

HUMAN DIGNITY AND THE DOCTRINE OF PROVOCATION: A NEW APPROACH

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INTRODUCTION

The doctrine of provocation is used to justify a reduction in criminal liability from murder to manslaughter in the case of an intentional killing that was a reaction to provocation.¹ This position raises two main questions, one doctrinal and the other philosophical: under what conditions is criminal responsibility reduced from murder to manslaughter in the case of provocation and what is the underlying ethical rationale?

In the United States, criminal jurisprudence requires that a two-prong analysis—a subjective test and an objective test—be applied in order to determine whether a provocation defense will stand.² The subjective test requires that the provocation did, in fact, impair the defendant's ability to think rationally and resulted in a loss of self-control, such that it can be demonstrated that the act of killing was performed spontaneously due to great emotion, with no thought as to consequences.³ The objective test requires proof that a reasonable man would have experienced a loss of self-control in the relevant

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1. See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* 491–94 (2d ed. 2003). The provocation doctrine has been the subject of in-depth research. See, e.g., JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* (1992); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133 (1992); Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197 (2005); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 427 (1982) [hereinafter Dressler, *Rethinking Heat of Passion*]; Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995) [hereinafter Dressler, *Reflections on Provocation Law*]; Jennifer Dumin, *Superstition-Based Injustice in Africa and the United States: The Use of Provocation as a Defense for Killing Witches and Homosexuals*, 21 WIS. WOMEN'S L.J. 145 (2006); Michael A. Smyth, *Queers and Provocateurs: Hegemony, Ideology, and the "Homosexual Advance" Defense*, 40 LAW & SOC'Y REV. 903 (2006); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1341 (1997).

2. See LAFAVE, *supra* note 1, at 494.

3. See *id.* at 506.

situation and would have acted as did the defendant.⁴ It is worth emphasizing that there is a consensus in American jurisprudence that infidelity can fulfill the objective condition and qualifies as provocation in criminal law, thus reducing criminal liability from murder to manslaughter.

To date, two main rationales have been suggested for the provocation doctrine: one based on the principle of excuse and the other on justification. Each one emphasizes a different aspect of the provocation doctrine. According to the excuse rationale, the reduction in criminal liability is based on the fact that a killer who was provoked bears less guilt for his act, due to the impairment of his ability to reason at the time. This rationale focuses on the defendant's subjective inability to reason. On the other hand, the justification rationale states that criminal liability is lessened due to the provocation by the victim. Here, the focus is on the objective element of the reasonable man.

This Article seeks to present an alternative rationale according to which the reduction in criminal responsibility is not the result of diminished guilt due to provocation or a justification for the act of killing but rather that the act of killing is less grave when there is provocation. This rationale rests upon an understanding of why murder is prohibited and an examination of the protected values at the core of the criminal offense of murder. As opposed to the intuitive assumption that the criminalization of murder is intended to protect only the value of life itself, I maintain that it is intended to protect an additional value, namely a human being's right to dignity, namely his right not to be treated in a humiliating and denigrating manner. Although murder generally fully violates both of these protected values, killing due to provocation constitutes a lesser violation of human dignity. In other words, not only is the killer's guilt reduced because of his loss of self-control, but in addition the act of killing is less severe. To be clear: the proposed rationale does not in any way justify the act of killing but considers the act to be less severe because of the lesser violation of one of the protected values that underlies the offense of killing.

The goal of this Article is not to criticize various rationales suggested by others for the provocation doctrine but to propose a new analysis of the doctrine which can explain the need for the two-prong test, i.e., the inclusion of both subjective and objective elements. The fact that this rationale is based on the difference in the degree of violation of human dignity in the case of provocation is what enables it to provide a coherent explanation for the need for both prongs of the test.

Section I presents the current state of jurisprudence in the United States and England. Section II presents possible rationales supporting the provocation doctrine. Section III proposes a new rationale for the provocation doctrine based on the protected values at the heart of the offense of murder, including the values of both life and human dignity, and explores its practical jurisprudential implications. In this context, I will argue that the provocation doctrine should not be accepted in the case of infidelity. In addition, I will briefly discuss U.S. case law, which has pushed the boundaries of the excuse

4. *See id.* at 494–95.

rationale, so that it can be interpreted as being based on the human dignity rationale that I shall introduce.

I. THE CURRENT STATE OF JURISPRUDENCE IN THE UNITED STATES AND ENGLAND

There is no consistent approach to the provocation doctrine in the United States with regard to either the circumstances to which it applies or the underlying rationale.⁵

As opposed to other jurisprudential systems, the United States has not incorporated provocation within the offense of murder. In the Model Penal Code, for example, provocation constitutes one of the instances included in manslaughter rather than a factor that will negate murder.⁶ This is true in many individual states as well,⁷ while in other states provocation serves as a defense against a first- or second-degree murder charge.⁸

The Model Penal Code (MPC) opposes the establishment of rigid categories of provocation and calls for a significant relaxation of the tests for this defense. As such, it is considered to be the extreme liberal limit with regard to provocation.⁹ In other words, there is no reference to a reasonable man test, although some showing of reasonableness is nonetheless required. This difference is not merely semantic, since the MPC appears to view reasonableness as including subjective factors.¹⁰ Furthermore, the MPC does not require that the killing will immediately follow the provocation.¹¹ This contrasts sharply with the legal situation in most states, according to which the

5. See Nourse, *supra* note 1, at 1341–42.

6. See MODEL PENAL CODE § 210.3 (AM. LAW INST. 1962).

Criminal homicide constitutes manslaughter when: . . . (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. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

Id. §210.3(1)(b).

7. See, e.g., ALA. CODE § 13A-6-3 (1975).

8. See, e.g., ALASKA STAT. § 11.41.115 (2019).

9. See MODEL PENAL CODE § 210.3 (AM. LAW INST. 1962). Regarding the American Model Penal Code, see Nourse, *supra* note 1, at 1339–40; Mison, *supra* note 1, at 144; Rozelle, *supra* note 1, at 202.

10. See Christina Pei-Lin Chen, *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, 208–09 (2000); Antonia Elise Miller, Note, *Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion*, 17 WM. & MARY J. WOMEN & L. 249, 259 (2010).

11. See LAFAVE, *supra* note 1, at 507.

provocation has to have occurred recently enough that the “passion” of a reasonable man would not have “cooled.”¹²

Most states in the United States have adopted the two-prong test, but implementation varies from one to the other.¹³ Some states explicitly require that a defendant pleading a provocation defense demonstrate that the emotional outburst that led to the killing was a sudden reaction to an unexpected event which constituted provocation. In other states, however, criminal liability may be reduced even if the emotional turmoil developed slowly, eventually peaking at the time of the killing.¹⁴

In some states, words alone are never considered to constitute provocation, while in others, words can indeed be considered provocation.¹⁵ For example, in *Chevalier*,¹⁶ the controlling Illinois precedent with regard to provocation, a man suspected that his wife had been unfaithful to him. He confronted her, and the woman admitted that she had been unfaithful and went on to mock his sexual prowess. As a result, the man shot and killed her.¹⁷ The court found that in Illinois: “[t]he only categories of serious provocation which have been recognized are ‘substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender’s spouse’”¹⁸ Based on the fact that infidelity can be considered provocation, the court found that it amounts to provocation only when a husband discovered his wife *in flagrante delicto* or immediately prior to or following the act. Moreover, it is clear that, without exception, mere words do not constitute provocation.¹⁹ Consequently, the court found that although *Chevalier*’s wife had admitted her infidelity and even goaded him regarding his sexual prowess, this could not be considered provocation.²⁰

On the other hand, Minnesota courts have made no distinction whatsoever between words and actions with regard to provocation. As such, a woman’s admission of infidelity can indeed be considered provocation. In *Hussein*,²¹ for example, the defendant killed his wife about a month after she left him, the day

12. In some states, the criminal code explicitly states this. *See, e.g.*, ALA. CODE § 13A-6-3 (2019); ALASKA STAT. § 11.41.115 (2019); *cf.* KAN. STAT. ANN. § 21-5404(a)(1) (2019) (stating voluntary manslaughter includes killing “in the heat of passion”).

13. *See* Nourse, *supra* note 1, at 1341–42; Miller, *supra* note 10, at 263 (“Due to these differences in the legal limitations and treatment of those convicted of voluntary manslaughter under the Model Penal Code and common law approaches, the standard adopted by each state may significantly affect how a voluntary manslaughter case proceeds in a given jurisdiction.”).

14. *See* Nourse, *supra* note 1, at 1342.

15. *See* Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1039 (2011); Nourse, *supra* note 1, at 1342. *See generally*, LAFAVE, *supra* note 1, at 499–502.

16. *People v. Chevalier*, 544 N.E.2d 942 (Ill. 1989).

17. *Id.* at 943.

18. *Id.* at 944 (quoting *People v. Crews*, 231 N.E.2d 451, 453 (Ill. 1967)).

19. *Id.* at 946.

20. *Id.*

21. *State v. Hussein*, No. C3-00-580, 2000 WL 33261028 (Minn. Ct. App. Apr. 10, 2001).

after she told him that she was sexually involved with someone else. Although the court did not accept Hussein's provocation claim, this was not because the claimed provocation was mere words but because it was demonstrated that the defendant had acted deliberately and not due to loss of self-control.²² The position that words can be considered provocation is also found in Minnesota law, as part of its definition of manslaughter: a person is guilty of first-degree manslaughter if the person "intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances."²³

In most states, reduction in criminal liability will be available even if the defendant intended to kill the person who provoked him, while in others the defendant must prove that the provocation actually caused him to lose control to the extent that he acted without intent to kill.²⁴

Despite these differences in approaches, it is worth emphasizing that there is broad consensus in American jurisprudence that infidelity fulfils the objective condition and qualifies as provocation in criminal law, thus reducing criminal liability from murder to manslaughter.²⁵ In the words of the legal scholar, Barret Broussard: "While many American jurisdictions have moved away from the rigidity of categorical approach, sexual infidelity remains a paradigmatic approach to manslaughter mitigation."²⁶

Nonetheless, in the case of infidelity there is disagreement as to the conditions under which it can serve as a basis for a provocation claim. There are states that require the couple to be married at the time of the infidelity and the killing in order to accept a claim of provocation,²⁷ while the MPC, like many of the states in the United States, does not condition the acceptance of a provocation claim on the couple being married.²⁸

Thus, the existing situation in the United States has resulted in two main approaches: the first roughly accords with the MPC and helps facilitate the possibility of relying on the provocation defense, while the second emphasizes

22. *Id.* at *2.

23. MINN. STAT. § 609.20(1) (2019).

24. LAFAVE, *supra* note 1, at 493.

25. Of course, even in cases of manslaughter as a result of infidelity, it must be shown that the accused had subjectively lost self-control.

26. D. Barret Broussard, Comment, *Principles for Passion Killing: An Evolutionary Solution to Manslaughter Mitigation*, 62 EMORY L.J. 179, 181–82 (2012) (footnote omitted). See Miller, *supra* note 10, at 260; see also Spencer v. State, 201 So.3d 573 (Ala. Crim. App. 2015); Davis v. Alabama, No. 2:17-cv-01363-LSC-HNJ, 2018 U.S. Dist. LEXIS 63672 (N.D. Ala. Mar. 15, 2018); People v. McDonald, 77 N.E.3d 26 (Ill. 2016); People v. Duenas, No. C070823, 2014 Cal. App. Unpub. LEXIS 3607, at *15 (Cal. Ct. App. May 21, 2014); Gonzales v. State, 546 S.W.2d 617 (Tex. Crim. App. 1977).

27. See, e.g., People v. Sutton, 818 N.E.2d 793, 802–03 (Ill. App. Ct. 2004) (declining to resolve the issue of whether to expand adultery to relationships that are comparable to that of husband of wife).

28. See, e.g., State v. Shane, 590 N.E.2d 272, 277–78 (Ohio 1992); State v. Williams, No. 24169, 2009 Ohio App. LEXIS 2701 (Ohio Ct. App. June 30, 2009).

the reasonable man test and limits a defendant's ability to rely on this defense successfully.²⁹

Despite the fact that most states do include a reasonable man test, this prong has been attacked from all sides. One critique relates to the denigration of women or discrimination against them. In other words, the provocation defense has been readily accepted in cases involving a man who killed his wife because she had expressed a desire to leave him or because he thought she had been unfaithful. That is, the reasonable man test literally referred to the reasonable man (not woman) who would lose self-control in such a situation.³⁰ Furthermore, Mison argues that the defense perpetuates homophobia, in that some provocation cases have involved defendants who killed homosexual people who had tried to kiss or caress them.³¹ Using the objective test, the reasonable man may well have lost self-control in such a situation because the reasonable man is heterosexual.³² Consequently, the provocation doctrine has been viewed as violating the rights of women, homosexual people, and other minority groups. It appears that such claims have wider acceptance in states that have adopted the MPC, which emphasizes the subjective loss of self-control and focuses less on the objective reasonable man test, regardless of the characteristics of a given defendant.³³

In England, the doctrine of provocation has undergone several transformations. In the past, the doctrine had included the dual elements of subjective and objective provocation. Objective provocation became the pure reasonable man test, with no subjective component whatsoever.³⁴ This test, standing alone, has been criticized for the high threshold it set for reliance on the provocation defense. Thus, a man who killed a prostitute, who had mocked his impotence, was not able to claim provocation and was given the death penalty.³⁵ Consequently, the pure reasonable man test was replaced by a mixed test, such that subjective characteristics directly relevant to the degree of provocation could be taken into account.³⁶

29. See Nourse, *supra* note 1, at 1342; Miller, *supra* note 10, at 261–63; Broussard, *supra* note 26, at 184.

30. For further discussion of the provocation defense, see Chen, *supra* note 10, at 205–10; see generally Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80 (1994); Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597 (2004) (reviewing CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003)); Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71 (1992).

31. See Mison, *supra* note 1, at 167–70. For a response to Mison, see Dressler, *Reflections on Provocation Law*, *supra* note 1. For additional articles regarding the provocation doctrine in the homosexual context, see Dumin, *supra* note 1; Smyth, *supra* note 1.

32. See Mison, *supra* note 1, at 148–49.

33. See Rozelle, *supra* note 1, at 203; Nourse, *supra* note 1, at 1332–33.

34. See *R v. Lesbini* [1914] 3 KB 1116 (Eng.); *Mancini v. DPP*, [1942] AC 1 (HL) (appeal taken from Eng.).

35. See *Bedder v. DPP*, [1954] 2 All ER 801 (HL) (appeal taken from Eng.).

36. See *R v. Camplin*, [1978] AC 705 (HL) (appeal taken from Eng.).

Unsurprisingly, this too did not last long, and, in 2009, a law was passed that provided for loss of control as a partial defense.³⁷ This defense required that the loss of self-control be shown to have resulted from fear of serious violence resulting from something that was said or done in unusually serious circumstances or that the defendant was given cause to think that he had been the victim of serious injustice, or both.³⁸ In addition, the defendant would have to demonstrate that, in similar circumstances, a person of the same age and gender with a normal amount of self-control would have reacted in the same way.³⁹ As such, circumstances that affected the particular defendant would not be taken into consideration. In addition, it should be emphasized that according to British law, the accused's criminal liability will not be reduced if his fear of violence on the part of the victim was the result of behavior that he himself (i.e., the accused) initiated.⁴⁰ Furthermore, according to British law, and in contrast to American law, infidelity does not constitute a basis for reducing criminal liability if the individual killed his spouse as a result of a loss of self-control due to the infidelity.⁴¹

II. THE PROVOCATION DOCTRINE—EXCUSE OR JUSTIFICATION

As opposed to manslaughter and assault, which are criminal offenses in their own right, killing due to provocation is not truly distinct from the offense of murder.⁴² That is, in many legal systems the prosecution must prove all of the elements of murder, but the criminal liability of the defendant is reduced due to the circumstances. Furthermore, in contrast to defenses such as self-defense, coercion, or necessity, which completely negate all criminal liability, provocation merely reduces the criminal liability from murder to manslaughter.⁴³

The key philosophical question is what rationale underlies the provocation defense. In other words: Why should criminal liability be reduced from murder to manslaughter in situations of provocation? This is important because understanding the rationale helps to explicate criminal law and to understand the connections and distinctions between various sections of the law. Understanding the rationale also helps to delimit this doctrine: What ought to be considered provocation? Can the provocation defense stand even when the provocation was initiated by a third party, rather than the victim? Is the

37. Coroners and Justice Act 2009, c. 25, §§ 54–56 (Eng.).

38. *Id.* § 55.

39. *Id.* § 54(1)(c).

40. *Id.* § 55(6)(a).

41. *Id.* § 55(6)(c) (“In determining whether a loss of self-control had a qualifying trigger— . . . the fact that a thing done or said constituted sexual infidelity is to be disregarded.”).

42. See Berman & Farrell, *supra* note 15, at 1045.

43. See, e.g., N.Y. PENAL LAW § 125.20(2) (McKinney 2019); ARIZ. REV. STAT. ANN. § 13-1103(A)(2) (2019). In some instances, the reduction is from first degree murder to second degree murder. See, e.g., 720 ILL. COMP. STAT. 5/9-2(a)(1) (2019).

provocation defense relevant when the killing did not follow on the heels of the provocation?

A. The Excuse Defenses and the Justification Defenses

In the realm of criminal jurisprudence, defenses can be divided into two categories: excuses and justifications.⁴⁴ A justification defense assumes that the violation of the interest protected by the criminal offense in question was justified. The implication is that the defendant acted correctly in committing the offense, usually because he acted to further an interest of greater value or importance than the interest protected by the criminal offense.⁴⁵ Self-defense, for example, is considered to be the classic case of justification, in that under the circumstances it is more just that the aggressor should die. The claim is that the value of the life of the ultimate victim, i.e., the aggressor, in social terms, is less than the value of the life of the person acting in self-defense.⁴⁶ In this context, the sum total of competing interests justifies the defense because the aggressor initiated an attack upon an innocent party, which he could have chosen not to do, while the potential victim acted to restore social order. In this sense, the message is that the potential victim acted correctly in killing the guilty party who was ultimately the victim.

On the other hand, an excuse defense assumes that there was no justification for infringing upon a protected interest and therefore that the act was wrong. However, the excuse defense implies that under the circumstances it would not be fair to attribute guilt to the defendant for the wrongful act because he could not have been expected to act in accordance with the law and refrain from offending.⁴⁷ One example of the excuse defense is insanity. One who kills when insane should not be penalized, not because no harm was done or the act was justified in any way, but because one who is insane cannot be expected to act lawfully and cannot therefore be considered guilty. As such, the dangers posed by such an individual must be addressed in other ways.⁴⁸ This distinction can also be demonstrated by noting that justifications focus on the act, while excuses focus on the agent.⁴⁹

44. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 515–80, 759–876 (1978); PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES: CRIMINAL PRACTICE SERIES* 83–116 (1984).

45. Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1558 (1999); Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 11–17 (2003).

46. See Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 436–37.

47. Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y, Spring 1990, at 29.

48. With regard to this distinction, see Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 436–37. For different approaches regarding the character of exemption defenses, see Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29 (1990); JEREMY HORDER, *EXCUSING CRIME* (2004); JOHN GARDNER, *The Gist of Excuses*, in OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 121, 121–39 (2007).

49. See Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 437.

B. Provocation as Excuse

Many scholars believe that the rationale behind the reduction in criminal liability in cases of provocation is implicit in a partial excuse defense, rather than a justification defense.⁵⁰

In other words, the reason for the reduced criminal liability is due to impairment of the defendant's ability to exercise self-control and his ability to exercise free choice and act rationally.⁵¹ When someone is in a state of rage due to provocation, it is more difficult for him to act lawfully or ethically, as opposed to someone who has not been provoked and is not acting under the influence of rage or fear but rather deliberately and with clarity of mind. As such, the former deserves a less severe penalty and a less severe criminal stigma.⁵² The reasonable man test, under this rationale, seeks to determine whether a reasonable person would have experienced emotional turmoil in response to the act of provocation. Consequently, the defense does not rely on the idea that the *act* of killing was justified, even partially, but that the legal system demonstrates an understanding of human weakness when a person acts under the influence of rage caused by provocation (partial excuse).⁵³

One of the main challenges faced by those who support this rationale relates to the reasonable man requirement.⁵⁴ If criminal liability is reduced due to an impairment in the defendant's ability to choose freely and to loss of self-control, why would there be any need to prove that the reasonable man would have also lost self-control and/or that the reasonable man's ability to exercise free choice would have been similarly impaired? All that ought to be required is to prove that the specific defendant's self-control was subjectively impaired.

Dressler, who supports the excuse rationale claims that:

[P]rovocation is an excuse premised upon involuntariness based upon reduced choice-capabilities. If the doctrine is to be defensible, however, it must follow that the anger which undermines choice-capability is itself formed under circumstances in which the actor cannot be fairly blamed for his anger. Otherwise, we have a case of

50. For the perspective that views provocation as an excuse, see, inter alia, *id.* at 459–67; Dressler, *Reflections on Provocation Law*, *supra* note 1, at 745–47; LAFAYE, *supra* note 1, at 512–13.

51. See Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 464–65; Rozelle, *supra* note 1, at 208.

52. See Rozelle, *supra* note 1, at 210.

53. For a complete picture, see the distinction made by Dressler between the partial defense of provocation that stems from the full defense of insanity and the duress defense, in Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 460–62. In situations of provocation, the defendant's ability to choose is impaired (but not negated), but his options are not limited. On the other hand, in situations of duress, the defendant's options are limited, while his ability to choose is not impaired. See *id.* at 463–66.

54. Cf. Berman & Farrell, *supra* note 15, at 1051.

voluntary anger, no more morally deserving of mitigation than voluntary intoxication.⁵⁵

This implies that when a reasonable man would not have lost self-control and his free choice would not have been impaired, it would not be appropriate to reduce the defendant's guilt because it is claimed that the impairment of his free choice and the loss of self-control resulted from his guilt. In other words, he is guilty in that he brought himself to a state in which his ability to choose was impaired as a result of the provocation. However, in a case of provocation that would have caused impairment in a reasonable man's ability to choose, the defendant bears no guilt for his loss of self-control and therefore his guilt is reduced.

An approach that bases the reduction in criminal liability on the excuse rationale is consistent with the concept of retribution—that criminal liability should be proportional to a defendant's guilt, regardless of any considerations of deterrence or prevention.⁵⁶ Dressler explains that the provocation doctrine, when based on the excuse rationale, does not fit into the utilitarian approach, which is based on deterring the defendant and society at large from performing similar acts in the future, since under such an approach, it would make sense to be more severe with regard to both level of liability and severity of sentence in situations of provocation.⁵⁷ A more severe penalty would send a “chilling” message to potential killers not to expect any reduction in liability simply because they were provoked. While it is more difficult for a person to control himself when he has been provoked, it is still possible to do so, and such a message of deterrence would be intended to strengthen the efforts of citizens to educate themselves to have self-control, even when provoked.⁵⁸

At least some of U.S. case law has followed the excuse rationale. In *Pouncey*, for example, it was held that:

“If the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation . . . then the law, out of *indulgence to the frailty of human nature* . . . regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter.”⁵⁹

In *Luebbers*, this was expressed even more clearly: “[P]rovocation is sufficient not because it affects the quality of one's thought processes but because it

55. Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 464.

56. Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 966 (2002); Rozelle, *supra* note 1, at 213.

57. Dressler, *supra* note 56, at 964.

58. *Id.* 965–66.

59. *People v. Pouncey*, 471 N.W.2d 346, 350 (Mich. 1991) (quoting *Maier v. People*, 10 Mich. 212, 219 (1862)) (emphasis added).

eclipses reflection. A person in this state [of mind] simply reacts from emotion due to the provocation, without deliberation or judgment.”⁶⁰

Nourse suggests a different rationale for provocation as an excuse, which also addresses the question of why the reduction in criminal liability applies only to situations involving provocation and not those involving unrequited love or despair. According to Nourse, we instinctively distinguish between a provocation claim in the case of a rapist being killed by the victim’s husband (after the rape has occurred) and such a claim in the case of a husband killing his wife because she was unfaithful.⁶¹ It is appropriate to accept the provocation claim in the case of killing the rapist but not in the case of killing the unfaithful wife.⁶² This distinction, Nourse explains, is due to the fact that in the case of killing the rapist, the emotional outburst against the rapist is consistent with the law itself, in that the law mandates that the rapist be penalized.⁶³ This reflects the fact that the law makes room for the rage and anger of the public and the victim. In this sense, there is consistency between the feelings of the victim’s husband and the fact that the law imposes criminal liability and severe penalties on the rapist. With regards to a woman who has been unfaithful to her husband, there is no alignment between the emotional outburst of the husband and the law. Even though society understands the husband’s feelings, the law does not impose criminal liability on the woman. As such, the legal system is indicating that it is not prepared to protect hurt feelings in such cases.⁶⁴ Thus, were we to reduce criminal liability in cases where the act of provocation is not a crime, such a reduction would be an inherent contradiction to the law because the implication of the absence of criminal liability is that the law does not wish to protect the attacker’s feelings of rage, and the reduction in liability implies an acceptance of such rage.⁶⁵

It should be noted that even according to Nourse, the rationale for reducing criminal liability rests on the loss of the defendant’s self-control; however, the reduction will be granted only in cases where the law recognizes the defendant’s feelings of rage and frustration.⁶⁶ Therefore, the difference between Nourse and Dressler is that the latter claims that provocation can be accepted also when the act of provocation did not constitute a criminal act, while according to Nourse the claim of provocation can be accepted only when the provocation is an act that must be punished and therefore for Nourse the reasonable man test is not relevant to the claim of provocation. Nonetheless, even according to Nourse, a criminal offense is not a sufficient condition for recognizing provocation since,

60. *People v. Luebbbers*, C071671, 2014 Cal. App. Unpub. LEXIS 3219, at *15 (quoting *People v. Beltran*, 301 P.3d 1120, 1130 (Cal. 2013)).

61. *See* Nourse, *supra* note 1, at 1392.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.* at 1393.

66. *See id.* at 1392.

for example, a traffic violation could not serve as the basis for a claim of provocation even though it is a criminal offense.⁶⁷

C. Provocation as Justification

There are those who claim that the rationale of the provocation defense is based on justification.⁶⁸ In contrast to the rationale based on excuse, the justification rationale holds that murder should be reduced to manslaughter in the case of provocation since the provocation was an unjustified act against the defendant, a fact that justified the violent emotions and acts toward the provoker.⁶⁹ According to a different version of the claim, the killing that follows a provocation is less grave as a result of the provoker's contributing guilt.⁷⁰ Thus, if *X* assaults *Y* and in response *Y* kills *X*, then according to the justification rationale criminal liability should be reduced from murder to manslaughter due to the partial understanding for the violent attack on the victim. This position explains why criminal liability should be reduced from murder to manslaughter only in the case of provocation and not in other cases that involve a loss of self-control. Furthermore, this position provides a justification of the need for an objective reasonable man test, since if most people would have reacted with violence due to emotional turmoil, then the attack on the victim is not without foundation.⁷¹

However, it should be noted that even according to this rationale, society cannot agree to the act of killing and therefore the defense is only a partial one.

Rozelle suggests a different explanation for reducing criminal liability in the case of provocation, which is based on practical justification. According to Rozelle, the provocation defense can only be presented in a situation where the law itself allowed the defendant to defend himself by use of force, but the defendant used excessive force and killed the provoking victim. In this situation of provocation, there is justification for the provoked emotions (emotion justification) and a partial justification for the provoked act (act justification) and this is the reason for reducing criminal liability from murder to manslaughter.⁷² If *X* was about to injure *Y* and *Y* killed *X* in an emotional outburst, then *Y* can invoke the provocation defense and he will only be convicted of manslaughter, rather than murder.⁷³ This argument is based on the

67. See *id.* at 1396, n.381.

68. See, e.g., Finbarr McAuley, *Anticipating the Past: The Defence of Provocation in Irish Law*, 50 MOD. L. REV. 133 (1987).

69. See *id.* at 137–39.

70. See Rozelle, *supra* note 1, at 209.

71. See *id.* at 208–09; Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 414 (2005) (“The fact that the law asks not only how badly the actor was distressed but also *why* he was so badly distressed implies that the rationale for the defense lies in the *source* of provocation, not merely the actor’s disturbed state of mind.”) (footnote omitted).

72. Rozelle, *supra* note 1, at 227–28.

73. See *id.* at 228–29.

fact that there was justification for *Y*'s emotions and partial justification for his act, since the law permits a person to defend himself by injuring *X*, but not killing him, which is considered disproportionate. According to Rozelle, when a man kills his unfaithful wife, the provocation defense is not relevant since even if there is understanding of the killer's emotions, the law itself does not permit a man to behave violently in this situation.⁷⁴ Thus, Rozelle limits the provocation defense even more than Nourse, since according to her, the provocation defense will not be accepted even when a man kills the rapist of his wife after the act or when a man kills the murderer of his son, because the legislator does not permit a man to use force and therefore there is no partial justification for this act. In contrast, according to Nourse, the provocation defense can be presented in these cases since the law has determined that the rapist and the murderer deserve punishment and retribution and therefore the emotions of the killer are justified in these situations.

III. A NEW RATIONALE FOR THE PROVOCATION DOCTRINE

A. Presentation of the Rationale

In this Section, a new rationale for the provocation defense will be presented, with the goal of explaining why in certain situations there is logic in reducing murder to manslaughter. The proposed rationale is not based on the excuse rationale as suggested by Dressler and Nourse, but rather on understanding the reason for the prohibition of murder and, in turn, on understanding the protected values that underlie the offense of murder, which have broader application than the protection of the sanctity of life alone. In the first stage, I will relate to the subjective component of the provocation doctrine and following that I will justify the requirement of an objective test.

Notwithstanding the fact that the prohibition of murder has been accepted throughout human history, the rationale underlying the prohibition is not at all clear.⁷⁵ The question of why murder is prohibited is not simply one for academics. Understanding the root of the prohibition of murder will help to characterize the conditions under which killing is permitted and when it is not. Specific to our case, an in-depth understanding of the prohibition will explain why killing following provocation is less severe than murder in other circumstances.

Thus, in cases where the arguments for the prohibition of murder do not exist for a certain type of killing, I will claim that this type of killing is permissible, and in cases in which the arguments against murder do exist but are weaker, I will claim that this type of killing is less severe than murder in other circumstances.

In order to understand this, we need to return to the basic question of why murder is prohibited. The accepted answer was given by Marquis and Rachels,

74. *See id.* at 228.

75. *See* JEFF MCMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* 189 (2002).

who cite the harm to the victim. Killing a man causes the greatest amount of harm that can be done to a man since it denies him of all future activities and pleasures that he would have enjoyed if he had not been murdered.⁷⁶

McMahan agrees that in certain contexts, the denial of the victim's future pleasures has significance, but claims that this approach does not provide a comprehensive explanation of the prohibition against murder.

The complexity of the protected values underlying the prohibition of murder can be demonstrated by way of an example presented by McMahan in a different context:

A runaway trolley is careering down the mainline track. If it continues along this track, it will crash into the station, killing hundreds of people . . . it can be diverted onto one or the other of two branchline tracks. . . . [Y]ou are a bystander who happens to have access to the switch that can divert the trolley. You see that there is an innocent bystander on each of the branchline tracks: Young is on the track to the left and Old is on the . . . right. . . . [N]either will be able to get out of the way of the trolley if you divert it.⁷⁷

Let's assume that the right thing to do is to divert the train toward the older man, as most people would respond.⁷⁸ Is it possible to conclude that *murdering* an older person is less grave than murdering a younger one? The accepted approach according to McMahan is that the gravity of murdering does not vary according to parameters such as the victim's age, socioeconomic or physical status, etc. Rather, the severity of the murdering is identical for every potential victim.⁷⁹ Therefore, McMahan concludes that murder is prohibited not only due to the harm caused to the victim, but also because it expresses a humiliating and denigrating attitude toward the victim's moral status.⁸⁰ Murder constitutes harm to human dignity. Therefore, in the context of murder, there is no difference between murdering a young man and murdering an old one, since, in both cases, the killing violates the dignity of the person and his moral status.⁸¹

It should be emphasized that, according to McMahan, a person's obligation to refrain from murder, which expresses a denigrating and humiliating attitude to the victim, is not in any way related to harming the interests of the victim, but rather, is related to the prohibition that applies to the agent. The agent is prohibited from treating a person in a degrading and

76. See Don Marquis, *Why Abortion Is Immoral*, 86 J. PHIL. 183, 189 (1989); see also JAMES RACHELS, *THE END OF LIFE: EUTHANASIA AND MORALITY* 6 (1986); James Rachels, *The Value of Human Life*, 24 PHIL. INQUIRY 3 (2002).

77. MCMAHAN, *supra* note 75, at 237.

78. See *id.*

79. See *id.* at 235.

80. See *id.* at 246.

81. See *id.* at 242.

humiliating manner.⁸² Therefore, murder is prohibited even if the victim would have agreed to such degrading treatment, since the obligation is on the agent to refrain from humiliating and degrading the person's moral status, regardless of the victim's interests.

[K]illing is wrong because it involves a failure of respect for the worth of the victim, where the worth of the victim is entirely independent of the value—be it personal value . . . instrumental value (the value to others), or impersonal value—of the contents of his possible life in the future. The wrongness of killing, therefore, does not vary with the strength of the victim's time-relative interest in continuing to live or with the degree of harm the victim suffers in being killed; it varies instead with the worth of the victim. Assuming, as liberal egalitarianism does, that all persons have equal worth, this account, which I will call the Intrinsic Worth Account, implies that all killings of persons are equally wrong, if other things are equal.⁸³

In contrast to McMahan's approach, which decouples the harm to human dignity from the victim himself, there is an alternative approach developed by Benbaji⁸⁴ and Statman.⁸⁵ According to this approach, murder causes direct harm to the victim's dignity.⁸⁶

Statman discusses the condition of "success" that is implicit within some of the conditions of legitimate self-defense. Thus, it is permissible to defend oneself and kill one's attacker only on the assumption that the act will indeed succeed in preserving the victim's life (assuming also that the goal of the self-defense is to protect the life of the victim).⁸⁷ Statman claims that the condition of "success" is implicit in the two well-known conditions within the right to self-defense: the condition of necessity and the condition of proportionality.⁸⁸ With respect to the former, it needs to be shown that the actions of the potential victim were necessary in order to fend off the attack. In the case of killing an attacker, this implies that the only way to prevent the killing of the victim was to harm the attacker and in some cases kill him.⁸⁹ With respect to the condition of proportionality, it needs to be proven that there is proportionality between the expected harm from the attack and the expected harm from the act of self-

82. Cf. Yitzhak Benbaji, *Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense*, 35 CANADIAN J. PHIL. 585, 609 (2005).

83. MCMAHAN, *supra* note 75, at 243 (emphasis omitted).

84. See Benbaji, *supra* note 82.

85. See Daniel Statman, *On the Success Condition for Legitimate Self-Defense*, 118 ETHICS 659 (2008).

86. See Benbaji, *supra* note 82, at 609.

87. See Statman, *supra* note 85, at 660.

88. See *id.* at 663–64.

89. See *id.* at 663.

defense.⁹⁰ For example, killing a person in order to prevent the breaking of a hand or leg does not meet the condition of proportionality.

The condition of “success” is related to the condition of necessity since if the victim dies in any case, then his actions were not necessary to save himself. The condition of “success” is implicit in the principle of proportionality, which permits harming an attacker in order to prevent harm of a similar magnitude to the victim. If the victim will die in any case, it is not proportional to kill the attacker, since there is essentially nothing to protect.⁹¹

Nonetheless, Statman claims that the condition of “success” goes against our moral intuitions. For example, there is a commonly held view that a woman who is about to be raped has the right of self-defense.⁹² Assume, for example, that five men are about to rape a woman and she is able to protect herself against only two of them since she only has two bullets left in her gun. Also assume that the rest of the men will not be deterred if she kills two of their friends and she will be raped by them in any case. According to the component of “success,” which is, as mentioned, implicit in the conditions of necessity and proportionality, not only is killing the two men not going to help her in a practical way, but from a moral viewpoint it is not permissible for her to do so, since this will not, in the end, prevent the rape.⁹³

Another example is the Warsaw Ghetto Uprising. In July 1942, the Germans began sending the Jews in the Warsaw Ghetto to Treblinka. Within two months, about three-hundred thousand Jews were murdered as a result.⁹⁴ The Jews remaining in the ghetto understood that the next *aktsia* would mean their death. Some of them decided to revolt against the Germans in what came to be known as the Warsaw Ghetto Uprising, but within about a month the Germans had put down the uprising and had destroyed the ghetto.⁹⁵ Although it was intuitively clear to the Jews that they had the right to defend themselves, if the situation is analyzed according to the condition of “success,” the Warsaw Ghetto Uprising was immoral since it was clear to the Jews that all of them would in the end perish.⁹⁶

Statman claims that the woman in the aforementioned example of rape has the right to defend herself and similarly, the Jews in the Warsaw Ghetto had the right to fight back even though they knew for certain that their actions against the Nazis would not lead to “success” but rather to their deaths.⁹⁷

According to Statman, the justification for the right of self-defense in these cases also rests on the moral fact that when a person is attacked, it is not just his body that is affected but his dignity as well. Therefore, in addition to the right

90. *See id.* at 664.

91. *See id.* at 663–64.

92. *See id.* at 664.

93. *See id.* at 664–65.

94. *See id.* at 665.

95. *See id.* at 665.

96. *See id.* at 665–66.

97. *See id.* at 666.

of a person to defend his body, he also has the right to protect his dignity and this right exists even if he is killed by the attacker.⁹⁸ Therefore, it is permissible for the woman to kill some of the attackers even though she will be raped in any case by the remaining ones, since in this way, she can at least protect her dignity, if not her body. Similarly, the fighters in the Warsaw Ghetto had the right to revolt against the Nazis even though they would certainly die in the end.⁹⁹

The assault on a person's dignity can be direct, such as in the case of a direct insult. In this case, the attacker is only interested in humiliating and denigrating the victim. But an attack on a person's dignity can also be indirect. When we are attacked by people that want to kill us, rape us, or steal from us, two important interests are threatened: the first is one's life, body, and property, and the second is one's dignity.¹⁰⁰ When a person is attacked, he understands that in the eyes of the attacker he is no more than an object meant to satisfy the attacker's needs. In this sense, when he defends himself, he is defending not only his life, body, and property but also his dignity. The act of self-defense is meant to demonstrate to the attacker, to ourselves, and to the public observing our actions that we are not passive creatures who can be knocked down and humiliated. By means of our actions, we are protecting and reinforcing our dignity as human beings.¹⁰¹

However, in that case, how can it be claimed that the woman or the ghetto fighters were protecting their dignity if, in the end, the woman was raped and the ghetto fighters were murdered? The answer is that although saving one's dignity in its entirety is not possible in these cases, since the attackers will successfully carry out their intentions, the victims' acts of self-defense helped maintain, to at least some extent, human dignity.¹⁰² This point is at the core of the claim that focuses on human dignity as part of the right of self-defense. Even when a person cannot defend his body, he can still defend his dignity, even if only partially.

Benbaji arrives at a similar conclusion as part of his discussion of whether, from the perspective of the right of self-defense, there is a distinction between a guilty attacker and an innocent one¹⁰³ (for example an innocent attacker could exist in a case where the attacker, *Y*, reasonably believes that the defender, *X*, is about to attack him; when the attacker, *Y*, is having a psychotic fit; or perhaps in a case where the victim, *Y*, is not in any way an attacker but rather someone who was knocked over onto *X* and *X* must kill him in order to defend himself). According to Judith Jarvis Thomson, who first raised the issue, there is no distinction between the cases, since if the attacker has no right to kill *X*, then *X* has a right to kill him, since otherwise *X* will die.¹⁰⁴ This claim is relevant, at

98. *See id.* at 668–69.

99. *See id.*

100. *See id.* at 668.

101. *See id.* at 669.

102. *See id.* at 667–69.

103. *See* Benbaji, *supra* note 82, at 597–99.

104. *See* Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 289 (1991).

least in theory, to whether the attacker is guilty or not, since in both cases the attacker has no right to kill *X*.¹⁰⁵ Benbaji claims that, even if there is a right of self-defense against an innocent attacker, the right of self-defense against a guilty attacker is stronger.¹⁰⁶ The justification for this is based on the understanding of the prohibition against murder. Consistent with McMahan's view, Benbaji claims that murder is prohibited not only because it is causing harm to the victim but also because of the attack on the victim's right to dignity and the fact that he should not be denigrated and humiliated. According to him, every individual has the right to be treated with dignity and the main implication of this right is that his interests be taken into account by others.¹⁰⁷

According to Benbaji: "Murder is wrong, not just because of its being materially harmful, but also because the murderer does not give due weight to the victim's interests. In the murderer's eyes, the victim's most basic interests simply do not count; this attitude is the most extreme form of disrespect."¹⁰⁸ Based on this approach, Benbaji claims that the right of self-defense against a guilty attacker (as opposed to an innocent one) is based not only on the right of the victim to protect his life, but also the right of the victim not to be treated in a humiliating and degrading manner.¹⁰⁹ The guilty attacker humiliates and denigrates the victim in such a way that he intentionally does not take his interests into account and the right of the potential victim to defend himself is based on, among other things, his right to defend his dignity.

The idea that an attack on human dignity provides a foundation for the right of self-defense (and therefore human dignity is also a protected value in the case of the offense of murder) can be seen in the following case: *Y* is in a truck and is interested in killing *X*. *Y* carries a powerful weapon and aims it at *X* in order to kill him. *X* also has a weapon and is able to shoot *Y* and kill him, but killing the driver will not save him, since the truck will in any case continue in his direction and kill him.¹¹⁰

If the right of self-defense is based on the right of a person to protect his life, then in this case *X* would not have the right of self-defense, since in any case he will be killed by the truck. However, since the right of self-defense against a guilty attacker is based on the right to prevent humiliation and denigration, then *X* has the right to kill *Y*, even if *X* will die immediately afterwards.¹¹¹

This case involves a guilty attacker; however, if *Y* were an innocent attacker, it appears that most people would feel that *X* is not permitted to kill *Y* if, in any case, *X* will die a few seconds later. According to Benbaji, the difference between the two cases involves the following moral distinction:

105. *See id.* at 287–89.

106. *See* Benbaji, *supra* note 82, at 606–07.

107. *See id.* at 610.

108. *Id.*

109. *See id.*

110. *See id.* at 597.

111. *See id.* at 597–98.

The right to kill an *innocent* threat in self-defense is the right to avoid the badness of death—it is a right to act in one’s material self-interest, against those who violate their duties not to hurt him. In such cases, there are no moral interests involved; the falling man does not treat the victim disrespectfully. In contrast, the right to kill the villain has a broader basis; the victim has (also) a right not to be wronged by disrespectful treatment, a right that the culpable aggressor violated.¹¹²

Therefore, if *Y* is an innocent attacker and *X* will die in any case, there is no reason to permit *X* to kill *Y*, since he cannot protect his life, and he has no need to protect his dignity since his dignity was not by harmed by *Y* who is innocent.

The notion that murder is an attack on human dignity can also be demonstrated by way of a comparison between the following cases:

Mafia—Ten members of the Mafia aim their weapons at *X* in order to kill him. *X* can throw a grenade and kill them all.

Elevator—Ten innocent people are descending in an elevator and it appears that if the elevator is not blown up, *X* will die.

It appears that in the Mafia case we would argue that *X* has the right to kill all of the Mafia members regardless of their number since they are guilty attackers seeking to kill him. In contrast, in the elevator case it is doubtful that we would say the number of people is unimportant. It appears that when the attackers are innocent the number of attackers should matter, in contrast to the case of guilty attackers.

What is the justification for distinguishing between the two cases? It would seem to be based on the fact that when the attacker is guilty, the harm is not only to the victim’s life but also to his dignity. In contrast, when the attacker is innocent, the attack is both on the person’s life and on his dignity and therefore it is logical to impose a limit on the number of innocent attackers that can be killed in order to protect one potential victim.

The discussion so far indicates that according to both Statman and Benbaji, the right of self-defense is based on the right of a person to defend not only his life, but also his dignity and therefore the prohibition of murder seeks to protect both of these important values.

B. The Implications for Mitigating Criminal Liability in the Case of Provoked Killing

This issue is closely related to the provocation doctrine and the rationale that underlies it. I would claim that an attack on human dignity when a man murders with intention and after reflecting on his decision, is more serious than an attack on human dignity in the case of a spontaneous killing as a result of provocation. In this context, I am adopting Waldron’s definition of human dignity. According to Waldron, human dignity is an individual’s ethical status which rests on his ability to control his actions and his life according to the

112. *Id.* at 610.

norms of behavior he has chosen for himself and also on his ability to give his life meaning according to his world view.¹¹³ The ethical status of human dignity is manifested in the right of every individual to have his humanity and existence be taken seriously by society, as manifested in the way it treats him.¹¹⁴ This definition implies that consciously and intentionally killing an individual not only denies him of his physical life but also seriously impairs his dignity, by degrading his humanity and his existence.¹¹⁵

When a person kills with intention and after reflecting on his decision to kill, he understands the interests of the victim and has considered them; he nonetheless decides that they do not concern him and are not to be taken into account. In a situation of intentional and premeditated killing, the murderer is depriving the victim not only of his physiological existence, but also what he could have achieved, his ambitions and his future desires. The murderer's motivation is to satisfy his needs and desires at the expense of the victim, and, in this sense, the attitude of the attacker is one of denigration and humiliation towards the victim. In contrast, when a man kills as a result of provocation and loss of self-control, he did not in any way consider the interests of the victim, since his emotional turmoil did not allow him to. In a situation of provocation, the attacker does indeed understand that he is about to kill the victim who provoked him, but he acts behind a curtain that does not allow him to reflect on the meaning of his actions. He understands that he is about to kill the victim, but is not interested in humiliating him or denigrating him. In this sense, he is not at all interested in harming the victim's dignity nor in depriving him of his moral status. It is possible that if he still had self-control, he would consider the interests of the victim and would choose not to kill him.

The harm to human dignity is greater when the attacker understands the victim's existing interests and in any case disregards them than in a situation where a man kills as a result of a loss of control, such that he does not reflectively consider the victim's interests. This is similar to the difference between a situation in which *X* slaps *Y* intentionally and without any provocation from *Y* and one in which *X* slaps *Y* spontaneously after *Y* provoked him. In the first case, *X*'s attitude to *Y* expresses denigration and humiliation as a result of the reflective process he previously underwent; in contrast, in the second case the attitude of *X* to *Y* does not express denigration and humiliation since his response was spontaneous and did not involve any reflection on the implications of his act.

I wish to propose that we need to examine the attack on human dignity not as a binary question (whether or not human dignity has been harmed) but rather

113. See Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 202 (2012).

114. See *id.*

115. For comparison, see Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 RATIO JURIS. 173, 174–75 (2008). (“[A] human person may be treated in a way at odds with his or her personal dignity. Human beings may be enslaved, they may be killed unjustly, raped, scorned, coerced, or wrongly imprisoned. Such treatment is undignified, yet it too, like a person's low sense of dignity, does not cause a victim to personal dignity; the slave or the murder victim are wronged precisely because they are treated in a way at odds with their genuine personal dignity.”).

as one of degree which is related to, among other things, the actual intention and circumstances in which the attack took place. If a man died as a result of a natural disaster, we would not say his death involved any harm to his dignity, since there was no intention involved, and, as I showed above, when the case involves an innocent attacker, then the right of self-defense is not based on the attack on the potential victim's dignity, but rather only on the physical harm that is liable to occur to the victim. Thus, one can speak of a spectrum of harm to human dignity when a man is killed. At one extreme is the case of premeditated murder in which the killer considers all the facts and decides to kill anyway, while at the other extreme is the case of the innocent killer, who had no interest in killing the victim. Although provoked killing is close to premeditated murder on this spectrum—since the attacker had intention and wanted his victim to die—it is nonetheless less grave, since the killer did not consciously decide that the interests of the victim do not concern him. It is possible that those interests were indeed important to him, but he did not manage to consider them due to his loss of self-control and his inability to think rationally.

Therefore, according to the approach of McMahan and of Benbaji and Statman, provoked killing is less severe than other types of murder due to the different degree of harm to human dignity (in what follows, I will further explain the need for an objective test in the case of Statman and Benbaji's approach, which relates to the harm to the victim's human dignity itself).

Therefore and in contrast to the view of provocation as a partial excuse, which views the subjective requirement of provocation as the basis for reducing the guilt of the provoked, my claim is that the subjective requirement of loss of self-control makes the killing less grave since there is less harm to the victim's human dignity.

C. The Implication of the Rationale for the Objective Test

I believe that the proposed rationale can also explain the need for the reasonable man test. When an individual has killed out of provocation, which involves only the subjective test, but not the objective one, the attitude of the provoked individual towards the victim is less humiliating (in the sense of McMahan) and the harm to the victim's human dignity (in the sense of Benbaji and Statman) is lessened. However, from the perspective of society as a whole and even from the perspective of the victim there has been significant harm to human dignity since the victim is dead for no logical reason but simply as a result of the attacker's malicious act. In such a situation—in which the killing has passed only the subjective test—criminal liability cannot be reduced, despite the lessened harm to human dignity, as explained above. In contrast, in the case of provocation, in which both the subjective test and the reasonable man objective test have been passed, society can understand the acts of the provoked individual (though it does not justify them). The very fact that this is provocation that has passed the subjective test described above and the objective test, in the sense that any reasonable man would have had an emotional outburst and might have killed the provoker, makes the harm to the victim's dignity less grave, at least in the eyes of society as a whole. There are two reasons for this:

First, the very fact that we are not talking about caprice, but rather a situation in which any reasonable individual is liable to act irrationally and reflexively, as did the attacker, means that all of society, including the victim himself, would consider this degradation of human dignity as less serious. Thus, the attitude that accompanies the act of the attacker—and the attitude of any other reasonable person—towards the victim's dignity is an important variable in the decision of whether and to what extent there has been harm to human dignity. Second, from the perspective of the victim-provoker and of society as a whole, it can be claimed that if the attack occurred following provocation by the victim—provocation that would have also caused an emotional outburst by a reasonable person and an act carried out behind a curtain of reflective fog—both the victim and society would consider the harm to human dignity to be less grave than if the attack had been motiveless. In other words, the intensity of the provocation by the victim himself is also an important variable in deciding to what extent human dignity has been harmed. To the extent that an act of little significance on the part of the victim led to his death, the harm to his dignity becomes more significant, even if the attacker acted behind a curtain of reflective fog. In contrast, if the killing occurred as the result of a major provocation by the victim then it can be claimed that the harm to human dignity as a result of his death is less serious from the perspective of both the victim and society as a whole.

Therefore, there are two important variables in the decision of whether and to what extent the killing has harmed human dignity. First, the attitude that accompanies the act of killing in the case of provocation does not eliminate the moral status of the victim and does not represent an assault on his basic human rights, in contrast to intentional murder following reflection, in which case the individual is aware of the victim's basic right to life and denies him of it. Second, the intensity of the provocation is an indicator of whether the killing was carried out with intention. The greater the provocation, and to the extent that any reasonable person would have reacted as the victim did, the less will be the denigration of human dignity.

The implication of this discussion is that the proposed rationale differs substantially from both the excuse rationale and the justification rationale. It differs from the former since the claim of reduced criminal liability is not the result of the accused's reduced guilt due to loss of self-control, but rather is due to the lessened harm to human dignity, which is one of the protected values on which the punishment of murder is based. The proposed rationale also differs from the justification rationale since it does not justify to any extent the act of killing. The core of the rationale is therefore based on the fact that the killing is less grave since the killing's gravity is, as discussed above, related to two protected values (protection of life and protection of human dignity) and, as has been shown, in the case of provoked killing the harm to human dignity is less grave.

D. The Need for a Subjective and an Objective Test Under the Provocation

Doctrine

One of the questions that arises in relation to the two rationales presented to date for the provocation doctrine is why there is a need for two tests—one subjective and the other objective—in order to reduce criminal liability. With respect to the excuse rationale, the question is why there is a need for the objective test. If the entire reason for reducing criminal liability is the defendant's loss of control, why does it need to be proven that a reasonable man would have also acted in such a manner? With respect to the justification rationale, the question is why there is a need for the subjective test. If the whole reason for reducing criminal liability is a specific justification of the act, then a reasonable man would have also acted in such a manner. Why does it need to be proven that the defendant acted out of a lack of self-control?

The rationale I am proposing, which relates to the harm to human dignity, explains the need for these two tests. With respect to the necessity for an objective test, it can be claimed as follows: If the killer passes only the subjective test, there would still remain an assault on the victim's human dignity. Thus, although the killer acted out of a lack of self-control and from behind a curtain of reflective fog, the situation is still one in which the victim died without any logical reason, since as mentioned, no reasonable man would have acted violently in this case. With respect to the necessity of the subjective test, the following claim can be made: If the killer passes only the objective test, but he himself had maintained self-control, then from the perspective of the killer, this would indicate an attitude of denigration and humiliation toward the victim—in the sense of McMahan—in exactly the same way as in the case of a man that killed without any provocation. Therefore, there is need for both tests.

E. The Implication of the Rationale for Cases of Infidelity

As mentioned, there is a lack of agreement among the various states with respect to certain aspects of provocation. Nonetheless, there is a consensus that infidelity can constitute a basis for a provocation claim. Although there is a question of whether the couple needs to be married at the time of the infidelity and the killing, and also whether the provoked spouse needs to actually witness the infidelity in order for the claim of provocation to be accepted, there is no argument that if the husband killed the wife (or vice versa) after witnessing the infidelity, the claim of provocation can be accepted. Following the theory I have proposed, according to which the claim of reduced criminal liability in the case of provoked killing is based on a lower level of harm to human dignity, I believe that the mitigation of criminal liability should be ruled out in these cases. This argument rests on the fact that even if the subjective and objective criteria are fulfilled in the case of infidelity, there still remains an obligation to consider whether the killing harmed human dignity. It can be claimed in this context that the killing of a spouse in this case degrades human dignity, from the perspective

of both the victim and society as a whole, since it reflects the view of a woman as an object belonging to her husband.¹¹⁶

F. Verdicts that Go Beyond the Excuse Rationale and Their Implications for the Proposed Rationale

In this Section, I will discuss in brief a number of verdicts that emphasize different rationales for reducing criminal liability in the case of provocation, beyond the excuse rationale and the justification rationale. In this context, I will show their implications for the rationale I have proposed with regard to human dignity.

In *Paz v. State*,¹¹⁷ Wilfredo and Esmeralda Paz were having a party in their home. Winton Guillen and his wife, Mirta, attended the party. After sitting and drinking for a while, Winton went up to the second floor of the house. A few minutes later Wilfredo also went up and found his wife crying. At this stage, Esmeralda confronted Winton and said: “Why did you do that? Why did you do that to me?”¹¹⁸ Wilfredo understood that Winton had sexually attacked Esmeralda. He grabbed a knife and immediately stabbed Winton to death.

In the initial proceedings, Wilfredo was convicted of second-degree murder. But in the appeal, the court ruled that the killing occurred as a result of Winton’s provocation and convicted Wilfredo of manslaughter. According to the ruling of the court:

“Such killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject. . . .”

. . . As a matter of law, Paz’s sudden act of stabbing the victim *immediately* after surmising that the victim had sexually assaulted his wife may not be deemed an act evincing a depraved mind regardless of human life, “but rather from the infirmity of passion to which even good men are subject.”¹¹⁹

The ruling emphasizes not only the excuse rationale, according to which criminal liability is lessened due to the fact that the defendant was not acting rationally, thus making it difficult for him to consider his actions in light of the law, but also that when a man kills as a result of provocation, his actions do not imply that he is evil or malicious. Furthermore, the act of killing out of provocation does not demonstrate denigration and humiliation toward the victim as does premeditated murder.

116. See Miller, *supra* note 10, at 265–66; Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 672 (2001); Margo Wilson & Martin Daly, *An Evolutionary Psychological Perspective on Male Sexual Proprietariness and Violence Against Wives*, 8 VIOLENCE & VICTIMS 271, 276–77 (1993).

117. *Paz v. State*, 777 So. 2d 983 (Fla. Dist. Ct. App. 2000).

118. *Id.* 983–84.

119. *Id.* at 984 (quoting *Febre v. State*, 30 So. 2d 367, 369 (Fla. 1947)).

Although this ruling did not use the terminology of “human dignity” as part of the protected values that underlie the offense of murder, it can be claimed that according to this ruling, killing out of provocation causes less harm to human dignity in general and to the dignity of the victim in particular, since “[s]uch killing is not supposed to proceed from a bad or corrupt heart”¹²⁰ and does not reflect any denigration or humiliation of the victim. Although there is an intention to kill here, it does not reflect a desire to denigrate or humiliate the person per se, since the killing is done from behind a curtain of reflective fog.

Furthermore, many rulings have emphasized that criminal liability can be reduced in a case of provocation, even when the defendant intends to kill the victim. These rulings have emphasized that the reduction in criminal liability is based on the fact that in the case of provocation there is no malice, as is required in a conviction for murder in the first or second degree.

Thus, for example, in the case of *Dorsey* it was stated: “A defendant who acts in a sudden quarrel or heat of passion because of sufficient *provocation* is presumed to act *without the malice* necessary for murder and is therefore guilty of only voluntary manslaughter.”¹²¹

In the *Ramirez* case, it was ruled: “Second degree murder may be reduced to voluntary manslaughter with evidence that *negates malice*. ‘A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter.’ Generally, the intent to unlawfully kill constitutes malice. ‘But a defendant who intentionally and unlawfully kills lacks malice’”¹²²

It would appear that these rulings emphasize that the reduction of criminal liability is not based on the excuse rationale alone. In other words, the reduction in criminal liability is based not only on the weight given to the weakness of human nature, which was manifested in the defendant’s loss of self-control that inhibited him from behaving according to the law. Rather, in the case of provocation, the attitude of the defendant toward the values that underlie the offense of murder is also different from a murder in a situation of intentional and premeditated killing; therefore, the killing is less grave. And it should be emphasized that these rulings are not in any way based on the justification rationale, since they do not justify the act of the defendant, even if it is a response to provocation. These rulings emphasize the point that killing out of provocation is less grave since the defendant demonstrated less denigration and humiliation toward the victim.

If one agrees with the theory I have presented, namely that the offense of murder is meant to protect not only life itself, but also human dignity, it can be said that in the case of provocation, the defendant demonstrated less denigration

120. *Id.*

121. *Dorsey v. Price*, No. 2:16-cv-07160-CAS-KES, 2017 U.S. Dist. LEXIS 146761 (C.D. Cal. Aug. 9, 2017) (emphasis added).

122. *People v. Ramirez*, No. C069700, 2016 Cal. App. Unpub. LEXIS 8108 (Cal. Ct. App. Oct. 25, 2016) (emphasis added) (citations omitted) (quoting *People v. Barton*, 906 P.2d 531, 538 (Cal. 1995)).

and humiliation toward the victim, which is different from cases of murder in which the defendant killed after premeditation and out of evil and malice. For this reason as well, provoked killing is less grave than premeditated, and other types of, murder.

CONCLUSION

The provocation doctrine is embedded deeply within criminal law. However, legal scholars are still divided as to the rationale that underlies it and, as a result, also with respect to its legal conditions. The reduction of criminal liability in cases of provocation led to a confrontation between the principle of guilt and the value of the sanctity of life, as well as social conflicts in various contexts. In contrast to the excuse rationale and the justification rationale, I have proposed a new rationale for the provocation doctrine, which is based on the understanding of protected values that underlie the offense of murder. First, I proved that the offense of murder seeks to protect not only the value of life, but also the value of human dignity. Second, I showed that in the case of provoked killing, there is less harm to human dignity than in other cases of murder, since in the case of provocation the defendant acted within a reflective haze and therefore was not able to consider his actions in a level-headed manner and did not intend to humiliate the victim. In contrast, in the case of premeditated murder, the individual planned his acts rationally and consciously decided that the interests of the victim do not concern him and therefore the attitude of the attacker is more humiliating and denigrating toward the victim than in the case of provocation.

In light of the difference in the extent of harm to human dignity, I claim that provoked killing is less grave and, therefore, it is correct to reduce criminal liability in this case.

Therefore, the proposed rationale, according to which the damage to human dignity is less in the case of provocation, suggests a logic for the existence of the two tests (subjective and objective) in a coherent and comprehensive manner. I believe that this understanding of the provocation doctrine, which is based on a wider view of the protected values that underlie the criminal offense of murder, can point to a new direction for the discussion of this doctrine.