

1982

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Recommended Citation

John R. Snowden, *The Case for a Doctrine of Provocation in Nebraska*, 61 Neb. L. Rev. (1982)

Available at: <https://digitalcommons.unl.edu/nlr/vol61/iss4/2>

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The Case For A Doctrine of Provocation in Nebraska

I. INTRODUCTION

Secure among the doctrines of the criminal law is the notion that malice is the distinguishing feature of any homicide to be punished as murder.¹ The doctrine of provocation² negates or excuses the malice of the actor and the unlawful homicide is punished as manslaughter rather than murder.³ The law of Nebraska obliquely recognizes the doctrine of provocation, but judicial opinion confuses the partial excusing defense of provocation with the statutory definition of the manslaughter offense.⁴

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1. See W. LAFAYE & A. SCOTT, CRIMINAL LAW 528-30 (1972) [hereinafter cited as LAFAYE & SCOTT]; R. PERKINS, CRIMINAL LAW 34-35 (2d ed. 1969) [hereinafter cited as PERKINS]. "Malice aforethought is the characteristic mark of all murder, as distinguished from the lesser crime of manslaughter which lacks it." *Virgin Islands v. Lake*, 362 F.2d 770, 774 (3rd Cir. 1966).

In this Article malice means: (1) an intent to kill; (2) an intent to do serious bodily injury; (3) an intent to do an act in wanton and wilful disregard of the obvious likelihood of causing death or serious bodily injury; and (4) an intent to do a named felony under a "felony-murder rule." LAFAYE & SCOTT, *supra*, at 528-61; PERKINS, *supra*, at 34-45; *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980).

2. "By provocation we mean the power possessed by some kinds of things and events external to human beings, of arousing in them desires by which they are moved to particular acts." Michael & Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1280 (1937).

3. LAFAYE & SCOTT, *supra* note 1, at 571-86; PERKINS, *supra* note 1, at 51-70; 1 WHARTON'S CRIMINAL LAW AND PROCEDURE §§ 271-89 (R. Anderson ed. 1957).

4. *E.g.*, *Savary v. State*, 62 Neb. 166, 176, 87 N.W. 34, 38 (1901); *State v. Rowe*, 210 Neb. 419, 425, 315 N.W.2d 250, 253 (1982). "[P]rovocation is *not* an element of manslaughter (whether voluntary or involuntary), but a *defense* to second degree murder." *United States v. Alexander*, 471 F.2d 923, 943 (D.C. Cir. 1972) (emphasis in original).

The confusion of the provocation defense and the manslaughter offense may be hard to avoid since a successful defense yields not an acquittal, but conviction of the lesser homicide offense. Interestingly, the law has not yet given doctrinal recognition to the notion of provocation partially excusing non-homicide offenses, *e.g.*, a first-degree assault that was provoked might be partially excused to second-degree assault. See generally English, *Provoca-*

The doctrine of provocation is the traditional analytical device for distinguishing between murder and manslaughter in cases of intentional homicide.⁵ To make this distinction in a rational and just way it is important that the doctrine be clearly articulated and nourished by proper instruction in the cases. This has not been the Nebraska experience.

This Article suggests that the Nebraska bar and bench should overtly recognize and develop the provocation doctrine. Toward this goal, the Article will first place provocation in the context of homicide jurisprudence by a brief overview of its doctrinal role. Second, the Nebraska treatment of the doctrine will be explored. Third, a benchmark articulation of the doctrine will be offered. Finally, a discussion of the issues that will illumine and be illumined by the doctrine is presented. To rethink and argue the case for a doctrine of provocation is the task of the lawyer who is required to take some responsibility for the condemnation and imprisonment of his fellow human beings as criminals.⁶

II. THE DOCTRINAL ROLE OF PROVOCATION

Once the word is found argument begins. Provocation begins as an argument over the Anglo-Saxon root of "malice." The argument occurred because a lawyer believed that his client was morally distinguishable from another lout who had previously killed a person. The lawyer suggested that the facts of the previous case could be characterized as involving a killing *par malice prepense*. Such a killing was obviously one which did not admit of excuse or justification.⁷

But, the lawyer's client had killed in a sudden fight between persons of quality. It was a "chance-medley."⁸ In any number of causes a person of quality might be drawn into a sudden fight, and in such circumstances the normal inference from the act of killing to the actor's state of mind and character was precluded.⁹ The law

tion and Attempted Murder, 1973 CRIM. L. REV. 727 (1973) (a synopsis of England's law on this issue). But see *Maier v. People*, 10 Mich. 212, 81 A.D. 781 (1862) (provocation a defense to assault with intent to murder).

5. See Coldiron, *Historical Development of Manslaughter*, 38 KY. L.J. 527 (1949-50). See also, *Exodus* 21:12-36; *Deuteronomy* 4:41-42; 22:22.

6. G. FLETCHER, *RETHINKING CRIMINAL LAW* 875 (1978) [hereinafter cited as FLETCHER].

7. See Kaye, *The Early History of Murder and Manslaughter I*, 83 LAW Q. REV. 365, 369-70 (1967).

8. Apparently this is noted in the Norman "chaud melee." See L. WEINREB, *CRIMINAL LAW* 66-68 (3d ed. 1980).

9. "[I]t matters not what the cause be, whether real or imagined, or who draws or strikes first, provided the occasion be sudden, and not urged as a cloak for preexisting malice." 1 EAST, *PLEAS OF THE CROWN* 241 (1803). See W. LOM-

should have compassion for this human being, the lawyer argued, and the common law responded.

Here are the seeds of a general theory of excuse manifested in the particular argument that the intentional unjustified killing in a sudden fight was less culpable and legally distinguishable from another homicide. First, the common law recognized what has become a fundamental premise, that the substantive offense must reflect a concurrence of mental state, *mens rea*, and act, *actus reus*.¹⁰ Second, circumstances of the killing in a sudden fortuitous fight made the argument that the law could not comfortably infer that the act was done *par malice prepense*, "wickedly," "wilfully," or "without lawful excuse."¹¹ Third, the circumstances restricted the actor's freedom of choice and whatever intent arose was a limited temporal distortion of an otherwise good person.¹² Finally, because of the involuntary force of circumstances, the law in compassion toward an equal would specify an excuse which would allow the actor to be convicted of a lesser offense, manslaughter, rather than the capital crime of murder.¹³

At one time people of quality wore side arms as a matter of course and matters of honor were settled by less disguised and more personal violence.¹⁴ The Statute of Stabbing¹⁵ attempted to impose an end to this way, but life and the common law prevailed.¹⁶ However, simultaneously the imposed order was reflected in the order of just expectations. The common law began to ask whether or not the cause of the sudden fight was such "provocation" that the resulting homicide would be manslaughter rather

BARD, EIRENARCHA 248 (1614 ed.); Kel. 55, 84 Eng. Rep. 1080 (1666) (directions for Justices of the Peace); Royley's Case, 79 Eng. Rep. 254 (1612). See generally Green, *The Jury and the English Law of Homicide*, 1200-1600, 74 MICH. L. REV. 413 (1976); Snelling, *Manslaughter Upon Chance-Medley*, 31 AUSTL. L.J. 102 (1957).

The notion of chance-medley, killing in a sudden fight from fortuitous cause, had its demise in England in *Rex v. Semini*, [1949] 1 K.B. 405.

10. LAFAYE & SCOTT, *supra* note 1, at 7. See also Green, *supra* note 9 (an historical development of the degrees of killing with emphasis on its early development in England).
11. Kaye, *supra* note 7, at 369.
12. See FLETCHER, *supra* note 6, at 798-802; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 22-24 (1968); ARISTOTLE, ETHICA NICOMACHEA 1110a (W.D. Ross trans. 1925).
13. FLETCHER, *supra* note 6, at 807-10. In sketching the doctrinal role of the chance-medley root of provocation the author has adopted much of Fletcher's general theory of excuses for its background. See *id.* at 798-817; see also Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974).
14. 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 59 (1883).
15. 1 Jac. 1, ch. 8 (1604).
16. 3 STEPHEN, *supra* note 14, at 47-50.

than murder.¹⁷ Thus, the focus shifted from the sudden fight into which a person of honor might be drawn to the provoking nature of the cause of the fight.¹⁸

The general theory of the partial excuse remained the same. Due to constricted choice from temporally limited involuntary circumstances an intent to kill was aroused which compassion required the law to recognize as less culpable. But, the normative focus of circumstances shifted from the sudden fight to the provoking act.

Evidence of serious provocation would rebut this presumption [malice] by introducing a more probable cause: the incident originated in the provocative conduct of the deceased, which in turn aroused violent passions in the accused. The accused's conduct could therefore be attributed to weakness of control or human frailty rather than to true wickedness.¹⁹

Hale accordingly inquired, "[W]hat is such a provocation, as will take off the presumption of malice in him that kills another. . . ."²⁰

By the first years of the eighteenth century the English courts had ruled various forms of provocation to be adequate or inadequate to rebut a finding of malice. Lord Chief Justice Holt in his opinion in *Regina v. Mawgridge*²¹ categorized the types of adequate or inadequate provocation²² and distinguished provocation from chance-medley. In *Mawgridge*, the accused and the deceased had a verbal argument, whereupon the accused threw a bottle at the deceased, which struck the deceased's head. The deceased rose, threw a bottle at the accused, and the accused gave the deceased a mortal blow with his sword. This killing was adjudged to be murder, having been done with malice aforethought, even though done upon sudden quarrel. Lord Holt reasoned that neither the deceased's words nor his lawful retaliation to the accused's initial attack would be adequate provocation.

17. See *id.* at 57-72; 4 W. BLACKSTONE, COMMENTARIES* 191; 3 COKE INSTITUTES 55 (1809); 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 453 (1847); Coldiron, *supra* note 5, at 534; Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 292-97 (1976); Perkins, *The Law of Homicide*, 36 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 391, 411-427 (1946).

18. See Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defense to Murder in English Law*, 7 AM. J. LEGAL HIST. 310, 310-11 (1963).

19. Ashworth, *supra* note 17, at 295.

20. 1 HALE, *supra* note 17, at 455.

21. Kel. 119, 84 Eng. Rep. 1107 (1707).

22. Adequate provocation was: (1) any striking of the accused; (2) angry words followed by an assault; (3) the sight of a friend or relative being beaten; (4) the sight of a citizen being unlawfully deprived of his liberty; and (5) the sight of a man in adultery with the accused's wife. Inadequate provocation was: (1) words alone; (2) affronting gestures; (3) trespass to property; (4) misconduct by a child or servant; and (5) breach of contract. *Id.* at 130-38, 84 Eng. Rep. 1112-15.

The doctrine of provocation was now well established in law.²³ It would from this point live in the world of ideas taking on the normative debates of the culture adopting it and the world of events would drive the law to refine and qualify this partial excuse as the legal actors who defined and punished wrong doing imprisoned or killed fellow citizens.²⁴

III. THE DOCTRINE OF PROVOCATION IN NEBRASKA

In Nebraska all crimes are defined by statute and the articulation of a substantive offense is the province of the legislature.²⁵ However, the common law power of the judicial branch may recognize and define defenses.²⁶ The Nebraska judiciary has recognized the doctrine of provocation but its function and role is confused by the courts' misplaced reliance on the bare language of the manslaughter offense. First, the Nebraska statutory scheme for the grading and punishment of homicides must be set out. Then, the importance of the provocation doctrine and its function may be understood as it is manifested in the statutes and cases.

28-303. Murder in the first degree; penalty. A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

28-304. Murder in the second degree; penalty. (1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

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23. This brief sketch of the doctrinal role of provocation has focused on a narrow view of law and community. Of course, the notion of provocation exists wherever human beings seek to join together. *E.g.*, *Winnebago v. Cheyenne reported in K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 140-46 (1941).
 24. "[D]octrinal disputes are not arid and aimless fights about narrow doctrinal points, but rather a stylized struggle over basic issues of principle." *FLETCHER, supra* note 6, at 875.
 25. "All crimes are statutory in this state." *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 782, 104 N.W.2d 227, 231 (1960). *See generally* *Abrahams & Snowden, Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1 So. ILL. L.J. 1, 12-40 (1976).
 26. The insanity defense is a creature of Nebraska common law. *Schwartz v. State*, 65 Neb. 196, 91 N.W. 190 (1902); *State v. Long*, 179 Neb. 606, 620, 139 N.W.2d 813, 821 (1966). *See* *State v. Ransburg*, 181 Neb. 352, 148 N.W.2d 324 (1967) (entrapment); *State v. Brown*, 174 Neb. 393, 118 N.W.2d 332 (1962) (intoxication).

(2) Murder in the second degree is a Class IB felony.

28-305. Manslaughter; penalty. (1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

(2) Manslaughter is a Class III felony.²⁷

Murder in the first degree is punished by life imprisonment or death. Murder in the second degree is punished by a sentence of ten-years-to-life. Manslaughter is punished by a sentence of one-year-to-twenty-years imprisonment, or a fine of up to twenty-five thousand dollars, or both such fine and imprisonment.²⁸

Recently, in *State v. Rowe*,²⁹ the defendant was convicted of murder in the second degree and appealed arguing that the failure of the trial court to instruct on manslaughter upon his request was error. The Supreme Court of Nebraska found that the trial court erred in not submitting to the jury the lesser-included offense of manslaughter along with the charge of murder in the second degree.³⁰ The opinion illustrates the problem faced in Nebraska when the role of the provocation doctrine is neglected.

In *Rowe* the accused testified that he had been out for an evening of beer drinking and dancing and came home about 11 p.m.

27. NEB. REV. STAT. §§ 28-303 through 305 (Reissue 1979). For the purposes of this Article's discussion, the Nebraska homicide statutes have not changed significantly since at least 1873. At that time the State adopted the so-called Pennsylvania division of murder into first and second degree which began with the Pennsylvania statute of 1794. PERKINS, *supra* note 1, at 88-89. The current definition of manslaughter was also established.

In 1867 the first legislature had defined manslaughter with specific reference to provocation:

SEC. 21. Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without any deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

SEC. 22. In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

SEC. 23. The killing must be the result of that sudden violent impulse of passion, supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as a murder.

Part III, §§ 4-21-23, Statutes of Nebraska (1867).

28. NEB. REV. STAT. § 28-105 (Reissue 1979). In 1979 the penalty for manslaughter increased from a maximum of ten to a maximum of twenty years.

29. 210 Neb. 419, 315 N.W.2d 250 (1982).

30. *Id.* at 426, 315 N.W.2d at 255.

He did not disturb his wife, the deceased, because she was in another bedroom sleeping and had to rise about 4:30 a.m. to get ready for work. He fell asleep in their usual bedroom and later awoke upon hearing a noise. When he went to investigate he found the deceased at the bottom of some steps, unconscious and bleeding from the nose. He attempted to revive her but failed. He wanted to join her and attempted to shoot himself but the weapon did not fire. He then mutilated her body with a sharp instrument and set their house on fire. He denied ever having struck his wife prior to the mutilation and he argued that the mutilation and burning were the results of a "brief reactive psychosis."³¹ That is to say, that upon finding his wife apparently dead he went crazy, mutilating her body, attempting to kill himself, and setting fire to their house.

The state's case, through the testimony of a pathologist, argued that the deceased's skull injury would have ultimately caused her death; that the skull injury was more likely the result of a blow to the head than a fall, and that in any event the actual immediate cause of death was the loss of blood caused by the defendant's admitted mutilation of the body.³²

The defense and prosecution both offered expert testimony on the issue of legal insanity.

In considering whether or not a manslaughter instruction was required, the court began with the basics. "The difference between murder in the second degree and manslaughter, as defined in the first clause of section 28-305, is the absence of malice."³³ The court then defined malice. "Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse."³⁴ Certainly, an intent to kill manifests malice.³⁵ What then would negate the malice manifested in an *inten-*

31. *Id.* at 423, 315 N.W.2d at 254.

32. *Id.* at 422-23, 315 N.W.2d at 254.

33. *Id.* at 425, 315 N.W.2d at 255. See *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978). In the discussion of the voluntary manslaughter charge *Beers* is the authority used throughout by the court.

For the purpose of this Article concern is focused solely on the first clause, the voluntary manslaughter offense of § 28-305. See 1 WHARTON'S CRIMINAL LAW AND PROCEDURE §§ 272-75 (R. Anderson ed. 1957); *Boche v. State*, 84 Neb. 845, 122 N.W. 72 (1909). The defendant in *Rowe* also argued for a manslaughter instruction on the basis of involuntary manslaughter, causing the death of another unintentionally while in the commission of an unlawful act. The court quite properly found the failure to instruct on such involuntary manslaughter to be error. *State v. Rowe*, 210 Neb. 419, 425-26, 315 N.W.2d 250, 255 (1982).

34. *State v. Rowe*, 210 Neb. 419, 424, 315 N.W.2d 250, 255 (1982).

35. Malice was defined for the purpose of this Article, *supra* note 1, as (1) an intent to kill; (2) an intent to do serious bodily harm; (3) an intent to do an act in wanton and reckless disregard of the obvious likelihood of causing death or serious bodily injury; and (4) an intent to do a named felony under a "fel-

tional³⁶ killing so that it would be with just cause or excuse? "Absence of malice may exist where the killing occurs upon sudden quarrel."³⁷

Now a fine line or huge gap appears. An intentional killing without premeditation is murder in the second degree. Yet, an intentional killing upon a sudden quarrel squares with the absence of malice allowing a conviction of manslaughter. What should be the offense here:

A: How about a cup of coffee together?

B: I've told you to leave me alone.

A: Come on, let's be friends. Have some coffee.

B: You're a creep. Leave me alone!

A: Drop dead! BANG. BANG.

Is the jury free to choose, without some notion of a just and morally defensible distinction, which defendants are to be found guilty of second degree murder and which manslaughter? Almost every intentional killing, not premeditated or deliberated, which may be imagined may be said to occur upon a sudden quarrel. Without an understanding of the law's provocation doctrine the jury is either denied its role as finder of fact and conscience of the community or forced to intuit justice in an inarticulate consciousness.

The *Rowe* court found that there was circumstantial evidence from which the jury could conclude that the killing was the result of a sudden quarrel:

The defendant came home after a night of drinking and dancing. He found his wife not in the bed which they customarily shared, but in another room. His sexual desires were urgent. (He acknowledged he was naked when all the events at the residence transpired). Fulfillment of his desires

ony-murder rule." In many jurisdictions any of the first three manifestations of malice may suffice for a second degree murder case. However, malice of types (2) and (3) are currently questionable as sufficient in Nebraska. Compare NEB. REV. STAT. § 28-402 (Reissue 1975) with NEB. REV. STAT. § 28-304 (Reissue 1979). See Note, *Is Purpose or an Intent an Indispensable Element of Murder in Nebraska?* 33 NEB. L. REV. 481 (1954).

In Nebraska, type (4) malice is only applicable to first degree murder. But see *People v. Williams*, 63 Cal. 2d 452, 406 P.2d 647, 47 Cal. Rptr. 7 (1965); Anno., 50 A.L.R.3d 397 (1973) (a discussion of inherently dangerous felonies for purposes of the felony-murder doctrine).

36. Voluntary manslaughter involves an intentional killing, but the malice, intent to kill, is excused. 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 274 (R. Anderson ed. 1957); LAFAYE & SCOTT, *supra* note 1, at 572; PERKINS, *supra* note 1, at 52; *Boche v. State*, 84 Neb. 845, 122 N.W. 72 (1909). Cf., *State v. Worley*, 178 Neb. 232, 132 N.W.2d 764 (1965) (manslaughter: killing of another without malice); *Skinner v. Jensen*, 178 Neb. 733, 135 N.W.2d 134 (1965) (manslaughter: unlawful but unintentional killing of another); *Fisher v. State*, 154 Neb. 166, 47 N.W.2d 349 (1951) (manslaughter: unintentional killing of a person without malice).

37. *State v. Rowe*, 210 Neb. 419, 425, 315 N.W.2d 250, 255 (1982).

was rejected. This resulted in a *quarrel*, the result of which was his striking his wife with a hammer.³⁸

What then would the court say as to *A* in the hypothetical above? What could be said without some notion of provocation?

Rowe is not a case where the court strays from the course of doctrine and practice. It is simply a current example of a long habit of confusing the provocation doctrine of the common law and the statutory definition of the manslaughter offense. Although the state's first criminal code specifically defined manslaughter in terms of provocation and heat of passion, that language was dropped and the current language, "kills another without malice, either upon a sudden quarrel . . . , " was adopted in 1873.³⁹

Ten years later in *Bohanan v. State*,⁴⁰ the supreme court was asked to consider whether the trial court had erred in failing to give the defendant's requested manslaughter instruction that if the killing was done, "upon a sudden quarrel and in the heat of passion, they should find the defendant guilty of manslaughter only."⁴¹ Although the facts of the homicide are not given in the opinion, the court found no error in failure to instruct on manslaughter because it incorrectly concluded that provocation, heat of passion, related to an inadvertent rather than intentional killing.⁴² Clearly, the manslaughter statute then and now describes two distinct notions and provocation functions to partially excuse an intentional killing.⁴³

The supreme court did not explicitly deal with provocation again until the case of *Savary v. State*⁴⁴ in 1901. In *Savary*, the defendant had been upbraided by the deceased for breaking up a card game and generally not treating him right. The deceased left the area and a little while later became embroiled in an argument and scuffle over a stick of wood with another man when the de-

38. *Id.* at 425, 315 N.W.2d at 255 (emphasis added). *But see* *Braunie v. State*, 105 Neb. 355, 180 N.W. 567 (1920) (no evidence of provocation in the record); *Wright v. State*, 169 Neb. 497, 100 N.W.2d 51 (1959) (language alone is no justification for the killing of another).

39. *See* note 27 *supra*. *See also* *Preuit v. People*, 5 Neb. 377, 384 (1877).

40. 15 Neb. 209, 18 N.W. 129 (1883).

41. *Id.* at 214, 18 N.W. at 131.

42. *Id.* at 215, 18 N.W. at 131.

43. *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909).

44. 62 Neb. 166, 87 N.W. 34 (1901). During the time between *Bohanan* and *Savary* the court did consider two cases which suggest a recognition of the notion that an apprehension of danger of death or great bodily harm insufficient to establish self-defense may nevertheless be an adequate provocation to reduce the intentional killing to manslaughter. *Vollmer v. State*, 24 Neb. 838, 40 N.W. 420 (1888); *Housh v. State*, 43 Neb. 163, 61 N.W. 571 (1895). *See* note 109 & accompanying text *infra*. *See also* *Carleton v. State*, 43 Neb. 373, 61 N.W. 699 (1895).

fendant came up behind them and struck the deceased a mortal blow on the side of the head with a wagon spoke. The defendant's conviction for first degree murder was affirmed by the court.⁴⁵

However, in the opinion the court approved a manslaughter instruction which was phrased in terms of provocation:

This court instructs this jury that under this information you can; and the court instructs you that it is your duty to find this defendant guilty of manslaughter if you believe from the evidence before you beyond a reasonable doubt that the fatal blow was struck unlawfully, but without malice and while the defendant was under the influence of passion and in the heat of blood produced by an adequate and reasonable provocation and before a reasonable time had elapsed for the blood to cool and reason to control. But if on the other hand you have any reasonable doubt of the guilt of this defendant it is your duty to find him not guilty.⁴⁶

Nebraska law was recognizing the traditional provocation doctrine as to adequacy and leaving the question of adequacy to the jury. Additionally, the traditional requirement that the death dealing act must occur before a reasonable time had elapsed in which the actor might cool off from the provocation, was found to be encompassed within the statutory language.⁴⁷ The court was interpreting the "sudden quarrel" language of the statute as referring to the provocation doctrine. The doctrine would not be so clearly articulated again. However, the court would reaffirm the doctrine while distinguishing the voluntary and involuntary manslaughter clauses of the statute.

This reaffirmation occurred in *Boche v. State*.⁴⁸ In *Boche* the accused had shot the deceased after a long night of drinking as the deceased was attempting to get the accused into a hack for a ride home. Boche was charged with first degree murder and convicted of manslaughter. On appeal he argued that he could not be found guilty of manslaughter because the state had not shown that he

45. *Savary v. State*, 62 Neb. 166, 176-80, 87 N.W. 34, 38-39 (1901).

46. *Id.* at 176, 87 N.W. at 38. The court noted that it could well be doubted whether the evidence was sufficient to support the instruction.

It should also be noted that although the instruction raises the issue of provocation in a clear way, it may confuse as to the burden of proof. The defendant should not have to prove provocation to the satisfaction of any standard of proof, but once the defense has produced the issue the state must prove malice beyond a reasonable doubt. See note 73 & accompanying text *infra*. See also *United States v. Murdock*, 471 F.2d 923 (D.C. Cir. 1972), *cert. denied* 409 U.S. 1044 (1972).

47. See *LaFAVE & SCOTT*, *supra* note 1, at 579-81; *PERKINS*, *supra* note 1, at 67-69.

48. 84 Neb. 845, 122 N.W. 72 (1909). A few years before *Boche* the court decided the leading case arguing for the proposition that an imperfect right of self-defense, arising from the provoking circumstance of fear, would reduce an intentional killing under such conditions to manslaughter. *Lucas v. State*, 78 Neb. 454, 111 N.W. 145 (1907). See note 44 *supra* and note 109 & accompanying text *infra*.

was engaged in an unlawful act independent of the homicide.⁴⁹ The court properly rejected the argument.

The court held that the statute does not change the common law and cited Blackstone's definition of manslaughter. "The unlawful killing of another, without malice . . . upon a sudden heat; or involuntarily, but in the commission of some unlawful act.'"⁵⁰ The opinion then referred to an Ohio case construing an identical Ohio statute and clarified the voluntary and involuntary manslaughter clauses of the statute. Manslaughter may be *either* a "killing done in a sudden quarrel,"⁵¹ or a killing while the slayer is in the commission of some unlawful act:

In the first class of cases referred to in the statute the homicide must have been intentional, but in sudden passion or heat of blood caused by a reasonable provocation, and without malice; in the latter clause the killing must have been unintentional, but caused while the slayer was committing some act prohibited by law and other than rape, arson, robbery or burglary.⁵²

Despite the recognition by the court that the "sudden quarrel" language of the statute refers to the provocation doctrine, it approved the manslaughter instruction used by the trial judge which merely tracked the statutory language.⁵³ The cases of the Supreme Court of Nebraska do not evidence any situation since *Savary*, in 1901, where an instruction informed the jury of the provocation doctrine. The *Nebraska Jury Instructions* make no reference to provocation and the only manslaughter example simply repeats the statutory language.⁵⁴ For over eighty years Nebraska juries have been asked to distinguish between murder in the second degree and manslaughter without any articulation given to them of the doctrine of provocation which might justly and morally guide that decision.⁵⁵

49. *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909).

50. *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES *191).

51. *Id.*

52. *Id.*

53. If you fail to find the defendant guilty of murder in the second degree, and do find, beyond a reasonable doubt from a consideration of all the evidence in this case and the instructions given you, that the defendant at the time and place charged in the information did unlawfully kill the said Frank H. Jarmer, without malice, upon a sudden quarrel, then you will find the defendant guilty of manslaughter, and so say by your verdict.

Id. at 853, 122 N.W. at 75.

54. NEBRASKA SUPREME COURT COMMITTEE ON PATTERN JURY INSTRUCTIONS, NEBRASKA JURY INSTRUCTIONS 299 (1969).

55. "There is no absolute guarantee that this verbal exploration will reveal the whole truth or that it will avoid the fabrication of satisfying fictions. On the other hand, there is every reason to believe that it will clarify factors that were only implicitly present in the original process of inarticulate deliberation."

*Braunie v. State*⁵⁶ illustrates what has come to be the apparent practice in Nebraska homicide trials. In its instructions the court defined the crimes of first and second degree murder and manslaughter. Yet, it neglected to instruct that it was adequate provocation which, in a sudden quarrel, would cause the absence of malice otherwise present in an intentional killing.⁵⁷

Braunie, employed as a farm hand, was convicted of murder in the first degree after he shot his employer who had discharged him. He argued that the failure to instruct that malice might be negated by an adequate provocation which would partially excuse the intent to kill, making the homicide manslaughter was error.⁵⁸ The court noted that in a situation where there was some evidence of adequate provocation it might be error to fail to instruct as to its effect on malice. More importantly, perhaps, the court held that there was no error since all that could be inferred was that the deceased had provoked the accused by his remarks. "That such manner and extent of provocation is insufficient, in law, to mitigate the offense is beyond question."⁵⁹

There has not yet been a case where the failure to instruct as to the effect of provocation on malice has been error when the evidence would support such an instruction.⁶⁰

It would be over fifty years⁶¹ before another issue directly relat-

E. ROBINSON, LAW AND THE LAWYERS 173-74 (1935).

56. 105 Neb. 355, 180 N.W. 567 (1920).

57. *Id.* at 360, 180 N.W. at 569-70. The *Braunie* court noted that there was no evidence to support and consequently no duty to instruct on manslaughter. Of course, in Nebraska when murder is charged the trial court must, without request, charge on such lesser degrees of homicide as to which the evidence is properly applicable. *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 255 (1982). However, the writer has not found a case where a lesser homicide charge without support has been found to be error.

58. *Braunie v. State*, 105 Neb. 355, 359, 180 N.W. 567, (1920).

59. *Id.* at 360, 180 N.W. at 569. Words are not so obviously an inadequate provocation. See note 90 & accompanying text *infra*. Moreover, the court's reasoning to support a voluntary manslaughter charge in *State v. Rowe* suggests that *Braunie* may have been silently overruled. See text accompanying note 38 *supra*.

60. See *State v. Newman*, 179 Neb. 746, 140 N.W.2d 406 (1966). Cf. *Wright v. State*, 169 Neb. 497, 504, 100 N.W.2d 51, 56 (1959) (apparently approving an instruction that provocation by words would not negate malice in a case giving second degree and manslaughter charges).

61. During this time several cases obliquely raised issues of provocation. See *Wehenkel v. State*, 116 Neb. 493, 218 N.W. 137 (1928) (there is no "unwritten law" to avenge a wrong done to female family member); *Clark v. State*, 131 Neb. 370, 268 N.W. 87 (1936) (error to charge first and second degree murder if evidence only supports manslaughter); *Veneziano v. State*, 139 Neb. 526, 297 N.W. 920 (1941) (imperfect self-defense); *Wright v. State*, 169 Neb. 497, 100 N.W.2d 51 (1959) (language no excuse for violence); *State v. Kimbrough*, 173 Neb. 873, 115 N.W.2d 422 (1962) (imperfect self-defense); *State v. Newman*, 179

ing to provocation came before the court. In *State v. Bautista*,⁶² the defendant had gotten in a fight outside a bar. He departed and then ten to twenty-five minutes later returned carrying a rifle. He asked the father of his assailant where the assailant had gone and threatened to shoot him if he did not tell him. Hearing no response Bautista shot the man.

The defendant was convicted of second degree murder after instructions having been given on first degree, second degree and manslaughter. On appeal, it was argued that it was error to refuse to give requested instructions on provocation.⁶³ The court held it was not error because there was no evidence of reasonable provocation by the victim. "On the contrary, what provocation existed resulted from the acts of the victim's son, not the victim himself."⁶⁴

The last case to be examined is *State v. Beers*.⁶⁵ Robert Beers was driving around Nebraska City looking for his estranged wife and drinking beer. When two police officers attempted to talk with him and settle him down he shot at them with a shotgun he was carrying. One of the officers was killed and Beers was charged and convicted of murder in the first degree. On appeal he argued that it was error to not instruct on manslaughter.⁶⁶

Beers argued that he believed he was fired upon without warning by someone, making it necessary for him to shoot in self-defense. The trial court instructed on self-defense. On appeal the court affirmed the either-or situation: either Beers was innocent because the killing was done in self-defense or he was guilty of murder.⁶⁷

Neb. 746, 140 N.W.2d 406 (1966) (lack of provocation instruction not error if instructed on manslaughter).

62. 193 Neb. 476, 227 N.W.2d 835 (1975).

63. *Id.* at 480, 227 N.W.2d at 839.

64. *Id.* The notion that provocation must stem from the victim to partially excuse the intent to kill and reduce the homicide to manslaughter seems to be widely accepted by the courts. The commentators are less enthusiastic. LAFAYE & SCOTT, *supra* note 1, at 581-82; FLETCHER, *supra* note 6, at 245-46. See notes 106-08 & accompanying text *infra*.

65. 201 Neb. 714, 271 N.W.2d 842 (1978). A year before *Beers* the court considered *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), in which several interesting questions arose. However, there were no new issues presented and the case will not be discussed here other than to take advantage of a piece of its language for a rhetorical question. "Even if the facts described above could be viewed as a 'quarrel,' the trial court was undoubtedly correct in stating that the evidence did not really show facts constituting manslaughter." 197 Neb. at 514, 250 N.W.2d at 860. Would the doctrine of provocation clarify the distinction between a "sudden quarrel" deserving of a manslaughter instruction and a sudden killing with malice?

66. *State v. Beers*, 201 Neb. 714, 716, 271 N.W.2d 842, 844 (1978).

67. *Id.* at 724-25, 271 N.W.2d at 848.

Beers does not mention *Lucas v. State*,⁶⁸ the leading Nebraska case for the proposition that an imperfect or unreasonable exercise of self-defense will reduce an intentional killing to manslaughter:

If he was not actuated by such desire and purpose to kill the deceased unlawfully, but killed the deceased under a mistaken notion that the circumstances were such as to justify the killing in self-defense, that is, if he acted unreasonably, rashly and unnecessarily, but with a belief at the time that the law would justify him in so acting, and without any purpose or intent to kill the defendant unlawfully, he is guilty of manslaughter.⁶⁹

Because the *Beers* court approached murder and self-defense in a black or white manner, it overlooked or avoided the gray area of what might be an adequate provocation. In fact, the court did not even discuss provocation, other than to say "there [was] no evidence of a sudden quarrel"⁷⁰

IV. A BENCHMARK ARTICULATION OF THE PROVOCATION DOCTRINE

In a homicide trial the jury must exercise its role as finder of fact and conscience of the community by determining the grade of the homicide if they find the accused to have unlawfully caused the death of another.⁷¹ The grade of the homicide turns upon the presence or absence of malice. It is the thesis of this Article that the doctrine of provocation is a just and morally defensible principle of the law of Nebraska which may be usefully employed to guide the jury in determining which homicides are murder and which are the lesser offense of manslaughter. Without the doctrine of provocation there is not a rational basis for understanding which intentional killings done "upon a sudden quarrel" should be found less culpable because of the absence of malice.

The writer suggests the following as a benchmark articulation of the provocation doctrine:

PROVOCATION MAY NEGATE MALICE, THE INTENT TO KILL, SO THAT EVEN IF SUCH AN INTENT EXISTS THE LAW DEEMS IT ABSENT AND THE HOMICIDE WHICH WOULD

68. 78 Neb. 454, 111 N.W. 145 (1907).

69. *Id.* at 457, 111 N.W. at 146. There are a number of other Nebraska cases recognizing this imperfect self-defense doctrine, that terror though unreasonable may be an adequate provocation to reduce the intentional killing done under its influence to manslaughter. See generally *Vollmer v. State*, 24 Neb. 838, 40 N.W. 420 (1888); *Housh v. State*, 43 Neb. 163, 61 N.W. 571 (1895); *State v. Kimbrough*, 173 Neb. 873, 115 N.W.2d 422 (1962). But see *Veneziano v. State*, 139 Neb. 526, 297 N.W. 92 (1941); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). See note 109 & accompanying text *infra*.

70. *State v. Beers*, 201 Neb. at 726, 271 N.W.2d at 849. See also notes 48-53 and accompanying text *supra* for the last Nebraska case to clearly interpret the statutory language, "sudden quarrel," to require a showing of provocation.

71. See NEB. REV. STAT. § 29-2027 (Reissue 1979).

OTHERWISE BE MURDER IS PARTIALLY EXCUSED AND PUNISHED AS MANSLAUGHTER WHEN COMMITTED AS A RESULT OF ADEQUATE PROVOCATION 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 THE ACTOR BELIEVES THEM TO BE.⁷²

Most importantly the jury should be instructed that provocation is a failure of proof defense arguing the negation of malice. That is, when the defense has met the burden of pleading and production on the issue of provocation, the burden of persuasion or proof is upon the state to prove malice beyond a reasonable doubt.⁷³

V. PROVOCATION ISSUES

The provocation doctrine recognizes that due to constricted choice from temporally limited circumstances an intent to kill may be aroused and acted upon which compassion requires the law to find less culpable.⁷⁴ Using the benchmark articulation of the doctrine suggested, the jury as finder of fact and conscience of the community would be left the task of "distinguishing between those impulses to kill as to which we as a society demand self-control, and those as to which we relax our inhibitions."⁷⁵ However, the courts' fear of the jury has resulted in having numerous provocation issues denied jury consideration.⁷⁶ Before leaving the provocation doctrine to either bloom or remain dormant in Nebraska, a brief survey is in order.

72. The articulation of the doctrine draws on the Model Penal Code. See MODEL PENAL CODE § 201.3 (Tent. Draft No. 9, 1959). See also FLETCHER, *supra* note 6, at 242; PERKINS, *supra* note 1, at 54; LAFAYE & SCOTT, *supra* note 1, at 573; REPORT OF THE COMMITTEE ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1981, S. REP. NO. 307, 97th Cong., 1st Sess. 567 (1981) Savary v. State, 62 Neb. 166, 175, 87 N.W. 34, 37 (1901).

73. See Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 233-34, 256-60 (1982); FLETCHER, *supra* note 6, at 524-41. See generally Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 MICH. L. REV. 30 (1977); Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979). See also CALIFORNIA JURY INSTRUCTIONS—CRIMINAL, 8.37, 8.40, 8.42 (1979 Revision).

74. See text accompanying note 19 *supra*.

75. FLETCHER, *supra* note 6, at 247 (describing the basic moral question in the law of homicide).

76. Each of these issues could be the subject of an extensive research and discussion. No such effort is within the scope of this Article. The thrust here is simply to urge that the provocation doctrine be reemployed as a basis for distinguishing killings with or without malice, murder or manslaughter.

A. Provocation and the Intent to Kill

It is clear in Nebraska⁷⁷ and in most jurisdictions that provocation need not so destroy the mental process of the actor that the mind is incapable of forming an intent to kill. At one time it was asserted by the House of Lords that where provocation inspires an intent to kill the defense would not lie, but that view was soon found to be an incorrect statement of the law.⁷⁸ Thus, "[t]he defense of provocation may arise where a person does intend to kill or inflict greivous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation."⁷⁹

B. The Adequacy of Provocation

The normative character of the provocation doctrine results in an institutional question of whether the judge or jury decides the adequacy of provocation.⁸⁰ For many years courts assumed that they must make a preliminary finding that the facts might establish an adequate provocation as a matter of law before allowing the jury to determine that there was an adequate provocation and that the intent to kill arose therefrom causing the homicide. The English courts categorized situations that might be adequate provocation⁸¹ and the Americans soon followed.⁸²

Mutual combat harking back to the notion of chance-medley is everywhere recognized as an adequate provocation.⁸³ However, only a significant blow rather than a technical battery will mitigate the death dealing blow returned.⁸⁴ Moreover, an assault will generally not suffice unless it results in a battery or is unusually violent and death threatening.⁸⁵

In an early case the observation of a spouse in an act of adul-

77. *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909).

78. Compare *Holmes v. Director of Public Prosecutions* [1946] 2 All E.R. 124 (requires lack of intent) with *Lee Chen-Chuen v. Regina* [1963] 1 All E.R. 73 (applies provocation even if an intent to kill is formed). Wisconsin is the only American jurisdiction taking such a view. See *Johnson v. State*, 129 Wis. 146, 160, 108 N.W. 55, 60-61 (1906). See generally LAFAYE & SCOTT, *supra* note 1, at 572-73.

79. *Lee Chen-Cheun v. Regina* [1963] 1 All E.R. 73, 77. See also Edwards, *The Doctrine of Provocation*, 69 LAW Q. REV. 547, 548 (1953).

80. FLETCHER, *supra* note 6, at 243.

81. See note 22 *supra*. Since the Homicide Act of 1957, 5 & 6 Eliz., ch. 11, § 3, English juries have increased ability to hear provocation issues without judicial approval of their preliminary adequacy.

82. See generally Perkins, *The Law of Homicide*, 36 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 391, 410-22 (1946).

83. PERKINS, *supra* note 1, at 57-59; LAFAYE & SCOTT, *supra* note 1, at 574-75.

84. LAFAYE & SCOTT, *supra* note 1, at 574; PERKINS, *supra* note 1, at 60.

85. LAFAYE & SCOTT, *supra* note 1, at 575; PERKINS, *supra* note 1, at 61.

tery was found to be adequate provocation and the notion has been universally recognized.⁸⁶ Some jurisdictions have gone so far as to find a killing in such circumstances completely justified.⁸⁷ Nebraska has specifically rejected this so-called "unwritten law."⁸⁸

Under the category approach, the most controversial area is the notion that words alone will never be adequate provocation.⁸⁹ Yet, courts have regularly distinguished instances of insulting words which would be inadequate from factual reports of events which if observed would be adequate provocation and have held that in the latter event the jury may consider the matter.⁹⁰

The modern tendency is to leave the category approach in favor of the view that upon a proper instruction the jury is to consider all of the evidence of the facts and circumstances.⁹¹ The law has attempted to search for an objective standard and has employed a concept well used in such a quest, the *reasonable* person.⁹² Commentators were quick to point out that the reasonable person does not kill at all,⁹³ and the current fashion is to ask whether the facts

86. "[T]here could not be greater provocation than this." Manning's Case, T. Raym. 212, 83 Eng. Rep. 112 (1793). LAFAVE & SCOTT, *supra* note 1, at 575-76; PERKINS, *supra* note 1, at 64-65. See also 4 W. BLACKSTONE, COMMENTARIES * 191.

87. LAFAVE & SCOTT, *supra* note 1, at 576; PERKINS, *supra* note 1, at 64. Interestingly in the *Holmes* case, which had said that provocation must completely negate the intent to kill, one exception was made for the observation of a spouse in an act of adultery. *Holmes v. DPP* [1946] 2 All E.R. 124.

88. *Wehenkel v. State*, 116 Neb. 493, 495, 218 N.W. 137, 138 (1928); Note, *The Unwritten Law as Defense to Homicide*, 19 NEB. L. REV. 146, 147 (1940).

89. Nebraska took this position in *Braunie v. State*, 105 Neb. 355, 180 N.W. 567 (1920) and *Wright v. State*, 169 Neb. 497, 100 N.W.2d 51 (1959). However, the court's conclusion in *Rowe* that an instruction was required on voluntary manslaughter hopefully may indicate that it is moving away from categories and toward allowing jury consideration of all the evidence. *Rowe v. State*, 210 Neb. 419, 425, 315 N.W.2d 250, 255 (1982). Such an approach should be guided by a specific provocation instruction.

90. LAFAVE & SCOTT, *supra* note 1, at 576-77; PERKINS, *supra* note 1, at 61-63; Anno., 2 A.L.R.3d 1292 (1965). Compare, *Commonwealth v. Cisneros*, 381 Pa. 447, 113 A.2d 293 (1959) (words of provocation not sufficient to reduce homicide to manslaughter); *People v. Lopez*, 93 Ill. App. 2d 426, 235 N.E.2d 652 (1968) (mere words do not constitute provocation) with *State v. Flory*, 40 Wyo. 184, 276 P. 458 (1929) (killing of father-in-law on information of rape and incest held to be adequate provocation); *Maher v. People*, 10 Mich. 212, 81 A.D. 781 (1862) (killing of alleged adulterer upon receipt of information by husband could be manslaughter). See also *People v. Valentine*, 28 Cal. 2d 121, 169 P.2d 1 (1946).

91. PERKINS, *supra* note 1, at 65.

92. See, e.g., Comment, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1023 (1958).

93. Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 742 (1954); FLETCHER, *supra* note 6, at 247; LAFAVE & SCOTT, *supra* note 1, at 573. The notion seems implausible in light of the many relatives of the writer who

and circumstances were sufficient to arouse the passions of the *ordinary* person so that he was liable to act rashly or without due deliberation and reflection, rather than from judgment.⁹⁴

This formulation of the adequacy test nevertheless tends to exclude attention to the special human circumstances of the actor. The benchmark articulation of provocation offered here attempts to steer a middle course between a doctrine which ignores all individuality and one which would partially excuse any killing done under emotional distress.⁹⁵ An actor lives in the world of human beings as well as the heaven of legal concepts, and the requirement of "reasonable explanation or excuse" to be "determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be" allows flexibility to sort those factors peculiar to the accused's situation that ought to be taken into account from those properly ignored.⁹⁶

C. Mistake

Few cases involve a mistake as to the actor's perception of a provoking event. However, it is a general notion of the criminal law that a reasonable mistake of fact will negate the *mens rea* of an offense.⁹⁷ Similarly, in self-defense an actor will be justified if acting with a reasonable but erroneous belief. Thus, the authors of a leading treatise argue that the killer should be partially excused if acting with a reasonable but mistaken belief as to the provoking

have gone to war. The same experience causes pause with the notion that words alone will not be an adequate provocation. See Edwards, *Provocation and the Reasonable Man—Another View*, 1954 CRIM. L. REV. 898, 901 (1954).

94. LAFAYE & SCOTT, *supra* note 1, at 573; Maher v. People, 10 Mich. 212, 220 (1862); People v. Berry, 18 Cal. 3d 509, 556 P.2d 777, 134 Cal. Rptr. 415 (1976); CALIFORNIA JURY INSTRUCTIONS—CRIMINAL, § 8.42 (1979 Revision). An excellent discussion and careful analysis of the reasonable person under the Homicide Act of 1957 is presented in Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292 (1976).

95. See MODEL PENAL CODE § 201.3 commentary at 48 (Tent. Draft No. 9, 1959).

96. For surely if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. They are material because they bear upon the inference as to the actor's character that it is fair to draw upon the basis of his act.

Id. A good discussion of the conflict between the "reasonable man" and the Anglo-American notion of individual mental state as the basis for criminal guilt may be found at Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981). See also Howard, *What Colour Is the Reasonable Man* 1961 CRIM. L. REV. 41 (1961); O'Reagan, *Sorcery and Homicide in Papua New Guinea*, 48 AUSTL. L.J. 76 (1974).

97. LAFAYE & SCOTT, *supra* note 1, at 356-68; PERKINS, *supra* note 1, at 939-43.

incident.⁹⁸ The provocation doctrine articulated here is in accord.

D. Cooling Time

The Nebraska cases recognizing the provocation doctrine as inherent in the distinction of murder and manslaughter state the doctrine in its traditional form that requires asking "whether, under all the facts and circumstances as disclosed by the evidence, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and reason resume control of the mind."⁹⁹ The majority view appears to be that the jury is told not to reduce the homicide to manslaughter if the time between the provoking act and the fatality is such that a reasonable person, provoked as was the accused, would have cooled, even if it is clear that the defendant had not, in fact, cooled during that time.¹⁰⁰ However, in some cases courts have held as a matter of law that the time between provocation and fatality was so great that the jury might not consider manslaughter.¹⁰¹

*State v. Gounagias*¹⁰² is often criticized for its rigid application of the cooling time notion.¹⁰³ In *Gounagias* the defendant had suffered a sodomizing assault by the deceased while the former was unconscious. The victim circulated the story among the accused's friends causing them to taunt Gounagias. Several days after the assault as a result of insults from his acquaintances, the defendant killed the deceased. The court held that evidence of provocation was inadmissible due to the cooling time rule.

Unfortunately, the lapse of time may exaggerate rather than decrease the provocation.¹⁰⁴ Moreover, the cooling time rule does not easily recognize that a defendant whose passion has cooled from a provoking event may have that passion rekindled to a greater effect upon a new occurrence that in itself may seem trivial.¹⁰⁵ Cooling time should be deleted from an articulation of the provocation doctrine and reliance should be placed on the need for "reasonable explanation or excuse."

98. LAFAVE & SCOTT, *supra* note 1, at 577-78. See *State v. Yanz*, 74 Conn. 177, 50 A. 37 (1901) (husband mistaken as to observation of adultery).

99. *Savary v. State*, 62 Neb. 166, 175, 87 N.W. 34, 38 (1901). See *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909).

100. LAFAVE & SCOTT, *supra* note 1, at 579; PERKINS, *supra* note 1, at 67-68; FLETCHER, *supra* note 6, at 244-45.

101. See *State v. Gounagias*, 88 Wash. 304, 153 P. 9 (1915) (elapsed time of two weeks); *In re Fraley*, 3 Okla. Crim. 719, 109 P. 295 (1910) (nine or ten months).
102. 88 Wash. 304, 153 P. 9 (1915).

103. LAFAVE & SCOTT, *supra* note 1, at 581 n.66; PERKINS, *supra* note 1, at 67.

104. See MODEL PENAL CODE § 201.3 commentary at 48 (Tent. Draft No. 9 1959).

105. LAFAVE & SCOTT, *supra* note 1, at 580.

E. Death of a Non-Provoking Victim

It has been argued here that the provocation doctrine is a partial excuse.¹⁰⁶ Yet, Nebraska has followed the lead of other jurisdictions in holding that the defense is not available where the victim is a non-provoking party.¹⁰⁷ Perhaps because the victim is usually the provoking party, the courts are misled to understand the doctrine as some notion of justification, that the victim justly deserved to die.¹⁰⁸ However, as a partial excuse due to constricted choice from temporally limited circumstances, it should be irrelevant that the victim of the provocation is innocent of wrongdoing.

F. Imperfect Self-Defense

Early Nebraska cases allowed a manslaughter instruction where the actor held a genuine but unreasonable fear of death or great bodily harm.¹⁰⁹ However, in *State v. Beers*¹¹⁰ the court took an all or nothing approach that would either justify the defendant's acts or restrict his guilt to murder. There does not appear to be any reason to deny that fear, though unreasonable as to self-defense, may be the basis of a reasonable explanation or excuse causing adequate provocation.¹¹¹

VI. CONCLUSION

The doctrine of provocation lies fallow in the law of Nebraska. Juries are left unguided other than by a recitation of the murder and manslaughter statutes as to a rational and morally defensible distinction between a killing with or without malice. Those who

106. See text accompanying note 19 *supra*.

107. *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975). See also *Goddiss v. State*, 207 Miss. 508, 42 So. 2d 724 (1949); *State v. Vinso*, 171 Mo. 576, 71 S.W. 1034 (1903).

108. *FLETCHER*, *supra* note 6, at 245. See also O'Reagan, *Indirect Provocation and Misdirected Retaliation*, 1968 CRIM. L. REV. 319 (1968).

109. See *Vollmer v. State*, 24 Neb. 838, 40 N.W. 420 (1888); *Housh v. State*, 43 Neb. 163, 61 N.W. 571 (1895); *Lucas v. State*, 78 Neb. 454, 111 N.W. 145 (1907); *Veneziano v. State*, 139 Neb. 526, 297 N.W. 92 (1941); *State v. Kimbrough*, 173 Neb. 873, 115 N.W.2d 422 (1962). See generally Note, *Are There Circumstances Other Than Provocation Which May "Reduce" Murder to Voluntary Manslaughter*, 36 Ky. L.J. 443 (1948).

110. 201 Neb. 714, 271 N.W.2d 842 (1978).

111. See *LaFAVE & SCOTT*, *supra* note 1, at 583-85. *PERKINS*, *supra* note 1, at 69-70; *State v. Flory*, 40 Wyo. 184, 276 P. 458 (1929); *Commonwealth v. Colandro*, 231 Pa. 343, 80 A. 571 (1911).

The defense is particularly important in cases of spouse abuse. See Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615 (1982) (partial excuse and self-defense in the context of the battered wife).

would judge others under law should look to the past heritage of the provocation doctrine that they may deal with justice and mercy in the present and walk humbly into the future.