Misunderstanding Provocation

Samuel H. Pillsbury
Loyola Law School, Los Angeles

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Criminal Law Commons, and the Law and Psychology Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol43/iss1/7

https://doi.org/10.36646/mjlr.43.1.misunderstanding

This Essay in Response is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
I disagree.

I disagree that determining whether provocation is a partial excuse or partial justification is important for criminal law. Although this inquiry touches on critical issues about homicide law and criminal responsibility generally, the question I think betrays a misunderstanding of provocation doctrine. It presumes a yes or no response to a question that can only be answered: both. Provocation is and always has been a compromise rule whose success depends on its ability to appeal to all ideological constituencies, and therefore will always—as long as it lasts—resist the final categorization that this question seeks. As long as provocation involves an inquiry into reasonableness, it will include considerations of justification. As long as it provides for mitigation of punishment based on the difficulty of resisting temptations to violence inspired by strong emotion, it will speak to considerations of excuse.

I disagree that emotionally-related cognitive dysfunction should mitigate punishment for criminal homicide regardless of reasons for emotion. That we can identify persons who are prone to mis-perceive threat and respond with extreme violence where others would not, that we can perhaps explain their special propensities by environmental or genetic factors, does not, by itself, say anything about whether such persons merit reduced punishment for killing. Criminal responsibility should be constructed according to the social and political function of criminal law here, which is to resolve violent disputes nonviolently. Its decisions should depend on the social-moral meaning of action, on the defendant's reasons for action. Although this involves an assessment of the defendant's choice, including reasons for emotion, judgment does not rely on reconstructing the internal processes leading to the defendant's decision. Criminal law and psychology have important, but difficult

* Professor of Law, Loyola Law School Los Angeles. My sincere thanks to Reid Griffith Fontaine for inviting this response to his article and reaffirming that invitation even after I warned that my response would likely be quite critical. This shows a commitment to robust discussion that in academia is usually expressed more impressively in words than action. I would also like to thank my research assistant Nicole Perreira for her assistance. Finally my thanks to the participants in the January 2008 discussion on Manslaughter at the American Association of Law Schools Conference in New York City, especially my fellow panelists: Stephen Garvey, Ken Simons, and Caroline Anne Forell. Their thoughts on the doctrine helped inform my own—which should not of course be confused with agreement with what I say here.
relations, which often become confused in the context of provocation because of the doctrine’s explicit concern with strong emotion.

I disagree that assessing reasons for emotion in provocation is incoherent or inconsistent with mens rea analysis generally. Provocation is best understood as taking standard mens rea analysis one step beyond its usual inquiry. In addition to asking about why the defendant acted as he or she did (the defendant’s purpose or awareness), we ask why the defendant was motivated to violence—why the defendant was so angry or fearful as to kill the victim. This approach can be justified substantively and is practically workable.

I. Categorizing Provocation as Partial Excuse or Partial Justification: Just Say Yes

Many scholars have debated whether provocation should be considered a partial excuse or partial justification.1 It’s not hard to see why. The doctrine of provocation has an extraordinarily rich jurisprudence developed across many years and jurisdictions; its treatment of emotion involves larger issues of criminal responsibility often implicated in defenses of both justification and excuse. And yet, I do not find the question as standardly phrased particularly useful. It assumes that we can discover what has never existed.

I imagine the matter this way. In some other-worldly interrogation room, a fiercely-determined Scholar, dogged in pursuit of the jurisprudential truth, leans over the bare table separating Scholar from Doctrine and demands: “Okay, enough of the fun and games, Provocation. Once and for all, the truth. Explain yourself. Do you provide lesser punishment because the defendant’s conduct or passion was in some way justified? Or do you mitigate because strong emotion, regardless of origin, makes self-control especially

difficult?" To which Provocation will smile and say: "Yes. Exactly. All of the above."

A. Defining Partial Justification

Professor Fontaine frames the excuse/justification question using philosopher J.L. Austin’s widely accepted distinction between the two. A justification represents a judgment that the challenged action was morally correct or acceptable in some sense. An excuse represents a judgment that although the action was wrong, the actor should not be punished because he or she lacks some trait critical for individual responsibility.

Professor Fontaine writes about provocation: "Presumably, for the doctrine to be one of partial justification, it would demand a higher standard than that of excuse, for it would mean that the action of the killer is a partially morally good or right (or at least partially acceptable) thing to do." But a person who successfully argues provocation will be convicted of a serious felony: manslaughter. This is a crime of violence usually punished with a significant prison sentence. All jurisdictions that recognize the doctrine classify a provoked killing as a serious offense. One does not get sent to state prison for years and suffer all of the consequences of a serious felony conviction for doing what society considers to be a morally good, right or acceptable action. Nor, as I will argue below, is modern provocation based on the judgment that a lesser amount of violence was justified in the situation.

A common misdescription (and often misunderstanding) of provocation is that it condones the defendant’s act by equating it with the conduct of a reasonable person. Law students often, and courts on occasion, speak about provocation as requiring a judgment that the defendant did as the reasonable person would do in the situation. As many have noted, however, this is clearly incorrect.


4. In California for example, the maximum sentence for voluntary manslaughter, without enhancements for aggravating factors such as use of a deadly weapon, is 11 years. The minimum prison term is three years. Cal. Pen. Code § 193(a) (2008).

5. The English Homicide Act of 1957 refers to "whether the provocation was enough to make a reasonable man do as he did." English Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 3 (Eng.). Fontaine states early on: "Adequate provocation is considered to mean provocation by
as a matter of law. Although the law's rhetoric of reasonableness can be obscure at times, the law's position on the provoked defendant's conduct is plain. He, or she, has committed a serious crime. No matter how we define the reasonable person, the adjective describes a law-abiding individual. We do not expect a law-abiding person to commit a felony, let alone a serious crime of homicidal violence. Professor Fontaine is correct that a finding of provocation does not represent a judgment that the defendant's conduct was in any sense morally acceptable.

B. Candidates for Justification: Lesser Violence, Justified Passion

If there is more to the justification versus excuse debate concerning provocation than this—and the number of powerful legal minds drawn to the question suggests there is—we need to understand justification differently here. I see two possibilities: (1) the defendant was justified in using some lesser amount of violence against the victim; or (2) the defendant's motivating passion—his or her fear or anger toward the victim—was justified. Neither condition would justify killing, but then provocation law does not either.

In his book on provocation, Jeremy Horder argues (rather persuasively to my mind) that provocation probably found its origins in the first of these notions. In the 17th century when English gentlemen commonly went about armed and were expected to defend their (male) honor with violence, provocation represented a judgment about situations where violence might be appropriate, but only of a non-deadly variety. When the defendant suffered a grave insult to honor, he was entitled to respond forcefully. The original insult might take the form of significant violence, or it might take a less violent but still gravely dishonorable form, such as the tweaking of a nose or discovery of the physical act of adultery. In all of these situations, the moral code of the day held that a gentleman might properly respond to the insult with measured violence. When a man responded to a grave, but non-deadly insult with fatal violence, this was a crime, but provocation mitigated it from murder to manslaughter.

the victim that would be sufficient to significantly undermine the rationality of a reasonable person." Fontaine, supra note 3, at 30.
6. See, e.g., United States v. Roston, 986 F.2d. 1287, 1294 (9th Cir. 1993) (Boocheever, J. concurring); Dressier, Why Keep the Provocation Defense?, supra note 1, at 998.
The modern doctrine may also be traced to an earlier rule called chance medley which applied to fair fights between men resulting in death. Again, while English criminal law prohibited the use of deadly force in fights, it mitigated punishment for homicide in a combat situation from a capital offense (murder) to a lesser crime (manslaughter) in recognition that some level of non-deadly violence might be warranted in defense of manly honor.  

So much for 17th century England: what about provocation today?

As Horder argues, provocation can no longer be based on a 17th century English gentleman’s code of honor. Mere insults to honor, no matter how grave, do not justify the use of significant violence. As a result, the use of violence to defend one’s honor must be considered an obsolete rationale for provocation. It cannot be the basis for partial justification.

As for the use of non-deadly force in a fair fight, to the extent that this justification survives into modern times, it should be considered in tandem with considerations of self-defense. To understand its role in provocation, we need to explore the ever-contested border between provocation and self-defense.

If an individual is threatened with what reasonably appears to be unlawful, non-deadly force, the victim may respond with non-deadly force. If the victim responds with excessive, meaning deadly force and kills, however, self-defense will not exonerate. Some jurisdictions recognize a partial defense of imperfect self-defense, in which a killing motivated by an honest but unreasonable belief in imminent deadly threat will result in a manslaughter conviction. For those jurisdictions that do not recognize this rule, provocation may produce the same result through a determination that a combination of anger and fear was justified.

Under provocation analysis, a decision maker might judge that a reasonable person would also have experienced some mix of anger and fear sufficient to make such a reasonable person sorely tempted to deadly violence. Punishment would still be merited

---

9. Although they remain powerful in certain subcultures and other nations.
10. See Joshua Dressler, Understanding Criminal Law 223 (5th ed. 2009).
11. Id.
12. Id. at 249–50.
13. Fear and anger can be difficult to disentangle both as psychological states and as cognitive states. Having a reason to fear will also provide a reason to rage. Consider the experience of being cut off by another driver in traffic. The flash of fear at the dangerous maneuver becomes a surge of anger almost immediately. In the context of homicide, a victim’s
because: (a) defendant’s fear did not rise to the level required for self-defense (reasonable fear of imminent deadly force) and (b) no matter how reasonable, anger alone cannot justify the use of deadly force.

Because provocation’s reach extends beyond situations where the defendant faced a plausible threat of violence, response to threat cannot provide a full explanation of the doctrine. Traditionally provocation has also extended to fatal violence in response to discovery of adultery and unlawful arrest. 14 While there is real question whether the latter (unlawful arrest) remains a viable claim, and serious question about whether the former (discovery of adultery) should, their recognition in standard rule statements suggests a broader rationale. Following the reasoning set out so far, provocation might be seen as resting on the reasonableness of the defendant’s passion at the time of the homicide. We might ask: Would any reasonable person have experienced similarly overwhelming anger and fear? Assuming we still consider unlawful arrests and adultery to be serious wrongs that would provoke great passion in the reasonable person, this approach would seem to support categorizing provocation as a partial justification. 15

C. Partial Excuse and the Effects of Strong Emotion

None of the foregoing establishes that provocation as understood by appellate courts or applied by decision makers is better classified as a partial justification than a partial excuse, however. There exists support in statutes, court decisions and jury instructions for the idea that provocation’s mitigation of punishment depends primarily on the effect of passion on rational decision-making without much concern for the source of, or the

threatening the defendant gives him or her reason to fear and also reason for anger supporting provocation.

14. See Dressler, supra note 10, at 536. Another standard category often cited by courts is unlawful arrest. I doubt whether this remains a viable claim in contemporary law, as the advent of professional law enforcement has eliminated the basic rationale for this claim. Until the 19th century in England, there were no professional police, meaning that arrests were undertaken by lay persons, leading to potential confusion between a lawful arrest and a criminal assault or kidnapping. Modern claims of this type might also fall under the doctrines of complete or imperfect self-defense.

15. I have argued previously that a sounder foundation for provocation would be to jettison reasonableness analysis and focus on reasons for emotion. I have proposed that provocation should apply only when the defendant had good reason to be extremely angry with the victim at the time of the homicide. Pillsbury, supra note 8, at 142-46. Were I to draft new rule language today, I would do so in terms of justified anger/fear to make clear that both emotions, apart or in combination, can support mitigation.
justification for, that passion. As Professor Fontaine argues, the notion here is that the experience of strong emotion disturbs the ordinary reasoning process, rendering the individual less capable of evaluating choices, and therefore less responsible for the chosen action that results. This sounds like a partial excuse based on the effects of emotion regardless of justification for emotion or lesser violence. The corrosive effect of strong emotion on moral restraint (i.e., self-control) is absolutely central to the doctrine. Given this, we cannot exclude excuse considerations from the doctrine.

And so, provocation has both justification and excuse dimensions, making a final categorization difficult, if not impossible. Which is why I do not find the original question especially useful.16 And yet there is an underlying question of real significance about the treatment of emotion which the justification/excuse debate touches upon. Does provocation require that the defendant have good reason for anger and/or fear toward the victim at the time of the homicide or is it enough that the defendant experienced any strong emotion at the time of the killing that made self-control particularly difficult?

Answering this question raises issues of both criminal responsibility generally and provocation doctrine specifically. In terms of responsibility, we must decide whether culpability in law is primarily an individual, perhaps psychological, construct based on the internal dynamics of a defendant's choice, or whether it is better understood as an assessment of individual choice according to moral-social norms. In doctrinal terms, the argument turns on how much we see provocation's reasonableness norm as a universal, moral-social standard and how much an individualized, psychological-normative standard. It is to these questions that we now turn.

II. PROVOCATION AND CRIMINAL RESPONSIBILITY

Most fundamentally and most controversially, I disagree with Professor Fontaine's view of criminal responsibility. Before exploring those disagreements I must offer an important caveat, however. Because Professor Fontaine's concepts of criminal responsibility and culpability are not explicitly articulated in his article, I will be working from suggestive references. I may be reading him wrong.

16. For another argument that the justification/excuse debate on provocation does not make sense—because the real issue is our understanding of emotion—see Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 COLUM. L. REV. 269, 318–21 (1996).
To the extent I argue against positions that Professor Fontaine does not hold, I invite his correction. The discussion that follows I hope will be useful regardless, though, because in all instances I argue against positions that may be found elsewhere in the literature on provocation and other aspects of criminal culpability and responsibility.

Early on, Professor Fontaine writes: “In its most serious form, provocation interpretational bias may be functionally limiting such that the reactive aggressor is able only to ‘read’ the ambiguously provocative situation at hand as one that is seriously wrongful or otherwise offensive.” Later he writes: “[O]ne who is psychologically biased toward interpreting certain kinds of ambiguous or ‘open’ social situations as unjust and harmful may become no less emotionally aroused, and therefore functionally limited, than do the types of heat of passion killers that have been discussed thus far.” In these and other passages, consistent with many others who argue for provocation as a partial excuse, Professor Fontaine seems to locate mitigation of punishment in a diminished capacity for deliberative reason, in the way that strong emotion reduces the defendant’s ability to deliberate fully. I read in Professor Fontaine’s article as well a suggestion that provocation provides mitigation of punishment because of a sympathetic character flaw. Finally, there are suggestions that this doctrine, which takes particular account of the effects of emotion on decision making, requires a psychological understanding of certain human behavior.

In these features, I identify three problems which I label responsibility temptations, because I think each involves an attractive conception of responsibility that in the end proves problematic for criminal law. I believe these are temptations to be recognized and resisted. They are, in the order in which they will be discussed: the naturalistic temptation, the character temptation, and the capacity temptation.

In a moment I will take up each of these in turn, but before doing so want to take a moment to consider criminal responsibility in its largest sense. How should we start to think about criminal responsibility? My argument is that the choice of a starting point will strongly influence how we see criminal responsibility and particular rules for culpability.

17. Fontaine, supra note 3, at 31.
18. Id. at 40–41.
A. Criminal Responsibility: Beginning with Criminal Law’s Function

The usual starting place for discussions about criminal responsibility is the individual and the individual’s experience of choice. Recalling and reflecting upon our own choice experiences, we imagine the choice experiences of others in different situations. In this respect, most contemporary philosophies of responsibility are agent-focused, concerned with the individual’s experience of—and capacity for—rational choice. The central challenge is how to make responsibility fair in view of the individual’s choice capacities. Beginning the study of criminal responsibility this way leads to a search for general principles of responsibility that will apply across many situations and responsibility contexts. It makes criminal responsibility a subset of moral philosophy, developed by the usual methods of philosophic inquiry. The discussion will involve testing general principles by particular hypotheticals in which the author has full information about an individual’s choice process. All theories are judged by their fairness according to a general conception of individual rational choice.

I think the starting point for any study of criminal responsibility should be the function of the criminal law. Criminal law is after all our subject, not philosophy or psychology. With respect to crimes such as homicide, criminal law must provide nonviolent solutions to violent disputes. The criminal justice system exists to respond to serious wrongdoing in a way that prevents and precludes private revenge. This political and social function makes criminal responsibility potentially distinct from other forms of individual responsibility.

Criminal responsibility is an essentially legal concept. This means that it cannot be understood independent of its legal function. Criminal responsibility is not so much a particular subtype or application of moral philosophy as its own normative genus, with its own criteria for success or failure. In the United States, criminal law constitutes a set of legislatively-enacted and judicially interpreted rules setting out fundamental conduct prohibitions for a highly heterogeneous population that must be applied by lay

persons acting as jurors. Criminal responsibility must take account of these features and needs.

To fulfill its dispute resolution function, American criminal law must address the social meaning and experience of crime. The legal system's norms and verdicts must make moral sense to decision makers and the public alike. I believe this suggests some basic criteria for principles and rules of criminal responsibility.

From a public perspective, criminal law is about crime. It is about chosen conduct harmful to individuals and society. I believe this means that criminal responsibility should be action-focused, assessing the wrongfulness of prohibited conduct according to the reasons for the conduct and its consequences. Reasons and consequences provide the social meaning of crime, to which society officially responds—assuming prosecution and conviction—with its own action statement of criminal punishment.

Criminal law must be morally based, but this morality is relational rather than universal. By this I mean that criminal law sets minimum expectations for how persons in society should interact.²¹ In a democracy, it determines how we are responsible to each other for our acts, and occasionally our omissions to act. It is constructed for a particular society and time. It makes no claim to fairness (or should make no such claim) outside of particular social expectations. Its source of norms is not theological, scientific, or even philosophic, though each of these may prove influential.

The functional perspective on crime also has implications for epistemology. Criminal responsibility should depend primarily on observable conduct and its consequences. As a responsibility structure created from social (political and legal) processes and answerable to society generally, its norms and its verdicts must be socially transparent. They must be comprehensible at some social distance. As a result, criminal law's decisions should turn on the observable actions of individuals—and their consequences—rather than on the internal dynamics of choice.

Does modern criminal law in the United States always meet these criteria? Certainly not. Do these criteria provide a full account of criminal law norms? Certainly not. These criteria do, however, give us some basis for critique of other approaches to responsibility frequently found in the literature and relevant to questions of provocation.

²¹ See John Gardner, The Gist of Excuses, 1 BUFF. CRIM. L. REV. 575, 593–94 (1998) (arguing that excuses from criminal liability are based on minimal social expectations).
Throughout his article, Professor Fontaine argues that what he calls the social cognitive bias of certain individuals should support mitigation of punishment when it influences the decision to kill. The notion seems to be that facts about psychological functioning affect culpability because psychological functioning reveals the nature of the defendant’s choice, a choice which determines liability. The problem is a familiar one. To what extent should the insights of behavioral science shape our judgments of criminal responsibility? The temptation, especially strong if we begin with an agent-centered concept of responsibility, is to believe that scientific observations about the dynamics of decision making must directly inform responsibility. The notion here is that criminal responsibility is a natural concept, depending on discoveries concerning the human condition and human behavior.

Understanding that criminal law is fundamentally about resolving disputes takes us in a different direction. We see that criminal responsibility is a social construction rather than a natural concept. By holding persons responsible for wrongdoing we create accountability; responsibility is our uniquely human contribution to the world. As a result, scientific study of human behavior may provide critical information that will inform responsibility judgments, but such study cannot prove or disprove responsibility principles. Its information about what human beings do can tell us much about what persons will do—science’s predictive powers are potentially impressive here—but criminal law is more about expectation than prediction. We set standards that we know some persons will not meet and that some probably cannot meet. And yet the setting of those standards remains essential to the work of criminal law.

I have elsewhere argued that to the extent there is an overarching principle behind criminal responsibility, it is our effort to find meaning in life. When we assess wrongdoing we are assessing the meaning expressed by the conduct of the accused according to the reasons for which it was taken. This interpretation of meaning depends on reading individual choices in social context. As to meaning itself, science can tell us something about what humans find meaningful, but meaning itself is not a natural subject. It is


not subject to scientific proof or disproof. Whether life has meaning or not cannot be assessed in any observer-independent measurement.

The naturalistic temptation is not just about science, however. We may identify another, related temptation to make criminal responsibility natural via philosophy. This is a temptation to which I am certainly drawn. Perhaps we can, through rigorous philosophic inquiry, discover first principles of fairness on which we may construct all of criminal responsibility. If we think big enough, hard enough, deep enough, we may discover a natural law or principle that lies behind all of our agreed-upon precepts of individual responsibility. Prime candidates for such law or principle are various conceptions of free rational choice.

Adequately addressing this conception of responsibility would require more space than I have here, and more philosophic talent than I can pretend to deploy. I simply want to suggest the possibility of law without such a metaphysical superstructure. We don’t need a metaphysics of fully fair or free choice, because criminal law is about the very practical, social, and political business of resolving critical disputes between citizens. Courtrooms run today and have run for centuries without a complete general conception of how responsibility is fair according to every individual’s situation and capacity.

Modern criminal liability today does not require full could-have-done-otherwise freedom to choose. It does not excuse for internal compulsion. Nor does it require proof of the capacity to appreciate moral reasons. Proof of ordinary rationality—that the individual acted for morally comprehensible reasons prohibited by law—is sufficient. The meaning-action approach, which I have advocated previously, is consistent with this limited view of criminal responsibility. As a result, it is likely to be (and has been) rejected by scholars who believe that a metaphysics of choice is foundational for criminal law. But although we academics are wont to dream metaphysical dreams while our intellectual ambitions often run to the grandest of conceptual schemes, I must ask whether we need a complete metaphysics of choice to do criminal law. Do I need a metaphysics of music to appreciate the work of Eric Dolphy, Ben Harper, or Jean Sibelius, to cite three favorites? Do I need a metaphysics of love to comprehend what I feel for my children and

24. E.g., ERIC DOLPHY, OUT THERE (Prestige/New Jazz 1982); BEN HARPER & THE INNOCENT CRIMINALS, LIVE FROM MARS (Virgin 2001); NEEME JARVI, THE GOTHENBURG SYMPHONY ORCHESTRA (Grammofon AB BIS 1984); JEAN SIBELIUS, SYMPHONY No. 3 (Ondine 2004).
wife? Might there not be wisdom in focusing on the practice itself, its function, and our historical experience of it to ground our understanding? Obviously I think so.  

C. The Character Temptation

Professor Fontaine argues for mitigation on behalf of "the cognitively-biased heat of passion killer [who] (a) did not cause his cognitive bias, and (b) could not have reasonably foreseen how said bias would contribute to his reactive killing." This constitutes mitigation based on a disposition to particular thoughts, feelings and actions: in other words, a character trait. Just as we might blame persons for having certain character traits, so we might excuse them for having certain traits. And again, taking an agent-centered general approach to responsibility, we may construct partial or complete excuses for character traits that inspire, impel or compel wrongdoing—assuming that the formation of those traits was not the fault of the individual. Taking a functional approach to criminal responsibility emphasizes the character of actions rather than the character of the actor, however.

As I have argued, criminal responsibility is fundamentally relational in that it orders relations between persons in society. It is not about character judgment; it does not render judgment on the

25. I do not pretend that this is a full argument sufficient to carry the propositions expressed here. It is more in the nature of a provocation or suggestion than a proof. Here I can at least claim the company of some other scholars who have recently argued for a more pragmatic approach to criminal law scholarship. For examples, see Kyron Huigens, On Aristotelian Criminal Law: A Reply to Duff, 18 Notre Dame J. L. Ethics & Pub. Pol'y 465, 465 & nn.1-2 (2004).

26. Fontaine, supra note 3, at 32.

27. And assuming that we could reliably assess responsibility for the character trait as part of the legal process. For another example of a character view of provocation, see Mousourakis, supra note 1, at 26-28. The literature on character, as relevant to criminal responsibility, is complex and beyond the scope of this discussion. For examples advocating the relevance of character to basic criminal responsibility, see Peter Arenella, Character, Choice, and Moral Agency: The Relevance of Character to our Moral Culpability Judgments, 2 Soc. Phil. & Pol'y 59 (1990). For an account of character's relevance to the wrongness of particular acts, see Huigens, supra note 25, at 484-89. Particularly good on the impossibility of a complete separation of character and act in criminal law and punishment are Gardner, supra note 21, at 575 and James Q. Whitman, Making Happy Punishers, 118 Harv. L. Rev. 2698, 2711-14 (2005) (reviewing Martha C. Nussbaum, Hiding from Humanity: Disgust, Shame, and the Law (2004)).

goodness or badness of persons. It concerns what particular individuals do and how others may be harmed as a result. In this regard criminal law applies a much more modest conception of responsibility than is often understood. In criminal law we do not—or at least I believe we should not—act as God and pass final judgment on a life or character. The only clear exception in current law lies in capital punishment, which is its own story and own problem. It is true that in judging the meaning of action we judge the character of that action and therefore say something about the defendant's character. But the point of criminal judgment should be to judge action, not character.  

D. The Capacity Temptation

Finally, and probably most importantly, the strong implication of Professor Fontaine's argument is that defendants who suffer social cognitive bias lack full capacity for deliberative decision-making. Predisposed to perceive situations as threatening that others would not, such individuals lack the ability to see the reality that others would, triggering powerful emotions that make restraint from violence especially difficult.

Concerns with capacity inform a wide variety of responsibility concepts in the literature on criminal responsibility. One concern is with volitional capacity: individuals must have the ability to choose to do otherwise or their choice is not free and therefore not responsible. Just as we excuse for external compulsion in duress, so we should excuse or mitigate responsibility when a defendant’s choice is internally compelled. Much of the partial excuse literature concerning provocation at least alludes to this concept, with discussions of "explosive" emotions and other mechanistic views of responsibility.

There is another form of capacity theory that is likely more central to Professor Fontaine’s argument, which may be termed

29. Again I must emphasize that this states my conception of an ideal criminal law. Many controversial features of criminal law are character-based, including a wide range of harsh recidivist offenses and special features for the treatment of sex offenders.

30. See Dressier, Why Keep the Provocation Defense?, supra note 1, at 986. Dressier also speaks of the provoked person’s “impaired capacity for self-control.” Id. at 978. For a critique of what they see as a tendency to the mechanistic view of emotion in provocation, as opposed to an evaluative view of emotion, see Kahan & Nussbaum, supra note 16, at 305-23. For a critical discussion of volition analysis in criminal law, see Stephen J. Morse, Uncontrollable Urges and Irrational People, 88 Va. L. Rev. 1025, 1054-74 (2002); Christopher Slobogin, The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial, 30 Am. J. Crim. L. 315, 320-23 (2003).
rationality-capacity. It is the idea that no person should be held criminally responsible—or in the case of provocation fully criminally responsible—if he or she lacks full capacity to comprehend the wrongness of conduct. In contemporary philosophy, individual responsibility is often said to depend on responsiveness to reasons. The individual must have the capacity to respond to moral reasons in order to be held blameworthy for a particular wrongful act.31

My objections to grounding criminal responsibility in capacity assessment, whether volitional or rationality-capacity, are twofold: (1) such discourse seeks information we cannot reliably obtain through observation; and (2) it draws from a universal conception of fair choice rather than the relational assessment of action on which criminal responsibility should rest.

My first, epistemological objection may well be the most important, but I will state it only briefly here, for its significance is better considered as part of the doctrinal discussion which will follow. Both capacity for choosing otherwise and capacity for rationality are states that can only be inferred from observable conduct. We may be able to infer a defendant’s ability to act or comprehend at the time of the alleged crime based on his or her conduct on other occasions, but this cannot be determinative. What matters is the defendant’s abilities at the time of the crime, not on other occasions. Even with full information about the person and incident, it is extraordinarily difficult to distinguish what a person could not do from what he or she chose not to do.32 And criminal cases must be decided on the basis of information that is far from perfect or complete. Rules that demand evidence about internal decision dynamics—which capacity standards do—are likely to produce decisions whose moral basis is opaque to the society at large.

My second objection is that because of its social and political function, criminal responsibility should concern chosen action and its reasons, not capacity for action or capacity for reasons. While I cannot provide a full argument here, I can provide the beginnings of such an argument. Simply put, while capacity conceptions of responsibility appear consistent with much of current criminal law, the tensions and gaps between those conceptions and current doctrine are telling. Where reason for action and capacity analysis

32. See Slobogin, supra note 30, at 322-23.
diverge, criminal law almost always prefers analysis of reasons. Considering criminal law's dispute resolution function, it is difficult to imagine how it could be otherwise.

Capacity theories would seem to preclude responsibility for conduct that is internally compelled, meaning where the individual experiences powerful needs to engage in certain activities that overwhelm countervailing concerns for the welfare of others or self. There are many individuals currently punished by the criminal law who, I think, could make a plausible argument of this sort. Persons addicted to drugs or alcohol, those who engage in compulsive stealing, fire setting or sexual offenses, all would seem to lack significant capacity for free choice with respect to criminality under this model. Nevertheless, capacity theory proponents generally defend responsibility in such cases. It lies beyond the scope of my efforts here to judge the merits of these defenses; it is sufficient to note the potential tension between law and capacity theory here. Instead I will focus on an even starker conflict between current criminal law and capacity theory: the treatment of psychopaths.

When it comes to psychopaths, the conflict between capacity theory and current law could not be more dramatic or basic. As Stephen Morse has noted, most philosophers of law have argued in recent years that psychopathy should excuse from criminal responsibility. Because psychopaths, by definition, lack the capacity for empathy, the core trait needed for conscience and therefore moral choice and moral responsibility, they are not culpable according to capacity theorists. Whether they are seen as lacking a critical aspect of rationality necessary for moral conduct, or lacking a motivational trait essential to being a member of the moral human community, they appear to lack some capacity essential to moral responsibility. Most who ground responsibility in individual emotional and rational capacities for moral choice believe that psychopaths should be treated like other non-responsible persons who suffer from a mental illness that causes dangerous conduct.

33. For a differently stated but in many respects similar argument against capacity understandings of excuse in criminal law, see Gardner, supra note 21, at 579–85.
34. E.g., WALLACE, supra note 31, at 170–75; Stephen J. Morse, Addiction, Genetics and Criminal Responsibility, 69 LAW & CONTEMP. PROBLEMS 165 (2006).
35. Morse, supra note 22, at 521 ("Almost all philosophers think that psychopaths should be excused because they lack the central rational capacities necessary to behave well—the capacity to understand others' interests and the difference between right and wrong."). See, e.g., R.A. Duff, Trials and Punishments 262-66 (1986); Jeremy Horder, Pleading Involuntary Lack of Capacity, 52 CAMBRIDGE L.J. 298, 302–04 (1993); Maya Mei-Tal, The Criminal Responsibility of Psychopathic Offenders, 36 ISR. L. REV. 103 (2002).
Civil powers should be used to protect society from their dangers, but they do not deserve punishment or moral condemnation in the way that criminal law requires.\footnote{37. \textit{E.g.,} Antony Duff, \textit{Psychopathy and Moral Understanding}, 14 Am. Phil. Q. 189 (1977); Morse, supra note 30, at 1072–73.}

Current law holds otherwise. Psychopathy nowhere provides an excuse from liability; its only legal relevance may be as an aggravating factor in sentencing.\footnote{38. \textit{See} Robert Schopp, \textit{Two-edged Swords, Dangerousness, and Expert Testimony in Capital Sentencing}, 30 Law & Psychol. Rev. 57, 66–67 (2006); Lisa Ells, \textit{Note, Juvenile Psychopathy: The Hollow Promise of Prediction}, 105 Colum. L. Rev. 158, 185–207 (2005).} Nor are there, to my knowledge, any credible efforts in the political realm in this country to grant excuse or mitigation based on psychopathy.

Now, it could be the criminal law that is wrong here. But when we consider the essential social and political function of the criminal law, I would argue that the error must lie in the focus on emotional/rational capacity. Psychopaths are exactly who most challenge our social norms and therefore present the greatest social and moral threats to the community.\footnote{39. \textit{See generally} Dave Cullen, \textit{Columbine} (2009) (discussing psychopath Eric Harris); Jack Olsen, \textit{The Misbegotten Son: A Serial Killer and His Victims: The True Story of Arthur J. Shawcross} (1993).} There is a reason, and not a trivial reason, that psychopaths, usually in the form of serial killers, are the favorite villains of Hollywood crime pictures. Their rejection of moral limitation is rational in the ordinary moral sense. They pursue their own aims, their own pleasure and power, in ways that are recognizably and standardly human, though taken to selfish extremes. They represent extreme examples of individual rejection of social-moral norms and challenges to social order. That they may not be able to choose otherwise in a psychological sense does not matter to criminal responsibility because their chosen actions so strongly challenge moral-social norms. Their relational responsibility could not be clearer. In this they seem, to me, to be much the same as compulsive arsonists, thieves and sex offenders, individuals whose rational wrongs demand punishment. Unlike the insane, whose conduct stems from irrational perceptions of the world and therefore may be attributed to irrational reasons, the psychopath’s amorality makes sense to the rest of us. The psychopath lives according to a morally comprehensible, but reprehensible, philosophy: only I count. The criminal law expresses our profound disagreement in concrete terms: conviction and punishment.
The preceding discussion of criminal responsibility has been relatively abstract. We must now apply its learning to criminal doctrine. What does the function of criminal responsibility tell us about criteria for rules of law, especially provocation? I suggest three basic criteria relevant to provocation: 1) the rules must turn on readily observable information about human conduct; 2) they must express clear moral norms; and 3) they must be susceptible of universal application regardless of group status.

The information criterion stems from both basic requirements of criminal responsibility (discussed previously) and from the nature of American criminal litigation. In the U.S. courtroom, one basic source of information about culpability—the defendant—is constitutionally restricted. Defendants cannot be compelled to testify.\(^{40}\) Rules that presume or demand information about the internal decision processes of the defendant, not readily observable by others, are simply unworkable. If interpreted strictly, rules that demand such psychological evidence will undercut the legitimate needs of law enforcement. If interpreted broadly, they will not reliably guide decision-makers.\(^ {41}\)

Rules of criminal law must be morally clear, meaning that their norms must be apparent to lay persons. Assuming we take their role seriously (and certainly that is not always the case), jurors must comprehend the rules of decision from very basic jury instructions. Their actual deliberations are secret and largely unregulated. Rules that turn on expert psychological determinations should be suspect because they are inconsistent with the experience and role of jurors. The normative clarity of criminal rules is also important for the larger legitimacy of criminal law in a democratic society—to its social and political function. Respect for criminal law depends primarily upon respect for its norms and if these are unclear or appear contradicted by decisions, criminal law's function is subverted.

Rules of criminal law must be susceptible of universal application, meaning that they should not invite or permit different readings according to group status such as gender, race, or class. This uncontroversial proposition is nevertheless worth stating ex-

\(^{40}\) Griffin v. California, 380 U.S. 609 (1965).

\(^{41}\) The law of premeditation might be seen as illustrative, with premeditation either being so broadly interpreted as essentially to provide no legal guidance (that is, no content independent of the mens rea of purpose to kill) or its proof requirements become so onerous that they exclude cases involving the highest level of culpability. See Pillsbury, supra note 8, at 100–06.
pressly because while accepted in principle, the possibilities for its violation in practice remain manifold.

III. Provocation Doctrine: Traditional v. Psychological Views of Reasonableness

Finally we are ready to talk about basic provocation doctrine and its most important element, the requirement that the passion experienced by the defendant be in some sense reasonable. To simplify considerably, we can identify two general approaches to reasonableness in provocation law today, what may be called the traditional and the psychological. Professor Fontaine favors the psychological. I favor the traditional. After describing these two approaches, I will discuss their doctrinal implications using three sets of problem cases to illustrate.

Under the traditional view of provocation, reasonableness represents an objective, social-moral standard for provoking events and the emotions they inspire. We look to see whether the reasonable person would have been similarly impassioned in the situation and whether sufficient time elapsed from the original wrong until the time of the homicide such that a reasonable person would have calmed down. Those jurisdictions which impose categorical requirements for provoking events present the clearest examples—though not the only examples—of the traditional view.\textsuperscript{42} Such jurisdictions recognize certain categories of provoking events as potentially sufficient for mitigation, the most important of which (i.e., most common) is a significant physical assault on the defendant or a loved one. The notion is that even if the defendant was overcome by passion as a result of the victim's conduct, that conduct must be such as to similarly impassion the reasonable person. Legally speaking, this requires a provoking act within one of the predetermined categories. This approach to provocation requires moral-social assessment of the reasons for the defendant's emotion and therefore is consistent with the justification side of the doctrinal debate.

Under the traditional approach, provocation is effectively restricted to the passions of anger and fear. The inquiry almost always concerns whether the reasonable person would have experienced a

\textsuperscript{42} Dressler, supra note 10, at 572–74.
similar degree of anger/fear as did the defendant at the time of
the homicide.\textsuperscript{43}

The psychological approach to reasonableness, exemplified by
the Model Penal Code's (MPC) rule of extreme emotional distur-
bance, envisions a more individualized and psychological
assessment of emotion. The MPC requires that the defendant have
killed under the influence of an extreme emotional disturbance
for which there is a reasonable explanation or excuse, which rea-
sonable explanation or excuse is assessed from the defendant’s
own point of view. Putting aside what I and some others believe to
be the incoherence of this joining of objective reasonableness with
individualized psychological assessment,\textsuperscript{44} it is clear that the draft-
ers of the MPC meant to change traditional reasonableness analysis
significantly. It is more focused on the defendant’s actual experi-
ence of choice and his or her individual choice-capacity
impairment than traditional reasonableness assessment contem-
plates.\textsuperscript{45}  

Jurisdictions that adopt the psychological approach place no re-
striction on the type of emotion experienced. The emotion simply
must be strong enough to disturb reason, to interfere with the or-
dinary operation of conscience. We must take account of the
strength and effect of the individual defendant’s emotions on or-
dinary decision-making. But that’s not all.

\textsuperscript{43} One question here is whether the law should consider a defendant’s individual his-
tory of victimization independent of the interaction with the victim. See, e.g., Stuart M.
Kirschen, Thomas Bartlett & Gary J. Galperin, \textit{The Defense of Extreme Emotional Disturbance}, 10
provocation when he killed a man who solicited him for sex; the defendant had been sexu-
ally abused as a teen). A similar issue arises in self-defense. See \textit{People v. Goetz}, 497 N.E.2d
41, 52 (N.Y. 1986) (reasoning that defendant’s past victimization by persons other than the
victims may be relevant to assessing reasonable fear).

\textsuperscript{44} \textsc{Pillsbury}, supra note 8, at 131–34; Norman J. Finkel, \textit{Achilles Fuming, Odysseus
Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction}, 74 \textsc{Neb. L.
(defending the MPC’s broader view of provoking circumstances and expressing general,
though not unqualified, support for the Code’s greater individualization of the reasonable
person).

\textsuperscript{45} Some American jurisdictions that use common law language in their provocation
rules nevertheless follow the psychological view in their interpretation of reasonableness.
to the psychological view. See Jeremy Horder, \textit{Between Provocation and Diminished Responsibility},
10 \textsc{King’s C. L.J.} 143, 145–46 (1999). Nevertheless the debate in the United Kingdom con-
tinues, see Gardner & Macklem, supra note 1, and in other Commonwealth nations as well,
see Heather Douglas, \textit{Assimilation and Authenticity: The ‘Ordinary Aboriginal Person’ and the
Provocation Defence}, 27 \textsc{Adelaide L. Rev.} 199 (2006); Caroline Forrell, \textit{Gender Equality, Values
and Provocation Law in the United States, Canada and Australia}, 14 \textsc{Am. J. Gender Soc. Pol’y &
Even under the MPC, the defendant’s emotion must be *in some sense reasonable* to mitigate punishment. Defining this form of reasonableness is difficult. It is not a purely objective, social-moral standard; it is meant to be more sensitive to the particular situation and psychology of the defendant than the traditional approach. Yet there remains a normative reasonableness limitation that depends on some assessment of ordinariness or understandability. The presumption here is that psychology, whether understood in its scientific sense or in a more folk wisdom sense, will provide sufficient norms for decision-making. It envisions the decision maker accepting mitigation because, “I could imagine losing it just the way he did,” or “I know I’ve never felt like that, but I know some people, regular people, might react that way.” Conversely, the decision-maker might reject mitigation, deciding: “That’s just too extreme, too weird, too idiosyncratic to be reasonable.”

Reasonableness defined in this fashion creates potentially significant proof problems in the courtroom, especially in its apparent invitation to introduce expert psychological testimony. Recall the earlier point about the importance of rules that contemplate decisions based on observable evidence. Proponents of the psychological view of reasonableness uniformly place considerable trust in decision-makers, especially jurors, believing that their life experience and judgment, applied to complex human interactions, will produce more just results than would a more directive rule. It is worth noting, however, that even given broader discretion, juries—and courts for that matter—will not necessarily accept the invitation to read reasonableness in the more individualized fashion that proponents envision.

---

46. *See* People v. Casassa, 404 N.E.2d 1310, 1313 (N.Y. 1980) (affirming trial court’s rejection of EED defense where appellate court noted that the trial judge had found “that the defendant’s emotional reaction at the time of the commission of the crime was so peculiar to him that it could not be considered reasonable so as to reduce the conviction to manslaughter”). For a rationality-capacity explanation of mitigation here, see Morse, *supra* note 31, at 300–01.

47. A test like EED that arguably centers on the internal dynamics of the defendant’s choice privileges evidence to which only the defendant has immediate access. Or, if we believe that psychologists or other mental health experts have special insight here, it would privilege their testimony. For a critique of expert involvement and the MPC rule, see Willard Gaylin, *The Killing of Bonnie Garland* (1982). *See also* Singer, *supra* note 1, at 322. Cf. Kirschner, Bartlett & Galperin, *supra* note 43, at 130 (although generally supportive of EED and expert testimony, questioning whether experts should give opinions about the reasonableness of EED).


49. *See* Kirschner, Bartlett & Galperin, *supra* note 43, at 117 (arguing that, based on a study of cases in one New York county, defendant’s plausible fear of the victim was the most important factor in prosecutor, judge and jury assessments of the reasonableness of EED);
The real test for any rule of criminal law is how it resolves cases, especially difficult or problem cases. Here I consider three sets of cases: the first being Professor Fontaine's problem cases—instances of cognitive-emotive dysfunction based on special sensitivity to threat; the second, involving male-female violence in intimate relationships; and the third, involving defendants suffering from diminished rationality.

A. Problem Cases I—Cognitive-Emotive Dysfunction & Violent Predisposition

The traditional approach would place most cases of cognitive-emotive dysfunction beyond provocation's reach. The psychological approach would at least consider them for mitigation.

Concerning the perpetrators of this kind of violence, I finally find a point of basic agreement with Professor Fontaine. He writes: "In psychology, there is considerable empirical literature that demonstrates that aggressive (or violent) individuals are biased in favor of interpreting ambiguous provocations as definitively intentional, hostile, and provocative." His description of individuals who are predisposed to read situations as threatening that others would not, and are predisposed to respond violently, is also supported by the criminological literature. It is entirely consistent with what we know about common patterns of reactive violence, including reactive homicide, especially among young men. The question is what this data about human psychology and behavior means for the criminal law.

Professor Fontaine uses psychological terms (cognitive-emotive dysfunction) to describe what could also be called a character trait. It is a predisposition to perceive human interaction in a particular way and to react in a particular way. It perceives more threats of violence in the world and judges a greater need for violent response than would most persons in the same situation. It is a bias that can frequently be traced to violent cultures. Living in a com-
community in which violent threats are common and in which young males are particularly at risk, a perceptive and reactive bias in favor of violence is rational. It is adaptive. It is the code of the street.\textsuperscript{52} The same dynamic holds true for male prison communities.\textsuperscript{53} But should the prevalence of violence in a particular community, should its culture of violence, reduce the punishment for a killing? Is this a rule we want to generalize in the criminal law?

The psychological approach attempts to incorporate the scientific insights of psychology and norms of capacity and character analysis. My concerns with all of these were previously stated in the discussion about criminal responsibility. But I can state my objection more simply: the psychological approach does not provide the reliable, general moral norms that criminal law requires. At most the psychological approach establishes a standard of averageness, but averageness is not moral. The criminal law sets an expected standard of conduct, a standard that in some instances will be higher than the predicted behavior of many persons in a particular community. If we permit averageness to be our standard, then those communities which presently suffer the most violence will be communities where the criminal law's sanction for violence will be the most lenient. I do not think this is what criminal law should do.

B. Problem Cases II—Gender & Domestic Violence

The shortcomings of the psychological view of reasonableness have been most extensively documented with respect to violence against women. Donna Coker has written about how patriarchal rage may be partially condoned by psychological understandings of provocation.\textsuperscript{54} Victoria Nourse has written more recently about how male rage against separating female partners might support mitigation of punishment under the MPC, though there should be no mitigation in such cases.\textsuperscript{55} The psychological approach might also permit arguments for mitigation by persons especially threatened

\textsuperscript{52} See Anderson, \textit{supra} note 51, at 32–34.

\textsuperscript{53} See, e.g., Kate King et al., \textit{Violence in the Supermax, A Self-Fulfilling Prophecy}, 88 Prison J. 144, 151 (2008).


\textsuperscript{55} Victoria Nourse, \textit{Passion's Progress: Modern Law Reform in the Provocation Defense}, 106 Yale L.J. 1331 (1997). But see Kirschner, Bartlett & Galperin, \textit{supra} note 43, at 116 (arguing that based on survey of cases in one New York county, decision makers are unlikely to find EED reasonable when it is based on male separation rage).

Initially, consider male-female homicides inspired by a woman's decision to separate from a male partner. We know from extensive study of domestic violence that the most dangerous time for a woman in an intimate relationship begins when the woman announces her intention to leave and continues through the early stages of physical separation. During this time a significant number of men experience overwhelming passion that inspires violence against the departing partner. Such men appear to fit the profile of individuals with a cognitive-emotive dysfunction. They experience strong emotions that appear to leave them with, psychologically speaking, reduced ability to choose nonviolent responses. The male experience of rage may be traced to upbringing and culture, causing the man to believe that his worth as a man depends on his woman's loyalty, and that any breach of that loyalty must be punished.

Should such defendants receive the benefit of provocation? I think not. Focusing on the reasons for these killings, we see homicides committed out of patriarchal, jealous rage, killings that should be categorized as murder not manslaughter.

There are other problem cases involving gender and homicide in which the killer is female. I refer to cases in which an abuse victim, usually a woman, kills her abuser, but not in direct response to serious abuse. Instead the homicide occurs well after the worst abuse. If we are sympathetic to such defendants and believe they should be candidates for provocation, current law presents significant obstacles. Traditional provocation law does not work well because of its insistence on a cooling off period and thus its reliance on a male model of quick rage and attack. The abused female who refrains from violent response until she finally can stand it no more may exceed the time limits of the cooling off period.\footnote{See Pillsbury, supra note 8, at 151-55.} The psychological view of reasonableness appears more attractive here because of its elimination or modification of the timing requirement and, perhaps, broader view of the emotions eligible for the heat of passion. But there is a hidden, practical difficulty. Recall the averageness which seems to be the normative bottom line to
the psychological view of reasonableness. This standard may implicate some very old and deep-rooted concepts of masculinity and femininity. According to these concepts we expect men to externalize their reactions to injury in open anger and acts of violence, but expect women to internalize their reactions in depression and sorrow. According to this view, a woman who reacts to a partner's abuse with rage and violence seems abnormal.

C. Problem Cases III—Mental Illness

Discussion of the last set of problem cases must be brief because it threatens to take us away from the most basic issues of provocation. These are cases involving mental illness, causing the defendant to suffer diminished rationality at the time of homicide. One of the aims of the MPC's EED rule was to include such cases as potentially within the purview of mitigation. Indeed, I believe this ambition to be the major cause of the rule's internal incoherence. I believe that if we are to recognize a doctrine of diminished responsibility, it should be clearly distinct from that of provocation.

A particularly appealing case for diminished responsibility might be a homicide committed under the influence of postpartum depression. We know of many instances in which women without any history of criminality or violence suffer severe depression following childbirth due to the enormous hormonal changes that come with the conclusion of a pregnancy. Some suffer such a severe depression that they no longer care for their child and even seek its death. The depression can sometimes cause psychosis, in which case it may provide the basis for an insanity claim. More often, the woman will retain sufficient rationality to make the insanity defense unlikely. But given the unexpected and situational nature of


60. See also Dressler, Why Keep the Provocation Defense?, supra note 1, at 985–89. For an argument along similar lines dealing with English law and the need to distinguish between provocation and diminished responsibility there, see James Chalmers, Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism, 2004 Crim. L. Rev. 198; Horder, supra note 45.


the condition and its powerfully distorting impact on thoughts and feeling, perhaps the condition should support mitigation for the homicide of an infant. Assuming this to be true, should this mitigation be found within the doctrine of provocation?

The temptation is to say yes. Provocation doctrine reduces a murder charge to manslaughter, perhaps in accord with our intuitive reaction to the offense. It does so based on the profound effect of strong emotion on the defendant's decision-making, which also seems implicated here. The individual suffering from postpartum depression seems one who is overwhelmed by emotion, leaving her with a severely restricted capacity for lawful choice. The apparent psychological similarity between these situations, however, masks important normative differences.

As I have argued previously, provocation should mitigate punishment because the defendant had good reason for anger/fear toward the victim. In postpartum depression, the defendant suffers from irrationality manifested in hostility toward her infant that is incomprehensible in ordinary human terms. She has no reason to hate or feel threatened by her infant. She has no reason to despair for the child's future. If the law is to provide mitigation here, that mitigation must depend on the irrationality manifested in her strong emotion. In diminished responsibility, mitigation comes from the lack of any rational reason for defendant's hostility and despair. In provocation, mitigation comes from our judgment that the defendant's anger/fear was justified. Trying to accommodate both of these situations in the same rule just invites confusion.

To sum up, this review of three types of problem cases indicates serious inadequacies in the psychological approach to reasonableness in provocation. Psychology simply does not provide reliable norms to distinguish between the expectations of a particular subculture and the moral norms of a society as a whole. It would permit, though it would not require, mitigation for predictable but, I would argue, socially unacceptable violent passions. Finally, if we are to recognize mitigation for diminished responsibility, we should do so under a different rule than provocation.

63. For a recent argument supporting a diminished responsibility rule in the United States, see Morse, supra note 31.
64. See Gardner, supra note 21, at 590–92.
65. Of course the traditional approach has its shortcomings as well. As I have argued elsewhere, it also needs significant reform to prevent discrimination according to gender, and also perhaps according to race and class. See Pillsbury, supra note 8, at 155–59.
IV. ANALYZING EMOTION AND REASONS FOR ACTION

Professor Fontaine does not believe that provocation does or should involve moral assessment of the defendant's emotion. His position depends significantly on his original framing of the justification/excuse distinction, which I have previously criticized. He titles the section dealing with this argument: "Justifiable Emotions Do Not Make Justifiable Behaviors," making the argument that justified anger can never justify homicide. I quite agree, but do not see how this furthers the discussion. Again, a legally provoked killing is a serious crime and therefore cannot be a justifiable behavior. Does anyone argue otherwise?

Professor Fontaine also hints at more substantive reasons for his rejection of normative analysis of emotion. He argues that emotion is not a proper subject for criminal law's judgment. Initially he suggests a categorical distinction between emotions, thoughts and action; he considers only the last of these distinctions relevant to criminal responsibility. "The distinction is that, because thinking and feeling do not in and of themselves cause harm to others, one should be free to think and feel as one likes, but the same, of course, cannot be said of behavior." Here Professor Fontaine's choice of words is revealing. Strictly speaking, criminal law does not judge behavior, but action.

We punish for chosen wrongful actions, not just behavior with harmful consequences. We punish—or do not—according to the reasons for which persons act, reasons which we ascertain by reading human action in context. We interpret conduct according to a wealth of human experience with choice, which includes a wealth of understanding about thoughts and emotions. Similarly, how could we engage in mens rea analysis or analysis of affirmative defenses without considering what the defendant aimed to accomplish or what he or she knew or was aware of? All of these implicate the defendant's thoughts about his action. How could we reliably judge mens rea or affirmative defenses without considering the emotions that drive most human action, including criminal

66. Fontaine, supra note 3, at 46.
67. Id. at 49.
68. Behavior is the preferred term in psychology because it is a nonjudgmental reference to observable conduct. It does not, by itself, differentiate the human animal from other creatures whose conduct can be observed and analyzed. Criminal law of course is concerned with passing judgment on human action and only makes sense for humans.
conduct? Criminal law that excludes consideration of a person's thought or emotion would be literally unrecognizable. 69

The same is true of any moral reasoning. Scholars may be skilled at discussing moral issues without (apparent) expression of or reliance on emotion, but that does not mean that emotions can finally be separated from morals. Professor Fontaine suggests, particularly in his footnote criticizing Hume, that in moral analysis emotion is epiphenomenal. He suggests that moral cognition—ideas about morals—precedes feelings about morals (emotions). But is that true? 70 Here, as elsewhere in his article, Professor Fontaine treats as separate and distinguishable parts of the human experience that are, in my experience, inextricably intertwined. It strikes me as equally plausible, per Hume and Adam Smith (among others), that our moral sense normally originates in our feelings. 71

This is not to say that emotion determines morals. But most moral positions begin with feeling, with a sense of right and wrong that then is made articulate by deliberative reasoning. I suspect this is as true for criminal law scholars as for anyone else. Moral reasoning does not end here; discussion and further deliberation about morality can change our ideas—and feelings. 72 Reason may alter emotion. The point is that our moral sense involves all of our perceptive and deliberative faculties, which absolutely include emotions.

As both critics and supporters of retribution have noted, a great deal of the moral impetus behind criminal law comes from emotional reactions to wrongdoing. P. F. Strawson famously argued that

69. An obvious example is premeditation, with its concern with deliberation and coolness. Another example is self-defense, where emotions and cognitions are central. More basically, we can only ascertain mens rea by reading the defendant's action in light of our background understanding of human experience, an understanding which includes our most intellectualized and deliberative faculties, but including our most emotional and intuitive.

70. Fontaine, supra note 3, at 48 n.67. At a minimum, the distinction suggested by Professor Fontaine between thought, emotion and action requires more definitional work to support the normative argument presented.


72. Though I recognize this is more the exception than the rule. More often, when one intellectual argument fails to justify our feelings we prefer to develop new intellectual arguments in support rather than change our feelings. Making this point in a characteristically vigorous fashion is Ron Allen, Moral Choices, Moral Truth and the Eighth Amendment, 31 HARV. J. L. & PUB. POL'Y 25 (2008).
the reactive emotions—the emotions inspired by wrongful acts—are essentially constitutive of our judgments of responsibility.\textsuperscript{73} Bypassing the usual dialectics of free will, Strawson argued that because we feel anger and upset at injustice, we create responsibility to assuage those feelings through nonviolent response. Reactive emotions are natural to the human condition. To imagine intelligent beings who do not react emotionally to wrongdoing against themselves or loved ones is to imagine a species that lacks a fundamental trait of humanity.

Emotion's influence on decision-making is not uniformly good or bad. Neither can it be generally eliminated or suppressed. Emotion's influence is instead normatively complex and nearly ubiquitous.\textsuperscript{74} Justice according to law requires emotive analysis and regulation, tasks that demand careful attention to language, context and norms.

Language poses a challenge to emotive regulation because our standard vocabulary distinguishes emotion types but not their normative basis. In this respect our language of emotion is more psychological than moral. Labels such as anger or fear or sadness say nothing about the source of the anger or fear or sadness, about whether they are—or to what extent they are—justified. For example, anger can be justified or unjustified; the former might support mitigation in provocation while the latter might be a key to proving a hate crime. These linguistic difficulties are not insurmountable, of course. In fashioning criminal law, we often develop specialized terms and phrases to respect normative distinctions missed by ordinary language. It just means that if we are to take explicit notice of emotions and criminal law—and I think sometimes we must—then we must be equally explicit about the need for normative analysis of those emotions.

In conclusion, I see no reason why assessing reasons for emotion should present insurmountable problems for criminal adjudication. In provocation, the assessment of emotion is essentially an assessment of motivation. The presence of strong emotion is not usually a point of controversy; what is contested is the source of—the justification or excuse for—that strong emotion. Analyzing whether a strong emotion is justified, as I believe doctrine should require, at most represents a redescription of a task that provocation


\textsuperscript{74} These are common themes in the contemporary literature on law, philosophy and emotion. For an introduction to the literature, see Kahan & Nussbaum, \textit{supra} note 16; Terry Maroney, \textit{Law and Emotion: A Proposed Taxonomy of an Emerging Field}, 3 L. & HUM. BEHAV. 119 (2006). \textit{See also The Passions of Law} (Susan Bandes ed., 1999).
has performed for centuries. To the extent that motive analysis is controversial, that must be a subject for another day.\textsuperscript{75}

V. Conclusion

The most serious issue with respect to provocation today is whether the doctrine should survive. Arguments for its elimination based on its pro-violence and pro-patriarchy tendencies have led to its abolition in two Australian states.\textsuperscript{76} Its elimination has been actively considered elsewhere.\textsuperscript{77} Were it not for the severity of penalties for murder in this country, which I believe to be excessive in some cases, I might also support provocation's demise. But I also believe that there will always be some cases where the defendant's justified anger/fear should support lesser punishment and that this distinction is important enough to make it the basis for a liability determination (guilty or not guilty) rather than leaving it to the discretion of a sentencing judge.

Assuming we retain provocation, we need to be clearer about its norms. The modern trend to make reasonableness a more individualized and psychological concept is in my view inconsistent with the basic legal needs of a highly heterogeneous society. For criminal law to do its basic political and social work in responding to criminal homicide, we need provocation rules that provide clearer normative guidance than the psychological approach does or can provide.

In closing, I want to express one final frustration with the state of current legal scholarship about provocation. It concerns methodology. Particularly in the United States, the discussion about provocation often proceeds at a high level of abstraction, drawing on philosophical concepts and methods to ascertain the law's nature and to describe (prescribe?) its rationale. As is true of so much contemporary American legal scholarship, the assumption is

\textsuperscript{75} I have argued that motive analysis represents just another, albeit more ambitious form of reason analysis similar to that required by standard mens rea forms—a difference more of degree than of kind. See Pillsbury, supra note 8, at 82–83, 110–24. For arguments supportive of motive in determining criminal responsibility, see Guyora Binder, The Culpability of Felony Murder, 85 Notre Dame L. Rev. 965 (2008) (justifying felony murder in part based on motive analysis); Carissa Byrne Hessick, Motive's Role in Criminal Punishment, 80 S. Cal. L. Rev. 89 (2006). For a more critical account distinguishing between motive in offense definition and excuses from liability, see Martin R. Gardner, The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1993 Utah L. Rev. 635.

\textsuperscript{76} See Forell, supra note 45, at 52–59.

\textsuperscript{77} See id.; Helen Brown, Provocation as a Defense to Murder: To Abolish or to Reform?, 12 Austl. Feminist L.J. 137 (1999); Edwards, supra note 59; Howe, supra note 59; see also Horder, supra note 7, at 186–97; Dressler, Why Keep the Provocation Defense?, supra note 1.
that good theory will produce good law. I do not doubt that this can be true. But I think that working in the opposite direction will be more fruitful.

For example, in provocation we scholars might devote more attention to discussion of paradigm cases. What might serve as central, concrete examples of provocation today? Traditionally these examples have arguably been more influential in setting the doctrine’s parameters than have general rule statements. This suggests that our efforts might be more productive in describing such paradigm cases rather than worrying about jurisprudential categories, which courts and legislatures generally ignore. Why are unlawful arrest and discovery of adultery still presented in cases and other materials as paradigmatic examples of this doctrine? What are the instances of provocation on which we can all agree today? If we are to keep this doctrine, I think we must decide on paradigm cases that fit contemporary values. For myself, I believe such cases would center on provoking acts of physical violence and violation of sexual autonomy. Others may see the matter differently.

Finally, the discussion of provocation should be informed by a better understanding of legal reality. We need more empirical work on how the doctrine is currently understood and applied. How do prosecutors, defense attorneys, judges and juries evaluate cases in terms of heat of passion? We need studies of plea bargains, trial outcomes, and sentencing. A great deal of legal scholarship, my own included, depends on speculation about practice based on a small number of published appellate decisions. This is a weak foundation for legal reform.

78. For a good example of such work, see Kirschner, Bartlett & Galperin, supra note 43.