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THE IRREDUCIBLY NORMATIVE NATURE OF PROVOCATION/PASSION†

Stephen J. Morse*

In his interesting and provocative article, *Adequate (Non) Provocation and Heat of Passion as Excuse Not Justification*,¹ Professor Reid Griffith Fontaine makes important claims. The first is that provocation/passion must be a partial excuse as an analytic matter. To prove this, he points to cases in which provocation/passion mitigated murder to manslaughter even though there was no adequate provocation, but only a reasonable or an unreasonable belief that provocation had occurred, or in which there was real provocation, but the person killed was not the provoker. He also uses an analogy to some cases of mistaken self-defense and the lack of entailed connection between justified emotion and justified behavior to make his argument that provocation/passion analytically must be a partial excuse. Finally, although somewhat obscurely, Fontaine suggests that analysis of the psychological components of provocation/passion proves that this doctrine must be a partial excuse.

I agree with Professor Fontaine that provocation/passion is best interpreted as a partial excuse, but the ground for my conclusion is normative and not analytic. Indeed, I fear that he has not made the analytic case in large part because he begs a question about failed justifications that has only a normative and not an analytic answer. This Essay first briefly provides my own understanding of provocation/passion. In the course of doing so, I address Professor Fontaine's argument that provocation/passion should also be applied to people with *provocation interpretational bias*.² I then turn to why Fontaine's case for partial excuse is not analytically airtight.³

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1. Reid G. Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27 (2009).

2. *Id.* at 31. For convenience, I will refer to this condition as PIB.

3. I have many doctrinal quibbles with Professor Fontaine's characterizations and arguments, but these may be more a matter of exposition than of substance. In any case, these quibbles do not affect the arguments of this Essay and I shall not address them.

I. PROVOCATION/PASSION AS A PARTIAL EXCUSE

What is the best justification for claiming that some people who kill intentionally in response to provocation should be found guilty only of the lesser homicide crime of voluntary manslaughter? Most rational adults understand two aspects of our psychological natures. First, things that happen can make people extremely angry. Second, we have much more difficulty behaving rationally when we are in states of such extreme emotion or other states that diminish rationality.⁴ If the provoking circumstances are of the type that might make ordinary, average (“reasonable”) people angry, then being in that state of diminished rationality is not fully the person’s fault. Indeed, if the provocation is sufficient, we might think that the person is not at fault at all for being in this state. Whether we think the diminished rationality is partially or fully justified or excused by the provocation does not seem important at this stage. Even if it is justified, which I am inclined to think, that does not entail that further action in that state is also justified, as Fontaine rightly notes.⁵

Sufficiently diminished rationality that is not the agent’s fault is a classic excusing or mitigating condition. Having the capacity for rationality is a traditional criterion for responsibility that explains why we mitigate or excuse the wrongdoing of minors and of some people with mental abnormalities. Thus, if an agent commits intentional homicide while in that partially or fully innocent state of diminished rationality, there is a strong case for mitigation. We can argue normatively about what sorts of provocations make diminished rationality partially or fully innocent and about the degree or type of diminished rationality that is sufficient to mitigate. But the principled case for mitigation follows from moral and penological theories that the law already explicitly or implicitly adopts.

Does it follow from these impeccable credentials that the law must adopt some provocation/passion mitigation? Of course not.

4. I recognize that it is common in doctrinal and everyday discussion to describe this state as one of “loss of control,” but I think that this locution is confusing, misleading and incapable of operationalization except in terms of diminished rationality. See Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025 (2002); Stephen J. Morse *Against Control Tests for Criminal Responsibility*, in CRIMINAL LAW CONVERSATIONS 449 (P. Robinson, K. Ferzan & S. Garvey eds., 2009). Professor Fontaine asserts that emotional upset must be a but-for cause of loss of self control in provocation/passion cases. Fontaine, *supra* note 1, at 45. But no such causal relation must be shown, nor must loss of self-control be independently demonstrated. It is sufficient if the defendant simply did kill in the heat of passion in response to the provocation. As a result of such potential confusions, I will use diminished rationality as the basis for the partial excuse throughout this Essay.

5. Fontaine, *supra* note 1, at 48. As I discuss below, this point does not have the analytic implications that Professor Fontaine claims.

A reasonable legislator might vote to abolish it on consequential grounds—for example, to maximize deterrence when emotions are in play and incapacitate those who show themselves to be dangerously liable to the influence of strong emotions. Or the reasonable legislator might abolish it on retributive grounds—for example, people must be expected to manage the serious consequences of their emotions, even if they are predisposed to untoward emotions, and they are morally at fault and deserve punishment if they do not. Abolishing observed or suspected sexual infidelity as a legally adequate provocation reflects both types of reasons, although infidelity frequently enrages ordinary people.

Two questions that arise in response to the partial excuse account of provocation/passion are why it is not a full excuse and why it is limited to homicide. The answer to the first is that the law is unforgiving towards diminished rationality claims, especially if the diminished rationality is occasioned by the type of strong emotions that are ubiquitous in interpersonal interaction. Even if it is not fully the agent's fault that he is enraged, he is expected to manage that rage and not to kill. Suppose, however, that the provocation is enormous and virtually any agent, no matter how morally well-constituted, would have had his capacity for rationality vastly undermined, and the defendant was in this state. Such cases may not arise frequently, but if they arise, there would be a strong case for a full excuse similar to an insanity defense. Cases of so-called "temporary insanity," which is not an independent doctrine, may be a response to precisely these types of cases.

The answer to the second question is more perplexing. If the account of partial excuse is accurate, then it seems generic. Imagine an adequately provoked and enraged arsonist who immediately burns the home of the provoker rather than killing him. In principle, there is no reason not to furnish the arsonist a partial excuse. It may be difficult doctrinally because not all crimes are divided as conveniently into degrees as homicide, but the principle is clear and this administrative problem could probably be solved doctrinally. Moreover, the account of the justification for provocation/passion that I provide also suggests that criminal law might justifiably create a generic partial responsibility mitigation based on innocent or partially innocent diminished rationality arising from many sources in addition to provocation, such as mental abnormalities of various kinds.⁶

6. See Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003).

Such a proposal has little practical hope of being adopted at present, but it provides a useful heuristic with which to judge Professor Fontaine's proposal to extend the provocation/passion mitigation to killers who apparently demonstrate PIB. Assuming that the bias is sufficiently serious, there is a case for arguing that such people have diminished rationality. The case is distinguishable from provocation/passion because the latter involves normal emotions but the former is a cognitive dysfunction. Why should this matter, however? In both cases the defendant is not fully at fault for being in a state of diminished rationality and in both cases there is equal reason to expect the person to manage (or not manage) the emotions or misperceptions. Simply because PIB is a cognitive dysfunction does not mean that the agent cannot be expected to recognize that he has a problem and to take steps to avoid it. A generic partial responsibility mitigation would have the resources to address PIB cases and other cases of diminished rationality without deforming the criterion of provocation.

Professor Fontaine should join me in calling for the creation of such a doctrine. There would be difficulties creating the precise criteria and evaluating individual cases, but this is a constant feature of excusing standards and a poor reason not to try to achieve justice.

In short, whether the criminal law should retain the provocation/passion doctrine of partial excuse, whether it should adopt a broader mitigating standard, and what the contours of any such doctrines should be are irreducibly normative questions. It is a matter of how we want to live together. But are we analytically committed to a partial excuse theory of provocation/passion? It is to that question that the next section turns.

II. IS PROVOCATION/PASSION NECESSARILY A PARTIAL EXCUSE RATHER THAN A PARTIAL JUSTIFICATION?

This section begins by providing the strongest possible argument for why provocation/passion is entirely or partially a partial justification. Any claim that analytically it cannot be a partial justification will not be persuasive unless it logically defeats the strongest claim that it is. The section then turns to the various arguments Professor Fontaine raises and tests their logic against the strongest claim for partial justification.

A. Provocation/Passion As A Partial Justification

The provocations that traditionally sufficed as legally adequate all involve a serious moral and sometimes legal injury or wrong to the defendant. Mutual combat, injury to a family member, seeing an Englishman deprived of his rights, and, most famously, discovering one's spouse in the act of infidelity are serious violations of the duties we owe each other. Even in jurisdictions that have a more permissive standard, exemplified by the English rule,⁷ the provocation must be sufficiently severe to arouse the "heat of passion" in the ordinary reasonable person. Although Professor Fontaine rightly notes the variation among jurisdictions concerning the criteria for provocation, he does not and cannot deny that the mitigation requires a provocation and that the provocation must always be serious.

The prime counterexample is the Model Penal Code's "extreme mental or emotional disturbance" doctrine (EMED),⁸ which does not require any provocation whatsoever, but this is definitely not a common law provocation/passion doctrine and no one would deny that it is fully a partial excuse. One cannot use its existence to buttress the argument that provocation/passion must be a partial excuse because it is a distinguishable doctrine. The Model Penal Code provision is also applicable to reckless homicides, further distinguishing it from provocation/passion, which applies only to intentional homicide. One can in part infer from the American Law Institute's substitution of this doctrine for provocation/passion that the A.L.I. recognized the ambiguities and insufficiency of provocation/passion as a partial excuse. Finally, it is scant consolation for Professor Fontaine's position that this doctrine has gained such limited acceptance and has been repealed by many states that adopted it.

In short, the provocation required by the provocation/passion mitigation must always be a serious physical, psychological or economic wrong. And note that many jurisdictions are not permissive and retain the traditional categories. Hence, the provoker certainly deserves a serious return for his wrongful behavior.⁹ The provoker does not deserve to die, but he does deserve a just desert.

The necessity of serious provocation *prima facie* establishes the partial justification explanation for provocation/passion mitigation.

7. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 3 (Eng.).

8. MODEL PENAL CODE § 210.3(1)(b) (1962).

9. Andrew J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 307-08 (1976) ("[A]n individual is to some extent morally justified in making a punitive return against someone who intentionally causes him serious offence . . .").

But it appears that this prima facie case is rebutted by the further requirement that the killing must be done in the subjective heat of passion, which Professor Fontaine, following Professor Joshua Dressler,¹⁰ claims establishes that the doctrine is primarily about the emotions. This appearance is deceptive, however. If the killer is not angry, that might well indicate that the killer was not particularly provoked and that the wrong done was not the primary reason for the homicide. After all, a partial justification requires that the defendant acted for the partially justifying reason. Sometimes a defendant can act without a genuinely justifying motivation even if the defendant is reasonably aware that he has one. Imagine a defendant who recognizes accurately that his worst enemy is about to try to kill him. The defendant believes that he is quicker on the draw than his enemy and kills the enemy because he hates the enemy and not because he wants to save his own life. It is an open question whether this defendant should have available the justification of self-defense even though he was the would-be victim of imminent, wrongful deadly force.¹¹

Heat of passion may be a standard evidentiary rule to establish genuine justifying motivation because it would be difficult to identify “cold anger” cases. Probably few adequately provoked people are not angered, however, and the anger is clearly justified even if the killing is not. The victim of provocation has been seriously wronged. Terming provocation/passion a concession to the frailty of human nature does not dispose of the question of whether the doctrine is one of justification or excuse. Frail human nature explains wrongful action whether arising from partial excuse or partial justification. The good person does not kill even if terribly provoked.

Even if the argument for heat of passion as a proxy for the justificatory motive is unconvincing, a second argument exists for the partial justification view. Perhaps provocation/passion is a mixed mitigation that requires both that the victim deserved some return and that the defendant acted in a state of diminished rationality when he made it. This is distinguishable from Professor Fontaine’s characterization of “alternating” theories for the doctrine and it does not mean that there are two necessarily independent defenses that have been illogically collapsed into one.¹² It is perfectly coherent to view each type of explanation as necessary but only jointly

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

11. I return *infra* to such cases and the role they must play in Professor Fontaine’s argument.

12. Fontaine, *supra* note 1, at 42 n.50.

sufficient. If this were true, it would explain the contours of the doctrine that have vexed courts and commentators alike. Fontaine is incorrect when he implies that heat of passion has no place in a partial justification doctrine.¹³ Indeed, Professor Fontaine explicitly recognizes the possibility of a mixed defense.¹⁴ There is nothing illogical or incoherent about considering provocation/passion as a mixed mitigation.

*B. Professor Fontaine's Argument That Provocation/
Passion Must Be a Partial Excuse*

Professor Fontaine does not deny that provocation/passion *ab initio* might logically be a partial justification (although this is in some tension with the argument that the partial excuse view is analytic). Rather, he claims that the partial justification account is flatly inconsistent with the law and thus provocation/passion must be a partial excusing condition. To support this claim, Fontaine first usefully creates a taxonomy (for which we are in his debt) of common law decisions that are apparently inconsistent with the justification account. For example, he notes that it seems inconsistent to permit the justification in cases in which the victim is known to be neither the provoker nor closely associated with the provoker. There are jurisdictions that do not allow the mitigation in this case, however. As Fontaine candidly admits,¹⁵ the validity of the partial excuse account is not entailed by the observation that some jurisdictions are fully aligned with it. I would go further. Even if all jurisdictions interpreted the doctrine to be fully consistent with partial excuse and fully inconsistent with partial justification, this would not logically entail that the doctrine is in theory necessarily a partial excuse. It would require only the conclusion that all American jurisdictions normatively prefer an excuse version of the doctrine and interpret it accordingly.

Some of the cases that Professor Fontaine believes are inconsistent with the justification theory are in fact inconsistent only if the jurisdiction has already made a previous normative choice. For example, consider the case of the provoked defendant who reasonably believes he was provoked but in fact there was no actual provocation.¹⁶ The defendant made an honest and reasonable mistake. On a few occasions, Fontaine raises the issue of a mistaken

13. *Id.* at 47.

14. *Id.* at 44 n.56.

15. *Id.* at 41–42.

16. *Id.* at 33–34.

defendant who honestly and reasonably believes that his action is justified. Sometimes he is inconclusive about whether the defendant is justified or excused in such cases¹⁷ and at other times he simply asserts the conclusion that such defendants are excused or partially excused.¹⁸ Fontaine never argues for a normative position on this vexing question, which has divided legal scholars without resolution in sight. Thus, the inconsistency arises from the explicit or implicit normative choice to treat an honest and reasonable mistake as excusing rather than justifying.

I firmly believe that such agents are justified because I adopt a particular, normative view of the action-guiding nature of criminal law rules.¹⁹ An agent who acts entirely reasonably for a justificatory reason has done all that any decent society can expect of him and therefore he is justified despite the regrettable mistake. He has done nothing wrong. Those who disagree, including, apparently, Professor Fontaine, are not illogical or incoherent, but neither is the view I defend. It is a normative choice. If one concludes that the reasonably mistaken agent is justified, then permitting the reasonably mistaken provoked and passionate agent to succeed with provocation/passion is not inconsistent with the partial justification version of the doctrine.

Professor Fontaine cites two cases, *Howell*²⁰ and *Mauricio*,²¹ for the proposition that provocation/passion is permissible in cases of unreasonable mistake about provocation, but neither case stands for the proposition. The facts in both might have raised the issue, but neither addressed it. In *Mauricio*, the issue of intoxication was raised only in connection with New Jersey's rule concerning when voluntary intoxication would be admitted to negate mens rea. This part of the court's discussion was entirely independent of the relation between voluntary intoxication and provocation/passion.

Let us assume, however, that there was support in these cases for the permissibility of using an honest but unreasonable mistake about justification as a basis for provocation/passion. An honest but unreasonable belief about justification, "failed justification," is a traditional mitigating condition. It can be taken into account at sentencing, and its most obvious doctrinal expression is "imperfect self defense," which in some jurisdictions reduces an intentional

17. *E.g., id.* at 50–51.

18. *E.g., id.* at 36, 44 n.56, 45 n.58.

19. Stephen J. Morse, *Reason, Results and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 405–09.

20. Fontaine, *supra* note 1, at 35–36 (discussing *Howell v. State*, 917 P.2d 1202 (Alaska Ct. App. 1996)).

21. *Id.* at 36–37 (discussing *State v. Mauricio*, 568 A.2d 879 (N.J. 1990)).

killing from murder to manslaughter. This is clearly a failed justification doctrine and it does not mean that the defendant is partially excused.

It is coherent to think that people who honestly but unreasonably act for justificatory reasons are less culpable than those who act from selfish motives. Consequently, the potential for establishing provocation/passion in cases of unreasonable mistake is not necessarily inconsistent with the justification version of the doctrine. I believe that Professor Fontaine incorrectly concludes that considering the case of honest but unreasonable mistaken provocation as a partial justification “must necessarily be quite confused.”²²

The same problem bedevils Professor Fontaine’s analysis of the transferred intent cases in which the defendant intends to kill the provoker but accidentally kills a third party. The cases he cites, *Paredes*²³ and *Stewart* (for the killing of the fetus),²⁴ grant the mitigation on the ground of reduced rationality because they have already made the normative judgment that provocation/passion is a partial excuse. One could logically reach the same result if the doctrine were a partial justification, however. Fully justified defendants sometimes do kill innocent third parties, but they are still acquitted if they acted with reasonable care under the circumstances. Again, there is disagreement about whether such initially justified defendants are justified or excused when they kill innocent third parties. For the reasons I gave previously, I firmly believe that they are justified if they acted with all the care one could reasonably expect under the circumstances. If one takes this position, which, again, is a reasonable normative choice, then permitting provocation/passion in accidental transferred intent cases is consistent with the partial justification version of the doctrine.

Professor Fontaine correctly observes that *Stewart*, which mitigates the killing of a non-provoker, is based on an excuse theory and is inconsistent with the justification version. All this means, however, is that the Minnesota Supreme Court made the prior normative choice to treat the doctrine as a partial excuse, a choice buttressed by the support it derived from the Model Penal Code’s EMED mitigation. If the court had made the coherent judgment that provocation/passion was best understood as a partial justification, it would simply have come out the other way. *Stewart* and the Model Penal Code do not stand for the logical conclusion that

22. *Id.* at 37.

23. *Id.* at 38 (discussing *People v. Paredes*, No. B182323, 2007 WL 3015696 (Cal. Ct. App. Oct. 17, 2007)).

24. *Id.* at 38–40 (discussing *State v. Stewart*, 624 N.W.2d 585 (Minn. 2001)).

common law provocation/passion analytically must be a partial excuse.

Based on his doctrinal exegesis, Professor Fontaine reaches the following conclusion:

[I]f the doctrine were one of justification . . . , it would *necessarily* mean that these courts, the corresponding statutory law, and the MPC all have heat of passion dead wrong, as heat of passion can only be argued to be a partial justification, or have a justification component, where there exists serious provocation²⁵

As we have seen, however, this conclusion does not follow and the citation of the Model Penal Code is inapt. Fontaine further concludes that provocation/passion cannot be a partial justification because it does not imply that the act is acceptable. This conclusion also does not follow. If provocation/passion is a partial justification, then it is a claim that a killing in these circumstances is less wrong and more acceptable than if there were no or inadequate provocation deserving of a return. It does not mean that the killing is acceptable. Denying this possibility simply begs the question against the partial justification version and does not analytically demonstrate that the doctrine must be a partial excuse.

To further support his position, Professor Fontaine argues that justified action always involves the prevention of unjust harm. This is true in theory, but it fails to address those cases in which the defendant was reasonably mistaken and no unjust harm was prevented. If these cases are treated as full or failed justification, which is a completely open question, then Fontaine's argument does not go through. He can save this point by limiting justifications to cases in which the agent is genuinely motivated by the desire to prevent further harm, but this will not save the analytic point Fontaine attempts to make.²⁶ If the agent is properly motivated, the reasonable mistake might still coherently be treated as justification. Moreover, some theories of justification are based on the view that the initial wrongdoer does deserve what the justified agent gives the wrongdoer (albeit we do prefer due process, if pos-

25. *Id.* at 42 (emphasis added).

26. Professor Fontaine also does not address the appropriate legal response to an agent who acts for an unjustifiable reason, but who luckily prevents unjust harm. These cases, too, divide commentators, but the ground for dispute is normative and not analytic.

sible, rather than individual action) and they are not based on the prevention of further unjust harm.²⁷

Suppose, however, that the law rejects this theory of justification, which would be a normative choice, and always requires a motive to prevent further unjust harm for the usual affirmative defense justifications. Doing so would not entail that the criminal law was incoherent or inconsistent, however, if it adopted a partially justificatory rationale in cases of serious provocation based on retributive support for provocation/passion.

Professor Fontaine next argues that an egregiously provoked agent who reacts with less than deadly violence might have a partial or complete excuse, but that no justification would be permitted. He cites no support for this position, it is not clear what the excuse would be, and I am not sure that he is correct. Suppose a defendant catches his partner after an act of adultery that has clearly just occurred. Even though neither of the offending parties is threatening the injured spouse and no further adulterous act is likely (and perhaps is not possible) at that moment, what would be the law's response if the injured spouse punched one or both of the adulterous couple extremely hard? I am reasonably sure that no prosecutor would prosecute unless the resulting injuries were exceptionally severe. Even if the injured spouse were prosecuted, I am also confident that almost no jury would convict the defendant of criminal battery. These are simply sociological speculations, however.

What is the right legal result? No standard justification applies, but suppose a trial court decided to give instructions on a potential full or partial defense based on some type of provocation theory. Would it be based on a justification, an excuse, or a mixed account? All would be coherent. Again, the conclusion would rest on a normative choice.

Professor Fontaine addresses the case in which the defendant acted to prevent further harm, but deadly force was unnecessary. If the belief that deadly force was necessary is reasonable, the defendant is fully acquitted. Full acquittal can be completely justified by a full justification theory as I suggested above. Here Fontaine seems to be taking sides in the debate about why we acquit such defendants. He terms the full justification theory a "mistake"²⁸ and suggests that full acquittal would be based on a mixed theory of

27. See, e.g., GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 27–29, 145 (1988).

28. Fontaine, *supra* note 1, at 42.

partial justification and partial excuse.²⁹ This demonstrates Professor Fontaine's apparent acceptance of the possibility of mixed justification/excuse doctrines. More important, however, is that the suggestion is unsupported by any normative argument. If the defendant's honest belief is unreasonable, he is partially justified, as Fontaine concedes.³⁰

Professor Fontaine is right that most jurisdictions do not accept a partial defense of self-defense with excessive force, but that is beside the point. In all cases in which provocation/passion is raised, the defendant has used excessive force. Let us assume with Professor Fontaine that a partial defense might be possible if the provocation/passion defendant acts with the honest but unreasonably mistaken belief that he has been seriously wronged by the provocation. The provocation/passion defendant knows that he is not in deadly danger, but if we accept the partial justification version of provocation/passion, he receives the reduced conviction of manslaughter because he acted for a justificatory motive. The same argument that supports a partial justification theory of imperfect self-defense or of honest but unreasonable mistake about justification can be used to support a partial justification version of provocation/passion. Whether one accepts this argument is a normative choice.

The argument from "perversity" is another support for Professor Fontaine's claim that provocation/passion must be a partial excuse. If the doctrine is a partial justification, he argues, then the provocation-resistant person is at a disadvantage because he must act in the heat of passion to obtain the mitigation. Thus, those people who are generally better controlled are punished more. This is also true, of course, if provocation/passion is treated as a partial excuse. There is no greater perversity if provocation/passion is a partial justification if the heat of passion is an epistemological proxy for acting for a retaliatory reason or if the mixed theory of the doctrine is accepted. Either the provoked defendant did not act for the right reason or he lacked one of the two necessary but only jointly sufficient criteria—heat of passion.

Professor Fontaine is correct that the agent's motive is crucial to the justification for affirmative defenses. He is also correct, as an

29. *Id.* at 44 n.56.

30. This concession is in some tension with the view that the imperfect self-defender who honestly believes that he is acting in self-defense is not even partially justified and cannot be said to be defending himself at all. *Id.* at 45 n.58. Of course the defendant is motivated by the belief that he needs to defend himself. To claim otherwise is to adopt a fully objective view of justification that is inconsistent with ordinary language. This view can be coherent, but it is a normative choice that must be supported by an argument.

interpretive matter, that provocation/passion is understood as a partial affirmative defense even in those jurisdictions that confusingly and technically treat the absence of provocation/passion as an element of malice that makes a killing a murder.³¹ The question is what motive we wish to credit. Professor Fontaine and I do not wish to valorize the desire to retaliate against a person who has seriously provoked another, but that is a normative choice about how to assess culpability. It is not an analytic truth about what might be a partial defense to a provoked killing.

CONCLUSION

Professor Fontaine and I agree that the common law provocation/passion doctrine *should* be interpreted as a partial excuse and that its various legal ramifications should be consistent with that interpretation. We part company, however, when he claims that the doctrine analytically must be a partial excuse and that proponents of the partial justification version rest their case on illogic. His arguments for the partial excuse version, and the sources he cites in support, already explicitly or implicitly presuppose rejecting the partial justification view and accepting the partial excuse version. Nowhere does he argue for the presupposition or for the excuse view of failed justification that he uses as support. The argument for partial excuse is normative and not analytic if one accepts the coherent premises of the justification theorists. It's all normativity, all the way down.

31. This narrow, technical point allowed the Supreme Court to permit placing the burden of persuasion on the defendant to establish EMED even though it had earlier ruled that the prosecution bore the burden of persuasion beyond a reasonable doubt to negate provocation/passion in jurisdictions that treated absence of provocation/passion as part of malice. Compare *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (holding Maine had burden of persuasion to negate malice), with *Patterson v. New York*, 432 U.S. 197 (1977) (finding New York EMED doctrine was clearly a partial affirmative defense and burden of persuasion could be shifted to defendant).

