

## Provocation at Face Value

Kyron Huigens

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## PROVOCATION AT FACE VALUE

KYRON HUIGENS\*

*To take provocation at face value is to plead and prove it as a manslaughter offense, as it is defined in most criminal codes. To do this seems to be both unnecessary and impossible. The defendant has the best access to evidence of provocation and will benefit from the proof of this partial defense, so why should he not be required to prove it? The prosecution has no incentive to prove provocation manslaughter because the definition of this offense includes a murder. Why would the prosecution, having proved a murder, set out to prove a lesser crime than the crime for which it already has a conviction? However, this Article will demonstrate that normative theory obligates us to treat provocation manslaughter as an offense, and that it is possible to do this as a practical matter.*

*The argument is a conceptual argument in the normative theory of punishment. The best theoretical description of provocation manslaughter is as an offense, and not as a partial justification defense or as a partial excuse premised on a partial loss of responsible agency. Once we distinguish three things that are usually conflated—intentions, intentional actions, and intent elements—we can see that provocation manslaughter depends on proof of a particular intentional act of killing, and that this proof brings a particular set of the defendant's intentions to the fore for purposes of determining his desert for punishment. This set of intentions is different from the set of intentions that proof of a killing with intent, murder, brings to the fore for purposes of determining desert. Regardless of any reference to an intent to kill in the definition of provocation manslaughter, this kind of manslaughter is logically and*

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normatively different from, and exclusive of, murder—in just the same way that reckless manslaughter is. If reckless manslaughter is an offense, then provocation manslaughter is an offense as well—and should be proved as one—because there is no conceptual difference between the two kinds of manslaughter, relative to the other homicides.

This Article shows how we can treat provocation manslaughter as an offense as a practical matter. We should adopt a set of rules that provide discovery to the prosecution, that obligate it to make a *prima facie* case on pain of a mistrial and bar to re prosecution, and that reverse the ordinary order of jury deliberations so that provocation manslaughter is considered first and murder is considered second—or not at all, if the jury has convicted the defendant of provocation manslaughter. These rules will provide an incentive for the prosecution to prove provocation manslaughter and a disincentive to sandbagging that proof in an attempt to obtain a murder conviction instead. More importantly, the proposed rules enable us to live up to our rule of law ideals—including the principle of lenity as well as the requirement of proof beyond a reasonable doubt—in a way that treating provocation as a partial defense does not. If we take provocation at face value, then we can better preserve criminal law's constitutional principles, theoretical consistency, and moral integrity.

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## I. INTRODUCTION

Provocation is criminal law’s trickster.<sup>1</sup> It appears in the form of something that it cannot be. In modern codes and in the common law of crime, it is defined as a kind of manslaughter.<sup>2</sup> Before this crime becomes manslaughter, it is murder in the simplest core sense—an intentional killing—and the state must prove the murder before it can prove the manslaughter.<sup>3</sup> As with other offenses, the prosecution is required to prove provocation manslaughter beyond a reasonable doubt;<sup>4</sup> and, as with other offenses, the prosecution is permitted to undertake this burden of persuasion only after it has met a burden of production.<sup>5</sup> It might seem that, having proved a murder, the prosecution would have no difficulty making a prima facie case of manslaughter. We must bear in mind, however, that the prosecution will also have to present evidence that the defendant was provoked, acted in the heat of passion, or was under the influence of an extreme mental or emotional disturbance.<sup>6</sup> The prosecution will have to do more

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1. The trickster is a figure in the mythology of many cultures. He uses deception, including shape shifting, in order to undermine authority, to impart wisdom, or simply to act maliciously. See KIMBERLY A. CHRISTEN, *CLOWNS & TRICKSTERS: AN ENCYCLOPEDIA OF TRADITION AND CULTURE* 186 (1998).

2. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 691–92 (1975); MODEL PENAL CODE § 210.3(1)(b) (1980); Catherine Elliot, *The Partial Defence of Provocation: The House of Lords Decision in Smith*, 64 J. CRIM. L. 594, 595–96 (2000).

3. See *Mullaney*, 421 U.S. at 691, 694.

4. See *In re Winship*, 397 U.S. 358, 368 (1970) (holding that the prosecution bears a burden of persuasion of proof beyond a reasonable doubt on all essential elements of a criminal offense, including juvenile offenses).

5. Cf. *U.S. v. Williams*, 553 U.S. 285, 327 (2008) (Souter, J., dissenting) (“If the Government sought to prosecute proposals about extant images as attempts, it would seek to carry its burden of showing that real children were depicted in the image subject to the proposal simply by introducing the image into evidence; if the figures in the picture looked like real children, the Government would have made its prima facie demonstration on that element.”).

6. See *Mullaney*, 421 U.S. at 684–85 (“The State of Maine requires a defendant charged with murder to prove that he acted ‘in the *heat of passion* on sudden provocation’ in order to reduce the homicide to manslaughter.” (emphasis added) (citation omitted)); *Girouard v. State*, 583 A.2d 718, 720 (Md. 1991) (noting types of provocation traditionally sufficient to

than prove a murder if it expects to convict the defendant of manslaughter.<sup>7</sup>

If we take provocation at face value, then this is what we get. None of it makes sense from the perspective of either the prosecution or the defense. If the prosecution were to fail to prove the provocation manslaughter, then the proven murder would be revived; or, if the prosecution failed to make a prima facie case for provocation manslaughter, then the case for murder would be left standing. Under these circumstances, no matter how principled the prosecution might be, it is too much to expect it to make an effective case for provocation manslaughter. It simply has no incentive to do so. Given this fact, the rational defendant would want to take the burden of persuasion from the prosecution. And given the fact that the prosecution's having the burden of persuasion on provocation is so counterintuitive—the defendant holds the relevant evidence,<sup>8</sup> the defendant will benefit from its being proved,<sup>9</sup> and the prosecution would be trying to obtain less than it already has<sup>10</sup>—there seems to be no reason to deny this wish.

This is, of course, the direction that provocation doctrine has taken. The traditional rule for proof of provocation provided that the malice inherent in murder is negated by provoking circumstances.<sup>11</sup> From a very early date, courts held that the negation of malice was for the defendant to prove, by a preponderance.<sup>12</sup> The implication of this rule,

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reduce murder to manslaughter, including “*mutual combat . . . or the sudden discovery of a spouse’s adultery*” (emphasis added); MODEL PENAL CODE § 210.3(1)(b) (1980) (“Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of *extreme mental or emotional disturbance* for which there is reasonable explanation or excuse.” (emphasis added)).

7. See *Mullaney*, 421 U.S. at 704.

8. See *United States v. Nobles*, 422 U.S. 225, 233–34 (1975) (defining the Fifth Amendment privilege against self-incrimination as protection against an individual’s inner thoughts and feelings).

9. See MODEL PENAL CODE § 210.3(2) (1980) (reducing the punishment for manslaughter to a second degree felony).

10. See *id.* § 210.2.

11. See Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 544 (1934) (“Moreover, the patent rolls of Henry III point to [the negation of malice] as a common formula in pardons granted in the 1200’s to those who had committed homicide by misadventure, in self-defense or while of unsound mind.”).

12. *Id.* at 551 (“It has sometimes been said that every homicide is presumed to be with malice aforethought and that it devolves upon the prisoner to prove circumstances which will justify, excuse or mitigate the act.”).

however, is that the defendant must disprove an element of murder.<sup>13</sup> If a crime must be proved beyond a reasonable doubt by the prosecution, then this traditional rule shifts the burden of persuasion to the defense; or, more precisely, increases the quantum of evidence demanded of the defendant from the modest amount required to raise a reasonable doubt to the substantial amount required to prove a fact by a preponderance.<sup>14</sup> In *Mullaney v. Wilbur*, the Supreme Court declared the traditional rules of proof unconstitutional for just these reasons.<sup>15</sup>

The response to the Court's decision in *Mullaney* was to redefine the elements of this kind of manslaughter so that they operate independently of the definition of murder.<sup>16</sup> Under the *Model Penal Code*, a purpose to kill is not negated by a finding that the defendant caused death under the influence of an extreme mental or emotional disturbance.<sup>17</sup> The latter facts constitute a stand-alone defense that the defendant is required to prove by a preponderance.<sup>18</sup> The Supreme Court has endorsed this way of proving provocation manslaughter because the prosecution is still required to prove all elements of murder beyond a reasonable doubt.<sup>19</sup>

This modern version of provocation manslaughter solves both the incentive problem and the constitutional problem that doomed its predecessor. The burden of persuasion has been shifted to the party who has the incentive and means to prove the offense, which now, of course, becomes a partial defense. This shift is unconstitutional if the elements of murder and the provocation defense complement one another in such a way that the proof of one disproves the other. After all, the burden of persuasion on provocation—like the burden to prove murder—cannot be assigned to the defendant.<sup>20</sup> However, the elements of provocation manslaughter can be assigned to the defense for proof, since they do not affect the elements of murder, and *vice-versa*.

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13. See *id.* (“[T]he defendant [has] the burden of going forward with the evidence [that proves the killing was done without malice]. . . . If no such evidence is offered, a conviction of murder is proper because of the ‘presumed malice.’”).

14. See *Mullaney v. Wilbur*, 421 U.S. 684, 702–04 & n.31 (1975).

15. *Id.* at 703–04.

16. See *Patterson v. New York*, 432 U.S. 197, 198–99 (1977).

17. See MODEL PENAL CODE § 210.3(1)(b) (1980).

18. *Patterson*, 432 U.S. at 198 n.2 (citing N.Y. PENAL LAW § 125.20 (McKinney 1975)).

19. *Id.* at 208–09.

20. *Mullaney*, 421 U.S. at 702.

Provocation's transformation from offense to defense is complete.<sup>21</sup> Its continued placement among the homicide offenses is a formal anomaly—one that has a clear historical explanation and ample justification.

What could be wrong with this brilliant arrangement? Several things. First, while we may be past the point at which this is possible, we ought to find it disturbing to scan the homicide offenses and to find that one of them is not subject to the constitutional requirement of proof beyond a reasonable doubt. The Supreme Court's decision establishing this level of proof is one of the few decisions to which the Court has given retroactive effect—the reason being that the principle is so fundamental to constitutional law that the new decision is no more than a nominal recognition of an old rule.<sup>22</sup> Where such a fundamental principle is concerned, however, we ought to be especially vigilant for evasion where there ought to have been compliance. The Court's test for this particular evasion of Due Process is to ask whether the tail wags the dog.<sup>23</sup> This metaphorical standard is vague, to say the least, but if anything should count as wagging the dog, it would be the transformation of an offense into a defense by means of a change in wording.

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21. This is an ahistorical way of putting things, given that the burden of persuasion had been shifted to the defendant and the doctrine had been described as a defense long before the Supreme Court decided *Patterson* and long before the *Model Penal Code's* authors drafted their version of provocation manslaughter. At both of these junctures, however, provocation might have been re-conceptualized as an offense. As unlikely as this choice might have been as a matter of history—it is not clear that it was ever recognized, let alone considered—it was, theoretically, available. I adopt this theoretical choice as my starting point for purposes of exposition because my argument is theoretical and normative, not historical.

22. *Ivan V. v. City of New York*, 407 U.S. 203, 204–05 (1972) (per curiam) (“*Winship* expressly held that the reasonable doubt standard ‘is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law[.]’ . . .’ Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.” (quoting *In re Winship*, 397 U.S. 358, 363–64 (1970))).

23. See *McMillan v. Pennsylvania*, 477 U.S. 79, 87–89 (1986) (upholding a Pennsylvania mandatory minimum sentence statute against a due process challenge under *Winship* and *Mullaney*, in part because it gave “no impression of having been tailored to permit the visible possession finding [on a sentencing factor] to be a tail which wags the dog of the substantive offense”).

Second, it is odd that there is a problem of appearances at all. The perverse incentives of provocation manslaughter drove it into the category of defenses a long time ago, and the solution to these incentive problems has twice required the attention of the Supreme Court.<sup>24</sup> At some point, would it not have been simpler to explicitly redefine provocation so that it is what everyone supposes it to be? One would think so, but this has never been done.

Third, the best time to redefine provocation would have been during the deliberate, centralized, and decades-long effort to draft the *Model Penal Code*.<sup>25</sup> Mysteriously, the drafters of the *Model Penal Code* failed to do so. In fact, they embedded provocation manslaughter even more securely within the structure of homicide definitions.<sup>26</sup>

Institutional inertia probably accounts for the failure to revise the homicide definitions. The real question is why we are so comfortable with this inertia—so comfortable, it seems, that we do not see the problem at all. One possible explanation for our complacency is the motive behind my argument: we would prefer to treat provocation manslaughter as an offense, if only we could find a viable way to do so.

The day-into-night transformation of provocation manslaughter from an offense to a defense raises a normative question that courts and scholars have not begun to consider. In mitigating a murder to a

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24. See *Mullaney*, 421 U.S. at 684–85; *Patterson*, 432 U.S. at 198.

25. For a brief history of the *Model Penal Code*, see Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 320–25 (2007).

26. In the *Model Penal Code*, murder, like manslaughter, is defined in the alternative, using an intentional-state and a hybrid intentional-state or objective-circumstances fault criteria, respectively. A murder is a killing done purposely or knowingly. MODEL PENAL CODE § 210.2(1)(a) (1980). As an alternative, a murder is a killing done recklessly with extreme indifference to the value of human life: a hybrid intentional-state or objective-circumstances fault criterion. *Id.* § 210.2(1)(b). This set of alternative definitions of murder resembles the alternative definitions of manslaughter. Manslaughter is a killing done recklessly. *Id.* § 210.3(1)(a). As an alternative, manslaughter is a killing done intentionally while under the influence of extreme mental or emotional disturbance. *Id.* § 210.3(1)(b). In fact, the four definitions are not merely similar; they are symmetrically complementary. A reckless killing that would otherwise be manslaughter is promoted to murder based on the objective-circumstances criterion of an extreme indifference to human life. A purposeful or knowing killing that would otherwise be murder is demoted to manslaughter based on the objective-circumstances fault criterion of a mental or emotional disturbance for which there is reasonable explanation or excuse. From this perspective, the “defense” of provocation assimilates into the “offense” definitions of homicide. No “partial excuse” of provocation remains.

manslaughter on the ground that the defendant was affected by a distressing situation, provocation doctrine sets the grade of an offense. This task concerns the core requirement of just punishment: fault in criminal wrongdoing and the concomitant desert for legal punishment.<sup>27</sup> The normative logic behind provocation manslaughter is that one who kills under provoking circumstances does not seem to deserve punishment for the worst homicide.<sup>28</sup> By designating provocation manslaughter a defense and altering its elements to meet constitutional demands, we have changed the formal expression of this norm without changing its logic. The doctrine still serves to grade a homicide. Given the centrality and gravity of the task of defining and grading homicides, the fact that this transformation has been effected so easily is suspect.

This point seems perverse. Why *should* any of this be hard? After all, we have a free hand to design criminal law as society's needs and demands require. If the practical and constitutional difficulties involved in taking provocation at face value necessitate our treating it as a defense instead of an offense, then so be it. We can say it so to make it so. This way of dealing with provocation manslaughter seems benign, but it is not. The problem is precisely the ease with which we do it. If we retain the normative logic of provocation manslaughter but change the form it takes in criminal law, then we make a murder a manslaughter by stipulation. This is an appalling thing to do.

Now, the stipulation I have in mind is a stipulation in the normative theory of legal punishment, and not a legal stipulation made in an actual criminal case. It is not as if the prosecution and defense would ever stipulate that one crime instead of another crime has been done. Even a plea bargain has more substance to it than that. Nevertheless, the morality of legal stipulations sheds some light on the morality of theoretical stipulations.<sup>29</sup> Punishment theory is, after all, normative legal theory, and it is impossible, in the end, to separate one kind of stipulation from the other.

Generally speaking, legal adversaries stipulate to things that are peripheral and unimportant. A stipulation skips over the hard parts. It

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27. See HERBERT MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31, 41 (1976).

28. See Kyron Huigens, *The Continuity of Justification Defenses*, 2009 U. ILL. L. REV. 627, 640–41.

29. See *id.* at 629.

grants a conclusion for the sake of argument, and then releases everyone concerned from the obligation to make an argument. A legal stipulation that a manslaughter, and not a murder, has been committed would dishonor the victim and fail to accord the offender the respect implicit in a careful consideration of his actions and his fate. The proof of provocation may be the most intense, high-stakes moment in a homicide trial. The defendant tries to persuade a jury that he did not commit murder, which involves the risky move, to say the least, of admitting that he did. No one can fail to appreciate the gravity of his situation. This gamble could cost the defendant decades of his life, or all of it. The significance of this part of the case is not lost on anyone, least of all the victim's survivors. And from their perspective, none of this risk and significance is appreciably lessened in a plea bargain.

The problem with the theoretical stipulation that provocation is a defense instead of an offense is that, before anything has been set in motion in any actual case, all of this social, moral, and emotional freight has been handled carelessly. The situation is no less grave than it is in any other homicide prosecution, and yet in those cases this gravity is reflected in the imposition of a demanding burden of persuasion on the government.<sup>30</sup> The prosecution must prove murder, reckless manslaughter, and negligent homicide beyond a reasonable doubt. Not to impose this burden on the prosecution in a case of provocation manslaughter is to take provocation cases too lightly. This theoretical stipulation fails to accord the defendant the proper kind and degree of respect, even if we have benevolent motives.<sup>31</sup> It would be better, if at all possible, to prove provocation manslaughter in the way that we prove

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30. See *In re Winship*, 397 U.S. 358, 368 (1970) (holding that the prosecution bears a burden of persuasion of proof beyond a reasonable doubt on all essential elements of a criminal offense, including juvenile offenses).

31. The literature on legal punishment and a due regard for the human dignity of the offender, including his right to be punished, is extensive and distinguished. See, e.g., MORRIS, *supra* note 27, at 41 (“In our system of punishment an attempt was made to maximize each individual’s freedom of choice by first of all delimiting by rules certain spheres of conduct immune from interference by others. The punishment associated with these primary rules paid deference to an individual’s free choice by connecting punishment to a freely chosen act violative of the rules, thus giving some plausibility to the claim . . . that what a person received by way of punishment he himself had chosen.”); Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 115–16 (1998); Martin R. Gardner, *The Right to Be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838, 839–46 (1981); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1829–30 (1999).

other forms of homicide.

Aside from this moral misstep, the treatment of provocation manslaughter as a defense is just odd. On the face of it, to convert an offense into a defense must be the least likely solution to any doctrinal problem in any body of law. What remedy could be more extreme? And yet, given the scope of the practical and constitutional problems presented by provocation manslaughter, we decided that this extreme solution was justified.<sup>32</sup> Perhaps it was; it might have seemed that we had no alternative.

But in fact we had an alternative. We might have tried to think through the problem from the opposite direction. We might have tried to keep provocation manslaughter in place as a homicide offense, making the necessary alterations elsewhere in law and legal theory. We chose not to work this hard. Instead, we merely declared that an offense would be a defense henceforth, stipulating away the normative complexity of the problem.<sup>33</sup>

This Article tries to do the work required to avoid this objectionable move. Ultimately, the principal obstacles to taking provocation at face value are the extreme measures required to do so. The prosecution's proof of murder must be extinguished if a *prima facie* case of provocation manslaughter has been made, so that a murder conviction is precluded thereafter. Furthermore, it must be up to the prosecution to make this *prima facie* case, just as it does for other offenses. In other words, homicide law must be reconfigured so that provocation manslaughter is the only viable case of homicide the prosecution can pursue if the facts show a homicide committed under provoking circumstances.

This reconfiguration of homicide law is the subject of Part IV of this Article. The necessary preclusion of a conviction for murder can be accomplished by inverting the normal course of jury deliberations, with the following procedure. *In a prosecution for murder, the prosecution is required to raise a prima facie case of provocation manslaughter if sufficient evidence of this offense is available to it. If the prosecution has*

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32. See *Patterson v. New York*, 432 U.S. 197, 210 (1977).

33. To reiterate a point I previously made, *supra* note 21, this is a deliberately ahistorical statement. It is simply a way of describing a choice not made by the *Model Penal Code* drafters or the Supreme Court, regardless of whether they made a deliberate choice not to frame provocation manslaughter, explicitly and unambiguously, as an offense.

*made a prima facie case of provocation manslaughter, then the jury should be instructed to consider this charge before it considers the charge of murder. If the jury convicts the defendant of provocation manslaughter, then it should cease deliberating and issue a verdict finding the defendant guilty of that crime. If the jury acquits the defendant of provocation manslaughter, or if it fails to reach a verdict on that crime, then it should proceed to consider and decide whether the defendant committed murder.*

One obvious question is, When is sufficient evidence of provocation available to the prosecution? Another procedural rule answers this question. *The defense may invoke the special order of proof for provocation manslaughter in a motion at the end of the state's case. Its right to make this motion, however, is conditioned on its providing pre-trial notice of its intention to make the motion and on the disclosure to the prosecution of all evidence of provocation in its possession when the notice is given, and thereafter.*

This inversion of ordinary proof procedures might appear radical, but if we are willing to accept that something defined as an offense can justly be treated as a defense, then the ship that quarantined unacceptably radical solutions to the problem has already sailed. In a more serious vein, everyone concerned with the problem agrees that there is something about provocation manslaughter that distinguishes it from other homicide offenses, as evidenced by the perverse incentives that arise if we require the prosecution to prove it in the same way that it proves the other homicides. At the most fundamental level, the correct normative-theoretical description of provocation manslaughter—that is, its description as a feature of just punishment—is at odds with the practicalities of criminal prosecutions under current constitutional and court rules.

For the moment, I am not concerned with when, how, or why this happened. My argument is that provocation manslaughter is an offense as a conceptual matter, and my working assumption is that we are committed to abiding by the constitutional principle of proof beyond a reasonable doubt. The accepted solution to this conflict between theory and practice is to convert provocation manslaughter into a defense, which I take to be nothing more than a work-around measure that fails to comply with *Winship*. The inverted proof procedure that I propose is actually a less radical solution to these difficulties, and it far better preserves criminal law's constitutional principles, theoretical consistency, and moral integrity.

Parts II and III of this Article lay out the premises of the proposal in anticipation of its defense in Part IV. The analysis is not historical or doctrinal. I will be making conceptual arguments characteristic of the normative theory of just punishment.<sup>34</sup>

In Part II, I will argue that provocation is an offense because it is unlike either of the two acknowledged categories of legal defense. First, it is not a claim of non-responsible agency—the kind of defense that American courts and scholars call an excuse.<sup>35</sup> Even if we assume that a provoked actor is partially incapacitated, we have no reason to think that criminal law treats this incapacitation in the way that it does incapacitation by mental illness, minority, or duress. Just punishment in response to offenses committed because of these incapacitating conditions consists of no punishment at all.<sup>36</sup> Regardless of whether any moral theory or morality-based jurisprudence requires us to refrain from imposing legal punishment in these cases, a civilized society will

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34. Conceptual analysis, in general, can be described this way:

Our subject is really the elucidation of the possible situations covered by the *words* we use to ask our questions . . . . I use the word “concept” partly in deference to the traditional terminology . . . and partly to emphasize that though our subject is the elucidation of the various situations covered by bits of language according to one or another language user, or by the folk in general, it is divorced from considerations local to any particular language.

FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS 33 (1998). This kind of analysis does not concern a priori truths, and so is ultimately sociological. See Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 43–51 (2003). Some theories of law purport to show that the content of law is determined by morality, and these are in one sense normative theories of law. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 1, 7 (1986); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 953–54, 995 (1988). The theory of legal punishment as it is ordinarily practiced is normative in a different sense. It assumes not only that its descriptions of criminal law ought to be adopted as positive law, but also that this is so because a correct description of legal punishment is a description of just punishment. This is so, in turn, because justice is in some way immanent in legal punishment. For example, one classic argument made against a utilitarian theory of punishment is that it is descriptively false because it immorally authorizes scapegoating. We assume that if a punishment theory describes unjust punishment as just, then it has failed to describe legal punishment correctly. See Kyron Huigens, *Implicitly Normative Punishment Theory*, (draft book chapter on file with law review), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1807523](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807523).

35. See *infra* note 104.

36. See MORRIS, *supra* note 27, at 49.

refrain from doing so.<sup>37</sup> A legal non-responsibility defense is a legal prescription that, from the point of view of morality, is supererogatory (in duty-based morality)<sup>38</sup> or virtuous (in virtue ethics).<sup>39</sup> Not even justice requires us to recognize non-responsibility defenses, but we are a better society if we do so. We perform morally supererogatory or virtuous acts out of kindness, generosity, or grace. It is not plausible to view provocation manslaughter as this kind of act. Provocation might look similar to insanity in that there is a loss of rational capacity, but it is fundamentally different with respect to *what we do about* that incapacity. Because of this difference, provocation is not a defense of non-responsibility.

Second, provocation is not a justification defense. The Supreme Court has addressed the law of provocation manslaughter twice, both times on the subject of the procedures for its proof.<sup>40</sup>

Remarkably, to prove provocation in the way that we prove justification defenses would have obviated all of these difficulties. This could be taken as a reason to think that provocation is a justification for homicide, conceptually speaking. This suggestion, however, is quickly dispelled. Provocation is not a justification defense because it does not function in the way that justification defenses do.

The law of justification defenses is unsettled, and the controversy concerns attributes of legal justification that simply are not part of provocation doctrine. The principal conceptions of legal justification spar over the proper arrangement of fact and fault elements in the proof of the defense.<sup>41</sup> Does a legal justification require only a belief that one

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37. *See id.* at 49–50.

38. “Supererogation is the technical term for the class of actions that go ‘beyond the call of duty.’ Roughly speaking, supererogatory acts are morally good although not (strictly) required.” *See* David Heyd, *Supererogation*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2011), <http://plato.stanford.edu/archives/win2011/entries/supererogation/>.

39. “[Virtue ethics] may, initially, be identified as the one that emphasizes the virtues, or moral character, in contrast to the approach which emphasizes duties or rules (deontology) or that which emphasizes the consequences of actions (consequentialism).” Rosalind Hursthouse, *Virtue Ethics*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2007), <http://plato.stanford.edu/archives/win2010/entries/ethics-virtue/>.

40. *See* *Patterson v. New York*, 432 U.S. 197, 198 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 684–85 (1975).

41. *See* Huigens, *supra* note 28, at 644–64, 684–91.

is justified (the position of the *Model Penal Code*);<sup>42</sup> both a belief and actual justification (a position known as the *Dadson* view);<sup>43</sup> or either a belief or actual justification (the negative elements view)?<sup>44</sup> This controversy is orthogonal to provocation doctrine. The provoked actor is exculpated, if at all, because of his response to provoking circumstances, not because he has a particular belief about them. In any event, from the perspective of mistake, the two defenses are clearly distinguishable. When we acquit one who is mistaken about having a justification, we acquit because he acted as he *would not have done* absent the mistake.<sup>45</sup> In contrast, when we acquit one who is mistaken about provoking circumstances, we acquit him because he has acted as he *would have done* had he not been mistaken.

I will argue in Part III that provocation is an offense. A murder conviction should be cabined—not barred, but strongly circumscribed in the way I propose—because even though a case for provocation manslaughter does not deny that an intentional killing has occurred, it does deny that a murder has occurred. This is far from obvious—in fact, it seems obviously wrong—because of the way the elements of murder and manslaughter align. In the *Model Penal Code*'s formulation, murder explicitly is made an included element of provocation manslaughter.<sup>46</sup> More generally, a murder is an intentional killing, and it is an inescapable feature of provocation manslaughter that provoked killers intend to kill their victims.<sup>47</sup> However, consider the common law of crime formulation. A murder was defined as a killing with malice, and provocation was said to negate this malice, resulting in a manslaughter. This definition of provocation manslaughter did not include murder; it expressly excluded murder.

Part of my objective is to recover this way of looking at provocation manslaughter within the modern scheme of homicide definitions. If a homicide is committed recklessly, then murder is not a viable charge. A

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42. *Id.* at 659–60.

43. *Id.* at 654–55.

44. *Id.* at 654.

45. *Id.* at 630.

46. MODEL PENAL CODE § 210.3(1)(b) (1980) (“Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”).

47. *See id.*

reckless killing is not an intentional killing. The key to my argument is to recognize that provocation manslaughter works the same way. Proof of provocation manslaughter necessarily precludes proof of murder. Recklessness and purpose are criteria of criminal fault.<sup>48</sup> Furthermore, they are both one kind of fault criterion—the kind that describes the subjective state of the actor when he is engaged in criminal wrongdoing. A second kind of fault criterion consists of the objective circumstances of the wrongdoing. Provoking circumstances constitute this kind of fault criterion, and provocation manslaughter is defined by reference to it, just as reckless manslaughter is defined by reference to a subjective-states criterion. I will argue that subjective-states fault criteria have no conceptual or normative priority over objective-circumstances criteria. Intentional killing under provoking circumstances constitutes an integrated fault criterion that is logically inconsistent with the intent to kill that defines murder. A provoked homicide can no more be a murder than a reckless homicide can be.

The critical part of this argument about criminal fault criteria is a three-way distinction between intentions, intentional actions, and intent elements of offenses. Desert for legal punishment depends on one's intentions. An intention lies behind an intentional action, obviously, but what is less obvious is this: any number of intentions might lie behind an intentional action. An intent element in an offense definition seems to describe the intention relevant to desert directly, but it actually cannot do so. Intent elements in offense definitions describe intentional actions, but not the intentions that constitute criminal fault. Just as many intentions lie behind an intentional action, many intentions are relevant to one's desert for punishment for a crime that consists of such an intentional action.

This is why subjective-states fault criteria—such as purpose, knowledge, or advertent recklessness—do not have conceptual or normative primacy over objective-circumstances fault criteria. Objective-circumstances fault elements, such as negligence and malice, describe intentional actions as well as, if not better than, subjective-states fault criteria do. They bring the defendant's relevant intentions, beyond the simple intention so to act, to the fore for purposes of adjudicating his desert for punishment.

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48. *See id.* § 210.2(1).

Provoking circumstances, even when they are described by reference to a subjective disturbance experienced by the defendant, are objective-circumstances fault elements. They operate in a manner that is strictly analogous to recklessness—the subjective-states fault criterion featured in the other kind of manslaughter. Like recklessness, provoking circumstances bring the relevant intentions of the defendant to the fore in the adjudication of his desert for punishment. Because provocation manslaughter is, in this central respect, conceptually indistinguishable from reckless manslaughter, it, too, should be pled and proved as an offense. In other words, we should take provocation at face value.

## II. WHY PROVOCATION IS NOT A DEFENSE

My argument that provocation manslaughter is an offense obviously conflicts with the two leading explanations of the nature of the offense: the claim that it is a partial excuse (a claim of partial non-responsible agency) and the claim that it is a partial justification defense.<sup>49</sup> While I would prefer to move immediately to a defense of my main thesis, it seems imperative to say something about these two rival conceptions of provocation, one of which is, overwhelmingly, the consensus view.<sup>50</sup> Fortunately, this exercise will bring out some points that are useful in the development of the thesis that the criminal fault in provocation manslaughter is logically inconsistent with the criminal fault of murder, so that a conviction of the former offense necessarily bars a conviction for the latter offense.

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49. Other writers have dissented from the “excuse or justification” dichotomy. See, e.g., Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1726–27 (2005) (advancing a virtue ethics-based theory of provocation as *akrasia*—the lack of affective, as opposed to merely cognitive, knowledge of the good); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 315–16 (1996) (advancing a virtue ethics-based theory of provocation, to wit, “[t]he existence of passion demonstrates that the offender values the good (which, of course, must be something that a person of good character would value) sufficiently in relation to other goods”); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1394–99 (1997) (describing provocation as a hybrid doctrine of “warranted excuse”). My view is closest to those of Kahan and Nussbaum, and Garvey, in that it is also a virtue ethics-based theory.

50. Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27, 29 (2009) (“A majority of United States jurisdictions recognize . . . heat of passion as an affirmative, partial defense to murder . . .”).

A. *Provocation Is Not a Defense of Non-Responsible Agency*

The prevailing consensus is that provocation manslaughter depends, normatively, on an irrational response akin to insanity.<sup>51</sup> The man who kills his wife and her lover when he finds them in bed together has, understandably, lost control.<sup>52</sup> The defendant is a non-responsible agent to some extent, and he should be acquitted of murder to the same extent.<sup>53</sup>

This analysis of provocation as a non-responsibility defense, however, is often incomplete. The analysis of non-responsibility defenses always starts with the recognition of some kind of disability that has exculpating implications—incomplete moral development in the defense of minority;<sup>54</sup> practical involuntariness in the duress defense;<sup>55</sup> mental illness or disability in the defense of legal insanity;<sup>56</sup> and a similar, partial, disabling of rational capacity in the partial defense of provocation.<sup>57</sup> Too often, however, the analysis of non-responsibility

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51. See, e.g., *id.* at 29–30; George Mousourakis, *Reason, Passion and Self-Control: Understanding the Moral Basis of the Provocation Defence*, 38 REVUE DE DROIT [R.D.U.S.] 215, 219 (2008) (Fr.) (“The real basis of the provocation defense, traditionally regarded as a concession to human frailty, lies in the actor’s loss of self-control in circumstances in which any ordinary person might also have lost control.”); Christina Pei-Lin Chen, Note, *Provocation’s Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL’Y 195, 205 (2000) (“That is, successful invocation of the provocation defense today results in the partial excuse of heat of passion killings via a reduction in the conviction from murder to voluntary manslaughter.”).

52. See Fontaine, *supra* note 50, at 34–35 (describing a scenario where a man’s reasonable interpretation of his wife’s betrayal “gives rise to [a man’s] heated killing, partially excusing the defendant’s crime and reducing it from murder to manslaughter”).

53. *Id.* at 35.

54. See MODEL PENAL CODE § 4.10(1)(a) (1985) (“A person shall not be tried for or convicted of an offense if . . . at the time of the conduct charged to constitute the offense he was less than sixteen years of age . . .”).

55. See *id.* § 2.09(1) (“It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”).

56. See *id.* § 4.01(1) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”).

57. See MODEL PENAL CODE § 210.3(1)(b) (1980) (“Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”).

stops there, as if it were obvious why exculpation follows from disability. This is not obvious, because the disability of the accused is a fact and exculpation is a norm—a reason why we should think that legal punishment is not called for. Perhaps the absence of rational agency makes legal punishment immorally gratuitous because it can have no deterrent effect;<sup>58</sup> or perhaps to punish a person who lacks rational agency when he commits a crime is to fail to treat that person with equal concern and respect;<sup>59</sup> or perhaps to punish in such a case is to fail to treat the defendant as an end in himself.<sup>60</sup>

None of this is very clear, however. For one thing, to punish an insane actor certainly does have a deterrent effect.<sup>61</sup> This is the effect contemplated by legislators in the jurisdictions in which the defense has been abolished.<sup>62</sup> Abolition of the insanity defense can be expected to deter malingering and to send a message of zero-tolerance for crime.<sup>63</sup>

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58. 2 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1–3, 5–6 (London, W. Pickering 1823) (1789). Jeremy Bentham contended that cases of insanity were among the “Cases Unmeet for Punishment” because “punishment must be inefficacious.” *Id.* at 2, 5–6. In these cases, “the penal provision, though it were conveyed to a man’s notice, *could produce no effect* on him, with respect to preventing him from engaging in any act of the *sort* in question.” *Id.* at 6.

59. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977) (“We may describe a right to equality of the second kind, which Rawls says is fundamental, in this way. We might say that individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them.”).

60. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 54 (Robert Paul Wolff ed., Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785) (“The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”).

61. *See* H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 43 (1968) (“[I]t does not follow—because the *threat* of punishment in his case . . . is useless—that his *punishment* . . . will also be unnecessary to maintain the efficacy of the threats for others at its highest.”).

62. Montana, Idaho, Utah, and Kansas have abolished the insanity defense. *See* Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL’Y 7, 34–35 (2007).

63. *See* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 621 (1989–1990) (“[T]he purported abuse of the insanity defense symbolizes the alleged breakdown of law and order, the thwarting of punishment . . . , the failure of the crime control model, and the ascendancy of a ‘liberal,’ exculpatory, excuse-ridden jurisprudence . . .” (footnotes omitted)); Donald H.J. Hermann, *The Insanity Defense*, 44 OHIO ST. L.J. 987, 987 (1983) (reviewing WILLIAM J. WINSLADE & JUDITH WILSON ROSS, *THE INSANITY PLEA* (1983)) (“Public opinion reveals opposition to the insanity defense, with the view often expressed that too many criminals escape punishment by pleading and, in some instances, feigning insanity.” (footnotes

As for whether the punishment of the insane offender fails to accord him equal concern and respect, to say no more than this is to beg the question. One is entitled to be treated with equal concern and respect simply because one is human.<sup>64</sup> In general, to fail to punish the guilty actor is a failure to recognize his status as an autonomous member of the human community.<sup>65</sup> The insane offender's disability does not deprive him of this kind of autonomy, and *not to* punish him on the assumption that it does so would be to fail to treat him with equal concern and respect. This leaves us still in search of some reason, beyond his disability, to think that *to* punish him would amount to this kind of failure.

Finally, it is not clear that to punish the non-responsible agent fails to treat the offender as an end in himself. This categorical imperative is a feature of Kant's moral theory and not of his legal theory.<sup>66</sup> The public authorization of coercion follows from the principle of right, *das Recht*,<sup>67</sup> and the principle of right is notoriously demanding.<sup>68</sup> Where legal punishment is concerned, mercy, in particular, is out of the question.<sup>69</sup>

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omitted)).

64. See DWORKIN, *supra* note 59, at 182 (“We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice.”).

65. See MORRIS, *supra* note 27, at 48–49 (describing the right to be punished in terms of a right to be treated as a person in a system that respects individual choice and equality).

66. See ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 11–13 (2009) (explaining why the categorical imperative, a product of Kant's ethical philosophy, cannot be applied to questions of law and government).

67. See Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 487, 498–99 (1987) (describing publicly authorized coercion as a principle of right, as opposed to an exercise of individual virtue).

68. In an often-quoted passage on retributive punishment, Kant wrote,

Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.

IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 142 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

69. Kant writes, “Of all the rights of a sovereign, the *right to grant clemency* to a criminal . . . is the slipperiest one for him to exercise . . . With regard to crimes of *subjects* against one another it is absolutely not for him to exercise it; for here failure to punish . . . is the greatest

The best explanation for non-responsibility defenses, it seems to me, is that suspending punishment is a morally supererogatory act that we have reduced to a legal rule. It does not matter whether punishment of the non-responsible agent is immoral because it does not deter; or whether to refrain from punishment is required by *das Recht*; or whether the right to equal concern and respect requires us not to punish. We exculpate the non-responsible agent for the sake of kindness,<sup>70</sup> mercy,<sup>71</sup> grace,<sup>72</sup> or some combination of the three. Supererogatory acts are by definition not required by morality—"the quality of mercy is not strain'd"<sup>73</sup>—but this is not a reason to think that they cannot be required by legal rules. The source of law's *validity* is not morality<sup>74</sup> but social

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wrong against his subjects." *Id.* at 145.

70. "Kindness" comes from the old English "*gecynðnys* in sense 'generation, nation,'" and has an obsolete meaning of "[k]inship; near relationship; natural affection arising from this." 8 THE OXFORD ENGLISH DICTIONARY 441 (2d ed. 1989) [hereinafter OED]. I use it, then, to refer to empathy, sympathy, and compassion, as well as in its ordinary sense: "The quality or habit of being kind; kind nature or disposition, or the exhibition of this in action or conduct." *Id.*

71. "Mercy" is the most clearly supererogatory of the three concepts that I use to explain defenses of non-responsible agency. The Latin root of "mercy" is "*mercēdem*" or "*mercēs*," and "[t]he post-classical uses of *mercēs* are developed from the specific application of the word to the reward in heaven which is earned by those who have no claim, and from whom no requital can be expected." 9 OED 625–26 (2d ed. 1989). This leads to the modern sense of mercy: "Forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected." *Id.* at 626.

72. "Grace" has one meaning that fits non-responsible agency defenses, as I conceive of them, almost perfectly: "An exceptional favour granted by someone in authority, a privilege, a dispensation." 6 OED 718–19 (2d ed. 1989). In its specifically religious sense, when used with reference to God, it refers to a supererogatory act: "Favour, favorable or benignant regard or its manifestation (now only on the part of a superior); favour or goodwill, in contradistinction to right or obligation, as the ground of a concession." *Id.* at 718. I use it, then, to refer to forgiveness and generosity.

73. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 4, sc. 1. In the play, "the speaker[, Portia,] is telling SHYLOCK that mercy must be freely given, and is inviting him to show mercy to the title CHARACTER." E.D. HIRSCH, JR., ET AL., THE NEW DICTIONARY OF CULTURAL LITERACY 137 (2002).

74. Compare DWORKIN, *supra* note 59, at 14, 39–45 (arguing that legal validity rests on law's integrity, which consists of fit and justification with respect to morality), with H.L.A. HART, THE CONCEPT OF LAW 256 (2d ed. 1994) (arguing, in the book's *Postscript*, that legal validity is determined by a rule of recognition, which is constituted by a community's engaging in a certain practice with the attitude that the practice is obligatory). Because the theory of non-responsibility defenses outlined above takes these defenses to be morally supererogatory, it is inconsistent with Dworkinian jurisprudence, which makes all legal defenses requirements of morality, just as all valid law is a requirement of morality.

practice exclusive of morality.<sup>75</sup> As a consequence, law's *content* is orthogonal to morality.<sup>76</sup> We can write the law to require less or more than morality does. Where non-responsibility defenses are concerned, we do the latter.

Consider the duress defense.<sup>77</sup> It is not clear whether this defense rests on the non-responsibility of the accused or the fact that criminal fault—and hence, criminal wrongdoing itself—is missing in such cases.<sup>78</sup> At least on the former account, however, the rationale of duress is kindness, in the literal sense. We empathize with a person who has been put in fear for her life. She has committed a crime—but so would we all have done had we been in her shoes. And how much more kindness, in the form of sympathy, do we confer on the insane actor who has been driven into wrongdoing by beliefs that he cannot defend and motivations that he cannot control?

Or perhaps the non-responsibility defenses reflect forgiveness for legal wrongs. This is most clear in the defense of minority: forgiveness is always called for in cases of children who have done wrong. The distinctive barbarity of a society that ignores human frailty, that uses lost souls to “send a message” in the way of heads on pikes, or that takes the

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75. Compare JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194, 209–10 (1994) [hereinafter *ETHICS IN THE PUBLIC DOMAIN*] (arguing that legal authority preempts moral reasons, so that law's validity cannot depend on morality), with HART, *supra* note 74, at 251–52 (arguing that the tolerable level of uncertainty in a legal system varies, so that there is no reason to expect the incorporation of moral principles in a rule of recognition to fatally undermine it).

76. Nothing in legal positivism precludes law's appealing to morality for its content, as opposed to its validity. See RAZ, *On the Autonomy of Legal Reasoning*, in *ETHICS IN THE PUBLIC DOMAIN*, *supra* note 75, at 310, 318 (“Rights of freedom of expression, assembly, the free exercise of religion, freedom of movement, privacy, non-discrimination, and others are typically declared in broad terms, and the courts are left free to develop legal doctrines giving these rights concrete content in light of sound moral considerations.”). Criminal codes commonly contain terms such as “malice,” “depraved mind,” “heinous, atrocious, and cruel,” and “extreme indifference to the value of human life.” See, e.g., 18 U.S.C. § 1111(a) (2006) (including the term “malice aforethought”); MODEL PENAL CODE § 210.2 (1980) (including the phrase “extreme indifference to the value of human life”). The moral content of these criteria is plain, as is that of any rule that requires finding them as a condition of a legally valid judgment of punishment, but nothing in legal positivism rules this out.

77. See MODEL PENAL CODE § 2.09(1) (1985) (“It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”).

78. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1333, 1349–50 (1989).

lives of delinquent children, lies ultimately in its refusal to enact into law the values of kindness, mercy, or grace in a way that would preclude such punishment.

From this perspective, it is very difficult to see provocation as a non-responsibility defense. Is our predominant reaction to homicides committed under provoking circumstances one of kindness, mercy, or grace? Do we sympathize with the person who has engaged in mutual combat and who has done so, we should bear in mind, without justification? Probably not. Most of us assume that we would have the sense not to wind up in such a situation. No doubt we feel something for the humiliated spouse in an adulterous affair, but is this compassion or merely pity—or even an essentially selfish wariness about our own situation that is merely prompted by the defendant's case? An assault on a member of the defendant's family draws a sympathetic reaction from the rest of us, and this sympathy might lead us to require a morally supererogatory mitigation in such cases, as a matter of law. But would this be so clear without the penumbra of necessity that surrounds such cases? If not, then provocation by an act of violence against a family member appears to be less a matter of non-responsibility and more a plea of justification.

The doctrinal features of provocation bear out the suspicion that provocation is not a defense of non-responsibility. It is possible, for example, to maintain a defense of provocation even if one was not, in fact, provoked.<sup>79</sup> Is mistaken non-responsibility even a coherent idea, let alone a legal defense? Many insane people are mistaken about the fact that they are insane because they believe that they are sane. But this mistaken belief in one's sanity is merely a feature of insanity. To the extent this mistake exculpates, the reasons for exculpation collapse back into exculpation for insanity itself. Conversely, suppose a defendant asks to be acquitted on the ground that he reasonably believed he was insane when he committed his crime, although, as it turns out, he was perfectly sane. As a defense, this is perfectly incoherent.

Finally, it appears that the more thoroughly the defense of provocation is framed in subjective terms as an emotional upset, the

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79. See Fontaine, *supra* note 50, at 33–40 (noting that cases of “adequate non-provocation” include: (1) mistakes about the circumstances constituting the supposed provocation that are (a) reasonable or (b) unreasonable; and (2) otherwise good cases of provocation that involve the killing of a third party (a) accidentally or (b) intentionally).

more often it leads to morally counterintuitive, even morally offensive, results.<sup>80</sup> Victoria Nourse discovered that provocation instructions have been given in what she called “departure cases.”<sup>81</sup> These are cases in which a woman has tried to leave an abusive relationship, and in which the abuser killed her, a man trying to assist her, or both.<sup>82</sup> Why did he do this? Because he was very upset his woman was leaving him, of course. If provocation is premised on reduced rational capacity, then it makes sense to give him a partial defense because of his infantile condition. The problem is that this makes no moral sense at all. It is grossly at odds with our assessment of such a case. But if provocation turns on non-responsibility, and if the accused has lost responsible agency because of an emotional upset, then why would following the logic of the defense closely and consistently make the defense less sensible?

### *B. Provocation Is Not a Justification Defense*

The Supreme Court has considered provocation as a constitutional question twice, both times on the subject of the procedures used for its proof.<sup>83</sup> In these cases and in the literature surrounding them, one thing has gone largely unnoticed. A perfectly adequate model for the proof of provocation was available—one that would have presented no constitutional difficulties, and that has raised no moral or theoretical objections in its native habitat. We might have proved the provocation defense in the same way that we prove justification defenses. The procedure for proving a justification is, in fact, an excellent fit for the substance of the provocation “defense,” which makes it all the more mysterious that it has never been widely adopted. The most likely explanation for this omission, it would appear, is that we are unwilling to tolerate the merest suggestion that provocation is itself a justification

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80. See Nourse, *supra* note 49, at 1390–94 (describing the ill effects of the *Model Penal Code*’s “extreme mental or emotional disturbance” formulation and re-conceptualizing provocation as a “warranted excuse”).

81. See *id.* at 1352.

82. See *id.* at 1351–52.

83. See *Patterson v. New York*, 432 U.S. 197, 198, 210 (1977) (holding that the burden of proving extreme mental or emotional disturbance may be placed on the defendant when it operates as an affirmative defense); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (holding that the burden of proving heat of passion may not be placed on the defendant when it is included in the actual offense).

defense.

This unwillingness is understandable given that the normative argument against treating provocation as a justification defense is simple, persuasive, and widely accepted. None of the reasons that count as adequate provocation is a morally sufficient reason to kill.<sup>84</sup> Provocation by mutual combat is clearly distinguishable from justification by self-defense—by the latter's requirement of necessity, for example.<sup>85</sup> Provocation by assault on a family member is easily distinguished from the justified defense of another person by, among other features, the latter's including a duty to retreat where this is feasible.<sup>86</sup> As for the sudden discovery of adultery, which is ordinarily treated as the central case of provocation,<sup>87</sup> there are several arguments in the nature of justification to be made, and each of them is more offensive than the last. If a husband discovers another man having sex with his wife, then his honor has been impugned. Is this a good enough reason for the husband to kill his wife's lover? In a culture of honor, the answer to the moral question seems to be yes.<sup>88</sup> But even in the regions of the United States in which the culture of honor is strongest,<sup>89</sup> a man's

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84. See Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 33 (1984) ("Reasonable people do not kill no matter how much they are provoked . . . . We cheapen both life and our conception of responsibility by maintaining the provocation/passion mitigation.").

85. See MODEL PENAL CODE § 3.04(1) (1985) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.").

86. *Id.* § 3.05(2)(a) ("[W]hen the actor would be obliged [under the section on self-defense] to retreat . . . he is not obliged to do so before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person.").

87. See *supra* note 52 and accompanying text.

88. For example, killings of women in Middle Eastern countries who have been accused of sexual misbehavior is a product of a culture of honor.

The concept of honor (*sharaf*) has to do with social standing on the basis of moral behavior; men's honor is intimately connected to the sexual chastity of their female relatives. Thus a woman's or girl's bad conduct would not only embarrass her family but would impugn the honor of the entire family, particularly the men, who have the right and duty of defending this honor.

Catherine Warrick, *The Vanishing Victim: Criminal Law and Gender in Jordan*, 39 LAW & SOC'Y REV. 315, 322 (2005).

89. See Keith F. Otterbein, *Five Feuds: An Analysis of Homicides in Eastern Kentucky in the Late Nineteenth Century*, 102 AM. ANTHROPOLOGIST 231, 232, 234 (2000); Nigel Barber,

engaging in adultery with another man's wife is not a legal justification for the husband to kill the adulterer.<sup>90</sup> If the husband kills his wife in this situation, is this acceptable because she has violated an oath? Clearly not. Is it acceptable because a man's wife is his property, for him to dispose of as he wishes? Certainly not. So what are we to make of the fact that the central case of provocation produces the most offensive justification arguments? Normatively, it is ample reason to avoid any suggestion, in provocation doctrine or procedure, that provocation is a justification defense. Descriptively, it suggests that provocation is not a justification argument as a conceptual matter.

It is all the more striking, then, to see how well a proof procedure for justification defenses works to prove provocation manslaughter. In the proof of a justification defense, the burdens of production and persuasion are divided between the defense and the prosecution, respectively, and the prosecution is required to prove non-justification beyond a reasonable doubt.<sup>91</sup> If provocation were proved this way, then there would be no incentives problem, nor any constitutional problem. The defendant would have the incentive to make a prima facie case of provocation; and given that the defendant is likely to have the best evidence for provocation, and would benefit from proof of provocation, it would make practical sense to give the defense this burden. After the

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*Is Southern Violence Due to a Culture of Honor?*, HUMAN BEAST BLOG (Apr. 2, 2009), <http://www.psychologytoday.com/blog/the-human-beast/200904/is-southern-violence-due-culture-honor>.

90. According to the Supreme Court of Georgia,

In this day of no-fault, on-demand divorce when adultery is merely a misdemeanor, and when there is a debate ranging in the country about whether capital punishment even for the most heinous crimes is proper, any idea that a spouse is ever justified in taking the life of another—adulterous spouse *or* illicit lover—to prevent adultery is uncivilized. This is murder; and henceforth, nothing more appearing, an instruction on justifiable homicide may not be given. Such homicides will stand on the same footing as any other homicides. Our ruling should not, however, be read to mean that the peculiar facts of a given case may never suggest 'passion' and 'provocation' within the meaning of the voluntary manslaughter statute.

*Burger v. State*, 231 S.E.2d 769, 771 (Ga. 1977) (internal citations omitted).

91. *See, e.g.*, *State v. Kelly*, 478 A.2d 364, 375 (N.J. 1984) ("Rather, if any evidence raising the issue of self-defense is adduced, either in the State's or the defendant's case, then the jury must be instructed that the State is required to prove beyond a reasonable doubt that the self-defense claim does not accord with the facts; acquittal is required if there remains a reasonable doubt whether the defendant acted in self-defense.").

defense has raised a claim of provocation, the prosecution would be eager to prove non-provocation beyond a reasonable doubt, just as it proves non-justification beyond a reasonable doubt. Success would secure a murder conviction.

In addition to distributing the incentives the right way around, this procedure would not violate the Due Process requirement of proof beyond a reasonable doubt. Placing the burden to prove non-justification on the prosecution is not constitutionally required, but it is unquestionably permitted.<sup>92</sup> The government can make things as difficult for itself as it pleases. If we used a justification proof procedure, then placing the burden to prove non-provocation on the prosecution would meet constitutional demands even if murder and provocation manslaughter were defined in close contradistinction to one another.

Recall that such close contradistinction was the fundamental defect of the proof procedure in *Mullaney v. Wilbur*.<sup>93</sup> Because heat of passion was the converse of malice, to impose the burden to prove the former on the defense was to relieve the prosecution of the burden of proving the latter.<sup>94</sup> The real problem in *Mullaney*, however, and the problem later alleged in *Patterson v. New York*, was that the defendant's burden of persuasion—and, therefore, the prosecution's as well—was a mere preponderance.<sup>95</sup> The problem was not that the defendant had an evidentiary burden; it was that the quantum of evidence required of the defendant had increased from an amount sufficient to raise a reasonable doubt to an amount sufficient to constitute a preponderance—an increased burden that was imposed because the defendant had raised an argument that he had a right to raise.<sup>96</sup>

If Maine law had required heat of passion to be proved as a justification defense is proved, then there would have been no practical

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92. Compare *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (burden of persuasion for self-defense may be placed on the defendant), with *Dixon v. United States*, 548 U.S. 1, 24–25 (2006) (Breyer, J., dissenting) (citing, with approval, cases upholding federal rule that places burden of persuasion to disprove self-defense on the government).

93. See 421 U.S. 684, 703–04 (1975).

94. See *id.* at 701–04.

95. See *id.* at 703; *Patterson v. New York*, 432 U.S. 197, 208–09 (1977).

96. See *Mullaney*, 421 U.S. at 703 (“Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence.”).

or constitutional problem in *Mullaney*. The procedure for proving justification defenses in most jurisdictions is that, once the defendant has presented sufficient evidence for each justification element, the prosecution must prove non-justification beyond a reasonable doubt.<sup>97</sup> Applied to provocation, the effect of the defendant's coming forward with even a small quantum of evidence of heat of passion would be to raise a reasonable doubt about malice. A conviction for manslaughter—a killing done without malice—would follow under the law of lesser included offenses.<sup>98</sup> If the defendant were able to raise such a reasonable doubt about malice, then it would be up to the prosecution to disprove heat of passion. Given that heat of passion raises a reasonable doubt about malice, the prosecution would dispel this doubt and avoid a mere conviction for manslaughter by reinforcing its case for malice in a way that addressed heat of passion specifically. It would be no more or less difficult for the prosecution to foreclose a reasonable doubt in this way, on this issue, than it is with respect to any other element that it sets out to prove. This proof procedure would not violate the Constitution because it would not raise the defendant's evidentiary burden or shift the prosecution's burden of persuasion onto him.<sup>99</sup>

The fact that we might prove provocation in the same way that we prove justification defenses does not imply that provocation is a justification. It merely suggests that this is so, and we have ample means available to us to counter any such suggestion—the simplest of these being to overtly repudiate its repellent moral implications. However, while these measures might serve to counter the normative suggestion, they are not necessarily sufficient to counter the descriptive suggestion that provocation is a justification as a conceptual matter.

Given this possibility, we should take a closer look at what the application of the proof procedure for justification defenses tells us about the formal features of provocation manslaughter. We obviously do not want to read too much into the fact that provocation could be proved in the way we prove justification defenses, but for analytical purposes it is worth looking into *what* might be read into it.

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97. See *supra* note 91.

98. See FED. R. CRIM. P. 31(c)(1); see also *Keeble v. United States*, 412 U.S. 205, 208 & n.6 (1973) (applying Rule 31(c)).

99. See *Patterson*, 432 U.S. at 208–10.

First, the fact that we could prove provocation in the way that we prove legal justification suggests that provocation has to do with criminal wrongdoing, as opposed to the status or characteristics of the wrongdoer. According to one view of justification defenses, the reason that the prosecution ordinarily has the burden of proving justification defenses beyond a reasonable doubt is that a crime has not been proved unless and until non-justification has been proved. This view is known, broadly speaking, as the negative elements view of justification defenses, one version of which is the continuity view.<sup>100</sup> There are difficulties with each of the competing analyses of justification defenses, but the continuity view best explains why the prosecution has the burden of persuasion to prove non-justification. The reason is simply that offense elements and justification elements are the mirror images of one another, so that the prosecution's proof of non-justification tracks its proof of an offense. This is particularly true with respect to the offenses' corresponding fault and non-fault elements—for example, negligence and reasonable belief, respectively. A reasonable belief that one faces an imminent threat implies that a defendant is not negligent about the fact that, as it turns out, he did not face an imminent threat. An unreasonable belief that he faces an imminent threat implies that the defendant is negligent about not being justified in this respect. If proving provocation manslaughter like we prove justification defenses works well, then perhaps provocation is like justification, in that it too is part of criminal wrongdoing. Even setting aside the thesis that provocation should be taken at face value, this seems very likely because, regardless of whether it is a defense or an offense, the provocation argument operates exclusively within the confines of homicide.

Second, the suggestion that provocation has to do with criminal wrongdoing is bolstered by the fact that offenses, justification defenses, and provocation, respectively, have a basic feature in common: their amenability to mistake arguments. Obviously, a mistake of fact regarding the offense is a good defense. There is, of course, a defense of mistaken justification. And, as I noted above, a defense of mistaken provocation is recognized.<sup>101</sup> From the perspective of mistake, then, provocation is not only like a justification defense but also like an

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100. See Huigens, *supra* note 28, at 645–53.

101. See *supra* note 45 and accompanying text.

offense. In this light, it seems even more clear that provocation has to do with criminal wrongdoing generally. In the resemblance of provocation and offenses with respect to mistake, there is even a suggestion that provocation manslaughter might be an offense.

Beyond this point, however, the analogy begins to break down. The mistake of fact defense in offenses and justification defenses operates to negate the fault elements in their respective definitions. If I go hunting and shoot a person whom I believe to be a deer, then I have not shot a human being purposely, knowingly, or recklessly. It never occurred to me that this “deer” was a person, and so I could not have had the requisite mental state regarding the element of “person” or “human being” in the offense definition.<sup>102</sup> If my actual belief is also reasonable, then I have not shot a person negligently either—and so have not committed a homicide of any kind. On a negative elements or continuity view of justification defenses, the mistake analysis is the same. If I kill a person who threatens to shoot me with a gun, but the threat is just a practical joke and the gun is made of rubber, then I have, nevertheless, committed murder. I have purposely killed a human being in the absence of justifying facts. However, if it honestly never occurred to me that this deadly attack was merely a joke, and if my not seeing that this was a joke was reasonable under the circumstances, then I killed a person purposely, but I was justified in doing so.<sup>103</sup> Again, I did not commit any criminal wrongdoing.

Whether we take provocation manslaughter to be an offense or a defense, however, mistaken provocation does not work this way. First, a belief that provoking circumstances are present when they are not present does not negate either the fault elements of an offense, such as knowledge that one’s victim is a human being; or the fault elements of a justification defense, such as knowledge that one does not face an imminent threat. The definition of provocation manslaughter does not pair its non-homicide elements—heat of passion, provoking circumstances, or extreme mental or emotional disturbance—with mental states fault elements such as purpose, knowledge, or

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102. MODEL PENAL CODE § 210.1–.2 (1980).

103. Whether I am actually justified when I make an honest mistake about justifying circumstances, or in some sense merely “excused,” is one of the principal controversies in the theory of justification defenses. I have taken the position that the mistake results in actual justification because fault or mens rea regarding non-justification has not been proved. See Huigens, *supra* note 28, at 630.

recklessness.<sup>104</sup> I can claim provocation without having to prove that I knew I was acting under the heat of passion or under an emotional disturbance. I merely have to have acted in this way. A good case of provocation depends on one's reaction to a belief in, say, adultery, and not on the belief itself.

Second, the basic logic of mistake in provocation, on one hand, and offenses and justification defenses, on the other, is clearly different. Where the latter defenses are concerned, we exculpate *because of* ignorance and the concomitant fact that the defendant has acted as he otherwise *would not have done*.<sup>105</sup> A mistake resulting in provocation exculpates *in spite of* ignorance, because the defendant has reacted, and acted, as he otherwise *would have done*.<sup>106</sup> In formal terms, a mistake about provocation does not mitigate, if it does, for the reason that it negates fault elements (such as negligence) or that it establishes non-fault elements (such as reasonableness). As we will see, this is so because provoking circumstances and the reaction to them are themselves fault criteria that consist of objective circumstances instead of subjective states. Provocation is not a justification defense simply because it does not operate as one.

### C. *Provocation Is a Fault Criterion in a Manslaughter Offense*

Where do these points leave us? On one hand, provocation is not a claim of non-responsibility, in part because it has to do with the defendant's acts of wrongdoing and not with his condition. This suggests that provocation might be a justification because justifications have to do with wrongdoing; this suggestion is supported by the fact that proving provocation in the same way that we prove justification defenses would work well, both in practice and as a constitutional matter. Ultimately, however, the concept of provocation as a

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104. See MODEL PENAL CODE § 210.3(1)(b) ("Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.").

105. Cf. *Woods v. Warden*, 36 Conn. L. Rptr. 529, 529 (Super. Ct. 2004) ("If he had not exaggerated the threat against him, presumably he would not have pulled out the pistol and by exaggerating the threat, a claim could have been made of mistake of fact and potentially a viable defense of self-defense.").

106. See *State v. Yanz*, 50 A. 37, 39 (Conn. 1901) ("Such a belief, though a mistaken one, is calculated to induce the same emotions as would be felt were the wrongful act in fact committed.").

justification defense is no more viable than the concept of provocation as a defense of non-responsibility. As mistake analysis shows, the basic logic and operations of the respective defenses are fundamentally different. What is left?

What is left is the concept of provocation manslaughter as an offense. This way of looking at provocation fits with the idea that it is a matter of wrongdoing, thus avoiding the principal weakness of provocation as a claim of non-responsibility. It recognizes that provocation is a matter of wrongdoing—but without running afoul of the fundamental moral objections and descriptive differences that rout any suggestion that provocation is a defense of justification. If provocation is a matter of criminal fault and, therefore, of criminal wrongdoing, and if provocation is not the justification part of wrongdoing, then provocation manslaughter is an offense.

My thesis requires me to show more than this, however. I need to show that provocation works, with respect to murder, in the same way that reckless manslaughter does. Proof of reckless conduct disproves murder based on purposeful or knowing conduct, because recklessness is conceptually different from purpose or knowledge, such that the presence of the former excludes the latter. A conceptual argument for taking provocation at face value will have to show that proof of a manslaughter based on provoking circumstances also logically precludes a conviction for murder based on purposeful or knowing conduct, and that it does this because provoking circumstances and their influence on the offender are different from purpose or knowledge in such a way that the presence of the former excludes the latter. I will have to show, furthermore, that there is a viable procedure that allows us to prove these offenses in a way that is consistent with this theoretical picture.

### III. PROVOCATION AS CRIMINAL FAULT

#### A. *Provoking Circumstances as Offense Elements*

If some guy in a bar was jabbing you in the chest in that soft spot just inside your shoulder, over and over again, hard enough to push you backwards; and if you'd tried to push him back, but couldn't; and if he was so up in your face and so smug that he couldn't see you pull a very sharp knife out of your pocket and open it behind your back; and if anyone who could see you do this either hated him or loved blood enough to say nothing, then when he finally backed you up against the wall, would you push the knife in as far as it would go, and pull upward

as hard as you could?

If you came home from the store and found a man raping your son, and if this man had laid his gun down on a table so that it was now much closer to you than to him, would you aim it at his chest or at his head? If in his confusion and shock he let your child slip away, would you deliberately hesitate so that he would know he was about to die? Would you smile? Would you pull the trigger?

Let us suppose that you have answered “no” to each of these questions (which, for what it is worth, seems likely to me because the vast majority of people would answer this way). This answer makes these cases of non-homicide, of course, in which provocation doctrine does not come into play. In an analysis of provocation manslaughter, however, it is useful to approach the question this way around. Because it is a prediction about your own behavior, your answer shows that you have an expectation, not only about what would happen as a matter of fact, but also about what ought to happen. This is so because part of your prediction about what would happen, presumably, is that you would have lived up to your own standards of behavior.

This normative expectation is the defining feature of criminal fault. We generalize the expectations that we have of ourselves so that we expect no less from other human beings. When a person’s acts violate a criminal prohibition, we do not find the case for punishment complete unless we also find that they have behaved unreasonably, or that they have disregarded a risk that they ought to have avoided, or that they have intentionally done an act that is so far outside the range of acceptable behavior that we have taken the trouble to ban it by law. John Gardner coined the term “normative expectations” for the purpose of describing criminal fault.<sup>107</sup> He writes about violations of these expectations in terms of excusing criminal wrongdoing—but it comes to the same thing:<sup>108</sup>

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107. See JOHN GARDNER, *The Gist of Excuses*, in OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 121, 124 (2007).

108. American criminal law and scholarship refers to non-responsible agency as an “excuse,” but English courts and theorists call non-responsibility defenses, sensibly, non-responsibility defenses. They use the word “excuse” in a sense that corresponds to non-fault in American terms. For example, American law and theory analyzes mistake of fact in terms of a failure to prove the fault elements of an offense. In British law and theory—in which offenses often are not defined in terms of discrete elements—mistake of fact is analyzed using the term “excuse.” See, e.g., A.P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY

The gist of an excuse, as I will try to explain, is precisely that the person with the excuse lived up to our expectations. . . . One may have an image of someone excusing themselves by saying: “I’ve always been spiteful and malicious, so how did you expect me to behave?” Being spiteful and malicious is, of course, no excuse for anything. Pointing to the spite and malice in one’s wrongful actions is asserting, not denying, that these actions cast one in a bad light. So the question, for excusatory purposes, is obviously not whether the person claiming the excuse lived up to expectations in the predictive sense of being true to form or true to type or even true to our disappointing experience of human beings in general. The question is whether that person lived up to expectations in the *normative* sense.<sup>109</sup>

In fact, Gardner describes provocation manslaughter in these terms (setting aside, apparently, the traditional rule that a manslaughter instruction cannot be given where there was only verbal provocation): “In the face of constant taunts, did this person exhibit as much self-restraint as we have a right to demand of someone in her situation?”<sup>110</sup> If the person did demonstrate the expected amount of self-restraint in this situation, then the jury would be instructed on provocation manslaughter.

To illustrate Gardner’s point, suppose that, in the first of my hypothetical cases, you did kill the other person. You were, after all, in a bar in which the regulars apparently regard bar fights as blood sport. It appears that you are a regular here, because you carry a knife large enough to kill another person, are capable of stabbing another person in the belly, know how kill this way, and are enraged to the point of irrationality because, like a lot of alcoholics, you are prone to rage. As a result, you kill this guy who is physically taunting you in front of a crowd of people who are likely to read a failure to retaliate as a sign of weakness. You might have met our descriptive expectations by killing

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AND DOCTRINE 547 (2d ed. 2003) (“Any mistake that D makes when committing an offense will have no bearing on her criminal liability unless it causes her to lack mens rea or provides her with a legally recognised excuse.”); J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 188 (5th ed. 1983) (“Where the law requires intention or recklessness with respect to some element in the actus reus, a mistake, whether reasonable or not, . . . will excuse.”).

109. GARDNER, *supra* note 107, at 124.

110. *Id.*

the other man, but you have failed to meet normative expectations—as a result of which, you probably will be convicted of murder, not manslaughter.

In the second case, of course, you are nothing like this. You are an ordinary middle-class person—a mother who, until this moment, could not imagine herself using a gun at all, let alone taking a life with it. At the moment of decision, with a gun in your hand, you could have killed this animal—or so you thought. Confronted with this horrific scene, you surprised even yourself when you decided that aiming at his chest was the better shot, and then did not take it. Most of your friends and family will say that they were surprised that you did not kill the rapist. Apparently, unlike the knife-wielding guy in the bar, you failed to meet expectations as a descriptive matter. However—again unlike the guy in the bar—you did meet normative expectations. Even your surprised friends would say that you were right, in the end, just to hold the man at gunpoint and dial 911 with your free hand.

The value of looking at provocation manslaughter in terms of criminal fault, and at criminal fault in terms of normative expectations, is that it shifts attention away from the emotional upset involved in these cases, and draws attention, instead, to the provoking circumstances themselves. More to the point, it allows us to conduct a certain kind of conversation about provocation cases. Suppose, for example, that the mother who is confronted with the sight of her son's being raped had discovered that his baseball coach had a record of sexual misconduct, and that the coach had invited himself over to her house for some individual batting practice with her son. She delayed going home after work on the off chance that she might catch the man engaging in some sort of inappropriate behavior with her son and then discovered him engaged in an act that was far worse than anything she had imagined. If she killed the man, she might get an instruction on provocation manslaughter because the situation meets the letter of the defense, and because there is some evidence that supports a rational verdict of manslaughter. But she is very, very unlikely to succeed with the jury in making this argument. Her conduct leading up to the shooting, and her conduct as a mother specifically, reflect poorly on her, to say the least.

Would her conviction be attributable to anything more than the jury's disapproval of her actions leading up to the killing? Well, no, it would not be, and my point is that this is as it should be. The *Model Penal Code* formulates provocation in terms of "extreme mental or

emotional disturbance,” but notice that its “reasonable explanation or excuse” language facilitates a *normative* evaluation of this emotional upset and, more importantly, of the actions leading up to the killing.<sup>111</sup> The reasonableness of an emotional upset—which emphatically is not the same as the reasonable man standard—is the pivot point of our evaluation of her provocation claim.

This evaluation consists of a conversation about our normative expectations and whether the defendant has met them. We expect citizens not to engage in vigilantism, and we certainly expect a parent not to take chances with her son’s well-being in the service of such a misbegotten mission. If, at the end of this disaster, the mother winds up being distraught to the point of committing murder, then she has no reasonable explanation or excuse for being in that condition. We expect, descriptively, that no murder would have occurred, not least because we believe, normatively, that she should not have created this problem at all.

To see the significance of this conversation more clearly, consider the contrast with the prevailing consensus on the nature of provocation manslaughter. If provocation were a matter of partial incapacity due to overwhelming mental or emotional disturbance, then we would be unable to conduct a meaningful conversation about either our descriptive expectations concerning homicide versus non-homicide or our normative expectations in this regard. Our descriptive expectations would be so fact dependent and context sensitive (how upset was the defendant, exactly?) that it would be difficult to say that we had any expectations about mental or emotional disturbance at all—except for normative expectations. But if provocation were a matter of emotional upset, and if our normative expectations turned on this question—as they would under the prevailing understanding—then we could not be said to have any meaningful normative expectations either. There would be no gap between our descriptive and normative expectations. If the defendant was very upset, then we would expect him to commit homicide and also, accordingly, to receive a manslaughter verdict. If he was not very upset, then we would not expect him to commit homicide, and we would also not expect him to need a manslaughter instruction. This uninteresting picture is a defect in the partial non-responsibility view of provocation. The fact is that we can and do conduct meaningful

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111. MODEL PENAL CODE § 210.3 (1980).

conversations about normative expectations in provocation cases.

Consider the case of the stabbing in the bar. As I have described it so far, we would expect the provocation instruction to be given, but we would not expect the jury to convict the defendant only of manslaughter. This case looks and sounds more like a murder, regardless of how badly upset the defendant might have been when he was taunted in the bar.

Suppose, however, that he had not been to the bar in a year or so, because he had been going to Alcoholics Anonymous meetings, trying to get sober. As part of his twelve-step program, he wants to make amends to one of his old drinking buddies for, say, stealing some snow tires out of his garage. Things do not go as the defendant had hoped, and he eventually finds himself cornered in the way that I described it above. In this variation, the defendant has a much better chance of succeeding with a plea of provocation manslaughter.

Notice that the emotional upset the defendant feels is the same as it was before. He is frightened, intimidated, and embarrassed. It is also largely the same case of mutual combat—a slow-building shoving match that gets out of hand, even though one of the participants is trying to hold his temper. The only difference is the different back story, but this new back story gives us a different result. Mutual combat looks different when it grows out of getting sober and trying to make amends, as opposed to the idiotic macho posturing that usually precedes bar fights. The jury will view the defendant more favorably because he is actively trying to recover from drinking. This increased sympathy will contribute to a verdict of manslaughter. Is there anything wrong with this? Does the result turn on impermissible factors? No. The defendant's recovery from alcoholism is exactly the kind of thing that provocation doctrine is meant to make relevant.

Because we have meaningful conversations about descriptive and normative expectations, we have a different way of thinking about provocation available to us. This different way of thinking about provocation manslaughter consists of thinking in terms of normative expectations, and this means thinking about provocation in terms of fault in criminal wrongdoing. I will argue below that, when we evaluate criminal fault, we conduct a wide-ranging evaluation of the set of objective circumstances and subjective states that obtained when the defendant acted. When we define criminal offenses, these objective circumstances and subjective states are the material that we use to formulate fault elements. The ways in which we do this, and the

significance of the various choices that we make when we do it, are the subjects of Parts III.B, III.C, and III.D, below. We will see that an “extreme mental or emotional disturbance for which there is a reasonable explanation or excuse,”<sup>112</sup> is not an intent element, but it does describe an intentional action. It also describes intentions and does this job in a way that permits a more complete assessment of desert for legal punishment than a subjective-states intent element would do. From this perspective, again, it is the reasonable explanation or excuse, and not the extreme mental or emotional disturbance, that is the primary component of the fault criterion that defines provocation manslaughter.

*B. The Presumed Primacy of Subjective Fault Criteria*

The law of homicide includes some homicides defined in terms of subjective-states fault criteria (such as premeditated murder<sup>113</sup> and reckless manslaughter<sup>114</sup>) and some homicides defined in terms of objective-circumstances fault criteria (such as negligent homicide;<sup>115</sup> malice murder;<sup>116</sup> and, I contend, provocation manslaughter).

In the first kind of fault criterion, subjective states of mind—to “purposely” or knowingly” cause death, for example<sup>117</sup>—do the normative work of determining the gravity of the offense. In the second kind of fault criterion, the circumstances of the offense do the normative work of grading. Circumstances reasonably giving rise to “extreme mental or emotional disturbance” reduce murder to manslaughter;<sup>118</sup> and “circumstances manifesting extreme indifference to the value of human life” raise manslaughter to murder.<sup>119</sup> Nevertheless, subjective-states fault criteria are taken to be primary here, too. Subjective-states fault criteria function as normative anchors, so to speak. Only a purposeful or knowing homicide is mitigated by provocation, and only a reckless

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112. *Id.*

113. *See, e.g.*, WASH. REV. CODE ANN. § 9A.32.030(1)(a) (West 2009) (“A person is guilty of murder in the first degree when . . . [w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person . . .”).

114. *See, e.g.*, MODEL PENAL CODE § 210.3(1)(a).

115. *See, e.g., id.* § 210.4.

116. *See, e.g.*, 18 U.S.C. § 1111(a) (2006) (“Murder is the unlawful killing of a human being with malice aforethought.”).

117. *See, e.g.*, MODEL PENAL CODE § 210.2(1)(a).

118. *See, e.g., id.* § 210.3(1)(b).

119. *See, e.g., id.* § 210.2(1)(b).

homicide can be elevated to murder based on the circumstances manifesting extreme indifference. Standing alone, these objective circumstances are thought to be too amorphous to justify the substantial legal punishment that we impose in cases of homicide. Many courts and scholars have taken the position that negligence is insufficient to support criminal liability for any but minor offenses.<sup>120</sup> Even fewer would condone the stand-alone use of these other, even less well-defined, objective fault criteria in the definition and adjudication of homicide offenses.

Given this state of the law, it is natural to think that subjective-states criminal fault criteria have conceptual and normative primacy over objective-circumstances fault criteria. It appears that the second kind of criterion can only ever be a variation, proxy, approximation, or special case of the first kind. This appearance is fundamentally misleading, however. A perpetual campaign to eliminate objective fault criteria from criminal law has conspicuously failed to do so because doing so is impossible. Objective-fault criteria pop up again and again, like weeds in an obsessively tended lawn, because these weeds are the native plants.<sup>121</sup> The objective features of offenses, not subjective states, are the paradigmatic fault criteria, because criminal fault consists of particularly salient aspects of criminal wrongdoing.

To say that criminal fault consists of particularly salient aspects of offenses is not to say that fault criteria are only implicit in offense definitions, where they operate invisibly and mysteriously.<sup>122</sup> On the contrary, these salient features of offenses have been generalized and

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120. MODEL PENAL CODE § 2.02 cmt. 4 (1985) (“No one has doubted that purpose, knowledge, and recklessness are properly the basis for criminal liability, but some critics have opposed any penal consequences for negligent behavior.”); *see also* Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 634–35 (1963).

121. *See, e.g.*, COLO. REV. STAT. § 18-3-102(1)(d) (2011); FLA. STAT. ANN. § 782.04(2) (West 2007) (defining traditional depraved heart murder); *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (upholding Montana statute excluding proof of voluntary intoxication to disprove purpose or knowledge in murder cases); *People v. Scott*, 927 P.2d 288, 294 (Cal. 1996) (upholding convictions for both attempted murder and murder on a transferred intent rationale); *People v. Luparello*, 231 Cal. Rptr. 832, 853 (Ct. App. 1986) (upholding accomplice’s conviction for murder on ground that murder was foreseeable); *State v. Oliver*, 627 A.2d 144, 152 (N.J. 1993) (requiring reasonable mistake as to consent for acquittal).

122. This is true, however, of so-called strict liability offenses. I have previously tried to dispel the mystery. *See* Kyron Huigens, *Is Strict Liability Rape Defensible?*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 196, 196–97 (R.A. Duff & Stuart P. Green eds., 2005).

formalized, and appear in regular forms from offense to offense. Willful ignorance and conditional intent, to take two examples, substitute for knowledge and purpose, respectively.<sup>123</sup> The point of looking at willful ignorance and conditional intent as salient features of the offense is to recognize that knowledge and purpose are no more than this themselves.

All four formal fault criteria stand on equal ground, and the objective-circumstances kind of fault criteria are not derivative, inferior substitutes for the intentional-states kind, as a conceptual or a normative matter. The act of avoiding knowledge of some criminal circumstance is about as blameworthy as the state of knowing the circumstance, but the relationship that each condition has to that circumstance is fundamentally different. When it relates to an element of an offense, willful ignorance marks the gravity of a wrong at approximately the same level that knowledge marks it. It does not perform this grading function as a proxy for knowledge. It performs the same function in its own right. The absence of knowledge is not a kind of knowledge; it is a different state altogether.

The same is true of conditional intent relative to subjective intent. A conditional intent could be described as an intent to have an intent. Described this way, conditional intent sounds like blameworthiness once removed, like a feeble echo of real criminal fault. But this is precisely what tells us that conditional intent is not derivative of a subjective intent. “Get out of the car or I’ll kill you,” does not sound like a feeble echo of anything. It is a threat, an objective circumstance that plays the same role as an unconditional intent, but that has its own distinct normative significance—that of marking a certain level of gravity in wrongdoing, one that more or less matches that marked by subjective intent.

Were our criminal code more fine-grained than it is in its use of fault criteria, willful ignorance and conditional intent might each serve to define different grades of some offenses than the grades defined by

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123. *See, e.g.*, MODEL PENAL CODE § 2.02(7) (“When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”); *Holloway v. United States*, 526 U.S. 1, 4, 12 (1999) (holding that the evidence that defendant planned “to steal the cars without harming the victims, but that he would have used his gun if any of the drivers had given him a ‘hard time,’” is sufficient to establish “the intent ‘to cause death or serious bodily harm’”).

knowledge and intent.<sup>124</sup> Even as matters stand, however, the use of one kind of fault criterion to substitute for the other in an offense definition in no way implies that the objective-circumstances fault criteria are subordinate to subjective-states fault criteria. Each kind of fault criterion relates to desert for legal punishment in precisely the same way. The failure to recognize this, and the mistaken perception that subjective states of mind are a primary kind of criminal fault, may be traced to two sources: a failure to distinguish between intentions and intentional actions, and a failure to distinguish between intent as an offense element and intentions as natural kinds.

### C. Intentions and Intentional Acts

To begin with the first error, it seems that an intentional act is the product of an intention so to act, on a one-to-one basis. If I intentionally run my car off the road, then this is because I had an intention to run my car off the road. We tend to take a statement such as this one to be a complete account of intentional actions. It is not a complete account, however, and the idea that it is one rests on a misconception of intentionality. It fails to include all of my relevant intentions in the description of my intentional act.<sup>125</sup> If I intentionally run my car off the road, then this is equally because I have an intention to die, an intention to show my girlfriend that she does not appreciate me, and an intention to ride my beloved Camaro out in a blaze of glory.

An intentional act arises from a number of different motivating intentions in addition to the simple intention so to act. Therefore, the intentional act featured in an offense definition cannot be equated, in a simple, straightforward way with an intention to so act. The intention to cause death, for example, is not the only source of an intentional act of killing, because it is not the only intention that motivates the killing. To ignore all but the simplest intention in an analysis of our intentional actions is a fatal omission in the analysis of criminal fault. It is our intentions, not our intentional actions, that define our desert for legal punishment, and our relevant intentions are more numerous and

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124. In fact, before the drafting and widespread adoption of the *Model Penal Code*, state criminal codes did contain more objective and fine-grained fault criteria than they do now. See PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* 48 (2006).

125. See MICHAEL E. BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON* 111–13 (1987).

complex than the simple intention to kill. As a result, our basis for inferring criminal fault from a person's actions is far broader than the intentional action described in an offense definition.

To see why this is so, consider the relationship between intentions and desert for punishment. I have used John Gardner's idea of normative expectations to explain criminal fault, and described specific expectations in specific hypothetical contexts.<sup>126</sup> But how should we describe the relevant expectations generally? What is their significance for desert?

Gardner says that the relevant expectations are those that concern our role as human beings in society, and notes that this is an Aristotelian idea.<sup>127</sup> A more fully developed Aristotelian account specifies the relevant role as that of a deliberator on ends.<sup>128</sup> The agent's deliberations on ends matter because this is where responsibility lies.<sup>129</sup> For Aristotle, human beings are inherently social beings,<sup>130</sup> and they have a distinctive *ergon*, a teleological purpose, of rational action.<sup>131</sup> A failure to reason well in practical matters—and in particular to reason well with regard to the society of which one is partly constituted and partly constitutive<sup>132</sup>—is the salient failure of the wrongful actor in Aristotelian ethics.<sup>133</sup>

Criminal law focuses on intentions in defining and adjudicating desert for punishment because our intentions reflect the quality of our practical reasoning, and so indicate whether punishment is deserved. Our reasons for acting come from our beliefs and desires, but the coordination of our reasons and actions, whether for ourselves or in cooperation with others, is the job of intentions. One defining mark of intentions, as a result, is that they are embedded in plans,<sup>134</sup> and plans reflect the long-term deliberations that have led the offender into criminal wrongdoing. We naturally inquire into the intentions that

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126. See discussion *supra* Part III.A.

127. See GARDNER, *supra* note 107, at 129 (identifying the normative expectations theory as “broadly Aristotelian”).

128. Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1449–56 (1995).

129. *Id.* at 1451–54.

130. *Id.* at 1451–52.

131. *Id.* at 1449–50.

132. *Id.* at 1454–56.

133. *Id.*

134. See BRATMAN, *supra* note 125, at 28–29.

constitute these plans when we inquire into the quality of the offender's practical reasoning—when we inquire, that is, into his criminal fault.

Let me give an example of this set of relationships as it appears in a case of provocation. Suppose that an elderly husband kills his terminally ill wife of fifty years, and that he does this in order to relieve her grave suffering. Ordinarily, we will say that he intends to kill her, and he will be guilty of murder in any jurisdiction because the definition of murder refers to an intentional act of killing; that is, it consists in part of an element such as “intends” or “intentionally” combined with an element such as “kill” or “cause death.”

However, the statement that the husband intends to kill his wife is inaccurate, because it is incomplete. The husband has acted intentionally to kill his wife, and he certainly does have an intention to kill. The important thing to see, however, is that his intention to kill is not the only intention that lies behind his intentional act of killing, or that is, correspondingly, relevant to his deserving legal punishment. He has other intentions that motivate his intentional act, and these intentions are no less relevant to his desert. These include his intentions to relieve suffering, to act lovingly, to honor another person's rational wish to die, and so on. These other intentions have motivating potential for the intentional act of killing, just as his simple intention to kill does, and, because of this, they are no less relevant to his deserving legal punishment. For one thing, society has normative expectations with regard to each of them. If the elderly husband's intentional act of killing is the product of such a cluster of intentions, then we will be uneasy (or should be) about letting his criminal liability turn on proof of only the intentional act of killing.

This uneasiness creates normative pressure in the direction of more complex criteria of criminal fault that will give these other intentions legal salience and that will help the law to produce morally defensible outcomes. Criminal fault is inferred from all of the relevant intentions, taken together, that lie behind the intentional act described in a legal prohibition. In order to include more of these intentions in the determination of desert for legal punishment, we often employ fault criteria other than, or in addition to, a description of a subjective state such as “intent,” or “purpose,” or “knowledge.” Objective circumstances describe intentional acts more completely than a description of a subjective state can do, and this more complete description brings a greater number of relevant intentions to bear on the question of desert for legal punishment. This is why, faced with the case

of the elderly husband and a criminal code that did not have a broadly framed offense of provocation manslaughter, we would amend our criminal code to add one.

#### *D. Intent Elements and Intentions*

There are two points in this argument that might raise objections. First, I suggested that we include objective circumstances, including provoking circumstances, among the elements of an offense definition as a way of bringing out the full range of the criminal actor's intentions as they bear on his desert for punishment. One might object that only an element of intentional action, such as killing intentionally, can bring out these intentions, because objective circumstances fault elements do not refer to intentions at all. Second, I referred to motivating intentions as implying criminal fault. Some readers might object that motivations are not *mens rea*, as black-letter criminal law doctrine has it.

Both of these objections make the same mistake, which is the second one that I referred to at the end of section III.B. The mistake is to equate intent elements in offense definitions with intentions as natural kinds. In other words, the mistake turns on a category error regarding criminal intent versus intentionality in general. In the theory of action, intentionality consists of one's having an object of some kind of attention. If I say, "I love my girlfriend," then I am describing my girlfriend intentionally—as the object of my love. If I say that I intend to marry her, then I am describing the act or state of marriage intentionally—as the aim of my actions. If I say that I will strive always to respect my wife's opinions no matter how radically we disagree on something, then I am describing my respect for her intentionally—as something that I propose to maintain through difficult times.

In contrast, to say, in the process of charging me with the murder of my wife's lover, that I acted with an intent to kill a human being, is to say that my act of killing meets a formal criterion of criminal fault. I deserve legal punishment if I am at fault in criminal wrongdoing; my intention to kill implies my criminal fault, along with my other relevant intentions; my intentional act of killing is sufficient evidence of my having these inculpatory intentions; and an offense element such as "intent to kill" serves, in the adjudication of my crime, to guide the jury's decision on whether or not I deserve legal punishment because of my intentions.

The distinction between the formal criterion "intent to kill" and my natural intention to do an intentional act of killing, is discernible in the

*Model Penal Code's* homicide definitions. The Code drafters wisely eschewed the words “intent,” “intended,” and “intentionally” in the definition of criminal fault. They opted, instead, for the terms “purpose” and “knowledge” as offense elements.<sup>135</sup> These formal fault criteria refer to the natural intentions of the accused—and, when used in correspondence with the material elements “to cause death” and “human being,” to his intentional actions—but they do so without raising the danger of confusion between formal element and natural kind. When it is used as a formal entity, “intent” can be replaced with new names—such as purpose or knowledge—with the stroke of a pen. In contrast, the actor’s natural intentions are not likely to be renamed in the philosophy of action. They are not terms of art in a formal normative system. They are colloquially entrenched terms for natural kinds, and to purport to change them would inevitably be confusing rather than clarifying.

Once we see the difference between intentions and intentional actions—and once we see intentional actions as natural kinds, in contrast to intent as a formal fault element in offenses—then we should be able to see the rationale and value of objective criteria of criminal fault. My desert for legal punishment is constituted, not only by my intention to kill, but also by *all* of my intentions that motivate the killing, and these intentions are evidenced by my intentional act of killing. Legal fact-finding concerning my intentional act of killing can be guided by an offense element consisting of some phrase such as “intent to kill.”

This is, indeed, the most common fault criterion for murder. A single subjective-state description such as “intent to kill” is extremely misleading, however, because it suggests that the only relevant intention is the simple intention to kill. If an offense element is to bring all of my relevant intentions into consideration for the purpose of deciding my desert for legal punishment, then we are better off if this fault element describes more of the situation than a single subjective state of the actor. In fact, a fault element need not contain the words “intent” or “intentionally,” or similar words such as “purpose” or “knowingly,” at all. Because an intention is merely some kind of attention paid to some object, an intentional action and, by way of that, my intentions can be adequately described in completely objective terms. In fact, an offense

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135. See MODEL PENAL CODE § 210.2(1)(a) (1980).

element that describes the circumstances under which criminal wrongdoing is done is not only sufficient to describe my inculpatory intentions and my desert for legal punishment, it is preferable for this purpose. A definition of manslaughter that avers to provoking circumstances is actually superior to one that avers to the subjective state of recklessness, because it is more comprehensive and more specific than a bare reference to the simple intention behind the intentional act.

#### *E. Provoking Circumstances as Criminal Fault*

How can we best understand provoking circumstances as fault elements in an offense definition? Consider two putative puzzles about provocation manslaughter. First, the common law imposed a “cooling off” period.<sup>136</sup> If the defendant had time to reflect and calm himself, then he could not claim that he was provoked.<sup>137</sup> On the consensus view of provocation as a non-responsibility defense resting on an emotional upset, this seems wrong. A person obviously can “heat up,” or become more emotionally overwrought with the passage of time, if he dwells on the provoking circumstances. Second, the common law also banned verbal offense from the set of valid provoking circumstances.<sup>138</sup> This also seems wrong because insults and verbal abuse can be just as upsetting as any other provoking act or event.

Neither one of these “puzzles” is difficult to figure out once we recognize that provocation manslaughter is not a non-responsibility defense resting on an emotional upset. Provoking circumstances are fault elements in an offense of manslaughter. Criminal fault is a matter of normative expectations, as Gardner describes it,<sup>139</sup> but it is in a deeper sense a matter of self-governance.<sup>140</sup> A person who dwells on something that he finds emotionally upsetting, with the result that he becomes increasingly angry, has failed to meet our expectations about self-governance. The common phrases “let it go” and “get over it” are usually offered as advice, but their imperative phrasing puts a sharp

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136. See *United States v. Bordeaux*, 980 F.2d 534, 537–38 (8th Cir. 1992); *Girouard v. State*, 583 A.2d 718, 721 (Md. 1991).

137. See *Bordeaux*, 980 F.2d at 537–38.

138. See *Girouard*, 583 A.2d at 721–22.

139. See GARDNER, *supra* note 107, at 124.

140. See Huigens, *supra* note 128, at 1449–56.

normative point on it. Similarly, we all learn a verse about “sticks and stones” when we are very young, and the object of this aphorism is self-control. One cannot be expected to simply shrug off physical contact or adultery, but we do expect one another to shrug off insults and verbal abuse.

Self-control is the product of practical reasoning over the long term; a character trait that embodies society’s normative expectations. In other words, it is a virtue that criminal law requires each of us to acquire and maintain. One learns about sticks and stones, and then practices its lesson, at first consciously and then more or less unconsciously. Occasionally, it is necessary to remind oneself that words can never really hurt, but for the most part, each of us has internalized this lesson to such an extent that, not only do we not think about it much, our mastery of it makes each of us who we are in an important respect. Partly as a result of this particular process, I will become known as thin-skinned or cool-headed, to pick just two relevant traits. Self-control is only one aspect of self-governance generally, and the latter is the product of the universal project of self-definition within society’s normative boundaries.

Criminal law is obviously one important way in which these boundaries are set and enforced. The feature of criminal law that is specifically devoted to assessing the quality of the defendant’s practical reasoning over the long term is criminal fault. A failure of self-control on a particular occasion manifests a chronic failure of the practical reasoning that ought to have produced better self-governance and a more tractable character. When these failures of practical reasoning lead a person to engage in conduct that violates a criminal prohibition, then the proof of this failure is proof that the violation is more than a nominal one. The failure of practical reasoning is what makes it a case of criminal wrongdoing, instead of merely some behavior that violates a prohibition.

The offense elements that serve as fault criteria in offense definitions facilitate the jury’s evaluation of this failure, including, of course, whether there was such a failure to begin with. Provoking circumstances are among the elements that serve these purposes. They appear in the definition of provocation manslaughter in various guises: heat of passion, extreme mental or emotional disturbance, or a common law set

of circumstances that includes sudden discovery of adultery and mutual combat, among others.<sup>141</sup> Regardless of the guise in which they appear, however, the offense elements that describe provoking circumstances are objective-circumstances fault criteria that describe a failure to develop and maintain self-control specifically, and that enable a jury to determine whether the offense was committed with criminal fault, as constituted by this failure.

If we look at normative expectations concerning self-control through the prism of excuses (in the British sense), as John Gardner does, then the question of criminal fault appears to be one of success in meeting normative expectations.<sup>142</sup> “In the face of constant taunts, did this person exhibit as much self-restraint as we have a right to demand of someone in her situation?”<sup>143</sup> If the defendant did exercise this much self-restraint, then she is innocent of murder, at least, in spite of the fact that her conduct nominally violates the prohibition on murder. Her conduct, causing the death of a person, is a homicide; and the fact that the homicide was committed intentionally would ordinarily make it a murder. But she has met the normative expectations that we have about constant taunting, which are that it can, regrettably, lead to intentional homicide (assuming, as Gardner apparently does, that we will count verbal provocation as sufficient). We count her killing as a kind of success, because she has met the particular expectations that we have, in this context, about self-governance and long-term practical reasoning concerning the actions that define her as a person. Because the commission of an intentional homicide under provoking circumstances meets our normative expectations in these respects, we will not convict her of murder. Her success in meeting normative expectations entitles her to a partial defense, because her criminal fault is not as great as the fault indicated by an intentional killing standing alone.

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141. See *Mullaney v. Wilbur*, 421 U.S. 684, 684–85 (1975) (“The State of Maine requires a defendant charged with murder to prove that he acted ‘in the *heat of passion* on sudden provocation’ in order to reduce the homicide to manslaughter.” (emphasis added)); *Girouard*, 583 A.2d at 720 (noting types of provocation traditionally sufficient to reduce murder to manslaughter, including “*mutual combat . . . or the sudden discovery of a spouse’s adultery*” (emphasis added)); MODEL PENAL CODE § 210.3(1)(b) (1980) (“Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of *extreme mental or emotional disturbance* for which there is reasonable explanation or excuse.” (emphasis added)).

142. See *supra* notes 107, 109–110 and accompanying text.

143. GARDNER, *supra* note 107, at 124.

How does provocation as a matter of normative expectations look if we approach it from the other direction—that is, as an analysis of fault in offenses instead of as a partial defense? If success in meeting normative expectations exculpates, then inculcation consists of a failure to meet normative expectations. This is nearly tautologous, but the benefit of analyzing inculcation as a failure to meet normative expectations is that it brings out the particularism of criminal fault as it plays out in objective-circumstances fault criteria. We have specific normative expectations about specific actions in specific practical contexts. The fault element of provoking circumstances, in its various guises, serves to define and enforce these expectations. Malice and heat of passion are, standing alone, imprecise terms, but they served well in the common law of crime because of the particularism of common law development. The common law produced a discrete but comprehensive set of recognized provoking circumstances—not all of which, incidentally, necessarily entailed great passion.<sup>144</sup> The *Model Penal Code*'s extreme mental or emotional disturbance formulation is similarly particularistic about normative expectations, which is evident once one recognizes that the critical inquiry under the Code is not the disturbance, but instead the explanation for it. The jury is instructed to look for a reasonable explanation for the mental or emotional disturbance, and a reasonableness inquiry is always a particularistic inquiry.<sup>145</sup>

It is important to note this particularism because the criminal fault indicated by a fault element of intent to kill is not only more grave, but simply *different from* the criminal fault indicated by objective-circumstances fault elements such as heat of passion or extreme mental or emotional disturbance. Viewed as a failure of practical reasoning, a provoked killing is a failure of comparable gravity to a killing done recklessly. It is the contrasting terms of these fault criteria, however, and not the comparative gravity that each represents, that should draw our attention. Because fault and fault criteria are particularistic, each of

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144. *Girouard*, 583 A.2d at 720–21. Typically recognized provoking circumstances include “extreme assault or battery upon the defendant; mutual combat; defendant’s illegal arrest; injury or serious abuse of a close relative of the defendant’s; or the sudden discovery of a spouse’s adultery.” *Id.* at 720.

145. See MODEL PENAL CODE § 210.3(1)(b) (“[A] homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is *reasonable explanation or excuse*.” (emphasis added)).

these four kinds of fault in homicide—intent, recklessness, malice, and provocation—is different from the others. For the same reason, the four kinds of fault in homicide are also *mutually exclusive*. This is not obvious in the case of intentional murder and provocation manslaughter, because an intent element appears in the formal definition of both offenses. But the intent to kill *simpliciter* and the intent to kill in the context of provoking circumstances, respectively, are entirely different criteria of criminal fault that describe different intentional acts that reference different sets of intentions that bear on desert of legal punishment.

Allow me to state this last point again, more completely, because it is the heart of my argument. It is best framed in terms of intentions, intentional actions, and intent as an offense element. The definition of murder contains an intent element, and the definition of provocation manslaughter contains an intent element. However, provocation manslaughter combines this intent element with a provoking circumstances element such as extreme mental or emotional disturbance. As a result of this combination, the intentional act described in the definition of murder is different from the intentional act described in the definition of provocation manslaughter. Furthermore, those two different intentional acts reflect two different sets of intentions held by the murderer and the provoked killer, respectively. These two different sets of intentions have different implications for the defendant's desert for legal punishment. Because of the differences in intentional acts and intentions, the criminal fault entailed in provocation manslaughter is different from, *and exclusive of*, the criminal fault entailed in a murder. The fact that intent to kill under provoking circumstances and intent to kill standing alone are mutually exclusive fault criteria, means that the proof of the former disproves the latter. A defendant who is convicted of provocation manslaughter cannot also be convicted of murder. Provocation manslaughter operates, in this respect, just like reckless manslaughter does.

The fact that intentional murder is disproved by proof of provocation manslaughter goes a long way toward justifying the search for a cure for the prosecution's perverse incentive to fail to prove provocation manslaughter, were we to treat it as an offense. It is hardly obvious, however, what that cure is.

## IV. HOW TO TAKE PROVOCATION AT FACE VALUE

A. *A Series of Insoluble Difficulties*

It seems that we can spin out the procedure implicit in treating provocation as an offense from any starting point without finding any point at which we could stop, change something, and then proceed, taking provocation at face value thereafter. It makes little sense in the first place to obligate the prosecution to make a prima facie case of a provocation offense. As things stand under current theory and doctrine, in order to obtain a conviction for manslaughter in what would otherwise be a case of murder, a defendant need only prove the non-homicide elements in provocation's definition. Like many other defenses, provocation forestalls a conviction for murder by doing something other than negating the intent to kill. If the defendant fails to prove sufficient provoking circumstances, then he is convicted of murder. If he does establish these facts, then he is not convicted of murder.

In contrast, if the prosecution must prove provocation manslaughter, then it must prove a murder, including an intent to kill, as an element of the offense. Coming from this direction, the murder forestalls the manslaughter, not the other way around, rendering an offense of provocation manslaughter incoherent. This is so because the other elements of this manslaughter—the heat of passion, provoking circumstances, or understandable mental or emotional disturbance—do not negate an intent to kill.<sup>146</sup>

This leaves an intentional killing standing as a murder. We could stipulate that these elements do have a defensive role to play (e.g., mitigating factors), but we cannot stipulate that the prosecution will have an incentive to prove them. In the company of an intentional killing amounting to murder, with no defensive role to play, the remaining elements in the prima facie case of provocation manslaughter are superfluous. To say that they do have a mitigating role is to say—as I did, tongue in cheek, at the outset—that the prosecution must prove more than a murder if it wishes to convict the defendant of manslaughter. In practice, the prosecution's case for provocation manslaughter will always be a case for murder instead.

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146. See *supra* note 17 and accompanying text.

We might try to avoid this outcome by defining murder without reference to an intention to kill, thereby allowing it to rest on purely objective fault criteria such as malice or extreme indifference to the value of human life. If our fault criteria for murder are objective features of the offense, then we have greater latitude to define provocation manslaughter in a way that will disprove a murder. We might say, for example, that murder is a killing with malice and that heat of passion negates malice. The prosecution's proof of heat of passion, and its negating malice in the process, logically disproves murder. But now we have two problems. The prosecution has no incentive to negate malice, and the Constitution prohibits shifting the obligation to do so to the defense, because to do this is to require the defense to disprove an element of the offense.<sup>147</sup>

We might eschew any formal connection between a homicide done in the heat of passion and a homicide done maliciously. This would mean that proving heat of passion did not forestall murder by negating an element of murder, thereby avoiding constitutional objections. This move works if provocation manslaughter is a defense, because proving a mitigating element that does not negate the offense element of malice does not give the jury the burden to disprove the prosecution's case.<sup>148</sup>

But this move will not work if provocation manslaughter is an offense—far from it. It makes the offense of provocation manslaughter either incoherent, a violation of due process, or both. Without a formal connection between murder and manslaughter, the proof of manslaughter will not disprove or otherwise forestall a murder conviction at all. We will have defined the offense of provocation manslaughter in such a way that a jury's finding that heat of passion has been proved beyond a reasonable doubt does not logically defeat their prior finding that malice murder also has been proved beyond a reasonable doubt. The prosecution's case for provocation manslaughter is either a case for murder instead, or a delegation to the jury of complete discretion over the correct level of homicide, in law as well as in fact.

The simplest way out of this serial dilemma seems to be to set aside the idea that the manslaughter must disprove the murder. We should think in terms of precluding a murder conviction, as opposed to

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147. *Mullaney v. Wilbur*, 421 U.S. 684, 701–04 (1975).

148. *See Patterson v. New York*, 432 U.S. 197, 208–10 (1977).

disproving murder. A rule of preclusion would solve the incentive problem. Such a rule would stipulate that, once a prima facie proof of provocation manslaughter has been advanced, the jury cannot be instructed on murder and a murder verdict cannot be returned. At this point, the prosecution could only make the case for manslaughter or remain silent. If the prosecution remained silent, then there would be no conviction for murder or for manslaughter. The rational prosecutor would do her best not to wind up without a conviction, by seeking to prove manslaughter, and the defendant would do his best to contest the state's case for manslaughter and obtain an acquittal. The incentives are now the right way around.

One problem with this way out of our difficulties is that this rule of preclusion seems to merely stipulate away the murder—the kind of defect that I cited in my case against provocation as a defense.<sup>149</sup> This is not necessarily fatal, however. A rule of preclusion would still be more defensible than the day-into-night conversion of an offense to a defense. Generally speaking, a stipulation is content-independent; its rationale is unrelated to the underlying substance of the dispute. If, however, a rule precluding a conviction for murder can be defended in terms of this normative logic, then it is not a mere stipulation. It is a content-dependent, principled rule. A rule precluding a murder instruction might be this kind of rule.

A more serious problem, however, is that a rule precluding a murder instruction based only on a prima facie case of provocation manslaughter would deprive the jury of its constitutional authority. I have argued that provocation manslaughter logically excludes a murder just as a reckless manslaughter does. But neither a prima facie case of reckless manslaughter nor a prima facie case of provocation manslaughter disproves murder. If I admit that I knew the safety on my gun was off when I pointed it at my friend, but deny that I intended to kill him, then the jury obviously is entitled to resolve this factual dispute, and to decide whether the killing was reckless or intentional. Likewise, if I admit that I intended to kill my wife's lover, but insist that I was understandably overcome with rage when I did so, then the jury is entitled to decide what the truth of the matter is and should be instructed accordingly. A rule precluding a murder conviction can be defended as a principled stipulation even if it does not rest on actual

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149. See discussion *supra* Part II.

disproof, but if the stipulation is triggered by only a prima facie case of provocation manslaughter, then it is likely to violate the Constitution's guarantee of a jury trial in criminal cases.<sup>150</sup> Presumably, most defendants would not object to the jury's not having an opportunity to consider the murder charge, but the jury right is not personal to the defendant.<sup>151</sup>

### *B. How to Forestall a Murder Conviction*

We seem to be caught in a dilemma. We have ample reason to think that provocation manslaughter is, conceptually, an offense, and we have normative reasons to treat it as one, if at all possible. If we did this, then we would shift the burden of proving provoking circumstances onto the prosecution. The problem is that the prosecution has no practical incentive to carry this burden. On the contrary, the prosecution has ample incentive to lay back or sandbag the proof of provocation manslaughter in order to obtain a conviction for murder. In order to solve the incentives problem, we need to forestall a murder conviction where provocation manslaughter is the proper verdict, but we cannot assume that provocation manslaughter is the proper verdict—which would be unconstitutional even if it were not question-begging.

#### 1. Regarding the Burden of Persuasion

Within the normative system of criminal law, if a killing with intent is murder, then a killing with intent plus provoking circumstances is *not* murder. This is apparent if we heed the distinctions I made in Part III. The intent to kill does not identify the same criminal fault as intent to kill in the context of provoking circumstances. These are two different kinds of criminal fault, because fault is not a matter of intent elements, or even of intentional acts described in terms of objective circumstances. Criminal fault is, instead, a matter of intentions. The intentional acts described in the definition of murder and the definition of provocation manslaughter are not the same as one another, regardless of whether the formal fault element of “intent” is mentioned in both. Furthermore, the two offense definitions do not have the same implications for desert for

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150. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

151. *See* Singer v. United States, 380 U.S. 24, 34–36 (1965) (holding that a defendant has no absolute right to waive a jury trial).

legal punishment, because the different intentional acts they describe bring different intentions to bear on the question of desert.

It is safe to say, then, that one who commits provocation manslaughter does not commit murder. We can hardly say, however, that one who does not commit provocation manslaughter does not commit murder. If a jury charged with deciding a case of provocation manslaughter were to acquit the defendant on this charge, and if it did so because the provoking circumstances element or elements had not been proved, then the jury rationally could find, and usually would find, that an intentional killing had taken place. If the jury did find this, then the appropriate verdict would be murder. The trick of finding a viable procedure for the proof of provocation manslaughter as an offense is to make room for the disproof of provocation manslaughter by the failure to find provoking circumstances, without, however, precluding a conviction for murder where an intentional killing has been proved. It will not do, for example, simply to deny an instruction on murder if the prosecution fails to make a prima facie case of provocation manslaughter. This certainly would encourage the prosecution to make every effort to prove provocation, but it could result in an acquittal in a case in which the evidence of provoking circumstances was very weak but the evidence of an intentional killing was very strong.

The solution to the problem is to treat murder, as a procedural matter, as an included offense of provocation manslaughter on an analogy to the proof of lesser included offenses. We should instruct the jury to consider and decide the charge of provocation manslaughter before it considers and decides the charge of murder. This rule will serve our primary objective of forestalling a murder where provocation manslaughter is the better verdict. Once the prosecution has made a prima facie showing of provocation manslaughter, the defense can bolster the case for provocation manslaughter in its portion of the trial.<sup>152</sup> The prosecution will be free to offer evidence of non-provocation in rebuttal, and to advocate against provocation manslaughter at the conclusion of the trial. Given that the defense has, at this point, taken on the task, if not the burden, of persuading the jury that only a manslaughter was committed, the prosecution can contest this issue without creating confusion over whether it seeks a murder

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152. On the prosecution's prima facie showing of provocation manslaughter, see *infra* Part IV.B.2.

conviction or a conviction on the manslaughter.

When the jury retires, the state of the evidence will be such that the defendant will have a fair shot at a manslaughter conviction. The argument that the jury should find the defendant guilty of no more than manslaughter will be presented in a perfectly logical fashion in the jury instructions, in spite of what the elements seem to imply about more and less grave offenses. If the jury is told to consider the charge of provocation manslaughter before it considers the charge of murder, and to stop its deliberations if it finds the defendant guilty of the manslaughter, then (if it follows its instructions) the jury will issue a verdict of provocation manslaughter before it has an opportunity to convict the defendant of murder.

If the case is one in which the evidence of provoking circumstances is weak and the evidence of an intentional killing is strong, then the jury will acquit the defendant of provocation manslaughter. The jury will, at this point, proceed to consider the charge of murder. If the evidence of an intentional killing is strong, then the jury will convict on this charge, and we will have avoided one troubling implication of taking provocation at face value. This procedure is analogous to jury deliberations in a case charging a lesser included offense, in that the jury considers the including offense and then the included offense; although it differs from these cases, obviously, in that the jury considers the lesser degree offense before it considers the greater.

If we take provocation manslaughter to be an offense, then what we end up with is murder as a greater included offense and provocation manslaughter as a lesser including offense. Given the choice between following our usual procedure with respect to the greater–lesser relationship or with respect to the including–included relationship instead, we should give greater consideration to the latter relationship, and arrange the order of proof accordingly.

Why is this so? The principle of lenity requires it. In its most familiar form, the principle of lenity is a rule of statutory construction that requires an ambiguous statute to be construed in the defendant's favor, instead of, for example, interpreting it in light of legislative intent.<sup>153</sup> But this rule of statutory construction is merely one application of a broader rule-of-law principle that also undergirds such

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153. See *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000).

features of the system as the presumption of innocence and proof beyond a reasonable doubt.<sup>154</sup> The defendant is entitled to be protected from the government's unfair advantages in every respect.<sup>155</sup> The proposed reversal of the order of deliberations on murder and provocation manslaughter is but another application of this fundamental principle. If provocation manslaughter is proved as an offense, then the concessions that we ordinarily accord the prosecution as the proponent in a criminal case tip over into unfair advantage, resulting in perverse incentives. A correction is called for, and inverting the order of deliberations in order to treat provocation as a lesser including offense provides it. There is also a normative-theoretical reason to alter the usual order of proof, which is the simple fact that provocation manslaughter is an offense.

*a. The Rule of Lenity, and Provocation Manslaughter as a Lesser Including Offense*

From the point of view of the rule of lenity, it is misleading to see the problem in terms of the prosecution's incentives in the first place. It is more instructive to frame the problem in terms of the unfair advantage that the prosecution has come to possess in the proof of this particular offense. The rule of lenity requires us to maintain the same balance of powers in the trial of provocation manslaughter that obtains in other criminal cases, and this is best accomplished by instructing the jury to consider and decide the charge of provocation manslaughter before it considers the included charge of murder.

Notice that the usual order in which offenses are considered is, in fact, a departure from the rule of lenity. The jury considers the highest charged offense first, and ceases its deliberations if it finds that this

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154. See Don Stuart, *Supporting General Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective*, 4 BUFF. CRIM. L. REV. 13, 41 (2000) ("A commitment to the presumption of innocence and the concept of proof beyond reasonable doubt points to a return to strict construction or to what American writers call the principle of lenity."); J. Harvie Wilkinson III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U. L. REV. 907, 913 (1992) ("Saving constructions of statutes, for example, are thought to showcase judicial restraint, and the rule of lenity has its roots in due process and the presumption of innocence." (footnote omitted)).

155. See David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 526 (2008) ("This canon of construction seems based on a fairness value regarding notice and the constitutional values that support a presumption of innocence and protections of criminal defendants against government overreaching.").

offense has been committed. This is to the advantage of the prosecution. The jury has no opportunity to consider whether, all things considered, it might be better to convict the defendant of a lesser offense. The rule of lenity—the requirement that, all things being equal, criminal law should be construed in favor of the defendant—arguably requires that the jury be given this opportunity.<sup>156</sup>

Why is lenity usually denied here? We deny the jury the opportunity to consider the lesser offense because we ordinarily have good reasons to depart from the rule of lenity in this regard. At trial, the prosecution is entitled to put on its evidence first and then to offer evidence in rebuttal, because it is the proponent in the case. We treat closing arguments in the same way: the prosecution leads off and also has the final word. We grant the prosecution these advantages as a fair counterweight to its bearing the burden of persuasion on the offenses it has charged. We usually order the jury's deliberation on the several offenses charged from the highest to the lowest degree for the same reasons. The proponent should be granted the full benefit of his success if he has succeeded in making the case that he set out to make. After all, some consideration has already been granted to the defense in the charges themselves, because the prosecution has an ethical duty not to seek a conviction on any charge that it does not believe, in good faith, it can prove.<sup>157</sup>

Furthermore, to permit the jury to consider the lesser offense after it has convicted on the greater seems to be an open invitation to jury nullification. It would create the opportunity for the jury to convict on the lesser offense even if the lesser offense has not been proved, for reasons of sympathy or prejudice. If the prosecution has proved the greatest offense that it could charge within the limits of its ethical obligations, then ordinarily it is both unfair and unwise to take back a portion of what the prosecution has fairly won, so to speak, by

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156. See *Dauray*, 215 F.3d at 264 (“In criminal prosecutions the rule of lenity requires that ambiguities in the statute be resolved in the defendant’s favor.” (citations omitted)).

157. See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009) (“The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . .”); STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(a) (1986) (“It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”).

permitting the jury to consider lesser charges after it has convicted the defendant on the greater charge.

When it comes to proving provocation manslaughter, however, we have a compelling counterweight to these reasons—one that should cause us to come down on the side of lenity, and to give the defense a fair shot at a manslaughter conviction. The justification for denying the prosecution its usual advantages rests on the perverse incentives that those advantages produce. The prosecution does not have the option of sandbagging in the proof of other homicide cases, and there is no plausible moral justification for its having this option in cases in which there is good evidence of provocation manslaughter.

One might object that it would not have these advantages if we left well enough alone and continued to treat provocation as a defense. But if provocation manslaughter is an offense as a conceptual matter, and if the normative theory of punishment requires us to treat it as such as a practical matter of positive law, then these perverse incentives are not merely the consequences of a novel proposal. They are features of provocation manslaughter as it has come to operate in the context of modern, constitutionally required procedures for proof of offenses. Regardless of how history put the law in this contradictory posture, we are required to regularize it. Reversing the order of deliberations, from lesser offense to greater is a conservative way to effect this resolution.

*b. Provocation Manslaughter and Normative Legal Theory*

Regarding the theoretical reason to reverse the order of deliberations, it is important to bear in mind that the theory that proves that provocation manslaughter is an offense as a conceptual matter is a normative theory of legal punishment. This is important because it is in the nature of a normative legal theory to require the practical implementation of its conclusions.

The difference between descriptive punishment theory and normative punishment theory can only be sketched here. Suffice it to say that a normative theory of legal punishment makes two fundamental assumptions. The first of these is that a correct description of legal punishment is a description of just punishment, because justice supervenes<sup>158</sup> on law or because law is a reductive description of

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158. Supervenience is a relationship of asymmetrical co-variance. MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 42

justice.<sup>159</sup> The second assumption is that if we have described legal punishment correctly, then this is itself a reason to make the positive law conform to this description. In technical terms, normative punishment theory assumes that reasons are internal to descriptions of norms.

The second assumption of normative legal theorizing, reasons internalism, is the more important one here.<sup>160</sup> For the internalist, a belief about morality provides a reason to put that belief into action, so that we ought to act on the belief if we are to act rationally.<sup>161</sup> For an externalist, in contrast, our beliefs and our reasons are two different things. We behave rationally if we believe that an action is morally required, and yet do not take that action.<sup>162</sup> For example, on an externalist view, we can reach the conclusion that the *Federal Sentencing Guidelines* are unjust, and then rationally ignore this fact and go on imposing unjust sentences. An internalist denies that this is rational. If we reach the conclusion that the *Federal Sentencing Guidelines* are unjust, then we have reasons to change our sentencing practices by altering or abolishing this unjust law. We ought to change our sentencing law because it would be not only immoral or unjust, but also irrational to go on imposing sentences under it.

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(2009). Asymmetrical co-variance means that any change in the properties of A requires changes in the properties of B, but not vice-versa. So if moral rightness supervenes on some social practice, then a change in rightness entails a change in what is right in that practice; but a change in our practices does not imply a change in what is right. For example, the principle of right requires us to punish only the deserving, and we might impose a constitutional bar on strict liability offenses for this reason. If new social circumstances create a need for increased deterrence, so that it is right to impose strict liability, then we ought to impose strict liability. Merely to impose strict liability, in contrast, could not make it right to do so. Supervenience is one way to understand realism in morals and ethics. In debating the justice or injustice of strict liability, most of us assume that the question is whether there has been a shift in what is right. Few of us take the question to be whether we should shift what is right by imposing strict liability.

159. A reductive description of A is a description of A in terms of B, C, D, etc., to the exclusion of A. For example, some scholars purport to give a reductive explanation of negligence liability, (A), in terms of efficient uses, (B), transaction costs, (C), and externalities, (D), to the exclusion of such negligence concepts as the reasonable person or corrective justice. See, e.g., Seth D. Harris, *Coase's Paradox and the Inefficiency of Permanent Strike Replacements*, 80 WASH. U. L.Q. 1185, 1190–94 (2002) (summarizing Ronald Coase's explanation of tort rules in terms of economic efficiency).

160. See MICHAEL SMITH, *THE MORAL PROBLEM* 71–76 (1994).

161. See *id.* at 72 (explaining that an internalist believes that one's actions are directly based on a person's "moral judgment itself").

162. See *id.* at 71–76 (explaining that an externalist believes that actions are based on a person's motivations, not his moral judgment).

The conceptual argument that I advanced above in Parts II and III is a normative legal theory that assumes reasons internalism. On this assumption, the descriptive conceptual account of provocation manslaughter *obligates* us, on pain of irrationality, to make provocation work as an offense. I have described how we can do this with respect to the burden of persuasion. It remains to describe an effective, defensible procedure for the burden of production.

## 2. Regarding the Burden of Production

Even assuming that one accepts my argument so far, the prosecution has no more incentive to make a *prima facie* case of provocation manslaughter than it ordinarily has to persuade the jury that this is the crime that the defendant committed. The reversal of the order of deliberations cannot help us here—it has not yet come into play. In addition to this incentives problem, there is a second practical problem. The defendant, not the prosecution, has the best evidence of provocation—a critical concern where the burden of production is concerned. This problem should not be overstated, because in many cases most of the evidence of provocation will be known at the start of the investigation. Even so, it would be unfair and unwise to impose the burden of production on the prosecution without guaranteeing, in some fashion, that it has in its possession every available piece of evidence in support of provocation manslaughter.

A third concern is the fact that the prosecution has the ability and incentive to sandbag the proof of provocation manslaughter so that no instruction on it would be justified. This is especially a danger where the evidence of provoking circumstances is weak. In this case, the only homicide that the jury would be instructed on would be murder, even though the case was at least arguably one of manslaughter, and the jury should have had the opportunity so to find. Finally, the prosecution might fail to make a *prima facie* case in spite of its best efforts to do so. Even if it has all of the evidence of provocation in its possession, the evidence that exists might simply be insufficient to make such a case, even if the prosecution makes a good faith effort.

This fourth problem is no problem at all, of course. If the prosecution has failed to make a *prima facie* case of provocation manslaughter when there seemed to be sufficient evidence to do so, and if that failure was a good faith failure, then no instruction on provocation manslaughter should be given. The apparently sufficient evidence simply turned out to be insufficient.

The second problem, the possibility that the prosecution will not have the necessary evidence in its possession, is not much of a problem.<sup>163</sup> It can be solved with a rule requiring the defendant to provide this discovery.<sup>164</sup> The Fifth Amendment Self-Incrimination Clause protects the defendant from being compelled to make incriminating statements, but this is not a general privilege not to provide discovery.<sup>165</sup> Specifically, the defendant can be compelled to produce investigative reports and defense witness statements if the prosecution needs them in order to respond to the defendant's case.<sup>166</sup> If a defendant were to offer proof of provocation manslaughter in his own defense, the prosecution ordinarily would be entitled to the discovery of this evidence. If, as proposed here, the prosecution is assigned the burden of production on provocation manslaughter, then it will need to receive this discovery before the defense puts on its case. To require the defendant to provide pre-trial discovery in anticipation of its putting on a particular case does not violate the Fifth Amendment, even if this discovery requirement effectively accelerates the timing of the defendant's strategic decision-making.<sup>167</sup>

The remaining two problems—the prosecution's having no incentive to prove provocation manslaughter and its opportunity to fail to make a prima facie case in bad faith—can be solved by combining the rule that reverses the order of deliberations with the discovery rule, in this way: *The defense may request the special order of proof for provocation manslaughter in a motion at the end of the state's case. Its right to make this motion, however, is conditioned on its providing pre-trial notice of its intention to make the motion, and on the disclosure to the prosecution of all evidence of provocation in its possession when the notice is given, and thereafter.*

Absent some proof that he has not produced all available evidence of provocation, the defendant will be allowed to move to reverse the order of deliberations. This motion, of course, entails a request for an instruction on provocation manslaughter. Having made the prima facie

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163. See *United States v. Nobles*, 422 U.S. 225, 233–34 (1975).

164. See *id.*

165. See *id.*

166. See *id.*

167. See *Williams v. Florida*, 399 U.S. 78, 85–86 (1970) (“Nothing in the Fifth Amendment privilege [against self-incrimination] entitles a defendant . . . to await the end of the State's case before announcing the nature of his defense . . .”).

case, it would be odd if the prosecution opposed the trial court's giving the instruction on provocation manslaughter, but we would expect the prosecution to oppose the defense motion to reverse the order of deliberations. This, however, comes to the same thing. If a jury in a good case of provocation manslaughter considers murder first, then it will find murder was committed, and cease deliberations, making the provocation instruction moot. Given that to deny the reversal of deliberations is to deny any meaningful instruction on provocation manslaughter, the only sensible standard by which to govern the motion to reverse deliberations is the same sufficiency of the evidence standard that governs the decision whether to instruct on an offense. If a rational jury could find provocation manslaughter beyond a reasonable doubt, then the order of deliberations should be reversed. In other words, the order of deliberations should be reversed in all cases of provocation manslaughter that go to the jury.

This hardly solves our problems with perverse incentives and bad faith. Because reversing the order of deliberations facilitates the proof of provocation manslaughter, it reinforces the prosecutor's reasons not to make a prima facie case. From one perspective, however, it changes the incentives and bad faith calculation fundamentally: it gives the trial court the power to dismiss the case with prejudice if the prosecution fails to make a prima facie case of provocation manslaughter where there was sufficient evidence to do so. The trial court ordinarily has no reason to treat the prosecution's failure to make a prima facie case as prosecutorial misconduct, because the prosecution has no obligation to make a prima facie case to begin with. In the situation that concerns us here, however, the question is not only whether the case should go to the jury. It is whether the prosecution has done what it is obligated to do, and whether it has done it in good faith. If it has failed to make a prima facie case and has done so in bad faith, then we are justified in treating this failure as cause for a dismissal with prejudice.

The key to this procedure, the counter-incentive to the perverse incentives of the prosecution, is the threat of a mistrial and a bar to retrial under the law of double jeopardy.<sup>168</sup> A trial court has the discretion to declare a mistrial and permit the prosecution to retry the case if the mistrial is a manifest necessity.<sup>169</sup> A mistrial granted because

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168. *See* *Illinois v. Somerville*, 410 U.S. 458, 466, 471 (1973).

169. *See id.* at 459 (holding double jeopardy clause does not bar retrial of an indictment).

of prosecutorial misconduct is not a manifest necessity, and retrial is barred even if the defense makes the motion for a mistrial.<sup>170</sup> In a case in which it is arguable that sufficient evidence of provoking circumstances exists, the prosecution's failure to make a prima facie case of provocation manslaughter is a ground for mistrial that does not constitute manifest necessity. The prosecutorial misconduct consists of exploiting the perverse incentives that would otherwise make it necessary to put the burden of proving manslaughter on the defense, in contravention of the fundamental values of lenity and the proof of offenses by the state.

If the evidence of an intent to kill in the case is very strong, then the effective acquittal of the defendant by means of a dismissal and bar to retrial is obviously undesirable. However, it is important to recognize that the only cases in which this will happen will be cases of a gross failure by the prosecution to prove provocation manslaughter where it has sufficient evidence of provoking circumstances available to it. In practice, the adequacy of a prima facie case is almost always a question on which reasonable minds might differ. It seems fair to assume that the prosecution will always make enough of a showing to conceal its bad faith, and that in doing so it is likely to present a case that is strong enough to bring it within the range of discretion that is ordinarily exercised in determining whether to instruct on a given offense. We cannot expect the prosecution to do more than this, but the prospect of a dismissal with prejudice will be sufficient to guarantee that it does not do less. Otherwise, if the prosecution's sandbagging were blatant, then its misconduct would be plain, and a dismissal with prejudice would be fully justified.

Under the procedure I propose, the question of whether there has been prosecutorial misconduct will turn on whether the prosecution has made adequate use of the evidence at its disposal. The fact that the defense has a discovery obligation makes this a fair question. The fact that the adequacy of the defendant's disclosures is presented for a determination at the same time and under the same standard as the sufficiency of the prosecution's prima facie case makes possible a fair

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that was dismissed because it was inadequate but could not be amended, because the dismissal was a manifest necessity).

170. See *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982) (holding double jeopardy clause bars retrial where the prosecution provokes the defense into moving for a mistrial).

answer to this question. Notice, furthermore, that the way in which these rules preclude a murder conviction does not infringe upon the province of the jury. Assuming that my theoretical analysis is correct, a murder conviction will be precluded only if the evidence is insufficient to support a verdict of murder. That is, it will be precluded only if the evidence is sufficient to support a verdict of provocation manslaughter, and if the jury does find provocation manslaughter beyond a reasonable doubt. Having found provocation manslaughter, they will cease deliberations before they consider murder, but of course this is as it should be. A verdict of provocation manslaughter means that murder has been disproved.

#### V. CONCLUSION

For historical reasons that I have not addressed, a gap developed between the correct normative-theoretical description of provocation manslaughter and modern proof procedures under court rules and constitutional law. The accepted solution to this conflict between theory and practice is to convert provocation manslaughter into a defense. This is, constitutionally, an evasion of responsibility and, theoretically, an implausible day-into-night conversion unlike anything else ever attempted in criminal law or, indeed, in law generally.

I have argued that provocation manslaughter is an offense as a conceptual matter, and my working assumption has been that we are committed to abiding by the constitutional principle of proof of criminal offenses beyond a reasonable doubt. The upshot of this argument and assumption is that provocation manslaughter ought to be pled and proved as an offense. The prosecution should carry both the burden of production and the burden of persuading the jury beyond a reasonable doubt that a particular, carefully defined kind of homicide has been committed. To do anything less is to fail to take the crime seriously and to give both the victim and the offender less than their due. The morality of criminal law requires us to treat any homicide with a level of care sufficient to determine the true gravity of the harm done to the victim and the true level of the offender's desert for punishment, and to do this in a way that does not suggest that the kind of homicide suffered by the victim and perpetrated by the offender is a lesser kind of crime.

We should adopt rules substantially similar to the following: *In a prosecution for murder, the prosecution is required to raise a prima facie case of provocation manslaughter if sufficient evidence of this offense is available to it. If the prosecution has made a prima facie case of*

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*provocation manslaughter, then the jury should be instructed to consider this charge before it considers the charge of murder. If the jury convicts the defendant of provocation manslaughter, then it should cease deliberating and issue a verdict finding the defendant guilty of that crime. If the jury acquits the defendant of provocation manslaughter, or if it fails to reach a verdict on that crime, then it should proceed to consider and decide whether the defendant committed murder. The defense may invoke the special order of proof for provocation manslaughter in a motion at the end of the state's case. Its right to make this motion, however, is conditioned on its providing pre-trial notice of its intention to make the motion, and on the disclosure to the prosecution of all evidence of provocation in its possession when the notice is given, and thereafter.*

This procedure is a less radical solution to our difficulties than the conversion of an offense into a defense, and it far better preserves criminal law's constitutional principles, theoretical consistency, and moral integrity.