2009

How Not to Argue That Reasonable Provocation is Not an Excuse

Peter K. Westen
University of Michigan Law School, pkw@umich.edu

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/iss1/8

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.
Reid Fontaine draws two conclusions regarding the partial defense to murder of reasonable provocation—one regarding its substantive content, the other regarding its formal classification:

(1) Substantive Content. Fontaine implicitly concludes that, with respect to defenses framed in terms of "reasonable" or "adequate" provocation, an actor who kills one or more victims ought to possess a partial defense of reasonable provocation if, based upon what the actor believes (whether he believes it reasonably or unreasonably), the actor suffers an indignity or experiences an outrage that leaves him so emotionally aroused—and that in a jury's judgment would leave a person of reasonable values so emotionally aroused—that the actor finds it difficult, though admittedly not impossible, to resist the killing.¹

(2) Formal Classification. Fontaine concludes that the partial defense of reasonable provocation ought to be classified in its entirety as a partial excuse—and not even partly as a partial justification.

I agree with both of Fontaine's two conclusions, and, indeed, I have previously written to that effect.² Unfortunately, while I agree with Fontaine's conclusions, I do not think he adequately supports them. Fontaine's arguments in favor of Conclusions 1 and 2 are not likely to persuade anyone except those who already accept them.

I will address Fontaine's arguments in Parts I and II and offer my own supporting arguments in Part III. Before I do, however, I should say something about how he approaches the relationship between Conclusions 1 and 2. As between the two, Conclusion 1 is

---

¹ I infer this from the way Fontaine would resolve the cases he classifies as 1(a), 1(b), 2(a), and 2(b), and from his approval of MODEL PENAL CODE § 210.3(1)(b) (1980), which, in abandoning references to "provocation," goes even further toward exculpation.

fundamental, while Conclusion 2 is derivative. That is to say, one cannot formally classify a partial defense of reasonable provocation as an “excuse” rather than a “justification” without first establishing its substantive content. Once one establishes its substantive content in accord with Conclusion 1, its formal classification is self-evident. The partial defense set forth in Conclusion 1 is self-evidently a partial excuse because it consists entirely of (i) what an actor believes (as opposed to what is true), (ii) how much he is agitated (as opposed to how much his victim deserves to suffer), and (iii) the degree to which he finds it difficult, albeit not impossible, to resist doing what the law emphatically wishes him to resist doing—namely, killing in anger.

Accordingly, I would expect Fontaine to proceed, first, by advocating Conclusion 1 and, then, taking the evident step of drawing Conclusion 2. Instead, Fontaine does the opposite. He starts and largely ends by claiming to establish that reasonable provocation is a partial excuse, and he does so because he implicitly assumes that if reasonable provocation is a partial excuse, its substantive content must consist of Conclusion 1. I think he is mistaken on both counts: he fails to demonstrate that reasonable provocation is entirely a partial excuse, and he fallaciously assumes that in so far as reasonable provocation is entirely a partial excuse, its substantive content must correspond to the defense set forth in Conclusion 1.

I. Fontaine's Arguments in Favor Of Excuse

Fontaine makes several arguments in support of treating reasonable provocation as entirely a partial excuse, all of which are questionable.

A. Appellate Rulings in Adequate Non-Provocation Cases

Fontaine's principal argument is to invoke appellate rulings that sustain the defense in what Fontaine calls instances of “adequate non-provocation”—which are to be distinguished from what I shall call “classic provocation” cases (and what Fontaine calls “adequate provocation” cases).3 “Classic provocation” cases consist of non-mistaken and non-accidental homicides that are directed against

the sources of reasonable provocation. Fontaine’s “adequate non-provocation” cases consist of ones in which, although the indignity or outrage that an actor perceives is otherwise adequate in law, the person who falls victim to the actor’s homicidal rage did not inflict that indignity upon the actor or cause the outrage. Fontaine further divides such adequate non-provocation cases into four subsets.

1. Actors who are not provoked by anyone.
   a. Reasonable mistake. An actor, A, intentionally kills V, while reasonably but mistakenly believing that V inflicted an indignity or outrage that leaves A feeling homicidal rage.
   b. Unreasonable mistake. An actor, A, intentionally kills V, while unreasonably and mistakenly believing that V inflicted an indignity or outrage that leaves A feeling homicidal rage.

2. The actor, though provoked, was not provoked by his victim.
   a. Accidental homicide. An actor, A, intending to kill the source of his provocation, S, accidentally kills V instead.

Fontaine identifies appellate rulings within each subset that sustain the partial defense of reasonable provocation, despite being adequate non-provocation cases. He offers those decisions as evidence that reasonable provocation is a partial excuse.

I think that Fontaine is mistaken in three respects. His first mistake concerns subsets 1(a), 1(b), and 2(a). Even if one assumes, arguendo, that Fontaine’s appellate rulings show that those subsets of adequate non-provocation are partial excuses within those jurisdictions, it does not follow that classic provocation cases within those jurisdictions—non-mistaken and non-accidental homicides in reasonable provocation—are also entirely partial excuses. On the contrary, the appellate rulings in subsets 1(a), 1(b), and 2(a)

4. I take the term “classic” from Finbarr McAuley, *Anticipating the Past: The Defence of Provocation In Irish Law*, 50 Mod. L. Rev. 133, 152-55 (1987). See also id. at 140-41 (referring to the “paradigm” of reasonable provocation).
5. Fontaine, *supra* note 3, at 34.
6. *Id.* at 36.
7. *Id.* at 38 (describing this as “unintentional misdirection”).
8. *Id.* (describing this as “knowing/intentional misdirection”).
are consistent with the position that, while mistaken and accidental homicides in reasonable heat of passion may be partially excused, the reason they are partially excused is that, if they were not mistaken or accidental—that is, if they constituted classic provocation cases—they would be partially justified.

To illustrate this proposition, consider an analogy in the area of self-defense. Assume that the following cases arise:

1. Self-defense—an actor, A, kills a person, P, rightly believing that killing P is necessary to prevent P from imminently and wrongly killing A;

2. Accident in self-defense—an actor, A, rightly believing that killing P is necessary to prevent P from imminently and wrongly killing A, attempts to kill P but accidentally also kills V; and

3. Mistaken self-defense—an actor, A, kills a person, P, while honestly but mistakenly believing that killing P is necessary to prevent P from imminently and wrongly killing A.

Every jurisdiction provides a complete defense in 1. Most jurisdictions provide complete or partial defenses in 2 and 3, depending upon whether the accidents or mistakes were reasonable. However, even if one assumes, arguendo, that the defenses in 2 and 3 are partial excuses, it does not follow that the defense in 1 is also an excuse. On the contrary, the defense in 1 is a classic instance of justified self-defense. The reason that defenses in 2 and 3 are complete or partial excuses is that they are homicides that, were they not mistaken or accidental, would be justified.

To be sure, Fontaine argues that if any homicides in reasonable heat of passion are partial excuses within a jurisdiction, including mistaken and accidental homicides, then all homicides in reasonable heat of passion must also be partial excuses within that jurisdiction. He takes this position because he thinks it follows from the premise that justification and excuse are mutually exclusive grounds of exculpation and hence cannot apply to the same conduct. Fontaine puts it as follows:

[Excuse] "admits to the existence of a social harm" and to the wrongfulness of the act. In contrast, a justification is an assertion that the act is acceptable and makes no such concession. In this way, excuse is a lower moral standard than justification, and, as such, the defense cannot be a justification (requiring it to always meet this higher moral standard) if it can, at any
time or in any instance, be rationalized and viewed as an excuse.\(^9\)

I agree with Fontaine that justification and excuse are mutually exclusive in that when a single instance of conduct is justified, it lacks anything to be excused (and vice versa). However, the cases at issue are quite distinct. Rather than involving a single instance of conduct that, if justified, is no longer a subject of excuse (and vice versa), they involve discrete instances of conduct—some of which are instances of mistaken reasonable heat of passion, and others of which are instances of non-mistaken reasonable heat of passion. That justification and excuse are mutually exclusive with respect to any single instance of conduct does not prevent some instances from being justified while others are excused. Indeed, Fontaine later concedes as much in discussing self-defense.\(^10\)

Second, if it is true that non-mistaken and non-accidental homicides in heat of passion constitute partial justifications (as we must assume till Fontaine demonstrates otherwise), some commentators would go further and claim subset 1(a) constitutes partial justifications, too (subset 1(a), it will be recalled, consists of cases in which actors act reasonably and in good faith, albeit in ways that result in mistakes). Some commentators take the position that “justified” conduct includes conduct that is reasonable and in good faith, even if it turns out to be unfortunate.\(^11\) Fontaine may disagree with that view of justification and excuse, as I do.\(^12\) But he cannot claim that subset 1(a) constitutes partial excuses without defending his view of justification and excuse against those who advance an alternative view.

Third, and finally, regardless of how many appellate rulings Fontaine may cite in support of exculpation in subsets 1(a), 1(b), 2(a) and 2(b)—and, as he must admit, he cites relatively few—they cannot possibly do the work that Fontaine expects of them. Fontaine’s goal, after all, is to persuade readers that the partial defense of reasonable provocation ought to consist of certain substantive elements, including those subsets. One cannot prove what the defense ought to be by pointing to what it occasionally or even frequently is. If Fontaine is right that reasonable provocation ought to consist of the elements set forth in Conclusion 1, nothing in appellate rulings can possibly hurt him. By the same token,

\(^9\) Id. at 42 (footnotes omitted).
\(^10\) See id. at 50 (discussing self-defense).
however, if Fontaine is wrong and reasonable provocation ought to consist of prompt and unmistakable killings by reasonably provoked parties of persons who actually provoke them, nothing in appellate rulings can much help him.\textsuperscript{13}

To be sure, the existence of supporting case law does establish one thing: it shows that certain legal rules are possible. "Ought" does presuppose "can." Hence, by showing that a legal rule can exist, its advocates can negate one argument that might otherwise be used to deny that it ought to exist. However, that hardly supports Fontaine's use of appellate rulings. The existence of MPC § 210.3(1)(b) within the jurisdictions that have adopted it proves that rules which correspond with Conclusion 1 are possible.

\textbf{B. Justification as Prevention of "Further Unjust Harm"}

Fontaine's next argument is premised upon an assertion regarding legal theory rather than positive law. Fontaine asserts that homicides in reasonable provocation cannot be regarded as partially justified because they fall outside what the law regards as justified conduct. An actor is justified in killing another, he says, only "to prevent further unjust harm [to himself or another]"\textsuperscript{14} and to prevent "greater unjust harm."\textsuperscript{15}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{13} Fontaine recognizes that these decided cases (which favor his position) do not in themselves "make the doctrine one of excuse." Nevertheless, he argues that the cases implicitly buttress his position because rejecting his position means deeming the cases to be "dead wrong." Fontaine, supra note 3, at 42. Unfortunately, Fontaine does not acknowledge that, given the conflict in case law regarding whether reasonable provocation is justification or excuse, id. at 28–29, 41, accepting Fontaine's position also means deeming many cases to be "dead wrong"—namely, the many cases, some of them in the majority, that reject Fontaine's position.
\item \textsuperscript{14} Id. at 43. Fontaine qualifies his rejection of justification by stating that there may be one area in which killing in reasonable provocation is justified, i.e., where an actor is wrongly attacked and, in the agitation to defend himself, uses excessive force to protect himself. However, Fontaine argues that such cases ought to be characterized as matters of self-defense—and not as matters of reasonable provocation, as the courts commonly characterize them. See id. at 44–45. I think Fontaine is mistaken in both respects. First, although doctrines of perfect and imperfect self-defense are appropriate regarding actors who genuinely but mistakenly believe that the force they are using is necessary, self-defense is inappropriate regarding actors who, in their fury at being attacked and having to protect themselves, know they are using excessive force. The only doctrine that is appropriate there is reasonable provocation. Second, by conceding that killings in reasonable provocation of the latter kind are partially justified, Fontaine implicitly concedes everything, because there is no distinction between the latter cases and other cases in which actors intentionally retaliate against persons whom they know wronged them, knowing that doing so is not necessary to protect themselves.
\item \textsuperscript{15} Id. at 47.
\end{itemize}
\end{footnotesize}
Fontaine errs in stating that justification is confined to preventing "further unjust harm,"[16] but the real problem lies elsewhere. (Justification is not confined to preventing "unjust" harms, for it also extends to a passerby who turns a runaway trolley into the path of a workman on the tracks where the alternative harm is to allow five workmen to die. And justification is not confined to preventing "further" harms, for it also extends to preventing original harms.) The real problem, however, is that Fontaine begs the question at issue. The question is whether the fact that wrongful provokers morally deserve retaliation from those whom they wrongfully provoke (which Fontaine seems to accept as true)[17] is evidence that when lawmakers provide the latter with a partial defense to murder, they do so in part because they regard the retaliation as partially justified. Fontaine's answer is "no," but only because he assumes away the question. He simply assumes that when lawmakers extend justification to the prevention of harms (as they do, for example, with respect to self-defense), they also mean to confine justification to the prevention of "greater unjust harm[s]," and that if courts rule otherwise, they violate "legality."[19] That is, Fontaine assumes that when lawmakers provide a partial defense for actors who kill those who wrongfully provoke them and who morally deserve retaliation, they cannot be doing so because they even partly regard such retaliation as partially justified, for that would contradict the only thing that, he says, justification can be. That is not an argument on Fontaine's part against his opponent's position. It is a simple denial of his opponent's position.

C. The Unjustly Provoked, but Cool and Collected Actor

Justification cannot be a rationale for the partial defense of reasonable provocation, Fontaine argues, because justification is inconsistent with the defense's requirement of heat of passion. To illustrate, Fontaine juxtaposes two actors who are both wrongly subjected to an identical indignity and who, therefore, are identical to being partially justified in killing their respective

---

16. Id. at 43.
18. Fontaine, supra note 3, at 43 ("Certainly, one who wrongfully provokes another may well deserve to be punished . . . .").
19. Id. at 47, 44 n.54.
provokers—the difference being that one actor is cool, collected and entirely self-possessed, while the other acts in a state of extreme emotional arousal. If justification were a rationale for the partial defense of reasonable provocation, Fontaine says, then the law would grant both actors a partial defense to murder. Yet lawmakers do the opposite: they give a partial defense to the emotional actor but deny it to the other. To Fontaine, this shows that justification cannot be a governing rationale. Fontaine puts it this way:

[I]n the case that heat of passion is treated as a partial justification, there emerges a rather perverse implication. If it is required that the killer need experience substantial emotional upset as a result of his reasonable belief of provocation, and that, but for his emotional upset, he would not have lost self-control and killed the provoker, the provocation-resistant person (or person who maintains his control despite being seriously provoked) is placed squarely at a disadvantage. For it is the provocation-resistant person in this context who, though he has the reasonable belief that he has been seriously provoked, and therefore is entitled to some degree of retributive aggression, fails to meet the requirements of heat of passion and is convicted of murder. From a justification perspective, this is problematic because it means that the person who exhibits greater resolve (in that he maintains his rational self) is punished more severely, although, everything else being equal, he was wronged by the provoker every bit as much, and therefore was just as entitled to retaliate.

I am afraid that Fontaine misunderstands those who advocate the justification rationale. No one claims that partial justification is a sufficient rationale for the partial defense of reasonable provocation. Rather, the claim is that actors are not entitled to a

20. Id. at 45-46.
21. Id.
22. Susan Rozelle argues that the classic partial defense of reasonable provocation ought to be abolished and replaced with a considerably different and narrower partial defense for persons who commit homicide in the rightful belief that they must use force to defend themselves against wrongful aggressors but nevertheless err in using lethal force where doing so is excessive. And she further argues (again wrongly, in my view) that such a partial defense—if it existed—would consist entirely of partial justification. See Susan D. Rozelle, Controlling Passion: Adultery and the Provocation Defense, 57 RUTGERS L.J. 197, 217, 223 (2005). Yet even she acknowledges that actors should not benefit from her proposed defense unless they resort to excessive force under the “emotion[s]” of “anger and fear.” Id. at 228.
substantial mitigation in punishment from murder to manslaughter unless their homicidal conduct is both partially justified and partially excused: partially justified by virtue of the wrongful conduct of their victims; and partially excused by virtue of their emotional arousal.23 Wrongful provocation alone may suffice to reduce a capital offense from the death penalty to extended imprisonment, even for an actor who is cool and collected.24 But no one claims that wrongful provocation suffices by itself to reduce a homicide from murder to manslaughter absent heat of passion.

D. Analogy to Assault in Reasonable Heat of Passion

Fontaine denies that partial justification can be a rationale for reducing a provoked actor’s punishment for homicide because, if it were, he says, it would also reduce a provoked actor’s punishment for assault, something the law presently rejects. Fontaine puts it this way:

Let us consider reactive violence in the form of criminal battery, by which a person intentionally inflicts harm or injury upon another. If such a behavior is provoked, even egregiously, we do not justify the behavior when it would not prevent further unjust harm... How could it be, though, that a reactive killing committed in the heat of passion is partially justified if a mere provoked battery that is enacted in a fit of rage is not? The incompatibility of this juxtaposition is immediately evident.25

With due respect, Fontaine’s argument is flawed on three counts. First, he is wrong to analogize homicide to assault with respect to legislatively-mandated mitigation. Homicide is unique in its range of possible criminal penalties, ranging from the most severe punishment known to law to punishments that are relatively mild, e.g., penalties for negligent homicide. Because homicide is unique in its range of punishments, it is also unique in the attention that legislatures devote to grading it. Assault carries a much narrower range of punishment and, hence, legislatures tend to delegate issues regarding its mitigation to judges in sentencing. If assault carried the same sentencing range as homicide, provoked

25. Fontaine, supra note 3, at 43-44.
assault would almost certainly carry a legislatively-mandated reduced tariff too.

Second, Fontaine is mistaken in thinking that because legislatures believe that reasonable provocation is sufficiently significant to mandate mitigation regarding homicide from murder to manslaughter, they do not wish judges to take reasonable provocation into account when sentencing defendants for assault. On the contrary, the law of sentencing specifically provides otherwise. The Federal Sentencing Guidelines allow judges to reduce a defendant’s sentence when “the victim’s wrongful conduct contributes significantly to provoking [an] offense.” And the Model Sentencing and Corrections Act treats it as mitigating that “the defendant acted under strong provocation.”

Second, if the law of assault counted against partial justification being a rationale for reasonable provocation, it would also count against Fontaine’s argument that partial excuse is its rationale. For assault is not legislatively graded in accord with reasonable provocation at all.

E. An Alternative Explanation of What is “Justified”

Fontaine’s final argument against justification being a rationale for reasonable provocation responds to the following question: “If justification is not the rationale, why are courts and commentators so eager to talk about ‘justification’ in connection with reasonable provocation?” Fontaine responds by arguing that the language of “justification” is, indeed, appropriate, but it is appropriate not in reference to the actor’s conduct but in reference to his state of aroused anger.

I agree with Fontaine that the substantive content of the partial defense of reasonable provocation ought to mirror Conclusion 1. And I also agree, therefore, that what is justified in such cases is the defendant’s anger at the indignity he believes he has suffered—as opposed to any aspect of the retaliatory harm he inflicts in response. However, all that Fontaine shows is that, if one agrees with him about the defense’s substantive content, one can still invoke the language of “justification.” He does not show that those who disagree with him about the defense’s substantive content—and who use “justification” in its traditional sense—are mistaken.

28. Fontaine, supra note 3, at 48.
II. FONTAINE'S CONCEPTION OF THE RELATIONSHIP BETWEEN CONCLUSIONS 1 AND 2

Classically, reasonable provocation consists of a partial defense to murder for an actor who has been unjustly subjected to an indignity or outrage that leaves him emotionally agitated—and that would agitate a person who appropriately valued his relationship to others—and who promptly responds by killing the provoker and the provoker alone. Every jurisdiction recognizes that reasonable provocation in its classic form is a partial defense, and it is that form of the defense that commentators have in mind when they claim that it is predicated in part on justification.  

Many jurisdictions have moved beyond reasonable provocation in its classic form by expanding its parameters. Variations on the classic defense consist of extending the defense variously to:

1. actors who are reasonably mistaken in thinking that their victims inflicted such indignities or outrages,
2. actors who, while intending to kill their wrongful provokers, accidentally kill others,
3. actors who are unreasonably mistaken in thinking that their victims inflicted such indignities or outrages,
4. actors who intentionally kill non-provokers, and finally,
5. actors who, rather than feeling provoked, suffer unrelated emotional disturbances such as depression and post-traumatic stress syndrome.

Moreover, regardless whether they confine the defense to its classic form or further adopt Variations 1–5, jurisdictions must resolve the further question: “Who decides whether a hypothetical person of reasonable values would have been emotionally agitated—the legislature, the presiding judge, or the jury?”

---

29. See McAuley, supra note 4, at 150–51; von Hirsch & Jareborg, supra note 3, at 252 & n.35.
30. See WAYNE R. LAFAVE, CRIMINAL LAW § 15.2(g) (4th ed. 2003).
31. See id.; McAuley, supra note 4, at 140.
32. See LAFAVE, supra note 30, § 15.2(g); A.P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE § 2.5 (i), at 344.
33. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.07(C)(2), at 580–81 (4th ed. 2006); SIMESTER & SULLIVAN, supra note 32, § 2.5(i), at 344.
Although commentators disagree about whether the classic form of the defense is partly predicated on justification, and although some commentators further maintain that Variation 1 is partly an instance of partial justification, everyone would agree that Variations 2, 3, 4 and 5 are solely instances of excuse. This is significant because it means that, if one argues, as Fontaine does, that Variations 4 and 5 are preferable to Variations 2 and 3, it is not enough to claim, as Fontaine does, that reasonable provocation is entirely an excuse.\(^{36}\) After all, Variations 2 and 3 are just as much excuses as Variations 4 and 5. Rather, in order to persuade readers that Variations 4 and 5 are preferable to Variations 2 and 3, one is obliged to do what Fontaine fails to do: one must defend Variations 4 and 5 as substantively preferable to Variations 2 and 3.

III. HOW TO ARGUE THAT REASONABLE PROVOCATION IS ENTIRELY AN EXCUSE

I have focused thus far on flaws in the way Fontaine argues that reasonable provocation is entirely an excuse. I will now say something about how I think one should go about defending what Fontaine and I both accept—namely, the substantive content and formal classification of a reasonable provocation defense. The argument involves three steps: (1) to establish that the partial defense of reasonable provocation must, at the very least, consist of Variations 1 and 2; (2) to establish that it may also consist of Variation 3; (3) to establish that it may consist of Variation 4 as well; and, finally, (4) to show that what mitigates murder to voluntary manslaughter may also consist of Variation 5.

A. An Argument for Variations 1 and 2

The first step is to show that reasonable provocation is not even partly a justification—even in its classic form—and that, being entirely an excuse, it must extend at least to Variations 1 and 2.

One way to refute the claim that classic provocation is a partial justification is to show that if it were accepted and extended, it would produce counterintuitive results. The claim, in essence, is

\(^{36}\) See Fontaine, supra note 3, at 40-41.

that a victim's bad behavior in inflicting a wrongful indignity upon a defendant makes the victim's death a lesser evil, however slight, than it would otherwise be, thus reducing a defendant's responsibility for the death. Moreover, because it is an argument regarding a victim's possessing a lesser right to life—not one regarding the defendant's state of mind—it applies regardless of when the indignity occurs and regardless of whether a defendant is aware of it. The consequences of such a claim are implausible. Among other things, if the claim were valid, it would undoubtedly play out in death-penalty cases where criminal penalties are the most severe and reductions in responsibility the most significant. It would require that death-penalty statutes be amended to provide mitigation for defendants who coolly and collectedly kill individuals who inflicted indignities on them at some point in the past, regardless of whether defendants are aware of the indignities and regardless of the malice with which they act.

The claim would also affect the relationship between murder and manslaughter. In order to qualify for the substantial reduction in sentence from murder to manslaughter, a defendant must show, at the very least, that he was emotionally agitated or in heat of passion at the time he killed. However, if reasonable provocation in its classic form is partly a justification, then the only additional requirement, beyond the defendant's emotional agitation, is that the victim partly deserves the harm that befalls him by virtue of having inflicted a wrongful indignity upon the defendant, regardless of whether the defendant is aware of it. Thus, consider the following hypothetical:

**Conservative Hate Radio**

David, a lifetime member of the NRA, listens avidly to several conservative talk radio hosts who claim that "liberals" are responsible for all the country's ills and must be utterly "destroyed." Already in a fury, David learns from a news report that the liberal candidate for President who favors gun control has just taken a lead in the state polls. Finding himself at the candidate's headquarters, David grabs his rifle from its rack, enters the headquarters and, in his fury, shoots and kills

---

38. I say this on the premise that justification is entirely "deeds"-based and not "reasons"-based. This is not the place to defend that view, though no one does it better than Paul Robinson. See Paul Robinson, Structure and Function in Criminal Law 95–124 (1997); see also Westen, supra note 12, at 299–310.

39. See Ashworth, supra note 23, at 240–42; Dressler, supra note 33, § 31.07(B)(1).
V, a clearly-marked pizza-delivery boy who is delivering pizza to the headquarters, not realizing that V was having an affair with David's wife.

If reasonable provocation in its classic form were partly a justification, David would possess a defense to murder because he is both partly excused and partly justified: partly excused, because he is in a state of extreme emotional agitation, and partly justified, because by virtue of wrongly inflicting an indignity on David, his victim V partly deserves the harm David inflicts on him. Yet it is counterintuitive that David would possess a defense to murder under provocation in its classic form, given that he was unaware of V's affair with his wife.40

To be sure, advocates of justification might challenge the hypothetical, arguing that a victim’s wrongful conduct does not partly justify a killing unless the victim is also causally responsible for the killing. However, that is easily incorporated into the hypothetical. Assume, for example, that V is delivering pizza at the fatal moment because he exchanged shifts with a fellow worker in order to later rendezvous with David's wife. In that event, the indignity V inflicts on David, i.e., his affair with David's wife, is causally related to David killing V. Yet what is lacking, and what intuition seems to require, is that David be aware of the indignity, and that his awareness kindle his heat of passion.

If we are right to conclude that justification is no part of the defense of reasonable provocation in its classic form, the conclusion is significant not only for the defense in its classic form, but also for Variations 1 and 2. For if reasonable provocation is not even partly a justification based on actual indignities victims inflict, the defense must consist entirely of a partial excuse—that is, it must turn on actors’ state of mind regarding what victims have done, rather than on facts about what victims have actually done. And if it consists of what actors believe rather than what victims have actually done, it ought to apply whenever actors reasonably believe in good faith that their intended victims have subjected them to indignities or outrages that, when they occur, are adequate in law—including when, as in Variations 1 and 2, their victims have not actually done so.

At the very least, a person has a partial excuse to homicide if, though his intended victim did nothing that even partly warrants

40. Cf. Dressler, supra note 33, § 31.07(B)(4) (observing that the law of voluntary manslaughter requires that the victim’s provocative act cause the actor’s emotional agitation); Simester & Sullivan, supra note 32, § 10.5(i) (same).
being killed, the person acted in an emotional state of anger at and/or fear of his victim that (1) rendered it difficult, albeit not impossible,\textsuperscript{41} to conform his conduct to the law, and (2) elicits moral sympathy.\textsuperscript{42}

\textbf{B. An Argument for Variation 3}

The second step, which involves Variation 3, is less a matter of logic than of judgment, a judgment that depends in turn on the severity of punishments for murder as opposed to manslaughter. The difference between Variations 1 and 3 is that, while both actors are mistaken in thinking their intended victims have subjected them to indignities, actor 1’s mistake is reasonable, while actor 3’s mistake is unreasonable. Like all actors who kill in reasonable heat of passion, both actors 1 and 3 are blameworthy, and they will both be punished for the homicides they commit—the only question being whether the charge will be murder or manslaughter. To be sure, the actor in Variation 3 possesses an additional level of blameworthiness because in addition to possessing the blameworthiness of killing in reasonable heat of passion, the actor in Variation 3 possesses the additional blameworthiness of having made an unreasonable mistake. However, given that actor 1 qualifies for a partial defense to murder, the question remains: “Is it appropriate to punish actor 3 for murder when the only thing that distinguishes him from actor 1 is negligence on his part?” The answer, I think, turns on the severity of the punishment for murder within the jurisdiction and the disparity in punishments within the jurisdiction between murder and manslaughter. The greater the punishment for murder and the less the disparity between murder and manslaughter, the greater actor 3’s claim that he too ought to be punished for manslaughter rather than murder when the only thing that distinguishes him from actor 1 is negligence.

\textsuperscript{41} Rozelle denies that the partial defense of reasonable provocation is an excuse, arguing that to be an excuse, the defense would have to be premised on the ground—which she disputes—that people who kill in anger cannot control themselves. Rozelle, \textit{supra} note 22, at 217–26. However, Rozelle begs the question. She assumes that partial excuse must rest on an actor’s inability to control himself, when, in reality, it rests on an actor’s having great difficulty in controlling himself. \textit{See} Dressler, \textit{ supra} note 37, at 974–75.

\textsuperscript{42} \textit{See} Sullivan, \textit{supra} note 37, at 424.
C. An Argument for Variation 4

The final step regarding the partial defense of reasonable provocation is Variation 4, which is the most contested case. The difference between Variations 1–3 and 4 is that actors 1–3 intend to retaliate against persons who provoked them, while actor 4 intends to strike a person who he knows did not provoke him. It is easier to sympathize with actors (like actors 1–3) who have difficulty refraining from retaliating against those who profoundly wrong them than with actors (like actor 4) who have difficulty refraining from striking third persons, because the former must struggle with conflicting moral inclinations, while the latter does not. Actors 1–3 suffer from two, conflicting moral norms: a norm against taking the law into their own hands and a norm against letting a wrongdoer escape chastisement. The norm against taking the law into one’s own hands is, of course, the stronger, which explains why even reasonably provoked actors are punished for the homicides they commit. However, the conflict lessens the ability of actors who already find themselves in a state of emotional agitation to negotiate the conflict correctly. In contrast, actor 4 does not suffer from the same moral conflict and hence has less excuse for resorting to violence.

Nevertheless, there may be cases in which—given the severity of the penalty for murder and the disparity in penalties between murder and manslaughter—murder is too severe a charge for defendants like actor 4. Consider, for example, the following case:

**A Ruinous Ponzi Scheme**

Henry has worked all his life as an auto mechanic and, despite lacking the benefit of an employer-based retirement account, has succeeded in saving enough to purchase a home with a mortgage and to retire at age 65 with a modest nest egg. Henry is approached by Victor, a member of his church and the brother of an acquaintance, about investing in a “Retirement Investment Fund” that, Victor said, guarantees a return of 12% annually. Henry can see that Victor’s fund was successful because Victor’s brother and other members of the church who had invested early with Victor are prospering handsomely. So, over his wife’s objections, Henry takes a home

43. *See Uma Narayan & Andrew von Hirsch, Three Conceptions of Provocation, 15 CRIM. JUST. ETHICS* 15, 19 (1996) (arguing that the defense of reasonable provocation ought to be confined to such instances of moral conflict).
improvement loan and invests it and his life savings with Victor—only to discover that Victor’s fund is a giant ponzi scheme that has swallowed Henry’s life savings. Henry tries to be stoic, but when he loses his house to foreclosure and his wife leaves him, he stormed into Victor’s brother’s sumptuous house, demanding to know where Victor is. Resentful that Victor’s brother had prospered in a scheme that left him impoverished, and furious that Victor’s brother does not know where Victor is, Henry shoots and kills him and, then, turns the gun on himself and tries, unsuccessfully, to kill himself. Henry is tried for first-degree murder, a crime that carries a mandatory penalty of life imprisonment. Henry requests that the jury also be instructed on voluntary manslaughter, a crime that carries a maximum penalty of twenty years imprisonment.

Reasonable people may differ about whether first-degree murder and mandatory life imprisonment are too severe in Henry’s case. The fact that they may disagree is precisely the point. If the jury in Henry’s case is instructed on voluntary manslaughter, it might well agree that Henry qualifies for voluntary manslaughter—or it might not. However, the jury will never have the chance to do so unless the jurisdiction adopts Variation 4 and allows the jury to be instructed accordingly. Nothing is lost by allowing the jury to decide. But much may be gained because the jury, having been properly instructed to eschew impermissible considerations such as racism and homophobia, might agree with Henry and convict him of manslaughter instead of murder.

D. An Argument for Variation 5

Variation 5 differs in nature from the preceding variations. Variations 1–4 are all partial defenses of reasonable provocation, that is, defenses predicated upon an actor’s emotional agitation which has its source in righteous anger at a triggering indignity he believes he has suffered. In contrast, what Variation 5 adds to Variations 1–4 is a level of partial excuse predicated upon non-provocation-based sources of diminished responsibility, rather than perceived violations of honor.

In some ways Variation 5 is easier to defend than Variation 4 because Variation 5 is the genus of which Variations 1–3 are species.

44. Cf. Westen, supra note 2, at 157.
Actors are partially excused under Variations 1–3 because of the combination of two components:

(a) Extreme emotional agitation—the actors are in states of extreme agitation that make it difficult for them (albeit not impossible) to act toward their intended victims on the basis of settled moral norms, and

(b) Reasonableness in light of the indignities the actors perceive themselves to have suffered—the public regards it as morally reasonable for the actors to find themselves in states of extreme emotional agitation.

Like Variations 1–3, Variation 5 also consists of components a and b, with one important exception: Variation 5 does not confine component b to the source of emotional agitation that component b contains in italics. Variation 5 does not require that the extreme emotional agitation that actors experience and that the public regards as morally reasonable be based upon perceived indignities. Rather, Variation 5 encompasses extreme emotional agitation that has its source in anything with which the public morally sympathizes, whether that source consists of indignation that the public regards as morally appropriate, or pathological depression or post-traumatic stress syndrome that the public does not attribute to moral failing on an actor’s part. If actors (who are more likely to be men than women) are partially excused for extreme agitation based upon perceived indignities to their honor, actors (who are more likely to be women than men) should also be partially excused for extreme agitation based upon pathological depression that is not due to any moral failing on their part.

CONCLUSION

I originally hesitated to comment on Professor Fontaine’s article because I basically agree with him on his essential conclusions. However, I found myself troubled by his supporting arguments. I have tried here to show that, while Fontaine’s arguments are flawed, other arguments can be advanced to support his conclusions.