should* be treated as containing both excusatory and justificatory elements. See The Law Reform Commission of Ireland, *Consultation Paper on Homicide: The Plea of Provocation*, LRC CP 27-2003, 141. But the Commission argues that provocation ought to be *reformed* as a combination of partial excuse and partial justification; it does not argue that provocation as is *currently stands* is best understood according to a hybrid theory. Additionally, the Paper fails to provide any theoretical framework for the hybrid view, or any rebuttal of the contrary views. Indeed, the Committee’s understanding of the justification-excuse debate – which they describe as having “taken on a somewhat forbidding theoretical character,” *id.* at 21 – is shaky at best. The Consultation Paper contains the curious claim that “the view that the doctrine of provocation rests just as much on notions of partial justification as upon the excusing element of loss of self-control” is “the more settled and accepted academic position on the matter.” *Id.* at 23. In sum, the Consultation Paper adds little to the debate about the theoretical rationale of the provocation defense.

justification as upon the excusing element of loss of self-control.”<sup>97</sup> He endorses “the claim implicit in partial justification [] that an individual is *to some extent* morally justified in making a punitive return against someone who intentionally causes him serious offence, and that this serves to differentiate someone who is provoked to lose his self-control and kill from the unprovoked killer.”<sup>98</sup> Ashworth believes the union of the two rationales “is no mere historical accident,”<sup>99</sup> and that the loss of either aspect would have “significant disadvantages.”<sup>100</sup>

Despite his endorsement of a dual rationale, however, Ashworth does not give a detailed theoretical framework for the defense as both partial excuse and partial justification. He says relatively little about what it means for an action to be partially justified, or about how the partial excuse and partial justification components of the rationale are reconciled. In other words, Ashworth’s article does not address most of the reasons American scholars give for rejecting a combined rationale for provocation – namely that excuse and justification are mutually exclusive, and that partial justification is an incoherent notion. That Ashworth does not address these critiques is hardly Ashworth’s fault, as his article was written prior to those positions being advanced. The search for a legitimate rationale for provocation did not capture the imagination of American scholars until the early 1980s.<sup>101</sup> More surprising is the fact that scholars on this side of the Atlantic have largely failed to engage with Ashworth’s substantive claim. While American authors regularly cite Ashworth’s article, they have just as regularly failed to directly address Ashworth’s position. For example, Dressler refers to Ashworth’s piece as “among the best English scholarly articles on provocation,”<sup>102</sup> yet surprisingly fails to acknowledge Ashworth’s position when he rejects a “dual rationalization of a partial defense which is both justification and excuse based.”<sup>103</sup> Rather than engaging with Ashworth’s view, most scholars have simply repeated the “traditional view” that partial excuse and partial justification are mutually exclusive. The view that provocation is both a partial excuse and a partial justification therefore remains in need of a theoretical framework, as well as in need of refutations of the criticisms that have regularly been leveled at the view since Ashworth’s article.

4. *Rejecting the justification/excuse framework.*— All the theories we have so far addressed treat provocation as either a partial excuse or a partial justification, in keeping with the exhaustive classification thesis. At least two

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<sup>97</sup> Ashworth, *The Doctrine of Provocation*, *supra* note 3, at 307.

<sup>98</sup> *Id.* It is worth noting that even Ashworth hedges his bets (or at least provides an argument in the alternative). He asserts that the adequate provocation requirement “may also be supported by causal reasoning.” *Id.* at 308. This is the idea that if the provocation was slight, the true cause of the heat of passion and consequent killing is the defendant’s bad character. *Id.* This position is akin to Dressler’s argument that the adequate provocation requirement acts as a forfeiture rule. See our discussion of Dressler’s partial excuse theory in Part II.B.1 above. This presumably explains why Ashworth is sometimes characterized as an advocate of provocation as partial excuse. See, e.g., Garvey, *Passion’s Puzzle*, *supra* note 38, at 1682 n.22, 1710 n.98.

<sup>99</sup> Ashworth, *The Doctrine of Provocation*, *supra* note 3, at 307.

<sup>100</sup> *Id.* at 317.

<sup>101</sup> See Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 424 n.24 (noting the remarkable lack of interest in the issue and the fact that “[w]hat interest has been demonstrated is largely found in British circles.”).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 439.

theories reject this approach: Garvey's theory of provocation as "akrasia,"<sup>104</sup> and Kahan and Nussbaum's approach based on the "evaluative theory of emotion."<sup>105</sup> According to these views, provocation is grounded in neither justification nor excuse.

(a) *Provocation as akrasia.* Garvey proposes to explain the provocation defense by invoking the concept of weakness of will: what the ancient Greeks referred to as *akrasia*. He begins by distinguishing between "two very different ways"<sup>106</sup> in which a person can violate an obligation imposed by the criminal law. First, he can *defy* the law: he can wholeheartedly choose to commit an illegal act,<sup>107</sup> with "full knowledge of the law and full consent of the will."<sup>108</sup> Second, he can violate a legal obligation, not by defying it, but merely as a result of weakness of will: despite wanting to obey the law, he succumbs to temptation. He violates the law "without wholeheartedly embracing the law-breaking desire that his will translates into action."<sup>109</sup> The explanation for the provocation defense, says Garvey, is that it "distinguish[es] actors who kill in defiance of the law from those who do not."<sup>110</sup> If an actor kills in defiance of the law, he is guilty of murder. But if he kills due to weakness of will, he is guilty only of manslaughter.<sup>111</sup>

We find Garvey's account of provocation, though nuanced and original, unsatisfactory for three reasons. First, the account is underspecified: Garvey does not clearly explain *why* the akratic killer deserves mitigation. Second, the explanation that appears most consistent with Garvey's other claims, and therefore most plausibly attributed to him, seemingly commits him to views about the in-principle scope of appropriate mitigation that few commentators are likely to accept. Third, insofar as Garvey and others do believe that, in principle, mitigation should be extended far more broadly than we think it ought to be, the pragmatic grounds he gives for limiting mitigation as a matter of doctrine are unpersuasive.

To start, Garvey does not flesh out an argument for *why* the akratic killer deserves less punishment than the defiant killer. His article provides some hints as to what the reason for mitigation might be, but none of the reasons is satisfying. Garvey refers to the defiant actor's "excessive pride or hubris"<sup>112</sup>—but punishing more severely for hubris amounts to punishing character, a position Garvey emphatically rejects.<sup>113</sup> Alternatively, the actions of the non-defiant, ambivalent actor might be less wrongful than the actions of the defiant actor. This could be plausible—but only in circumstances where the actor's ambivalence is due to having some morally relevant reasons (other than self-interest, for instance) for being tempted to violate the law. Garvey does not present such limits on the circumstances of non-wholehearted lawbreaking. If he did, his account would collapse into a theory of partial justification.

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<sup>104</sup> Garvey, *Passion's Puzzle*, *supra* note 38.

<sup>105</sup> Kahan & Nussbaum, *Two Conceptions of Emotion in Criminal Law*, *supra* note 54.

<sup>106</sup> Garvey, *Passion's Puzzle*, *supra* note 38, at 1727.

<sup>107</sup> *Id.* at 1727.

<sup>108</sup> *Id.* at 1728 (emphasis in original).

<sup>109</sup> *Id.* at 1729.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1730.

<sup>112</sup> *Id.* at 1728.

<sup>113</sup> *Id.* at 1710.



Garvey comes closest to explaining why the akratic killer deserves mitigation when he declares that, “In the end, the culpability of an actor guilty of manslaughter consists in his failure to exercise his capacity for self-control.”<sup>114</sup> From this perspective, Garvey’s theory seems best understood as a broad version of partial excuse. On this view, all failed attempts to exercise self-control deserve substantial mitigation—not merely those failures that are due to particular circumstances that make the exercise of self-control more difficult.

If this is Garvey’s explanation for why the akratic killer deserves mitigation, however, its implications are bracing. A violation of a duty imposed by the criminal law is akratic if it occurs “in a moment of weakness,” if the actor has a desire to violate the law, but also a simultaneous (but lesser) desire to conform to the law.<sup>115</sup> This ambivalence, we suggest, describes a large number of criminal violations – perhaps even the majority of crimes, and certainly crimes for which substantial mitigation is neither currently available nor, we believe, morally deserved. Garvey’s akratic account would apply, for instance, to every thief who steals because his desire for an object of value outweighs his weaker desire to adhere to the law, or to every sex offender who recognizes his sexual urges are unlawful and unsuccessfully attempts to resist them. It would apply, in short, to every failure to resist temptation.

Perhaps, however, the mistake is ours. Perhaps all akratic intentional killers are, in principle, entitled to the same degree of mitigation as that presently afforded, under provocation manslaughter doctrine, to just a small subset. If so, however, it would seem at first blush that Garvey’s analysis would amount, not to a defense of existing doctrine, but to a repudiation of it. That is, on Garvey’s analysis, the key features of voluntary manslaughter doctrine—namely, heat of passion and adequate provocation—would seem indefensible, for an actor can struggle with the competing desires to kill and to abide by the law without being subject to either heat of passion or provoking conduct.

Garvey resists this conclusion. Acknowledging that “the passion and adequate provocation requirements might appear superfluous,”<sup>116</sup> he argues that they do play a role – as “*evidentiary rules*.”<sup>117</sup> That is, the requirements of heat of passion and adequate provocation have evidentiary, but not operative significance. While akratic intentional killers who do not satisfy these twin requirements are, as a class, no more blameworthy than those who do, these requirements serve to identify (albeit imperfectly) those who are *in fact* akratic.

As it happens, we have considerable sympathy for the impulse to rethink seemingly operative rules of criminal law in evidentiary terms.<sup>118</sup> But we believe

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<sup>114</sup> *Id.* at 1730.

<sup>115</sup> *Id.*

<sup>116</sup> Garvey, *Passion’s Puzzle*, *supra* note 38, at 1733.

<sup>117</sup> *Id.* (emphasis in original).

<sup>118</sup> One of us has written at length on this theme. See Mitchell N. Berman, *Blackmail*, in JOHN DEIGH & DAVID DOLINKO, EDS., *THE OXFORD HANDBOOK OF THE PHILOSOPHY OF CRIMINAL LAW* (forthcoming 2010) (arguing that the conditional threat in blackmail, the harm requirement in offenses of recklessness, and the peculiar contours of affirmative duties to act, can all be explained

that the requirements of heat of passion and adequate provocation are such poor proxies for the fact of akrasia as to make it radically implausible that their function is evidentiary. Garvey argues that, “The akrasia theory denies the defense to the inadequately provoked actor . . . because his claim to have lost self-control is *incredible*.”<sup>119</sup> In our view, the EMED case law demonstrates that this is not so: the adequacy of provocation is an exceedingly poor proxy for whether someone has in fact experienced substantial impairment of control.<sup>120</sup> More importantly, substantial impairment of control is itself a poor proxy for an akratic killing. Consider Garvey’s own euthanasia example.<sup>121</sup> Suppose Terminally Ill, who is suffering enormous pain, pleads with Friend to end her life. We can easily imagine Friend believing that killing is wrong and desiring not to do wrong, but desiring more strongly to implement Terminally Ill’s wishes and put an end to her suffering. A killing in these circumstances would clearly qualify as akratic, a conclusion that seems quite easy to reach notwithstanding the absence of both heat of passion and adequate provocation. For these reasons, then, we remain quite skeptical of Garvey’s effort to link his akratic theory of mitigation with anything approximating existing provocation doctrine.

(b) *The evaluative conception of emotion.* Dan Kahan and Martha Nussbaum also propose a theory of provocation that rejects the categories of justification and excuse. They rightly observe that the “most popular account”<sup>122</sup> of provocation manslaughter is that a person who kills in anger has limited culpability because his choice capacities have been partially undermined.<sup>123</sup> Kahan and Nussbaum reject this orthodox account of provocation as partial excuse for the same reasons we do. They assert that it “fails to make sense of the most basic requirement of the common law formulation: that the defendant’s passion arise from a provocation by the victim.”<sup>124</sup> On a traditional theory of partial excuse, this limitation is inexplicable because an actor’s culpability ought to be reduced whenever his choice capacities have been impaired, regardless of the impairment’s cause.<sup>125</sup>

Kahan and Nussbaum argue instead that provoked killers deserve mitigation because their emotions express “cognitive appraisals” that are morally appropriate, that reflect an appropriate evaluation of the good.<sup>126</sup> Their account of provocation therefore mirrors the justified emotion theories addressed above, in which the defense is deserved when the “cognitive component” of the provoked

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in evidentiary terms); Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 895 (1998).

<sup>119</sup> Garvey, *Passion’s Puzzle*, *supra* note 38, at 1735.

<sup>120</sup> See, e.g., Victoria Nourse, *Passion’s Progress*, *supra* note 8 (cataloguing many cases of “intimate homicide” in which the defendant apparently suffered genuine impairment of control as a result of trivial, nominal, or non-existent provocation).

<sup>121</sup> Garvey describes an “actor who kills in order to relieve the suffering of an terminally ill friend.” Garvey, *Passion’s Puzzle*, *supra* note 38, at 1698.

<sup>122</sup> Kahan & Nussbaum, *Two Conceptions of Emotion in Criminal Law*, *supra* note 54, at 305.

<sup>123</sup> *Id.* (citing Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 467).

<sup>124</sup> *Id.* at 306.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 315.

killer's anger is justified.<sup>127</sup> Consequently, Kahan and Nussbaum's theory has the same fatal flaw as the justified emotion theories: it cannot account for the requirement of heat of passion. Kahan and Nussbaum purport to explain the heat of passion requirement by arguing that it is only when a person kills in the heat of passion that he can be said to act on worthy motives and judgments. Without heat of passion, they claim, "it would be impossible to understand the defendant's act as expressing an appropriate valuation of the good—whether it is the defendant's honor or the dignity or physical security of the defendant's family members—that is threatened by the victim's wrongful provocation."<sup>128</sup>

This does not ring true to us. Consider the case of Parent killing Villain, who has murdered Parent's child (or Kahan and Nussbaum's similar example of a mother who kills the man who sexually assaulted her daughter). We can imagine Parent deciding to kill Villain precisely because she values her (or her child's) honor, and values the security of her family members, and perhaps also because she values the security of Villain's potential future victims. We can imagine a killing for these motives, which Kahan and Nussbaum accept as worthy, even when Parent dispassionately kills. A period of time may have passed, during which Parent's passion turned to grief and sorrow or fear of future attacks.

The euthanasia case of Friend killing Terminally Ill also provides a counterexample to Kahan and Nussbaum's claim that a person can only be said to kill on worthy motives if they are experiencing the heat of passion. Friend has appropriate beliefs and valuations regarding human suffering, even if Friend is not experiencing anger or rage. On Kahan and Nussbaum's view, it is the *judgment* or *evaluation* expressed by rage that does all the work. Emotions do express judgments, but the requisite worthy motives, judgments and evaluations can exist in the absence of anger or rage. Kahan and Nussbaum's theory therefore cannot explain why the heat of passion is required for a defendant to benefit from the provocation defense.

### III. OUR ACCOUNT: PARTIAL JUSTIFICATION AND PARTIAL EXCUSE

So far we have considered the various theories that scholars have advanced to explain the doctrine of provocation, and we have found each of them wanting. The orthodox view of provocation as a partial excuse cannot account for the doctrinal requirement of adequate provocation. The heretical view that provocation is a partial justification cannot explain the requirement that the killing occur in the heat of passion. Other views that reject (or purport to reject) the traditional justification-excuse framework either fail to explain all the elements of provocation, or collapse into a partial justification theory, or prove implausible for other reasons.

For our part, we accept that neither partial excuse nor partial justification alone can account for all the central elements of the provocation doctrine. But we

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<sup>127</sup> See *supra* notes 82 - 87 and accompanying text. As with justified emotion theories, we believe that Kahan and Nussbaum's theory of provocation is in truth a theory of partial justification. See also Garvey, *Passion's Puzzle*, *supra* note 38, at 1722 (2005); see generally *id.* at 1718-22.

<sup>128</sup> Kahan & Nussbaum, *Two Conceptions of Emotion in Criminal Law*, *supra* note 54, at 315.

do not consequently reject partial excuse and partial justification from the field of explaining provocation. Quite the contrary. We consider both partial excuse and partial justification as components of the rationale underlying provocation.

The short version of our theory is this: partial excuse and partial justification each provide independent grounds for mitigation. But the mitigation that flows from partial excuse alone is insufficient to warrant treating an intentional killing as manslaughter rather than murder. Ditto the mitigation that flows purely from partial justification. However, when an intentional killing is both partially excused and partially justified, it *is* appropriate to treat the killing as manslaughter. Hence the provocation defense's dual requirements of heat of passion and adequate provocation: they ensure the defense is only available to those defendants whose killing was both partially excused (because it occurred in the heat of passion) and partially justified (because it was in response to adequate provocation).

We present our account in stages. In the remainder of Part III, we provide a brief description of our theory. We sketch our arguments for (1) the claim that partial excuse and partial justification represent dual grounds for mitigation, and (2) the claim that the provocation defense is rightly reserved for the conjunction of partial excuse and partial justification. We elaborate on this account in Part IV, in the course of responding to objections that the unorthodox aspects of our account are sure to attract.

#### A. *Dual Grounds for Mitigation*

1. *Less blameworthy due to emotion.*—The fact that an actor who intentionally kills another was in an inflamed emotional state, which made it more difficult for him to conform his actions to the dictates of the balance of applicable reasons, makes him less blameworthy than he would otherwise be. This claim is just the common wisdom that undergirds the dominant partial-excuse position on provocation. We shall therefore spend relatively little time defending it. But we wish to be clear on the scope of the claim: it is a claim merely about mitigation. We are not claiming that the fact that an actor was experiencing emotional turmoil, without more, supports a conviction for manslaughter, or that a theory based on partial loss of self-control explains all the elements of the doctrine of provocation. We simply claim that the existence of emotional turmoil of a kind that undermines the actor's capacity to conform his actions to those dictated by the applicable guiding reasons deserves *some* mitigation.

The *Raguseo* case provides an example. The defendant, who was meticulous about his vehicle and parking space, became increasingly angered by repeated unauthorized use of the space. In an argument with a man who had used his parking space and almost hit his car, the defendant became enraged stabbed the victim to death. However unreasonable the defendant's rage and violence, we can easily see that this unreasonable rage could have undermined his capacity to control himself. He does not deserve a manslaughter conviction as a result of this. But he does deserve some mitigation. He deserves less punishment than would be due had he killed the victim while in full control of his rational faculties.

An example is also provided by the infamous case of *Commonwealth v. Carr*,<sup>129</sup> in which the defendant shot two women, killing one, and claimed that he became enraged at the sight of their “lesbian lovemaking,”<sup>130</sup> in the woods. On our account, Carr is not entitled to a manslaughter instruction. But he is less blameworthy than would be a close cousin who coolly and calmly kills women for engaging in lesbian lovemaking. Let us be clear: Carr is not entitled to mitigation relative to the “ordinary” or baseline murderer. But this is not because Carr’s loss of control has no mitigating bearing on his blameworthiness. Carr’s loss of control mitigates, but the *cause* of his loss of control – his attitude towards his victims – *exacerbates* his blameworthiness. Although these things cannot be measured with any accuracy, the net effect of the mitigating and exacerbating factors might be that Carr deserves roughly the same punishment as the “ordinary murderer.” Relative to the cool, collected murderer who kills lesbians out of hatred, however, Carr does deserve lesser punishment – to some degree. That is because the cool, collected murder is of exacerbated blameworthiness relative to the supposed norm for the class of intentional killers,<sup>131</sup> but does not have any offsetting mitigation due to loss of control. Relative to *that* murderer, Carr’s loss of control is (somewhat) mitigating.

The amount of punishment deserved in inadequate provocation cases, however, is not solely a function of the extent to which his faculty of rational self-control were impaired by strong emotion. We fully agree with Kahan and Nussbaum that the evaluations that undergird the loss of self-control are also relevant. A comparison of Carr and Ragueso illustrates this. Assuming each was in a similarly compromised emotional state, Ragueso is less blameworthy because his anger is rooted in excessive evaluation of his property, whereas Carr’s is rooted in actual hatred of a class of persons.

2. *Less wrongful due to reasons for acting.*—The fact that an actor had a good reason for aggressing against his victim renders an intentional killing less wrongful than it would have been absent that reason, notwithstanding that the killing remains wrongful on balance. Killing in response to adequate provocation is wrong—seriously wrong, and deserving of heavy punishment. But it is less wrong, all else being equal, than killing in the absence of provocation.

We are aware that this claim is treated as morally repugnant by many of the critics of partial justification,<sup>132</sup> but we believe it nonetheless true. We provide a more rigorous rationale and defense of the claim in Part IV. For now, we provide just the rudiments—enough to establish the claim’s plausibility.

When we refer to intentional killings for which the actor had good reason to aggress against his victim, we mean to refer, roughly, to intentional killings in retaliation for the types of grievous wrongs that would be uncontroversially accepted as adequate provocation. Intentional killings of this kind remain

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<sup>129</sup> 580 A. 2d at 1362 (Pa. Super. Ct. 1990).

<sup>130</sup> *Id.*

<sup>131</sup> This is why penalty enhancement for hate crimes is defensible in principle.

<sup>132</sup> Put briefly, the usual criticism is that treating a provoked killing as less wrong is tantamount to either treating the victim as partly to blame for his own death, or treating the victim’s life as less valuable than that of a victim who did not provoke his killer.

wrongful. But wrongfulness admits of degrees. It is a commonplace of criminal law and of morality that not all wrongs are created equal. Some wrongs are more (or less) wrongful than others. The complex schemas of stratified punishments for different criminal offenses reflect this basic fact that wrongs vary in degree.

That an intentional killing was in response to a grievous wrong is one of the factors that render it less wrongful. To illustrate the point, recall the case of Parent. Parent discovers that Villain has murdered Parent's child, and intentionally kills Villain. Parent's killing of Villain is wrong, but it is less wrong than, say, a garden-variety killing for financial gain. We suspect most readers' intuitions will concur on this. Parent's action is less wrong precisely because of Parent's *reasons* for killing Villain—reasons that issue from the fact that Villain had seriously wronged Parent by killing Parent's child. Note that these reasons (whatever, precisely, they may be)<sup>133</sup> are independent of Parent's emotional state. They apply both in cases where Parent kills while (understandably) in a state of great anger and emotional turmoil, and in cases where parent kills coolly and calmly. In order to properly isolate the reasons why Parent's killing is less wrong (and to avoid the possibility that our intuitive reactions are unduly colored by assuming that Parent is in emotional turmoil), let us refine the circumstances we are presenting. Suppose Parent coolly kills Villain two years after Villain's killing of Child and after having painstakingly tracked him across the country. Surely we would say that such a killing, while wrong—and perhaps so wrong that Parent ought to be convicted of murder—is nevertheless *less wrong* than it would be had Villain not subjected Parent (or Parent's child) to a grievous wrong. It is less wrong than a killing of Villain by some unrelated third party. And it is less wrong than was Villain's killing of Child. Surely we would say that Parent deserves a lesser sentence as a consequence of her reason for killing Villain. The fact that Villain killed Parent's child provided Parent with reasons to retaliate against Villain, and those reasons lessened (without eliminating) the wrongfulness of Parent's killing of Villain.

If this is the correct understanding of cases of this sort, then the actor's reason for killing partially reduces the wrongfulness of the killing. But recall that a reason which *completely* reduces the wrongfulness of an action (that is, that renders the act not wrongful) is a *justification*. It therefore seems sensible to characterize a reason that merely reduces the wrongfulness of an act as a *partial justification*, and to characterize the less wrongful act as *partially justified*. In Part IV, we will consider at length a number of arguments to the effect that the notion of partial justification is incoherent. We believe these arguments are flawed, or at the very least, overstated. But there is nothing magical about the language of partial justification. Our substantive point is that adequately provoked killings are *less wrong* than those that are not so provoked.

#### *B. The Conjunction Requirement.*

If what we have said so far is correct—that partial excuse and partial justification each independently provide mitigation—the next task is to explain why provocation should require *both* elements. Why shouldn't heat of passion and

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<sup>133</sup> A matter explored in some greater detail in Section IV.C, *infra*.

adequate provocation each be sufficient, instead of necessary, conditions for provocation, at least so long as the mitigating force of either is adequate, in the particular case, to reach some threshold? We provide two explanations. We call the first response the “additive-proxy account,” and the second the “expressive-deterrent account.” They are not mutually exclusive.

1. *The additive-proxy account.*—A defendant who intentionally killed under conditions that give rise to a partial excuse—when his emotional turmoil substantially interfered with his capacity for self-control—merits some amount of mitigation. A defendant who intentionally killed in conditions that give rise to a justification—he was grievously wronged and so had reason to retaliate—also deserves a degree of mitigation. But what should we say of the defendant who was subject to both excusing conditions and justifying conditions?<sup>134</sup> Surely we should say that such a defendant deserves more mitigation than he would if only the partially-excusing condition or partially-justifying condition applied. That is, the mitigation that flows from partial excuse and partial justification is *cumulative*.

In general, the mitigation due a defendant whose conduct is partly excused will be insufficient to warrant such a reduction in penalty that would result from a conviction of manslaughter rather than murder. The same applies to a defendant whose conduct is partly justified. In each case, some mitigation in sentencing will be appropriate, but the sentence should nonetheless be higher than the maximum sentence available for manslaughter in most states. The Table we have included as an Appendix lists the sentence ranges for murder and provocation manslaughter in each of the fifty states. As this Table shows, jurisdictions have adopted widely varying sentencing ranges for both manslaughter and murder. Nonetheless, in the majority of states the maximum penalty for manslaughter is less than or equal to the minimum penalty available for murder (and often less by a large margin).<sup>135</sup> In almost all jurisdictions, a manslaughter conviction lowers both the floor and the ceiling of available punishment by a significant degree from that available for a murder conviction. As a general matter, a defendant who has intentionally killed will only deserve a sentence in this lower range if the killing was both partially excused and partially justified.

We can readily make sense of the cumulative mitigating effect of partial justification and partial excuse. A partial justification reduces the wrongfulness of an action, and a partial excuse reduces the degree of blame the actor deserves for

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<sup>134</sup> Whatever may be said of the incompatibility of a *claim* of excuse and a *claim* of justification (a topic we address in Part IV), it is clear that excusing *conditions* do not necessarily exclude justifying *conditions*. Nothing in the nature of the conditions that give rise to excuse prevents the simultaneous existence of conditions that give rise to justification. To borrow a term from Kent Greenawalt, it is possible for the elements of excuse and justification to “coalesce.” Greenawalt, *Distinguishing Justifications from Excuses*, *supra* note 62, at 96, 103. This is true at both the level of complete defenses and partial defenses. An insane person may kill in self-defense. See Douglas Husak, *On the Supposed Priority of Justification to Excuse*, 24 L. & PHIL. 557, 576 (2005). Similarly, a person under the influence of extreme anger can have reason to retaliate violently.

<sup>135</sup> For example, the penalty range for provocation manslaughter in Colorado is 3–6 years (or 5–12 years if aggravated), whereas the penalty for murder is life. See Appendix. Other states in which the minimum penalty for murder is significantly higher than the maximum penalty for manslaughter include Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Massachusetts, Michigan, and New Jersey. *Id.*

the (less wrongful) conduct. Each of these reductions affects the amount of punishment the actor deserves. Consider once again the case of Parent. We have already contended that if Parent kills Villain calmly and deliberately, he has committed a lesser wrong and so deserves less punishment than if he did not have this reason for killing Villain. Now consider the case in which Parent sees Villain murder his child, and kills Villain in a fit of extreme rage. We should surely say that Parent deserves less punishment in this case than in the case where Parent kills while in full control of his rational faculties.

This strikes us as a plausible way to view partial justification and partial excuse. Intuitively, it seems correct that, *ceteris paribus*, a partially justified killing in the heat of passion deserves less punishment than a partially justified killing that is coldly deliberate, and also less punishment than an entirely unjustified killing committed in the heat of extreme reason-clouding passion.

While Dressler has described this approach as “torturous,”<sup>136</sup> we think it quite natural. There is something quite common-sensical about the idea that an actor with both a partial excuse and a partial justification deserves some mitigation as a result of each. The results of this structure or reasoning conform to our intuitions about which intentional killings deserve greater mitigation than others, i.e. about which intentional killings deserve enough mitigation to warrant the substantially lower range of penalties available for manslaughter. The dual requirements of provocation—heat of passion and adequate provocation—deny this lower penalty range both to the person who exacts cold-blooded revenge for a grievous wrong and the person who kills in genuine heat of passion triggered by a trivial slight. In each of these cases, some mitigation in sentencing is warranted, but not that associated with the lesser offense of manslaughter.

The better objection to a doctrine that limits provocation manslaughter to cases in which the defendant not only had some good reason to do as he did (but not, we emphasize again, “good reason” all things considered) but was also in an emotional state that substantially interfered with his ability to conform his conduct to the balance of reasons, does not deny that partial justification and partial excuse can aggregate in the way we have just described. Rather, it questions why the criminal law should require that each type of mitigation be present instead of demanding only that some specified quantum of mitigation be satisfied, while allowing that that total might be reached by excusatory considerations alone, partially justifying considerations alone, or an aggregation of the two.

We do not deny that partial excuses and partial justifications vary in degree, and that in some extreme cases either basis of mitigation alone would diminish the actor’s blameworthiness as much as, or even more than, do the two forms of mitigation combined in a typical case of provocation manslaughter. To make this concrete, consider the Australian case of *Scriva*.<sup>137</sup> The defendant in that case saw his child seriously injured by an automobile driver. In the heat of passion, the defendant attacked the driver. When a bystander intervened, the defendant intentionally stabbed him. Dressler argues that the defendant was

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<sup>136</sup> Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 439.

<sup>137</sup> [1951] V.L.R. 298.



“sufficiently enraged or otherwise overwrought” to deserve to be punished for manslaughter only.<sup>138</sup> We do not deny that a manslaughter-level sentence might be entirely appropriate on the facts of *Scriva*.

The short response to the objection, however, is that legal doctrine need not, and frequently does not, perfectly correspond to its underlying moral considerations.<sup>139</sup> Cases (perhaps including *Scriva*) where the requisite degree of mitigation could be realized as a result only of partial excuse—or only from partial justification—will be rare. In most cases where a defendant is sufficiently enraged to warrant a manslaughter sentence, for example, he will also have some reason that partially justifies his actions. In the vast majority of cases where the only mitigating condition is partial excuse, the defendant will not warrant a sentence in the manslaughter range. The combination of partial justification and partial excuse is a decent proxy for the level of mitigation that warrants such a lower sentence. It is therefore sensible for the law to require both, even at the expense of some underinclusiveness.

This is especially true because an alternative approach that would more perfectly track the moral analysis would incur real costs. To start, there is the formidable legal drafting problem of trying to articulate the total quantum of mitigation required to move from murder to manslaughter. Furthermore, allowing partial excuse alone to suffice for manslaughter runs the opposite risk of allowing partially-excused intentional killers to be punished too lightly. We have in mind cases such as *Commonwealth v. Carr*,<sup>140</sup> killings in response to homosexual advance,<sup>141</sup> and multitude of cases of intimate homicide in which the victim has done little or nothing to provoke the attack.<sup>142</sup> Indeed, we suggest that the tendency for provocation arguments to succeed in such cases is partly caused by too much emphasis having been placed on the partial excuse dimension of provocation, at the expense of the requirement of partial justification. As a result there has been a trend towards the partial loss of self-control aspect of provocation overshadowing the requirement of adequate provocation. The Model Penal Code is part of this trend, with the partial justification aspect of the provocation defense minimized (if not eliminated) in its EMED incarnation. As Nourse has effectively demonstrated, this has resulted in the EMED defense being more often successfully argued in undeserving cases of intimate violence than its common law predecessor.

2. *The expressive-deterrent account.*—Another approach views each element of provocation as necessary, but not simply because they combine to provide a sufficient magnitude of mitigation. On this approach, heat of passion and adequate provocation are both necessary, but for different reasons. Adequate

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<sup>138</sup> Joshua Dressler, *Provocation: Partial Excuse or Partial Justification*, *supra* note 6.).

<sup>139</sup> Although a commonplace, this point is overlooked with surprising frequency. For an exploration of some of the pitfalls of forgetting this simple point, see Mitchell N. Berman, *On the Moral Structure of White Collar Crime*, 5 OHIO ST. J. CRIM. L. 301, 315-27 (2007).

<sup>140</sup> 580 A.2d 1362, 1363 (Pa. Super. Ct. 1990).

<sup>141</sup> See, e.g., Mison, *Homophobia in Manslaughter*, *supra* note 4.

<sup>142</sup> See generally Nourse, *Passion's Progress*, *supra* note 8; Rozelle, *Controlling Passion*, *supra* note 9.

provocation is required for expressive reasons, while heat of passion is required principally for reasons of deterrence.

This perspective emphasizes—and helps to explain—an element of the provocation defense to which we have paid relatively little attention until now. Provocation is a *partial defense*: it does not merely provide for sentencing mitigation, nor even result in a lesser degree of murder. It does not simply support a range of punishment with lower maximums and minimums. The provocation doctrine carves out a separate offense—voluntary manslaughter—for expressive reasons. Sentence aside, a murder conviction expresses a greater degree of moral condemnation than a conviction for manslaughter.<sup>143</sup>

It is plausible to think that *manslaughter* is meant to mark conduct that is different in kind from murder.<sup>144</sup> A defendant who intentionally kills with great partial excuse, but without good reason (i.e. without adequate provocation), might deserve significantly reduced punishment. But that is because he is *less to blame* for an act that is no less wrongful than a paradigm murder. His intentional killing is not a different type of—that is, less wrongful—act. His partially-excusing condition does not alter the quality of his act, just the degree to which he is to blame for it. By imposing the stigma of “murder” on a partially-excused intentional killing, the law maintains its maximum expressive condemnation of the *act* of intentionally killing (without substantial supporting reasons), while the mitigation the defendant deserves is provided by imposing a sentence at the very low end of the range available for murder.<sup>145</sup> By providing a different offense category that carries less stigma—that communicates a lesser degree of condemnation—when the defendant is adequately provoked, the law communicates that the relevant conduct itself is *less wrongful*.

But if the category of manslaughter corresponds to less wrongful killings, and less wrongfulness is established by the existence of adequate provocation, then why does the provocation defense also require that the killing occur in the heat of passion? The answer to this question draws out the asymmetry of this approach. Heat of passion is required for different reasons than adequate provocation. While the latter is required for expressive reasons, the former is required principally for reasons of deterrence. A lesser offense of manslaughter with only the requirement

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<sup>143</sup> A murder conviction with a sentence of twenty years, for instance, expresses greater moral condemnation than a conviction for manslaughter with a twenty year sentence. For a general discussion of the expressive function of law, see, e.g., Joel Feinberg, *The Expressive Function of Punishment*, in JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95-118 (1970).

<sup>144</sup> This is consistent with the historical narrative Horder presents. See Part I, *supra*.

<sup>145</sup> This reasoning suggests that the ideal sentencing scheme for homicide would have some overlap between murder and manslaughter. That is, ideally the minimum sentence available for murder should be equal to or slightly lower than the maximum available for manslaughter. This is because some defendants with a partial excuse of great magnitude that warrants a sentence in the manslaughter range, but for expressive reasons should be convicted of murder. This is perhaps the best way to think of cases such as *Scriva*: such defendants should have their actions branded as murder, but deserve a sentence in the high end of the manslaughter range. Approximately half the states use this model. In nine states the sentencing range for manslaughter is contiguous with the sentencing range for murder (that is, the manslaughter maximum is the same as the murder minimum). There is overlap between the manslaughter and murder ranges (with the manslaughter maximum higher than the murder minimum) in a further seven states. See Appendix.

of adequate provocation runs the risk of incentivizing retaliatory killing. A person who has been grievously wronged may make the cold cost-benefit calculation that conviction for manslaughter (and the accompanying lesser punishment) is a price he's willing to pay in order to exact vengeance on his wrongdoer. The case of Ellie Nesler provides a telling illustration. Nesler fatally shot the man accused of molesting her son while the man sat in a California court.<sup>146</sup> The California judge in her trial found that "she had known the penalty for manslaughter before she killed [the victim] and had been prepared to accept it."<sup>147</sup> Such reasoning is far less likely if a partial justification, by itself, is relevant only to mitigate a sentence for murder. Even if the minimum sentence is as low as, or lower than, the maximum for manslaughter, a wronged person contemplating killing in retaliation could not guarantee that he will receive a sentence at the low end of the murder range. The applicable punishment therefore remains a punishment for wrongful conduct, rather than merely the price of acting in a certain way. Restricting manslaughter to situations in which both partial excuse and partial justification apply ensures that those who are unable to convince a factfinder that they killed in the heat of passion will not have their possible punishment capped at the maximum sentence available for manslaughter, and therefore would risk a substantially greater punishment.<sup>148</sup>

To restate this latter point, the criminal justice system is, in its fundamental self-conception, a system of sanctions, not prices—that is, a system that threatens and imposes penalties for prohibited conduct, rather than exacting charges for permitted conduct.<sup>149</sup> While it is true that the system's addressees sometimes treat the threatened sanctions as mere prices (this is a problem that bedevils corporate criminal law, for example), that is an inversion that the penal department of the legal system cannot condone. The limitation of manslaughter, with its reduced maximum penalties and its less condemnatory expressive force, to cases in which provoked killers act in the heat of passion and not as a result of a cool cost-benefit calculation, is necessary to help maintain the integrity of criminal law as a prohibitory and condemnatory system of social control.

#### IV. OBJECTIONS AND ELABORATION

The partial excuse aspect of our account reflects common wisdom about provocation manslaughter. The novelty of our account concerns the role we assign to what we call partial justification. We expect, therefore, that most objections to our account will target that aspect of our theory. In this Part, we consider three potential objections: first, that justifications and excuses are mutually exclusive

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<sup>146</sup> *Mother in Courtroom Slaying Calls Jail Term Fair*, N.Y. TIMES, Jan. 9, 1994.

<sup>147</sup> *Id.*

<sup>148</sup> A risk remains that a wronged person might believe he could convince a court that he acted in the heat of passion, and therefore conduct his cost-benefit analysis on this basis. But there are doctrinal protections against this. For example, one of the rules that falls under the heat of passion element is the requirement (in most states) that there must not have been a lapse in time sufficient to give the defendant reasonable time to cool down. This is best understood as an evidentiary rule which, while it may exclude some genuine claims of heat of passion, is justified by the extent to which it guards against false claims of heat of passion.

<sup>149</sup> For the classic discussion of the distinction, see Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

and therefore cannot be combined in the fashion we propose; second, that the notion of partial justification is incoherent or misguided; and third, that to intentionally kill someone in the face even of extraordinary provocation is not less wrongful than to intentionally kill someone absent such provocation.

To each of these three objections we offer a different type of response. The mutual exclusivity objection, we argue, is just plain mistaken. There are no good reasons to doubt that a doctrine of the criminal law can combine elements of both justification and excuse. Somewhat more can be said to support resistance to the concept of partial justification. Nonetheless, we will argue that there are good reasons to favor it. More importantly, though, we also explain that absolutely nothing of substance about our account would be lost were that particular nomenclature abandoned. The substance and originality of our account are fully preserved if the notion of “lesser wrongfulness” is substituted for that of “partial justification.” Finally, in support of our contention that the adequately-provoked killing is less wrongful than it would be absent the provocation, *ceteris paribus*, we offer something in the spirit of what Robert Nozick termed a “philosophical explanation.”<sup>150</sup> That is, we do not present an argument that purports to decisively establish that such a killing *is* less wrongful. Rather, we give an explanation of how such a killing could be less wrongful. In other words, we set out what propositions both about the nature of wrongfulness and about the reasons for killing under provocation could be true that would vindicate our claim. We anticipate that many readers (most, we hope) will find this explanation congenial and probable. But we offer no arguments to bludgeon into acceptance those who do not. Instead, we suggest, such readers have reason to reject standard provocation manslaughter doctrine, either by scrapping it altogether or replacing it with rules that are better understood purely in the nature of partial excuse, like the MPC’s doctrine of “extreme mental or emotional distress,” broadly understood and applied. The final section of this Part highlights additional aspects or implications of our account that warrant explicit attention.

#### A. *Partial Justifications and Partial Excuses are Not Mutually Exclusive*

Despite the appearance of both partial-justification- and partial-excuse-related criteria in the doctrine of provocation, criminal law scholars have overwhelmingly been reluctant to treat provocation as a combination of partial justification and partial excuse.<sup>151</sup> Many considerations contribute to this reluctance, but the single factor with greatest explanatory force, we believe, is the widespread belief that justification and excuse are mutually exclusive. As Doug Husak recently declared, “[c]riminal law theorists believe—with almost no exception” that justifications are incompatible with excuses.<sup>152</sup> Notice that this is a claim about the compatibility of *complete* justification and *complete* excuse, not about the compatibility of *partial* justification and *partial* excuse. A great deal of mistaken thinking about provocation has flowed from insufficient attention being paid to the difference between the claim that the *complete* defenses are mutually exclusive, and the claim that the *partial* defenses are mutually exclusive. Only the latter claim is incompatible with our account of provocation as a combination of

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<sup>150</sup> ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 8-11 (1981).

<sup>151</sup> See *supra* notes 4-7 and accompanying text.

<sup>152</sup> Husak, *On the Supposed Priority of Justification to Excuse*, *supra* note 134, at 561.

partial justification and partial excuse. But perhaps due to a failure to fully appreciate the consequences of the move from complete to partial defenses, the bulk of provocation theorists simply cite the claim that *complete* excuse and justification are incompatible as the reason why provocation cannot be explained by a combination of *partial* excuse and *partial* justification.<sup>153</sup> That is, the mutual exclusivity of *partial* justification and *partial* excuse is treated as synonymous with, or at least entailed by, the mutual exclusivity of complete justification and excuse. As it happens, there are good reasons to be skeptical even of the widespread belief that *complete* justification and excuse are incompatible.<sup>154</sup> But even if we assume *arguendo* that complete excuse and justification are mutually exclusive, it is not the case that the partial defenses are mutually exclusive. The considerations upon which the incompatibility of the complete excuses is founded simply do not apply to partial defenses.

Complete excuse and justification are considered mutually exclusive because the existence of wrongdoing is taken to be a necessary component of excuse, and justification entails that no wrong has been done. Mutual exclusivity is routinely written into the definitions of justification and excuse. J.L. Austin, who started the whole Sisyphean ball rolling, stated that to claim a justification is to “accept responsibility but deny that it was bad.”<sup>155</sup> To plead an excuse is to “admit that it was bad but [not to] accept responsibility.”<sup>156</sup> The phalanx of scholars that has since addressed the issue have followed Austin’s lead, at least to the extent of uniformly defining excuses as admitting that there was wrongful conduct (as variously conceptualized), but denying responsibility. Dressler speaks for the general view, then, in his oft-cited passage framing the mutual exclusivity of justification and excuse as a *definitional* matter: “It must be remembered that ordinarily a defense cannot properly be viewed simultaneously as a justification and an excuse because the latter, by *definition*, admits to the existence of social harm.”<sup>157</sup>

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<sup>153</sup> See, e.g., Fontaine, *Adequate (Non)Provocation*, *supra* note 5, at 19 (declaring that a long series of cases “reflect a longstanding rationale as to why heat of passion is an excuse, and *thus* not a justification”) (emphasis added); Nourse, *Passion’s Progress*, *supra* note 8, at 1394 (“Traditionally, ‘excuse’ and ‘justification’ have been viewed as mutually exclusive categories: a defendant cannot be both excused and justified because an excused action presupposes that the action was wrong and therefore unjustified.”). Both Fontaine and Nourse cite Dressler as authority for the view that the mutual exclusivity of justification and excuse precludes a combined theory of provocation. Dressler claimed that, “It must be remembered that ordinarily a defense cannot be properly viewed simultaneously as a justification and an excuse because the latter, by definition, admits to the existence of social harm.” Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 439. Note that Dressler claims only that complete justification and excuse are mutually exclusive. In the next sentence (*not* regularly quoted by later scholars) Dressler admits that, “It is possible, though not easy, to imagine a dual rationalization of a *partial* defense which is both justification and excuse based.” *Id.* Greenawalt, by contrast, claims that the *partial* versions of justification and excuse are mutually exclusive. Greenawalt, *Distinguishing Justifications and Excuses*, *supra* note 62, at 96.

<sup>154</sup> Husak, *On the Supposed Priority of Justification to Excuse*, *supra* note 134 (arguing that justification does not have “priority” over excuse, which necessarily means that justification and excuse are not mutually exclusive).

<sup>155</sup> Austin, *A Plea for Excuses*, reprinted in *PHILOSOPHY OF ACTION*, *supra* note 5, at 20.

<sup>156</sup> *Id.*

<sup>157</sup> Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 438. Note that Dressler follows Robinson in equating the wrong in unjustified conduct as social harm. See generally, Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 *UCLA L. REV.* 266 (1975). We address this view in Part IV.B *infra*.

But while fully justified conduct is *not* wrongful (or not criminal, or not warranted or permissible, depending on your conception of justification), partially justified conduct is *wrongful*. It is less wrongful than the same conduct would be were the justifying condition not present, but it is still all-things-considered wrong. And since it is all-things-considered wrong, there is no contradiction involved in claiming either a partial or complete excuse in addition to a partial justification – because claiming a partial justification admits to the existence of a wrong (albeit a lesser wrong than in the absence of the partial justification).

Imperfect self-defense provides an example outside the realm of provocation. Suppose a person is confronted with an attack involving signification but non-deadly force, and responds in defense with unreasonable and disproportionate force, killing his attacker. This is plausibly understood as conduct that is partially justified.<sup>158</sup> Invoking our conception of partial justification, we would say that the defender had a reason to act as he did (to avoid being significantly harmed), but had weightier reasons not to act as he did (the obligation not to kill outweighs his legitimate interest in protecting himself from harm substantially less than death). His conduct was not (on the whole) warranted or justified, but it was partially justified. This accords with our intuitions that such conduct is wrongful homicide, but of less gravity than a premeditated killing for financial gain.

Given the residual wrongfulness of partially justified conduct, there is no contradiction in also claiming an excuse, either partial or complete. Suppose our killer in excessive self-defense is insane. It is perfectly coherent for him to raise self-defense as a *complete* excuse in order to avoid blame for the (lesser or residual) wrongfulness of his conduct. She would be fully excused in relation to this (lesser) wrong.

A possible response at this juncture would be to point out that, if the defendant has a complete excuse, there is no *need* to claim a partial justification because the complete excuse will preclude liability even for a charge not ameliorated by the partial justification.<sup>159</sup> But this response is not available to deny combining partial justification with *partial* excuse. Imagine that our defendant who killed using excessive force in self-defense was beside himself with rage at the time: the violent but non-deadly attack occurred during an extremely heated argument. Let us assume that this rage did in fact interfere with his capacity to exercise self-control, and this contributed to the excessiveness of his response. We now have both partially justifying and partially excusing conditions present. Though partially justified, his conduct was still wrong (but less wrong than had there been no attack at all). And though partially excused from blame for his wrong conduct, he is still *partially* to blame for this wrongful conduct. It involves no contradiction to say that partial justification *reduces* the wrongfulness of the conduct, and also that partial excuse *reduces* the degree of blame for the

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<sup>158</sup> See Rozelle, *Controlling Passion*, *supra* note 9, at 255.

<sup>159</sup> Husak responds wryly to the argument from need: “We should not be too quick to conclude that persons cannot *have* a given kind of defense simply because they do not *need* one. I may *need* my umbrella only if it rains, but I *have* one nonetheless. Why can’t excuses be like umbrellas?” Husak, *On the Supposed Priority of Justification to Excuse*, *supra* note 134, at 567.

(residual or comparatively lesser) conduct. As we argued in Part III.B., the mitigation associated with partial justification and partial excuse is *cumulative*.

As the concepts of partial excuse and justification are not inherently (or necessarily, or conceptually) incompatible, some further argument is required to justify dismissing out of hand a combined rationale for the provocation defense. We know of no such additional arguments other than those that reject the notion of partial justification – arguments to which we now turn.

### *B. Partial Justification is a Coherent Notion*

A common reason for rejecting a combined rationale in favor of an excuse theory of provocation is the view that the notion of *partial* justification is either incoherent or morally repugnant. As such, partial justification can neither play a role in a combined rationale for provocation, nor provide a rationale for provocation in its own right. The only remaining option, so this thinking goes, is that provocation is a partial excuse. Hence the result that partial excuse has become the dominant rationale for provocation.

The arguments for rejecting partial justification fall into two categories, with the second group consisting of two sub-categories. First, theorists have asserted that the *concept* of partial justification is incoherent. Second, the various *conceptions* of partial justification<sup>160</sup> have been criticized as either (a) conceptually contradictory, or (b) morally insupportable.

*1. Partial justification as a contradiction in terms.*—Many scholars have asserted that “partial justification” is a contradiction in terms. Justification on this view is like a light switch: it is either on or off. Something is either justified or it isn’t. As justification is a binary concept, admitting of no degrees, it makes no sense to say that conduct is partially justified. Garvey provides a recent example of this position:

The concept of a “partial justification” is puzzling. A justified action is usually understood to mean an action one is (at least) permitted to do, and any particular action can be described as either permissible or impermissible. But it makes no sense to say a particular action is “partially permitted”. The logic of permission is all-or-nothing.<sup>161</sup>

Greenawalt has expressed similar concerns: “The conceptual difficulty is that the term justification has an either-or quality that makes people hesitant to speak of a partial justification when no aspect of the action is fully justified.”<sup>162</sup> The conceptual difficulty is overstated. To be sure, the term “justification”—*when unmodified*—has an either-or quality. This does not entail, however, that modifying the term amounts to contradicting it. The unmodified terms “full” and

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<sup>160</sup> Husak, *Partial Defenses*, *supra* note 2, at 170.

<sup>161</sup> Garvey, *Passion’s Puzzle*, *supra* note 38, at 1693 n.57. To be fair, Garvey seems to view this puzzle to be merely one of nomenclature and therefore easily resolved by renaming partial justification theories as “lesser wrong theories.” *Id.*

<sup>162</sup> Greenawalt, *Distinguishing Justifications from Excuses*, *supra* note 62, at 92.

“empty” have an either-or quality about them: to say a vessel is “full” is to declare it completely full; to say a vessel is “empty” is to declare it completely empty. The logic of fullness and emptiness, it seems, is quite literally all-or-nothing. Yet people are not at all hesitant to refer to a glass as either half-full or half-empty. Nor do we have any difficulty understanding what is meant by these phrases when they’re uttered.<sup>163</sup>

The same point can be made regarding the term “wrong.” When wielded without modification, “wrong” has a binary connotation. But no-one would deny that the concept of wrongfulness admits of degrees.<sup>164</sup> Wrongful actions can be more and less wrongful.

2. *Uniacke and the Incoherence of Partial Justification.*—At the risk of belaboring the point more than half to death, we ought to directly address the position of Suzanne Uniacke. She is the scholar most regularly cited as advocating the view that the concept of partial justification is incoherent,<sup>165</sup> and her position on partial justification is both nuanced and interesting. Uniacke states that, “I do not think that the concept of a partial justification *for a particular act or offense* makes sense.”<sup>166</sup> At the same time, she admits that “Justification can be a matter of degree.”<sup>167</sup> How does Uniacke reconcile these two claims?

On Uniacke’s view, when we choose between labeling an action “justified” or “unjustified,” we make an overall evaluation of that act.<sup>168</sup> If an act is justified, it can be more or less justified. That is, among the set of overall-justified act, some are better—more justified—than others. (One may be justified in repelling an unwanted kiss from a persistent would-be paramour by either pushing him away or slapping him on the cheek. But, if pushing him away will get the message across, this is *more* justified than slapping him.)

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<sup>163</sup> Of course, some terms cannot sensibly be modified in this way. It is not the case, for instance, that some animals are more equal than others.

<sup>164</sup> Husak, *On the Supposed Priority of Justification to Excuse*, *supra* note 134; Douglas N. Husak, *Partial Defenses*, *supra* note 2. The term “right” is a little more difficult. While there is clearly a gradation of behavior ranging from barely permissible through deserving of approval to heroic, we do not normally describe these as more or less right—although we can certainly say that some morally (or legally) right acts are *better* or *more preferable* than others. Nonetheless, the asymmetry between “right” and “wrong” may explain Garvey’s hesitation in calling conduct partially *permitted*. But as Garvey himself points out, whatever the linguistic hesitation, the notion of partial justification makes sense as making conduct less wrongful, but still impermissible. Garvey, *Passion’s Puzzle*, *supra* note 38, at 1693. (Garvey uses the phrase “just as impermissible,” which adds an unnecessary layer of confusion, given he has just asserted that “the logic of permission is all-or-nothing.” *Id.*)

<sup>165</sup> See, e.g., Garvey, *Passion’s Puzzle*, *supra* note 38, at 1693 n.57; Husak, *Partial Defenses*, *supra* note 2, at 171 n.24.

<sup>166</sup> UNIACKE, *supra* note 62, at 15-16 n.8.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* One of us has challenged this idea elsewhere, arguing instead that the demanding and giving of justifications display a dialectical structure, such that to label an act “justified” (fully, not partially) usually signifies only that it is not rendered impermissible by the particular considerations invoked (explicitly or implicitly) against it. Thus, one need not normally warrant that the act is all-things-considered permissible by deeming it “justified.” See Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258, 262-66 (2008). Our analysis of provocation does not depend upon this “tailored” conception of justification.



However, all unjustified acts are simply that—unjustified. Uniacke’s point seems to be that while justification can be a matter of degree, *un*justification cannot.<sup>169</sup> Moreover, calling an act “partially justified,” according to Uniacke, expresses the judgment that the act falls within the set of overall justified acts. But acts to which the provocation defense applies are overall *un*justified. So, to call provoked killings partially justified is to contradict the law’s overall assessment of such killings as wrong, and deserving of serious punishment.

This is a plausible view of the linguistic implications of “justified” and “unjustified.” However, it is not the only plausible view. It is also plausible to view “partially justified” as indicating that an act is supported by some good reasons, but not enough to make the act overall justified. But we feel no need to insist that our linguistic preferences should trump those of Uniacke and others. We believe the term “partially justified” is a particularly efficacious way of describing the moral status of provoked killings, but “less wrong” also suffices. Nothing of substance in our position turns in this change in nomenclature, and nothing in Uniacke’s approach denies that overall-unjustified acts can be more or less wrong.

3. *Conceptions of Partial Justification.*—The arguments we have just addressed purport to establish that the concept of partial justification is incoherent. We have shown that there are reasons to reject these arguments. But it is also worth noting that these arguments are primarily linguistic. Because of this, the thrust of the arguments is easily parried by simply replacing the term “partially justified” with “less wrongful.” Nothing of substance is lost as a result of the change in nomenclature.

Another approach used to reject partial justification is to argue that the particular *conceptions* advanced to explain partial justification in the context of provocation cannot be supported. Dressler, the chief antagonist of provocation as partial justification, identifies three theories that have been advanced to explain partial justification: (i) the “rights theory”; (ii) the “forfeiture theory”; and (iii) the “lesser harm” theory. He argues that each of them fails—either because they are conceptually incoherent, or because they are morally unacceptable.<sup>170</sup> Dressler approaches the task of identifying theories of partial justification by first isolating the theories that have been posited as explaining *full* justification, and then considering when these theories are translated into partial defenses.

According to the rights theory, “it is sometimes morally justifiable to enforce a legal and moral right by taking the life of another.”<sup>171</sup> This is at least plausible as a rationale for self-defense: you are entitled to enforce your right to life by taking the life of your attacker.<sup>172</sup> As a basis for partial justification

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<sup>169</sup> *Id.* at 15-16 n.8.

<sup>170</sup> Theories of partial justification are *moral* theories, because they are theories about degree of wrongfulness of actions.

<sup>171</sup> Dressler, *Provocation: Partial Justification or Partial Excuse?*, *supra* note 6, at 477.

<sup>172</sup> Note that, stated in this form, the justification does not necessarily depend on wrongdoing by the person killed. Your right to life can be accidentally violated (by a person sleepwalking, or hypnotized, etc.). In killing an innocent attacker, you are nonetheless enforcing your right to life—or, more precisely, your negative right not to be killed.

Dressler criticizes this theory on two counts. First, whatever right is being protecting when one is provoked is less than the right to life, as *ex hypothesi* one's life is not endangered by the provoking conduct (else one could avail oneself of self-defense). It must be some lesser right being protected, in which case it is difficult to see why one is morally entitled to take another's life (and so violate a *greater* right). As Dressler puts it, "it should certainly come as a surprise to us that such a right entitles the actor to take a human life to enforce it."<sup>173</sup>

Dressler's second criticism is that, if the actor has a *right* that he is entitled to enforce by killing his provoker, we are left with a puzzle as to why provocation is a partial rather than a complete defense.<sup>174</sup> The same criticism has been leveled at the so-called partial-right doctrine of imperfect self-defense, namely that to say someone has a partial right is a contradiction in terms.<sup>175</sup> Dressler therefore claims that, as a rationale for the partial defense of provocation, the "rights theory" is both a conceptual and moral failure.

We feel no desire to defend the rights thesis. It suffices to point out that our theory of partial justification indeed denies that the adequately provoked person has the right to kill. He does not have such a right, which is why he is guilty of murder—or of manslaughter, if he is also partially excused. His wrongful conduct (in which he violates the right to life of his provocateur) is simply less wrongful than it would have been had he not been supplied with *some* reasons to kill as a result of the provocation.<sup>176</sup>

Whereas the "rights theory" proposes that the killer has a right to kill the "forfeiture theory" proposes that the victim *does not* have the right to life. The victim forfeits his life by choosing to engage in wrongful conduct, and so no wrong is done by killing him.<sup>177</sup> In the context of provocation, the argument is that adequate provocation is a wrong (and often a legal wrong) that amounts to a forfeiture of the provoking agent's right not to be killed. The forfeiture theory, as a basis for *partial* justification, has a symmetrical conceptual problem to that encountered by the rights theory: it "should serve to make the defense complete,"<sup>178</sup> not partial. Either the victim forfeited his right not to be killed, or he did not.<sup>179</sup> It makes no sense to say that the provoking agent forfeited *part* of his right.

Once again, we need not argue this point with Dressler. Our theory of partial justification does not entail a claim that the defendant forfeits any part of his right. A person who kills in response to adequate provocation, even in the heat of passion, violates his victim's rights; his action is not all-things-considered justified. Our position is that the circumstances in which the violation of a right

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<sup>173</sup> Dressler, *Provocation: Partial Justification or Partial Excuse?*, *supra* note 6, at 477.

<sup>174</sup> *Id.*

<sup>175</sup> Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 449 & n.229 (referring to R. Perkins, CRIMINAL LAW 33 (2d ed. 1969)).

<sup>176</sup> Remember that the degree of mitigation to which the provoked killer is entitled, absent a partial excuse also applying, does not suffice to warrant a manslaughter conviction, but rather ought to be considered in sentencing.

<sup>177</sup> Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 454.

<sup>178</sup> *Id.* at 456.

<sup>179</sup> *Id.* at 455.

occurs can affect the moral gravity of that violation. One of the circumstances that affect the gravity of a right violation is the degree of intent. A premeditated killing is a greater wrong than a negligent killing, even though they involve violation of the same right—the right not to be killed—and violation *to the same degree*, qua right. (The negligently killed victim is just as dead as the intentionally killed victim.) Another of the factors that affect the gravity of a right violation is a worthy motive, such as retaliation for the murder or sexual assault of a loved one. The provoking agent has not forfeited any rights, but the killer’s violation of those rights is less grave than it would otherwise have been in the absence of the reasons provided by the provoker’s conduct.

According to the “lesser harm” theory, killing a person who has done the killer a serious moral wrong involves less “social harm” than killing an innocent person.<sup>180</sup> As the killing causes less harm, it is less wrong. For Dressler, this is the “basic” theory of justification: “The basic theory of justification is that *if an act is justified there has been no social harm*, or, at least, less social harm than if the actor did not act as he did.”<sup>181</sup>

Unlike in response to the rights and forfeiture theories, Dressler does not assert that a partial defense on this theory would involve a contradiction. Rather, he acknowledges that the theory is conceptually coherent,<sup>182</sup> and even suggests that the theory has considerable intuitive force in explaining provocation.<sup>183</sup> Dressler rejects the lesser harm theory on the basis that it is morally unacceptable. A person’s bad conduct should not make his life less valuable than that of an innocent person: “Are we to say that immoral conduct, albeit non-life endangering, should make a person’s life less deserving of society’s protection? Such a position runs counter to most common law theories of criminal culpability.”<sup>184</sup>

The moral dangers associated with suggesting the victim *deserved* to be killed have struck a chord with writers concerned that the provocation doctrine reinforces beliefs that members of some groups are less worthy than the mainstream. Hence Rozelle suggests that calling provocation a partial justification “smacks of ‘blame the victim’.”<sup>185</sup> Similarly Mison worries that framing provocation as a partial justification in cases of homosexual advance expresses the notion that the life of a homosexual man is worth less than that of a heterosexual man.<sup>186</sup>

Once again, the appropriate response to this argument is to point out that the lesser harm theory is merely one conception of partial justification. A theory of partial justification does not *necessarily* entail the view that the victim’s life is less valued, or is a lesser social harm. It may be that, *ceteris paribus*, if conduct causes less harm, then the conduct is less wrongful. But it does not follow that if

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<sup>180</sup> *Id.* at 454. Dressler also refers to this theory as the “comparative moral wrongdoing” theory. Dressler, *Provocation: Partial Justification or Partial Excuse?*, *supra* note 6, at 477.

<sup>181</sup> Dressler, *Rethinking Heat of Passion*, *supra* note 34, at 450.

<sup>182</sup> *Id.* at 457.

<sup>183</sup> *Id.* at 456.

<sup>184</sup> *Id.* at 458.

<sup>185</sup> Rozelle, *Controlling Passion*, *supra* note 9, at 215.

<sup>186</sup> Mison, *Homophobia in Manslaughter*, *supra* note 4, at 170-74.

conduct is less wrongful, then it must have caused less harm. Accidental killing is less wrongful than intentional killing, but the harm is the same.<sup>187</sup> The victim of an accidental killing neither less valuable, nor more deserving of death, than the victim of an intentional homicide.

The harm that an actor intends or anticipates is certainly an important factor in determining the degree of wrongfulness of that conduct. But it is not the only factor. One of the other contributing factors is the set of reasons upon which conduct is based. Once again, the arguments Dressler marshals against this particular theory of partial justification do not apply to our conception of partial justification.

In summary, first, none of the arguments so far advanced demonstrate that the *concept* of partial justification is incoherent. Second, none of the arguments that particular *conceptions* of partial justification are either incoherent or morally unacceptable apply to the theory of partial justification on which we rely, that of partially warranting reasons. Third, no one appears to have even attempted to critique this theory as it applies to partial justification. Therefore, no sufficient argument has been advanced to support the view that partial justification cannot form part of the rationale of the provocation defense.

### *C. Provocation Renders an Intentional Killing Less Wrongful*

As we observed above, wrongfulness is a scalar, not merely a binary, property. We take this to be common ground. Nobody, say, who believes that shoplifting or hurling a gratuitous insult is wrongful believes that either is as wrongful as rape or murder. Nobody believes that pick-pocketing is as wrongful as genocide. Importantly, nothing that we have said or contemplated in Section III.B. is to the contrary. Rejection of the concept of partial justification, as we explained above, rests on the idea that conduct is either wrongful or not and that justified conduct is not wrongful.<sup>188</sup> But this idea does not entail that wrongfulness does not admit of degrees. It does not insist that each wrongful act is precisely as wrongful as every other wrongful act. So we will accept as a given that, within the universe of wrongful conduct, particular acts can be more or less wrongful than others.

Against this background premise, to fully establish that provoked intentional killings can be less wrongful, in virtue of the provocation, than unprovoked intentional killings, we need to do two things. First, we need to provide and defend a general theoretical account of the determinants of the degree of wrongfulness of wrongful conduct. Second, we need to provide a specific

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<sup>187</sup> Dressler might respond that the “social harms” in each case are different, as the intent of the wrongdoer is somehow a component of the harm caused to society. But on this copious conception of “social harm,” the amount of social harm is not a measure of the worth of the victim. Treating a provoked killing as less harmful is not to treat the victim as less valuable, any more than treating an accidental killing as less harmful is to treat the victim of an accident as less valuable than the victim of a homicide.

<sup>188</sup> This is the dominant view. Some theorists believe, in contrast, that a justification qualifies wrongdoing but does not eliminate it, thus creating three categories rather than two: wrongful and unjustified, wrongful but justified, and not wrongful. See Berman, *Justification and Excuse*, *supra* note 2, at 7 n.11.

account of how killing in response to provocation satisfies the criteria made relevant by our general account. That is a very tall order indeed, for this first step would require that we detail and defend something close to a full moral theory, or a full account of practical reasoning. (Consider to begin with that consequentialist and nonconsequentialist moral theories are committed to different positions regarding the considerations (1) in virtue of which conduct is wrongful and (2) that determine the magnitude of a wrong. Likewise, different theories within each of these two broad ethical families are apt to supply different answers.) Accordingly, we cannot tackle in this paper the daunting task of establishing that the lesser wrongfulness thesis is true across diverse moral theories.

Instead, our plan of attack in this section is to sketch the rudiments of a general account of wrongfulness and to offer reasons, consistent with that general account, to believe that an intentional killing is less wrongful when in response to adequate provocation. (We will not try to demarcate the contours of the class of adequate provocations, contenting ourselves in this section to argue that it is a non-null set.) We will then consider objections to this account—objections that must themselves be consistent with the thesis that wrongfulness has variable magnitude or weight—and explain why we find them unpersuasive. If this leaves us some distance short of having proven that intentional homicide is less wrongful when responsive to (adequate) provocation, it should nonetheless establish why one might reasonably think so, and thus might well *explain* the provocation doctrine even if it does not (as we believe it does) *defend* it.

*1. Affirmative Account.*—Let us start with some remarks about wrongful conduct or wrongdoing (terms that we will treat as synonymous) that, while not uncontroversial in all particulars, are well within orthodox thinking. Morality is concerned with guiding behavior and providing the basis for a certain type of criticism. Moral reasons are the subset of all reasons that concern the regard we ought to pay the interests of others, what T.M. Scanlon calls “what we owe to each other.”<sup>189</sup> One ought to act in accordance with the balance of nonexcluded reasons. (In the Razian account of practical reason, the broad outlines of which we follow here, exclusionary reasons are second-order reasons not to act on certain first-order reasons. So, for example, the fact that *A* has promised to attend *B*’s party on Saturday night excludes or preempts, and does not merely outweigh, some of what would otherwise be perfectly acceptable reasons for *A* to pursue activities on Saturday night that are incompatible with his attendance at *B*’s party.)<sup>190</sup> One acts wrongfully if he acts against the direction of applicable moral reasons that are

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<sup>189</sup> T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).

<sup>190</sup> One of us has suggested elsewhere that this model should be revised to distinguish between wrongdoing and ought-to-be-doneness on something like the following lines. See Berman, *Blackmail*, *supra* note 118. What morally ought to be done is what the balance of nonexcluded moral reasons directs. And what morality commands of us is that we try to determine what the balance of nonexcluded moral reasons directs, and then that we act in conformity with the conclusion we reach at this first, deliberative, stage. Thus, if we reach a sincere but erroneous judgment that what ought to be done in a given case is  $\phi$ , and then do  $\phi$ , we do not act wrongfully even though we fail to act in accordance with what the balance of nonexcluded moral reasons direct. For simplicity of analysis, we ignore this refinement in our discussion in the text. We believe, however, that the simpler analysis we provide could be revised to accommodate complications or nuances of the foregoing sort.

not themselves outweighed or excluded by other applicable reasons, moral or otherwise.

The nature, character, and constituents of wrongdoing are, of course, central concerns of moral philosophy. Moral philosophers have paid less attention, however, to questions regarding the magnitudes of wrongdoings. (Perhaps this should not surprise: if moral reasoning directs that  $\phi$  would be wrong, then it ought not be done, and the separate questions of *how* wrong it is, and therefore *how much* it ought not be done might strike some as rather beside the point.) But insofar as wrongdoing itself is in some sense the upshot or consequence of a balancing of reasons, it seems plausible to suppose that the magnitude of wrongful action is a function of the extent to which the nonexcluded moral reasons against it outweigh or outdistance the nonexcluded reasons in its favor. Take again the case of promising. Suppose that A stays home Saturday night because his child is ill. Caring for an ill child, we suppose, is a reason not to attend the party that the promise does not exclude. But that does not necessarily mean that staying home is morally permissible all things considered or even that it is morally permissible against the moral reasons created by the fact of his promise. If, say, the child's illness is minor and another responsible adult is available to care for her, then the reason for A to keep his promise might render his decision to stay home wrongful. Nonetheless, because he does have a good reason to stay home, his staying home is less wrongful than it would have been had he stayed home to watch a television program he enjoys or merely because he felt unsociable.

If that sketch of the nature and magnitude of wrongdoing is fundamentally correct, then it remains only to determine whether there exist types of wrongdoing in which an actor might engage that would give another person reason(s) to kill her, which reason(s) are insufficient to prevent the killing from being wrongful but sufficient to reduce its wrongfulness by an amount that would warrant recognition from the legal system. We believe that an affirmative answer is exemplified by Villain's intentional killing of Parent's child. In a case such as this, we think that, ordinarily, Parent has such reason to kill Villain.

That this is so might emerge more clearly if we first assume something approximating the state of nature, or at least a state with a notably ineffectual criminal justice apparatus. Here, most of the reasons customarily invoked to justify state punishment—and capital punishment in particular—seem to provide reasons for Parent to kill Villain: e.g., to give Villain what he deserves (for those who believe that one deserves to suffer, or to be punished, on account of his blameworthy wrongdoing); to prevent Villain from victimizing other innocent persons; to deter similar acts of aggression by others; and to express the appropriate degree of moral outrage toward Villain's actions, an outrage that, punishment skeptics notwithstanding, might be hard to express in other than pallid form through other means. Furthermore, Parent has special agent-relative reason to be the author of Villain's punishment, either to satisfy an obligation of loyalty owed Villain's victim (Parent's child) or to avenge the wrong done Parent himself, albeit derivatively. To be sure, we do not expect all readers or all citizens to agree that each of these considerations underwrites a reason for Parent to kill Villain.

But we do expect most readers to recognize at least some of these as valid reasons of nontrivial, perhaps substantial, weight.<sup>191</sup>

No doubt things are different when we introduce a working state with a reasonably effective, if imperfect, system of criminal justice. In general, the existence of the state likely strengthens some of the preexisting reasons, and adds new ones, for Parent not to kill Villain. For example, there is a greatly increased likelihood that retributivist, deterrent and incapacitative objectives will be served even if Parent stays his hand. Additionally, the social costs of private vengeance are greater if public order is already reasonably well maintained. So whether or not it would have been wrongful for Parent to kill Villain in the absence of an effective centralized enforcement system, it seems rather clearly wrongful under contemporary developed conditions.

But we would caution against exaggerating the extent to which the existence of a moderately effective state changes the moral terrain as it bears on the present question. The state's existence provides some new moral reasons for Parent not to kill Villain and adds weight to preexisting reasons not to kill.<sup>192</sup> It might also displace or eliminate some reasons that would lend support to Parent killing Villain. However we think it implausible that the presence of the state extinguishes all the reasons that Parent would have had, absent the state, to kill Villain. For one thing, law enforcement is far from perfect. Parent might reasonably believe, and it might well be the case, that if he does not himself act, Villain has a good chance of escaping capture, conviction, or punishment. If so, Parent's retributive and incapacitative reasons to kill that we previously invoked would be preserved, if to attenuated degrees. Furthermore, any agent-relative reasons Parent might have to act against Villain are likely to be similarly preserved despite the existence of the state. Consider Stranger, who, like Parent, reasonably believes Villain is unlikely to be caught or punished. Both Parent and Stranger have (attenuated) reasons of incapacitation and retribution that lend support to either of them killing Villain. But Parent has reasons for killing Villain that Stranger does not share: to fulfill a duty of loyalty to Parent's child, or to avenge a wrong done Parent himself, and so on. If Parent reasonably (and perhaps rightly) believes that Villain would escape punishment by the state, not only are there reasons for Parent to want Villain killed, but there are also reasons for Parent, and not Stranger, to do the killing. In sum, then, while the existence of an effective state surely affects the moral calculus, it is far from wholly transformative. If Parent would have reasons to kill Villain sufficient to render his killing less wrongful in the absence of an effective state, such reasons likely exist (in weakened form) even in the world as we know it.

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<sup>191</sup> The case in favor of Parent's lesser wrongdoing is likely to be strengthened if, as suggested earlier, the moral command is *not* "to act in accordance with the balance of (nonexcluded) reasons," but (to a first approximation) "to reason sincerely and sensitively about what the balance of reasons demands, and then to act in accordance with the conclusion that one has reached." See Berman, *Blackmail*, *supra* note 118.

<sup>192</sup> Of course, it also adds legal reasons not to kill. But to avoid circularity (we are, after all, trying to make sense of the way that a legal rule might be responsive to the moral status of one's actions), we must here be concerned with the moral reasons that bear on Parent's situation and not the legal reasons except insofar as the latter help shape the former.

2. *Challenges.*— The first possible challenge to this argument would reject our general account of the determinants of the magnitude of wrongdoing. On the competing view we have in mind, the degree to which a wrongful action is wrongful is a function entirely of the wrongmaking reasons and not at all a function of the delta—that is, the difference—between the wrongmaking reasons and the putatively justifying ones. For example, homicide is more wrongful than vandalism just because the reasons against killing a person are stronger than the reasons against destroying somebody’s property. Reasons that tend in favor of an action need not be considered at all if they are insufficient to render it permissible.

This alternative view is highly implausible. It seems plainly wrong if we assume a consequentialist moral framework in which the right is a function of the good and the good is determined entirely by aggregating states of affairs. But this alternative view seems arbitrary and unmotivated even on nonconsequentialist assumptions. Consider Slow Swimmer and Fast Swimmer, shipwrecked and swimming for a plank that can accommodate only one. If Fast Swimmer reaches the plank first (or looks poised to reach it first) and Slow Swimmer shoves him aside, Slow Swimmer acts wrongfully on most moral views. (In Anglo-American law, she would not be entitled to the justificatory defenses of self-defense, necessity, or duress of circumstances.) But now consider Boater, floating by in a skiff, who pushes Fast Swimmer off the plank because he wants the wood to make picture frames and planters that he will sell at flea markets. We contend that Boater is not merely more blameworthy than Slow Swimmer, but also that his action is more wrongful. In these paired cases, however, the reasons against the action are constant—namely, whatever reasons weigh against knowingly causing the death of another human being. What distinguish the cases are the reasons for which Slow Swimmer and Boater act. If Slow Swimmer’s act is less wrongful, that lends substantial support for our claim that reasons that fall short of rendering putatively wrongful action justified can nonetheless render it less wrongful.

The remaining challenges accept, at least *arguendo*, our general account of degrees of wrongfulness—namely, that (perhaps loosely speaking) magnitude of wrongdoing is a function of the delta between wrongmaking and supportive reasons for action—but deny that any sort of provocation is adequate to supply an actor with reason(s) to intentionally cause the death of another of a character and force sufficient to (nontrivially) reduce the wrongfulness of the killing. First, one could object that none of the putative reasons we invoked above, or any others, are in fact good reasons to intentionally cause another’s death. Second, one could contend that, insofar as they are good reasons, or would be under certain assumptions, they are reasons that the provoker’s right to life excludes from consideration.

We have little to say in response to the first of these two objections. While we have already tried to present in a sympathetic light the reasons in favor of Parent’s killing of Villain (reasons, it bears reiteration one last time, that are defeated by the reasons against), we have also acknowledged that these claimed reasons may not have merit under all moral theories and theories of value. And we have further acknowledged that we don’t present arguments sufficient to establish the case decisively if what we have said thus far does not resonate. We will add only this. Imagine you learn that *A*, an acquaintance, has killed *B*. In response to



your query or criticism, *A* says: “I had a reason. *B* killed my child.” “Still,” you might say, “you ought not to have done it.” Or: “What you did was wrong.” The instant question is whether you would go so far as to assert: “But that’s no reason at all!” We expect that would be your response were *A* to have said: “I had a reason. I hate black people” (or white people, or gay people, or tall people, or people who listen to opera). That fact, you would say, might *explain* the killing but is no *reason* for it. If you would find such a response appropriate in some cases but not in the case of Parent and Villain, we suspect that is because you recognize that the fact that Villain killed Parent’s child, while not itself precisely a reason for Parent to kill Villain, does support such reasons and is therefore telegraphic of them.

The second objection is slightly different. It allows that Parent has reasons to kill Villain, perhaps reasons captured by the retributivist, deterrent, incapacitative, and agent-relative considerations to which we have already alluded, but claims that such reasons count among those that Villain’s right to life specifically excludes. The “right to life,” the argument might go, captures what Raz calls a “protected reason”—a first-order reason not to cause death backed or reinforced by a second-order reason not to act on various first-order reasons that might come into conflict with the possessor’s interests in life. The reasons that would otherwise support Parent’s actions are excluded by the second-order reason. But reasons grounded in promoting or protecting the lives of others are *not* excluded. This is why Slow Swimmer’s killing of Fast Swimmer is less wrongful than would be Boater’s killing of Fast Swimmer: the reasons supporting Slow Swimmer’s action are precisely among those that Fast Swimmer’s right to life does not exclude.

Possibly. Indeed, an argument that does not deny *tout court* that the reasons Parent would invoke in support of his killing of Villain are good reasons, but seeks instead to show why they are excluded from our practical reasoning by the reasons that render killing wrongful in the first place, strikes us as the most promising potential line of attack against our thesis. At present, though, we are not persuaded. First, some of Parent’s reasons for killing Villain—those that sound in deterring evildoers like him and in preventing Villain himself from harming other innocents—would seem, on this competing account, *not* to be excluded from the set of reasons that determine right conduct. Furthermore, vastly more argument is needed to establish just what sorts of reasons are excluded by the protected reason that corresponds to an individual’s supposed right to life. Equally or more plausibly, it seems to us, is that the excluded reasons are limited to more quotidian reasons for action like promoting the actor’s own pleasure and convenience, and promoting ordinary welfare. That agent-relative reasons to avenge a grievous wrong—reasons that might themselves plausibly be conceived as obligations of a sort—are also excluded requires sustained argument, we think, and cannot be merely asserted.

Those who argue that provoked killing is not less wrongful than a paradigmatic murder bear the argumentative burden for another reason as well. The case of Parent killing Villain establishes the intuitive (or perhaps *prima facie*) appeal of the claim that an intentional killing provoked by a grievous wrong can be less wrong than a typical murder. Those who reject our account of lesser wrongs

must either contend that Parent's conduct is just as wrong as that of the typical murder, or provide an alternative explanation for why it is less wrong.

A final challenge, like the previous two, accepts our general account of degrees of wrongdoing, but questions whether the requirement that the accused act in a heat of passion precludes our reliance on this account of wrongdoing. If the killer was too embroiled in anger to conform his behavior to the balance of reasons, the objection would run, then he might seem unable to draw moral credit, as it were, from the fact that reasons in fact existed to support (but not to fully justify) his action. Put another way, the wrongfulness *vel non* of an action is not a function solely of the guiding or true reasons that obtain, but on whether they are explanatory reasons too—i.e., reasons that in fact explain why he acted. If this is so, then the particular marriage of partial excuse and partial justification that we seek to effectuate would be unworkable because the demands that the defendant have some good reason to do as he did and that he was too engulfed by passion to adhere to reason stand in a contradictory relationship.

This challenge evokes a debate in criminal law theory between proponents of “subjective” and “objective” theories of justification, especially in the context of what are often called “unknowing justifications.” Roughly, subjectivists about justification believe that whether an actor is justified depends only upon whether he nonculpably believed that facts existed which would support his violating a criminal prohibition, as by using force against another; objectivists believe that the validity of a justification depends only upon whether the facts did in fact exist. The issue arises more commonly when an accused mistakenly believed that his life was endangered (or that some other sort of important interest was threatened). The “unknowing justification” variant arises when the converse is true: the actor is unaware of facts that would unproblematically support a justification were the actor to have been aware of them and to have acted (in some sense) because of them. An example is the accused who attacks a seemingly innocent and unthreatening person who, unbeknownst to the accused, was just about to attack the accused or some innocent third party.

We say that this challenge evokes the subjective/objective debate over justifications because the challenge would seem wholly to lack force against those who adhere to the fully “objective” theory of justification in which justification (full or partial) depends only upon the existence of guiding reasons. Be that as it may, we are not objectivists about justification. We agree that reasons that are grounded on facts of which the actor is unaware do not help to justify his action against the wrong-making reasons of which he is aware.<sup>193</sup> It may seem, then, that this final challenge should worry us.

It does not. In cases of provocation, the killer is only too aware of the most fundamental fact that gives birth to reasons to kill—namely, the wrong that his victim has done him (or one close to him). Given his emotional state, the killer is not likely to have immediate access to all the reasons themselves—reasons that we have described by reference to the values of retribution, deterrence, loyalty, etc.

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<sup>193</sup> For arguments by one of us in support of that position, see Mitchell N. Berman, *Lesser Evils and Justification: A Less Close Look*, 24 *LAW & PHIL.* 681 (2005).

But unlike the paradigmatic putatively unknowingly justified actor, the provoked killer is aware of the underlying facts. It's just that, by hypothesis, he is not consciously advertent to the good reasons that correspond to, or are grounded upon, those facts. We do not believe that the subjectivist component to the correct account of magnitude of wrongdoing properly requires that the actor consciously advert to the reasons that bear on the gravity of his wrongdoing in just the way that this objection contemplates. Rather, the reasons that serve to partially justify his action are available to him, for purposes of assessing the magnitude of his wrongdoing, so long as he is aware of the facts that underwrite those reasons, and his awareness of those facts has the right sort of causal relationship to his action.

#### D. Final Observations

In this final section we develop two features of our analysis that the particularly attentive reader might have inferred from the analysis to this point, but warrant more explicit emphasis, lest they be missed.

1. *The touchstone of adequate provocation.*—Existing provocation doctrine is mildly ambiguous regarding what the touchstone of adequate provocation is. Most statutory provisions and commentators require that the provocation be such as to cause a reasonable person to experience heat of passion.<sup>194</sup> Others require that the provocation must be adequate to provoke a reasonable man to action.<sup>195</sup>

Our account decouples the provocation and heat-of-passion requirements. It would require that the defendant be in a heat of passion and that the provocation be of the sort that gives the defendant reasons to kill (subject to a substantial qualification discussed below). This is the more demanding test for provocation, for while it is hard to imagine the cases in which provocation would satisfy that standard yet not satisfy the orthodox one, the converse is not true. It seems that many provocations might be adequate to cause an ordinary person to be enraged to a degree in which the power of self-control is greatly impeded, yet which are inadequate to furnish a genuine reason to kill the provoker.

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<sup>194</sup> See, e.g., Georgia, GA. CODE. ANN. § 16-5-2 (provocation must be sufficient to incite “irresistible passion” in a reasonable person); Illinois, ILL. COMP. STAT. 5/9-2 (provocation must be “sufficient to excite an intense passion in a reasonable person”); Louisiana, LA. REV. STAT. ANN. § 14:31 (provocation must be “sufficient to deprive an average person of his self-control and cool reflection”). LaFave declares, “It is sometimes stated that, in order to reduce an intentional killing to voluntary manslaughter, the provocation involved must be such as to cause a reasonable man to kill.” LAFAVE, CRIMINAL LAW, *supra* note 33, at 777. He further says that, “Language to this effect is to be found in many of the modern statutes.” *Id.* at 777 n. 14. We have found no language in the statutes that refers to causing the reasonable man *to kill*. The closest are the statutes referred to above which require that a reasonable man would have lost self-control or that the provocation would have been “irresistible.”

<sup>195</sup> Ashworth declares that the test of adequate provocation is “whether the provocation was ‘enough to make a reasonable person do as [the accused] did.’” Ashworth, *The Doctrine of Provocation*, *supra* note 3 at 298. Ashworth does not provide a cite for the claim in quotation marks, but is presumably referring to s. 3 of the English Homicide Act, which provides: “Where on a charge of murder there is evidence on which a jury can find that the person charged was provoked ... to lose self-control, the question whether the provocation was enough to make a reasonable person do as he did shall be left to be determined by the jury.” The Homicide Act, §. 3, *supra* note 33 (emphasis added).

On our account, then, manslaughter should probably be available in a smaller class of cases than would be the case in jurisdictions that measure the adequacy of provocation by its tendency to cause anger in a reasonable person. But this would be so only when the nominal and actual sentencing range for murder is broad and in which the sentencing authority (judge or jury) is willing to grant the mitigation for murder that might often be due when loss of control is present but a genuine reason to kill is absent. If intentional killers who do not qualify for manslaughter cannot realistically get the mitigation that is due them, then a more expansive manslaughter regime is justifiable as a second-best solution. This follows from a point we have already tried to emphasize: the fact that an intentional killer should not be entitled to the partial defense of manslaughter does not, on our account, entail that he does not have a sound claim to be punished less—even significantly less—than the paradigmatic or statistically ordinary murderer.

2. *Whether the accused must have reason “to kill.”*—In presenting our affirmative account, we exploited the example of a parent who (while in a heat of passion) kills the murderer of her child. We claimed that the parent in fact has reasons to kill. We contrasted this case with cases like *Carr* and *Raguseo*, in which the killer plainly lacked any such reason. Admittedly, these examples represent something close to the polar cases. More needs to be said about the intermediate case in which the provoked killer has ample reason to do something to his victim—let’s say, not putting a very fine point on it, that he has reason “to retaliate”—but may not have reason *to kill* him. Consider Bully’s unprovoked beating of Ordinary Joe, an assault that causes massive bleeding and broken bones, but leaves Joe very much alive. If, after the assault is complete and without fear of additional attack, but while still subject to the heat of passion, Joe stabs Bully in the back, killing him, would he be entitled to provocation mitigation on our analysis?

Perhaps this example is too thinly sketched to permit confident conclusions regarding whether Joe had (some, but insufficient) reason to kill Bully, though we think he did not and expect that most readers would share that judgment. Whatever you might think about this particular case, we mean only to invite you to imagine a case in which you would believe that the killer had reason to retaliate or “to effect a punitive response,” but *not* reason to kill. It might seem to follow that, on our account, Joe is not entitled to a manslaughter instruction on our account. In fact, that does not necessarily follow. To understand why requires that we attend more carefully than we have thus far to the act description *killing*.

Any bodily movement can be described under an innumerable number of distinct act descriptions. One given act might answer to all of the following descriptions: moving one’s index finger, firing a handgun, firing a Glock .45, shooting at a person, killing, murdering, assassinating the president, etc. If I cause the death of a pedestrian by driving when speeding, my action was wrong not because it is wrong to kill a person, but because it is wrong to drive carelessly, or recklessly, or too fast. When I try to justify my conduct by invoking my reason to drive fast—say, I was rushing a gunshot victim to the hospital—the question is not whether that need justifies *killing someone*, but whether it justifies *driving fast* (as

fast as I had been driving). The appropriate act description (putting negligence aside) must be sensitive to what I took myself to be doing.

In the case of Parent and Villain, we have assumed that Parent acted with intent to kill and we have argued that Parent had reason to do just that. In contrast, we are assuming that Joe lacked reason to try to kill Bully. But—and here’s why manslaughter might nonetheless still be available to him—Joe might not have had any such intent. Surely in some homicide cases in which a defendant hopes for a manslaughter conviction, his only intent was “to punish” the victim or “to teach him a lesson” or “to hurt” him. The balance of reasons model we have employed would seem to open up a sizeable space in which an actor has reason to act under a description like this even when he would not have reason to act under the description *to kill*. In some set of these cases, the accused would have reason to act under the description *to grievously harm* while lacking reason to act under the description *to kill*. Of course, under the common law and most current codes, the intent to cause grievous bodily harm counts as “malice” and supports a murder conviction when death results. There is some uncertainty regarding whether provocation manslaughter is available when the (provable) intent is to cause grievous bodily harm, but not to kill.<sup>196</sup> A negative answer to that question, we submit, is crazy. While it is a fallacy that the greater always or necessarily includes the lesser, it *usually* does—or should. When the defendant did not intend to kill but only intended to cause grievous bodily harm, and when the defendant had reason to do the latter, but not to do the former, he should, on our analysis, be entitled to the partial defense of provocation<sup>197</sup>—assuming, of course, that the heat of passion prong is satisfied too.

## CONCLUSION

The search for an explanation for the provocation defense has become something of a *cause célèbre* among American criminal theorists over the last quarter century. The primary focus of this search has been the question of how provocation fits into the justification-excuse framework of criminal defenses. The orthodox view is that provocation is a partial excuse. While some adherents of partial excuse allow that the provoked killer’s anger may be justified, they deny that the killing itself is even partially justified. One small camp of dissenting

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<sup>196</sup> Some modern statutes include language that appears to define provocation as requiring an intent to kill. *See, e.g.*, Indiana, IND. CODE § 35-42-1-3 (provocation applies to a person who “knowingly or intentionally kills”); Kansas, KAN. CRIM. CODE ANN. § 21-3403 (provocation applies to an “intentional killing of a human being”); Minnesota, MINN. STAT. § 609.20 (provocation applies to a person who “intentionally causes the death of another person in the heat of passion”). Courts have also often defined provocation “as if intent to kill were a required ingredient.” LAFAVE, CRIMINAL LAW, *supra* note 33, at 776 and 776 n.3. Despite the presence of this restrictive language, the great majority of jurisdictions allow a provocation defense in cases of intent to cause grievous bodily harm, but not to kill. *Id.*

<sup>197</sup> Say that intentionally injuring (X) is a lesser included offense of intentionally killing (Y). Now consider three possibilities regarding when Y is partially justified: (1) if there are some (but insufficient) reasons to Y; (2) if there are full and sufficient reasons to X, even if no reasons to Y; and (3) if there are some (but insufficient) reasons to X, and no reasons to Y. We have defended proposition (1). While we do not advocate proposition (2), our defense of (1) does not necessarily exclude (2)—an approach with affinities to those advanced by Greenawalt and Rozelle.

scholars argues that provocation is a partial justification. Another camp claims that provocation is best understood as neither a justification nor an excuse.

None of these rationales provides a convincing explanation for the central features of the provocation doctrine. Partial excuse theories can explain the heat of passion requirement, but struggle to explain the adequate provocation requirement. Partial justification theories have the opposite problem. We propose that provocation is best explained as a combination of the two: the defense is limited to intentional killings that are both partially excused and partially justified (or less wrong, which comes to the same thing). This theory provides a natural explanation for both the adequate provocation and heat of passion requirements. It also explains why the provocation defense results in a lesser defense—manslaughter—rather than merely a lower sentence.

We analyze partially justified actions as those supported by *some* unexcluded reasons, but not supported by the balance of unexcluded reasons bearing on that action. Scholars have traditionally resisted a combined partial-excuse/partial-justification rationale for provocation due to the long shadow cast by two claims: the mutual exclusivity thesis and the claim that partial justification is incoherent. We demonstrate that the mutual exclusivity thesis is wrong, at least as it pertains to partial excuse and partial justification. We suggest that skepticism of partial justification is overstated, but point out that, in any event, such skepticism is negated by replacing “partial justification” with “less wrong.”

In sum, heat of passion and adequate provocation are necessary conditions of provocation because the defense is limited to intentional killings that are less wrong in virtue of the defendant’s reason for killing, and for which the defendant is partially excused in virtue of his being in the thrall of strong emotions that substantially impeded his ability to conform his conduct to what the balance of reasons required.

APPENDIX: SENTENCING RANGES FOR PROVOCATION MANSLAUGHTER AND  
MURDER

	<b>Provocation Manslaughter</b>	<b>Murder</b>
<b>Alabama</b>	2-20	10-99
<b>Alaska</b>	< 20	20-99 (1 <sup>st</sup> deg), 10-99 (2 <sup>nd</sup> deg)
<b>Arizona</b>	3-12	25 - Life (1 <sup>st</sup> deg), 10-22 /16 (2 <sup>nd</sup> )
<b>Arkansas</b>	3-20 (5 – 20 aggravated)	10-life
<b>California</b>	3, 6, or 11 years	25-life
<b>Colorado</b>	3 – 6 (5 – 12 aggravated)	Life
<b>Connecticut</b>	1-20, 5-20 (aggravated) 5-40 (with firearm)	25-life
<b>Delaware</b>	2-25	Life (1 <sup>st</sup> deg), 10-life (2 <sup>nd</sup> deg)
<b>Florida</b>	<15	Life
<b>Georgia</b>	<20	Life
<b>Hawaii</b>	<20	Life w/o parole (1 <sup>st</sup> ), life w/ parole (2 <sup>nd</sup> )
<b>Idaho</b>	<15	10-life
<b>Illinois</b>	4-20 (called 2 <sup>nd</sup> degree murder)	20-life
<b>Indiana</b>	6-20 (20-50 with deadly weapon)	45-55, advisory 55, life possible
<b>Iowa</b>	10	Life (1 <sup>st</sup> ), 25-50 (2 <sup>nd</sup> )
<b>Kansas</b>	7.5-8.5 (truth in sentencing guidelines)	Life (1 <sup>st</sup> ), 9-15 (2 <sup>nd</sup> )
<b>Kentucky</b>	10-20	Life
<b>Louisiana</b>	<40	Life w/o parole
<b>Maine</b>	<5 (<10 with firearm)	25-life
<b>Maryland</b>	<20	Life (1 <sup>st</sup> deg), 30 (2 <sup>nd</sup> deg)
<b>Massachusetts</b>	<2.5 (<= life with infernal weapon)	Life
<b>Michigan</b>	<15	Life
<b>Minnesota</b>	10	Life (1 <sup>st</sup> deg), <40 (2 <sup>nd</sup> ), <25 (3 <sup>rd</sup> )
<b>Mississippi</b>	2-20	Life
<b>Missouri</b>	5-15	10-life
<b>Montana</b>	2-40	10-100
<b>Nebraska</b>	1-20	Life w/o parole (1 <sup>st</sup> ), life w/ parole (2 <sup>nd</sup> )
<b>Nevada</b>	1-10	20-life (1 <sup>st</sup> deg), 10-life (2 <sup>nd</sup> deg)
<b>New Hampshire</b>	<30	Life
<b>New Jersey</b>	5-10	30-life
<b>New Mexico</b>	6	15-life
<b>New York</b>	5-25	25-life (1 <sup>st</sup> deg), 15-life (2 <sup>nd</sup> deg)
<b>North Carolina</b>	3-9 (truth in sentencing)	10-life
<b>North Dakota</b>	<20 (lower grade of murder)	30-life
<b>Ohio</b>	3-10	15-life
<b>Oklahoma</b>	>4	Life w/o parole (1 <sup>st</sup> ), 10-life (2 <sup>nd</sup> )
<b>Oregon</b>	<20	25-life
<b>Pennsylvania*</b>	<20	Life (1 <sup>st</sup> & 2 <sup>nd</sup> ), <40 (3 <sup>rd</sup> )
<b>Rhode Island</b>	<30	Life (1 <sup>st</sup> deg), 10-life (2 <sup>nd</sup> )
<b>South Carolina</b>	2-30	30-life
<b>South Dakota</b>	<= life	Not less than life
<b>Tennessee</b>	3-15	Life (1 <sup>st</sup> ), 15-life (2 <sup>nd</sup> )
<b>Texas</b>	2-20 (“murder with mitigated punishment”)	5-99
<b>Utah</b>	1-15	5-life
<b>Vermont</b>	1-15	35-life (1 <sup>st</sup> deg), 20-life(2 <sup>nd</sup> )
<b>Virginia</b>	1-10	20-life
<b>Washington</b>	<= life	Life
<b>West Virginia</b>	1-10	Life (1 <sup>st</sup> ), 10-40 (2 <sup>nd</sup> )
<b>Wisconsin</b>	<60	Life (1 <sup>st</sup> ), <60 (2 <sup>nd</sup> )
<b>Wyoming</b>	<20	Life (1 <sup>st</sup> ), 20-life (2 <sup>nd</sup> )