

# Motive and Cognitive Dissonance as Part of the Mental Element in Murder Offences

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## ABSTRACT

This article introduces a novel theoretical and practical model for grading criminal liability in murder offences under Israeli law, in response to the 2019 Homicide Reform. While the reform introduced a new grading scale for homicide, it continues to rely on traditional distinctions such as premeditation and provocation, which, as argued herein, fail to capture the true depth of a murderer's culpability. In contrast, the proposed model centers on three key elements—motive, the presence or absence of cognitive dissonance, and dangerousness—which together reveal both the offender's readiness to commit murder and the societal threat he poses. Grounded in Kahneman's dual-process theory, this approach differentiates between intuitive, automatic thought (*System 1*) and rational, systematic reasoning (*System 2*), thus offering a nuanced framework for understanding the interplay between motive, intent, and volition. The article further contrasts the limitations of the traditional American and Canadian approaches with the innovative perspective provided by the Israeli reform, calling for a fundamental shift in how murder offences are graded to ensure a more accurate reflection of culpability.

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## INTRODUCTION

This article analyzes how the mental element (*mens rea*) in murder offences shapes the assessment of a murderer's degree of culpability. The recent homicide reform enacted in Israel serves as a case study for refining the conceptualization of intent and evaluating its significance in determining the severity of culpability. The distinctions between American and Canadian criminal law, particularly their graded approaches to intent and provocation, provide a useful comparative lens for this analysis.

In the United States, criminal law distinguishes between types of murder based on intent and circumstances. Generally, first-degree murder involves premeditated, intentional killing, with planning as an aggravating factor. By contrast, second-degree murder refers to intentional killing without premeditation.<sup>1</sup> Some states define murder broadly as intentional killing,<sup>2</sup> while others employ the term "malice aforethought."<sup>3</sup> These elements – intent, knowledge, premeditation, and malice aforethought – form the foundation of "*mens rea*" and guide culpability assessment.<sup>4</sup>

Canadian criminal law, like its American counterpart, adopts a graded structure for homicide offences. The *Criminal Code* of Canada distinguishes between first-degree murder, second-degree murder, manslaughter, and infanticide.<sup>5</sup> Section 231(2) defines first-degree murder as a killing that is both planned and deliberate, thereby placing significant emphasis on the existence of prior thought and intentional decision-making.<sup>6</sup> Second-degree murder, defined residually, includes all other intentional killings that do not

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<sup>1</sup> 18 USC § 1111 (2023).

<sup>2</sup> Wis Stat § 940.01 (2023).

<sup>3</sup> Ga Code Ann § 16-5-1 (2023).

<sup>4</sup> US, Congressional Research Service, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, (CRS Report No R46836) (Washington, DC: Congressional Research Services, 2021), online (pdf): <[crsreports.congress.gov/product/pdf/R/R46836](https://crsreports.congress.gov/product/pdf/R/R46836)> [perma.cc/MHZ2-2UBY].

<sup>5</sup> *Criminal Code*, RSC 1985, c C-46, ss 231, 233–234 [*Criminal Code*].

<sup>6</sup> *Ibid*, s 231(2).

meet the criteria of planning and deliberation.<sup>7</sup> Manslaughter is defined under Section 234 as unlawful killing without the intent to cause death, typically involving sudden provocation or criminal negligence.<sup>8</sup> The Canadian model aligns with the traditional common law approach by treating planning and deliberation as the most aggravating mental elements—similar to the concept of premeditation in U.S. law and "genuine deliberation" in Israeli law.<sup>9</sup>

Under U.S. law, "Heat of Passion Murder" is defined as an immediate response to an event causing a loss of control.<sup>10</sup> In such cases, the "Provocation Doctrine" is sometimes used to reduce the charge from murder to "manslaughter," assuming the act resulted from a temporary emotional disturbance.<sup>11</sup> The *Model Penal Code* (MPC)<sup>12</sup> provides a defence for defendants who acted under extreme emotional distress, considering a motive of rage as a factor in assessing the degree of the offence.<sup>13</sup>

Under Canadian law, section 232 of the *Criminal Code* allows a murder charge to be reduced to manslaughter if the accused acted "in the heat of passion caused by sudden provocation."<sup>14</sup> The provision requires that the provocation be of a nature that would cause an ordinary person to lose self-control. Canadian courts have interpreted this requirement as comprising both a subjective and an objective element: the accused must have actually lost control, and the provocation must be sufficiently grave from the standpoint of an ordinary person.<sup>15</sup>

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<sup>7</sup> *Ibid*, s 231(1)–(2).

<sup>8</sup> *Ibid*, ss 231(2), 234.

<sup>9</sup> *R v Nygaard*, 1989 CanLII 6 (SCC) [Nygaard].

<sup>10</sup> Samuel H Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter* (New York: NYU Press, 1998) at 97, 116, 136.

<sup>11</sup> *Model Penal Code* § 210.3 [Model Penal Code].

<sup>12</sup> *Ibid*, § 210.3(1)(b).

<sup>13</sup> Elkana Leist, *The Motive in Criminal Law* (Ramat Gan: Sifriyat HaMishpat, 2018) at 130 (in Hebrew), online: <Nevo.co.il>.

<sup>14</sup> *Criminal Code*, *supra* note 5, s 232(1).

<sup>15</sup> *R v Thibert*, 1996 CanLII 249 (SCC) at para 6.

In 2015, however, Parliament amended s. 232(2) through the *Zero Tolerance for Barbaric Cultural Practices Act*.<sup>16</sup> Since that reform, the statutory definition of provocation has been narrowed so that the defence is available only where the victim's conduct would itself constitute an indictable offence under the *Criminal Code* punishable by five or more years of imprisonment, in addition to being of such a nature as to deprive an ordinary person of the power of self-control and occurring suddenly, before there was time for the accused's passion to cool. This legislative change formally restricts the scope of provocation, although its constitutional status and practical impact have been the subject of ongoing debate in recent Canadian case law and scholarship.<sup>17</sup>

The significance of this article lies in the critical need for precise grading of murder offences, as it emphasizes the value of human life while clarifying and reinforcing the protected values of society. Indeed, the more blatant the offender's disregard for the sanctity of human life, the greater the justification for enhanced culpability. Therefore, differentiating levels of culpability not only upholds the value of human life but also enables proportional punishment that aligns with the principle of guilt.<sup>18</sup>

The 2019 homicide reform in Israel reclassified murder offences based on the offender's mental state, incorporating principles rooted in common law and relating to Canadian and U.S. legal classifications of homicide. The reform's principles could serve as a case study for distinguishing premeditated, impulsive, and

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<sup>16</sup> *Criminal Code*, *supra* note 5, s 232(2), as amended by *Zero Tolerance for Barbaric Cultural Practices Act*, SC 2015, c 29, s 7.

<sup>17</sup> See *R v Simard*, 2019 BCSC 531; *Fredette c R*, 2019 QCCS 4116; National Judicial Institute, "Defence 232: Provocation - as amended July 16, 2015" (November 2022), online: <[www.nji-inm.ca/index.cfm/publications/model-jury-instructions/defences/provocation-in-force-july-16-2015/defence-232-provocation-as-amended-july-16-2015/?langSwitch=en](http://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/defences/provocation-in-force-july-16-2015/defence-232-provocation-as-amended-july-16-2015/?langSwitch=en)> [perma.cc/CWL8-WNM]].

<sup>18</sup> Mordechai Kremnitzer & Khalid Ghanayim, *The Reform of Homicide Offenses in Light of Fundamental Principles of Law and Historical and Comparative Research* (Ramat Gan: Sifriyat HaMishpat, 2020) at 241, 263, 278 (in Hebrew), online: <[Nevo.co.il](http://Nevo.co.il)>; Kimberly Kessler Ferzan, "Plotting Premeditation's Demise" (2012) 75:2 L & Contemporary Problems 83 at 83-108.

provoked killings in Canadian and U.S. law. This comparison underscores the need for precise definitions of intent and motive and highlights their role in decision-making leading to homicide.

This article is structured as follows: Part I defines the mental element in murder and examines the 2019 Homicide Reform, introducing three new degrees of culpability. Part II analyzes Kremnitzer and Ghanayim's focus on premeditation and provocation. Part III critiques this reliance, using Kahneman's reference to the dual-process theory to argue for the elimination of the reliance on premeditation and provocation. Part IV refines the definition of 'motive' and highlights its relevance to evaluating culpability. Part V proposes a new model for grading murder offences, emphasizing motive, cognitive dissonance, and dangerousness.

## I. THE MENTAL ELEMENT IN MURDER OFFENCES

In this chapter, I review the definition of the mental element in murder offences, focusing on significant changes in Israeli law, from the Mandate period to the 2019 Homicide Reform, which introduced a new approach to grading culpability based on the offender's mental state.

The Israeli definition of murder was established at the founding of the state, adopting the 1936 "*Criminal Code Ordinance*" from the British Mandate period into Israeli law.<sup>19</sup> Similarly, both Canadian and U.S. criminal law are rooted in British common law traditions, including their definitions of murder. All three systems inherited foundational principles from English legal doctrine, shaping their graded approaches to homicide and their interpretation of criminal culpability.<sup>20</sup> In 1977, Israel enacted the *Penal Code*, based on the *Criminal Code Ordinance* and additional statutes. In 1994, Amendment 39 introduced the definition of the

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<sup>19</sup> Norman Abrams, "Interpreting the Criminal Code Ordinance, 1936 – The Untapped Well" (1972) 7:1 Israel L Rev 25 at 25, 28, 50.

<sup>20</sup> Guyora Binder, "The Origins of American Felony Murder Rules" (2004) 57:1 Stan L Rev 59 at 59-76, 208; Kent Roach, *Criminal Law*, 8th ed (Toronto: Irwin Law, 2022) at 5, 7, 19-21.

mental element in the general part of the *Penal Code*. The Homicide Reform occurred only in 2019 with Amendment 137, during which the legislature addressed the mental element in murder offences.<sup>21</sup> This reform, informed by comparative legal systems, also corresponded with U.S. and Canadian law, both of which adopt a graded framework for homicide based on distinctions in mental states, such as premeditation, deliberation, and provocation, as inherited from English common law.<sup>22</sup>

Before the reform, murder was defined as the act of killing with premeditation, based on three elements: a conscious decision to kill, the absence of immediate provocation, and preparation for the act.<sup>23</sup> A trend could be identified in Israeli case law of narrowing the scope of spontaneous intent and expanding the circumstances under which premeditation could be established. This was because, otherwise, judges would be compelled to classify the defendant as one who killed rather than one who committed murder.<sup>24</sup>

To address this issue, the reform redefined the hierarchy of homicide offences. Section 300(a) defines the basic murder offence of spontaneous intent.<sup>25</sup> Section 301A establishes aggravated murder, including 11 aggravating circumstances, one of which is murder with premeditation.<sup>26</sup> Section 301B defines the offence of murder under circumstances of diminished responsibility.<sup>27</sup>

Only a few years have passed since 2019, and extensive case law has yet to accumulate. However, several key and important rulings have been issued, indicating that judges have interpreted the new

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<sup>21</sup> Israel, *Penal Law* (Amendment No 137), 5779-2019.

<sup>22</sup> Kremnitzer & Ghanayim, *supra* note 18 at 241-291.

<sup>23</sup> Israel, *Penal Law*, 5737-1977, s 110(a), as amended by 5779-2019 [*Penal Law*, 1977].

<sup>24</sup> Kremnitzer & Ghanayim, *supra* note 18 at 205-206.

<sup>25</sup> *Penal Law*, 5737-1977, *supra* note 23, s 300(a).

<sup>26</sup> *Ibid*, ss 300(a), 301A, 311A.

<sup>27</sup> Kremnitzer & Ghanayim, *supra* note 18 at 441.

terms drafted by the legislator in line with the legislator's intent to dibranchiate between premeditation and spontaneous murder.<sup>28</sup>

The basic offence was defined by the legislator as intent or indifference formed spontaneously, without provocation. Judicial interpretation has characterized this as a decision made impulsively, in the heat of the moment,<sup>29</sup> without the exercise of substantial judgment and without preparation involving preliminary actions.<sup>30</sup> This occurs when the formation of the idea, the final decision to act, and the execution itself coincide.<sup>31</sup> The legislator defined provocation as a mitigating circumstance.<sup>32</sup> Case law has established three cumulative conditions for provocation: the individual struggles to control themselves,<sup>33</sup> the difficulty in self-control is justified,<sup>34</sup> and there was immediacy between the provocation and the act of murder.<sup>35</sup> The legislator defined several aggravating circumstances, with the central one being the aggravated offence of "premeditation." This occurs when the act of

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<sup>28</sup> *Peretz v State of Israel*, CA 5363/20 at para 4 (Isr 7 November 2022) (Hendel J) [*Peretz*]; See Israel, *Penal Law (Amendment No 124) (2015)*, Government Bill No 170; Israel, Ministry of Justice, *Report of the Committee for Examining the Elements of Homicide Offenses, at 5771–2011*, at 9 (Israel) (Jerusalem: Ministry of Justice, 2011), online (pdf): <<https://www.gov.il/BlobFolder/reports/death-crimes-report/he/full-report.pdf>> [Committee Report].

<sup>29</sup> *State of Israel v Zerensai*, CC 35846-05-17, § 17 (Beer Sheva Dist Ct 7 August 2019) (Zlotchover J) [*Zerensai*].

<sup>30</sup> *Abu Sarari v State of Israel*, CA 578/21, § 32 (Isr 16 February 2023) (Elron J)[*Sarari*]; *Zhimov v State of Israel*, CA 4066/22, § 20 (Isr 25 June 2023) (Elron J) [*Zhimov*].

<sup>31</sup> *Sarari*, *supra* note 30, § 30; Shneur Zalman Feller, *Foundations of Criminal Law*, vol 1 (Jerusalem: Magnes Press, 1984) at 681–82 (in Hebrew), online: <Nevo.co.il>.

<sup>32</sup> *Shua v State of Israel*, CA 1130/19, § 27 (Isr 27 December 2020) (Elron J) [*Shua*].

<sup>33</sup> *Shua*, *supra* note 32 at s 28; *Martinez Jorge Mario v State of Israel*, CA 8956/20, § 32 (Isr 28 June 2022) (Elron J) [*Mario*].

<sup>34</sup> *Ibid*, s 34; *Shua*, *supra* note 32, ss 27–29.

<sup>35</sup> *Ibid*, ss 18, 30; *Mario*, *supra* note 33, s 32; *Zerensai*, *supra* note 29, s 19; Committee Report, *supra* note 28 at 9; *Peretz*, *supra* note 28, s 2.

murder results from a genuine deliberation process and a formulation of a conscious decision regarding the nature of the killing and its outcome.<sup>36</sup>

The Supreme Court of Israel accepted the legislator's position to narrow the broad interpretation previously given to "premeditation" and maintained the distinction between "premeditation" and "spontaneous intent."<sup>37</sup> Similar distinctions have been employed by courts in Canada and the U.S., where planning and deliberation are considered decisive factors in determining the degree of culpability in homicide cases.<sup>38</sup>

This chapter outlined the formulation of the mental element in murder offences in Israeli law. The reform adopted an approach that positions premeditation and provocation as central elements for determining the degree of culpability, similar to the Canadian and American legal systems. In the next chapter, I will present the reasoning and justifications behind the design of the Homicide Offences Reform.

## II. JUSTIFICATIONS FOR CULPABILITY GRADING

After outlining the Israeli legal framework, this section examines the perspectives of Prof. Kremnitzer and Dr. Ghanayim regarding the justification for grading culpability in murder offences under Israel's Homicide Reform.

Kremnitzer and Ghanayim argue that the criteria of "planning," "consideration leading to a decision to kill," and "provocation" are appropriate for grading culpability in murder offences, while "motive" and "dangerousness" are unsuitable.<sup>39</sup> This perspective partially aligns with aspects of Canadian and U.S. law, where premeditation or deliberation is treated as an aggravating factor,

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<sup>36</sup> Committee Report, *supra* note 28 at 9; Peretz, *supra* note 28, s 2.

<sup>37</sup> Peretz, *supra* note 28, s 4; Penal Law, 5779-2019 *supra* note 21, Explanatory Notes; Committee Report, *supra* note 28 at 9.

<sup>38</sup> John T Joseph, "Deliberation and Premeditation in First Degree Murder - *Cummings v State*" (1961) 21 Md L Rev 349 at 352-58; Nygaard, *supra* note 9.

<sup>39</sup> Kremnitzer & Ghanayim, *supra* note 18 at 327-28, 374-78.

and motive is generally considered irrelevant to the legal assessment of culpability.<sup>40</sup>

According to Kremnitzer and Ghanayim, premeditated murder reflects a deliberate and resolute choice to take a life, made following a controlled process of planning and deliberation.<sup>41</sup> This demonstrates a deeper commitment to the act and an ability to resist external pressures, in contrast to spontaneous killings driven by emotional impulses, where offenders lose self-control and cannot fully exercise judgment.<sup>42</sup> They contend that the calculated nature of premeditated murder justifies harsher punishment, as it reflects a clear understanding of the act's wrongfulness and the capacity to avoid it.<sup>43</sup>

Kremnitzer and Ghanayim further argue that premeditation warrants greater culpability due to the violation of enlightened values, which expect human reasoning to prevent such acts.<sup>44</sup> Moreover, they assert that premeditated murder is more effectively deterred than spontaneous acts driven by uncontrolled emotions and lack of rational judgment.<sup>45</sup>

Kremnitzer and Ghanayim argue that motive should not be considered an aggravating factor in murder offences, as criminal law focuses on actions rather than the offender's motives or character.<sup>46</sup> In their view, premeditation sufficiently captures cases involving wrongful motives.<sup>47</sup> They caution against aggravating culpability based on antisocial behaviour or cruelty, asserting that neither motive nor cruelty is more significant than the act of taking a human life.<sup>48</sup> Furthermore, they oppose basing punishment on the offender's future dangerousness, as it shifts the focus from the

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<sup>40</sup> Ferzan, *supra* note 18 at 83–87; Nygaard, *supra* note 9.

<sup>41</sup> Kremnitzer & Ghanayim, *supra* note 18 at 296, 368–69.

<sup>42</sup> *Ibid* at 367–368, 444, 446.

<sup>43</sup> *Ibid* at 340, 379.

<sup>44</sup> *Ibid* at 367.

<sup>45</sup> *Ibid* at 370, 296.

<sup>46</sup> *Ibid* at 297.

<sup>47</sup> *Ibid* at 318–319.

<sup>48</sup> *Ibid* at 442–443.

act to the person's character, transforming criminal law from addressing offences to targeting offenders.<sup>49</sup>

I seek to question the distinctions made by Kremnitzer and Ghanayim and to reexamine the appropriate legal framework for grading culpability in homicide offences. In the following chapters, I will explain why premeditation, spontaneous murder, and provocation are not suitable components for determining culpability and why, in my view, motive and dangerousness should be considered instead.

It has already been argued that premeditation and provocation are not the appropriate components for determining the degree of culpability in the offence of murder.<sup>50</sup> It has also been argued that it is appropriate to rely on motive in determining culpability and its degree.<sup>51</sup> The contribution of this article lies in expanding the discussion and adding new arguments for why premeditation and provocation are not suitable criteria for assessing culpability, focusing on the offender's control and awareness. The uniqueness of this article pertains to the analysis and conceptualization of motive through Kahneman's dual-process theory, leading to a precise and clear definition of the legal concept of motive. Another novelty of the article concerns the addition of arguments for using motive to assess culpability, derived from the limitations of human cognitive abilities. The importance and contribution of the article lie in presenting a systematic mathematical model for assessing mens rea, providing a more accurate distinction between different degrees of criminal responsibility. Finally, the article addresses the conceptual, normative, and evidentiary challenges involved in evaluating motive.

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<sup>49</sup> *Ibid* at 442.

<sup>50</sup> Ferzan, *supra* note 18.

<sup>51</sup> Leist, *supra* note 13.

### III. FLAWS IN THE EXISTING CRITERIA FOR GRADING CULPABILITY

In this chapter, I will propose eliminating the criterion of "prior planning or deliberation and forming a decision to kill" as an aggravating circumstance and "provocation" as a mitigating circumstance.

For the purpose of accurately determining the degree of culpability in the offence of murder, I propose utilizing Kahneman's perspective on Dual-process theory,<sup>52</sup> combined with Freud's concepts of the *id*, *ego*, and *superego*.<sup>53</sup>

*Kahneman's Perspective on Dual-Process Theory*: Kahneman explains that human thinking consists of two systems of thought. *System 1* is a fast-thinking system responsible for intuitively, automatically, and unconsciously interpreting what we perceive through our senses and attempting to explain the input, as well as the emotions and impulses it evokes. It quickly constructs narratives and forms opinions.<sup>54</sup> The impressions it provides serve as the foundation for beliefs and motives that guide an individual's choices and actions. *System 1* generates consistent patterns of ideas formed through a process of associative recall, which we are often unaware of.<sup>55</sup> *System 1* first draws conclusions and only afterward seeks arguments and justifications to support them.<sup>56</sup> *System 2* is the conscious system responsible for evaluating the impressions of *System 1* and deciding whether to adopt them or engage in systematic thinking to reassess the situation. This system operates slowly, requires cognitive effort and awareness, and is governed and

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<sup>52</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Tel Aviv: Kinneret Zmora-Bitan, 2013) (in Hebrew).

<sup>53</sup> Sigmund Freud, *The Ego and the Id*, in James Strachey, ed & translation, *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Volume XIX (London: Hogarth Press, 1923) at vol 1, 1-66.

<sup>54</sup> Kahneman, *supra* note 52 at 26, 35-36.

<sup>55</sup> *Ibid* at 62-64.

<sup>56</sup> *Ibid* at 30, 54, 61.

regulated by rules, systematic reasoning, and critical analysis. It is flexible and relatively controllable.<sup>57</sup>

Both systems operate while we are awake, but *System 2* maximizes its capabilities only when necessary.<sup>58</sup> *System 2* monitors and regulates the impressions and appropriate responses proposed by *System 1*, allowing some to be expressed in behaviour while suppressing, modifying, or adjusting others.<sup>59</sup> When functioning properly, *System 2* adopts the suggestions of *System 1* with minor adjustments or without any modifications.<sup>60</sup> When *System 1* encounters difficulty or an unusual event that challenges its beliefs about the world, it draws the attention of *System 2* to assist in more accurate and detailed processing to resolve the issue.<sup>61</sup> *System 2* functions as a self-control mechanism capable of overcoming the impulse.<sup>62</sup>

*Freud's Theory*: Freud explains human thought using the terms *id*, *ego*, and *superego*.<sup>63</sup> The *id*, the most primal part of personality, is driven by instinctual impulses and operates on the Pleasure Principle, seeking immediate gratification without regard for reality or consequences.<sup>64</sup> The *ego* mediates between the *id*, *superego*, and reality, guided by the *Reality Principle* to satisfy impulses within social and realistic constraints, functioning as the personality's "manager."<sup>65</sup> The *superego* represents an individual's conscience and internal moral compass. It consists of internalized values, social norms, and expectations, functioning to promote self-judgment and moral perfection, often in conflict with the *id's* impulses.<sup>66</sup> Within their interactions, the *ego* is tasked with balancing the

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<sup>57</sup> *Ibid* at 27, 43.

<sup>58</sup> *Ibid* at 30.

<sup>59</sup> *Ibid* at 53.

<sup>60</sup> *Ibid* at 30.

<sup>61</sup> *Ibid* at 30-31.

<sup>62</sup> *Ibid* at 32.

<sup>63</sup> Freud, *supra* note 53 at 19.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid*.

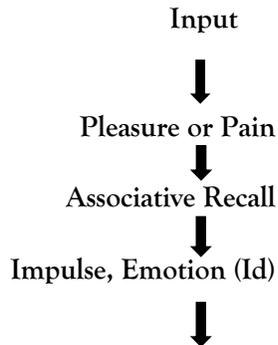
<sup>66</sup> *Ibid* at 25.

demands of the *id* (desires), the *superego* (conscience), and reality, often encountering internal conflicts that result in psychological tension.<sup>67</sup>

When applying Freud's concepts to Kahneman's perspective on Dual-Process Theory, I connect the *id* to the impulses and emotions that *System 1* attempts to explain. The *ego* corresponds to the conscious self within *System 2*, tasked with determining whether to engage in systematic thinking or to automatically adopt *System 1*'s impressions. However, the *ego* also exists in the unconscious *System 1*, where it seeks to provide explanations for stimuli, impulses, and emotions to resolve cognitive dissonance and avoid the discomfort of psychological tension. The *superego* manifests in *System 2* during systematic thinking, where moral considerations, societal norms, and the consequences of actions are evaluated. Yet, the *superego* is also present within *System 1*, through internalized societal values and norms. In such cases, *System 1* may autonomously propose explanations for impulses and emotions that incorporate the *superego*'s moral considerations. This occurs through associative memory, drawing on past experiences where the individual reconciled similar situations, allowing for potential resistance to impulses within *System 1* itself.

Table 1: Two Thinking Systems

*System 1* (Subconscious Thinking)




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<sup>67</sup> *Ibid* at 19.

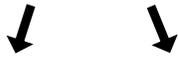
System 2 (Conscious Thinking)  
(Ego)

← System 1 provides an **explanation** for the input and the impulse or emotion it triggered.  
Including:  
*Superego* – considerations of societal regard.  
*Ego* – utilitarian considerations of self-interest.



**Rejects System 1's explanation and engages in systematic thinking, which includes:**  
*Superego* – Social norms and consequences.  
Utilitarian thinking.  
Morality and consideration for others.  
Critical thinking.

**Accepts System 1's explanation without engaging in systematic thinking**  
*Reasons:* Laziness (systematic thinking requires significant energy). Sacred values (the strength of belief in one's core values).  
Avoidance of cognitive dissonance.



Systematic thinking may reach a different conclusion.  
Systematic thinking may arrive at the same conclusion as System 1.

*Applying the Diagram to the Thought Process in the Crime of Murder:*  
System 1 identifies external stimuli that may trigger an urge or intense emotion, such as anger or hatred. When these emotions

arise, they may lead to impulses to act violently. Subsequently, *System 1* provides intuitive justifications that validate these urges and emotions. For example, it might argue: “The victim deserves it; He is a terrible person who hurt me” or “The intensity of the emotion I feel justifies the action.”<sup>68</sup>

After *System 1* provides intuitive impressions, *System 2* begins to operate. This system can either affirm the conclusions of *System 1* or challenge them. At the initial stage, *System 2* examines whether there is “cognitive ease” in the conclusions of *System 1*—namely, whether the ideas presented naturally align with the individual’s fundamental attitudes and tendencies. In cases where *System 2* does not identify a need for systematic thinking, it may approve the conclusions of *System 1*. By doing so, it makes a conscious decision to commit murder. This decision is made with intent, awareness, and control over both the decision-making process and the execution of the action.<sup>69</sup>

At times, *System 2* may choose to engage in systematic thinking, exerting effort to critically and thoroughly analyze the situation. It may question *System 1*’s interpretation of reality or its conclusions and raise complex considerations, such as: Is the act of murder morally justifiable? Does the cost of committing the murder (e.g., the risk of exposure, imprisonment, and personal harm) outweigh the potential benefits? These questions demand a high level of critical thinking and deliberate decision-making processes.

Moral reasoning rooted in a strong *superego*, empathy toward others, consideration for needs and rights, as well as utilitarian and critical thinking, are essential components of systematic reasoning. When these capacities are robust, they may counteract and overcome the impulse to commit murder, depending on the intensity of the impulse. The presence of ‘negative thought vectors’ can play a crucial role in this process by inhibiting violent impulses. Consequently, the commission of a murder requires not only the presence of propelling factors (such as impulses, emotions, and beliefs that support the act) but also the absence of significant inhibitory factors.

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<sup>68</sup> Kahneman, *supra* note 52 at 30.

<sup>69</sup> *Ibid* at 71-72.

Not only systematic reasoning can deter a person from committing murder; opposing impulses may also play a crucial role. For instance, in certain situations, self-preservation instincts and the perpetrator's desire to avoid risking their own life may outweigh the urge to act violently. Similarly, even within *System 1*, *superego* mechanisms may operate, bringing to the surface beliefs about the needs of others or society, providing initial resistance to impulses during stages of intuitive and unconscious thought.

When *System 2* engages in systematic reasoning, the process may be accompanied by intense emotions such as fear, remorse, or guilt. These emotions, if sufficiently strong, can overpower the initial impulse and redirect behaviour. They influence not only the current decision but also the formation of future attitudes and beliefs. This process may reduce the likelihood of similar impulses arising in the future or diminish the intensity of the impulse to act violently.

I propose examining this process through a mathematical formula that describes how urges and emotions create a "cumulative outcome. When this outcome exceeds a certain threshold, it results in action. Each of the rationales provided by *System 1* is considered a "positive vector" in the formula, as it represents justifications for the urge to commit murder. Conversely, opposing urges or rationales—such as critical thinking or *superego* considerations—are regarded as "negative vectors," which are subtracted from the overall outcome. However, in cases of murderers, these negative vectors may be weak, allowing violent impulses to dominate and lead to action.

When *System 2* engages in systematic thinking, it may also add positive vectors that justify the murder, provided that the act is perceived as aligned with the individual's goals according to utilitarian reasoning.

**Table 2: Formula for Calculating the Vectors Leading to Action**

<i>System 1</i>	<i>System 2</i>	<i>System 2</i>
	Does not engage in systematic thinking	Engages in systematic thinking

<p>Positive vectors in favor of performing the action are multiplied by one. Negative vectors against performing the action are multiplied by negative one.</p>		
<p>A strong impulse to act violently. 8X1</p>	<p>The explanation provided by <i>System 1</i> aligns with the individual's strongly held beliefs. There is a sense of cognitive ease, and there is no need to engage in systematic thinking. The individual either seeks to avoid cognitive dissonance so that it does not prevent them from committing the murder or succumbs to cognitive laziness, avoiding the effort required for systematic thinking. 0X1/1-</p>	<p><b>Weak Superego Considerations:</b> "Murder is prohibited by society's rules." 2X1-</p>
<p>A strong emotion such as anger or insult. 8X1</p>		<p><b>Weak Utilitarian Consideration:</b> "I will be punished, so it is not worth committing murder." 2 X -1</p>

Explaining the emotion and impulse as rational. 8X1		<b>Weak Moral Consideration:</b> "Murder is immoral." 2 X -1
A counteracting impulse, such as fear for his own life in case he acts violently. -1 X 0		<b>Weak Critical Thinking Considerations:</b> "This is not the only course of action or the one necessarily required by the circumstances." 2 X 1-
<i>Superego</i> <b>Considerations:</b> Taking customary morality into account. <i>Ego</i> <b>Considerations:</b> Weighing the consequences of the act. -1 X 0		
8- = (2-)+(2-)+(2) 16 = 24-8	24=8+8+8	24=8+8+8
<b>A Statistical Threshold for Action:</b> $15 \leq X$		

The basic offence of murder refers to a spontaneous act of murder, carried out without a substantial process of deliberation and forming a decision to kill. In this case, *System 1* provides the explanations for the powerful emotions and the justifications for

action, while *System 2* approves them without engaging in systematic thinking.<sup>70</sup> The motives then transform into intention.

The offence of murder under aggravated circumstances is characterized by planning or a substantial process of deliberation and forming a decision to kill. In this case, *System 2* engages in systematic thinking and considers the implications and consequences of the act. Nevertheless, the individual decides to commit murder. This decision is possible due to two factors: an impulse so strong that it cannot be overcome by negative thought vectors (such as moral considerations, utilitarian consideration, and critical thinking) or the weakness of these mitigating forces.

The main difference between a spontaneous decision and one made after a deliberative process is the passage of time, during which emotions are expected to subside. The assumption is that if enough time has passed, *System 2* would not approve the action, as the weakening of emotions allows the brain to engage in rational thinking and overcome the impulse to kill. However, this assumption is not always correct. Systematic thinking can occur even in the presence of strong emotions. Additionally, intense emotions may persist over time.

The prevailing assumption is that the passage of time eliminates the element of surprise and allows for the activation of systematic thinking. However, systematic thinking is sometimes not engaged due to factors such as strong beliefs, laziness, or the resolution of cognitive dissonance.

An offence under mitigating circumstances due to provocation occurs in a state of emotional turmoil involving the activation of *System 1*. The provocation diverts attention and hinders the individual's ability to engage in systematic thinking, to the point of near loss of control.<sup>71</sup> However, inhibitory factors such as negative thought vectors are not sufficient on their own to lead to murder;

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<sup>70</sup> Robert E Hanlon et al, "Neuropsychological and Intellectual Differences Between Types of Murderers: Affective/Impulsive Versus Predatory/Instrumental (Premeditated) Homicide" (2013) 40:8 *Crim Just & Behav* 933 at 933-35.

<sup>71</sup> Kahneman, *supra* note 52 at 28, 53.

there must also be a strong impulse to act violently, which is absent in most individuals.

After explaining the different levels of offences using the concepts of dual process theory, I propose eliminating the distinction between spontaneous murder, premeditated murder, and murder following provocation. I will justify my position in the following subsections.

***A. Eliminating Planning or Genuine Deliberation and Forming a Decision to Kill as an Aggravating Circumstance:***

In my opinion, it is not appropriate to distinguish between spontaneous murder and premeditated murder. I believe that the elements of planning, or genuine deliberation, and forming the decision to kill should be abolished as an aggravated circumstance. This distinction does not reflect inherent severity in the acts, as premeditated murder is not inherently more severe than spontaneous murder.

*Self-Control in the Basic Offence:* According to the approach that shaped the aggravation of the offence of premeditated murder, a comprehensive deliberative process requires systematic thinking.<sup>72</sup> However, the assumption that only systematic and deliberate thinking reflects self-control and awareness is incorrect. This view reflects a misunderstanding of how *System 2* functions. Self-control does not always require systematic thinking. *System 2*, in fact, represents "the conscious self," which governs the selection of which impulses, emotions, and motivations will be expressed and developed into goals and actions, and which will be suppressed.<sup>73</sup> *System 2* can consciously navigate the decision-making process despite the unconscious and automatic influence of *System 1* on our behaviour through associations. *System 2* can regulate the recall process and program memory to recognize situations requiring attention and suppress habitual responses.<sup>74</sup>

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<sup>72</sup> *Ibid* at 76.

<sup>73</sup> *Ibid* at 42.

<sup>74</sup> *Ibid* at 44.

Even when *System 2* adopts the suggestions of *System 1* without systematic analysis, it exercises control and awareness. *System 2* adopts and approves the proposals provided by *System 1*, especially when similar issues have already been systematically examined in the past and there is no need to reexamine them. In doing so, *System 2* selects the motivations for action. Spontaneous murder is often perceived as an act stemming from an unexpected factor that prevented comprehensive thinking. However, in surprising moments, it is *System 1* that activates *System 2* to handle the situation. The choice to avoid systematic thinking is a result of a conscious decision, not a failure of *System 2*. It does not stem from a lack of ability but rather from a lack of will.<sup>75</sup> Moreover, engaging in systematic thinking does not guarantee the conclusion that murder is wrongful. At times, *System 2* may conclude, after thorough and systematic consideration, that committing murder is desirable.<sup>76</sup>

I wish to explain why people choose not to engage in systematic thinking that includes utilitarian analysis, critical thinking, and moral reasoning. This choice stems from three main mechanisms: strong beliefs, cognitive laziness, and the avoidance of cognitive dissonance.

### ***1. Strong Beliefs:***

Strong or sacred beliefs are moral values that are non-negotiable. These beliefs do not necessarily have to be religious. People who hold such values will not trade them for material benefits. When beliefs are perceived as sacred, they become unassailable, extremely difficult to change, and significantly influence the thought processes of those who hold them.<sup>77</sup> Behavioural studies show that when people decide whether to act

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<sup>75</sup> *Ibid* at 42.

<sup>76</sup> *Ibid* at 26.

<sup>77</sup> Shaul Rosenthal, *Jihad, Radicalization and Terrorism: A Social Neuropsychological Perspective* (The Institute for the Research of the Methodology of intelligence & Intelligence Heritage Centre, August 2020) at 4, online (pdf): <<https://www.intelligence-research.org.il/userfiles/banners/הבררת%20הברתית%20הברתית.pdf>> [perma.cc/37TN-LLX7].

violently, even in ways that endanger their lives, in defence of their sacred values, they do not engage in utilitarian thinking and do not weigh the pros and cons of their actions.<sup>78</sup>

In such situations, decreased activity has been observed in brain regions responsible for decision-making and cost-benefit analysis (systematic thinking operated by *System 2*). Additionally, increased activity has been observed in regions responsible for the subjective evaluation of the significance of these values to the individual (impressions and explanations proposed by *System 1*).<sup>79</sup>

The motivation for action stems from the impressions provided by *System 1*, based on beliefs about what appears logical, reasonable, good, and right. When *System 2*, "the conscious self," approves of these impressions, it selects them as justifications and reasons for action.<sup>80</sup> People seek justifications for actions driven by impulse, and these justifications are found in the explanations provided by *System 1*, often framed as moral or utilitarian arguments. These justifications are meant to validate a decision that has already been made. Jerome Frank addressed this phenomenon, arguing that judges tend to form their decisions first and only then provide their reasoning.<sup>81</sup> Dworkin, in response, explained that this process stems from judges reacting intuitively to events because they have previously considered similar factors and already reached conclusions regarding the same issue.<sup>82</sup> Similarly, a spontaneous murderer can be understood as someone who decides to act and only then selects justifications that align with their sacred values.

Murderers do not necessarily act due to a momentary failure but rather based on principles and beliefs formed in the past. *System 1*, which provides the suggestions for action, operates based on previous thought processes that have left their mark on the individual's memory. Values and beliefs accumulated in the past,

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<sup>78</sup> *Ibid* at 5.

<sup>79</sup> *Ibid* at 5, 7.

<sup>80</sup> Leist, *supra* note 13 at 184.

<sup>81</sup> Jerome Frank, *Law and the Modern Mind* (New York: Brentano's Publishers, 1930) at 122-24, 126-27.

<sup>82</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 81-130.

especially sacred beliefs, serve as a kind of "automatic instruction" for carrying out specific actions under certain conditions. Thus, even if the murder itself and its circumstances were not premeditated, the readiness to commit it is the result of prior deliberation. Therefore, the hope that activating *System 2* in proximity to the act could have prevented the murder is misguided, as the decision had already been embedded in the murderer's thought process.<sup>83</sup>

When a person holds strong beliefs such as "a woman belongs to a man" or "God commands the killing of infidels," their thinking is shaped according to these values. *System 1* provides explanations and causal connections that align with these values, even if they are not grounded in reality.<sup>84</sup> Instead of critically examining these suggestions, *System 2* tends to approve them and focuses on gathering information that supports the existing beliefs, in order to maintain cognitive consistency.<sup>85</sup>

There is no fundamental difference between a spontaneous murderer acting out of sacred beliefs and a premeditated murderer motivated by the same beliefs. An example of this can be seen in cases of premeditated murders, such as terrorist attacks. Although

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<sup>83</sup> Just like the spontaneous killer, an intoxicated attacker does not necessarily engage in complex deliberative thought immediately prior to the act. *System 1*, as conceptualized in dual-process theory, may offer *System 2* a course of action—such as inflicting harm—with a specific goal in mind, even without conscious, rational calculation. This goal can arise from pre-existing associative memory, deeply internalized beliefs, or sacred values embedded in the individual's worldview. In this way, *System 1* can simulate purpose, enabling the individual to act with apparent "specific intent" even under cognitive impairment or emotional overload, without the involvement of higher-order reasoning. This observation challenges the doctrinal distinction made in Canadian criminal law between *general intent*—the basic intention to perform the prohibited act—and *specific intent*, which involves a further goal or purpose beyond the act itself. This distinction plays a crucial role in determining the availability of certain defences, such as intoxication, which is more readily admitted in *specific intent* offences. Section 33.1 of the Canadian *Criminal Code* addresses the exclusion of the intoxication defence in offences involving bodily harm.

<sup>84</sup> Kahneman, *supra* note 52 at 90–91.

<sup>85</sup> *Ibid* at 93, 82, 119.

these acts are carried out after planning, they are not based on systematic utilitarian thinking. Terrorists usually do not calculate the costs and benefits of their actions and do not consider the consequences, such as the state's response, the harm to their ethnic group, or the risk of being caught.<sup>86</sup> Nor do they engage in moral deliberation that condemns harm to innocent people. Instead, *System 2* refrains from engaging in systematic thinking because *System 1* has already provided justifications for the action, rooted in their sacred values.

## 2. Laziness

As noted, *System 2* does not always engage in systematic thinking. The argument that a spontaneous murderer failed to conduct a full deliberative process due to a lack of ability stemming from the intensity of emotions or time constraints is incorrect. Sometimes, even when sufficient time is available, individuals tend to avoid engaging *System 2* due to a habitual tendency to evade effortful thinking in order to conserve energy. Additionally, the significant cognitive effort required for systematic thinking is unpleasant for them, leading them to avoid it and seek cognitive ease. *System 1* strives for coherence; when conclusions align with individuals' basic beliefs, they tend to accept supporting arguments even when they are unfounded. The cognitive ease created by mental consistency and the absence of effort causes individuals to perceive claims as true, while their associative system suppresses doubts and ambiguities.<sup>87</sup> In conclusion, refuting *System 1*'s conclusions requires effort, which is why the lazy *System 2* has become accustomed to relying on the conclusions provided by *System 1*.<sup>88</sup>

Among individuals characterized by cognitive laziness, weakened executive functions lead to a tendency to perceive superficial messages as persuasive without critical examination.<sup>89</sup> This indicates a low level of reflective functioning, which manifests

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<sup>86</sup> Rosenthal, *supra* note 77 at 5.

<sup>87</sup> Kahneman, *supra* note 52 at 101.

<sup>88</sup> *Ibid* at 54, 94, 38, 100, 114.

<sup>89</sup> *Ibid* at 94.

as impulsivity, impatience, and a preference for immediate gratification. Such individuals are easily influenced, driven by fears, impulses, and unregulated emotions, and tend to think in categorical terms –“them” versus “us” –without deeply scrutinizing their positions.<sup>90</sup> In contrast, intelligent individuals exhibit a high capacity for attention control and systematic thinking. Intelligence is reflected not only in the ability to think methodically but also in retrieving relevant information from memory and maintaining a high level of concentration. These individuals rely less on intuition and prefer to engage in deeper analysis of their positions rather than accepting superficial or appealing answers.<sup>91</sup> Thus, the choice to avoid systematic thinking reflects cognitive laziness rather than an inherent limitation in thinking abilities.

Support for the idea of cognitive laziness among spontaneous murderers can be found in research comparing spontaneous and premeditated murderers. A study found that spontaneous murderers are often characterized by weaker self-control compared to premeditated murderers. Additionally, significant differences were observed in regional brain activity between the two groups.<sup>92</sup> The brains of spontaneous murderers exhibit noticeably lower activity patterns in areas related to behavioural control,<sup>93</sup> as control is achieved through engaging in effortful, systematic thinking, which spontaneous murderers are less prone to.<sup>94</sup>

### *3. Avoiding Cognitive Dissonance:*

Cognitive dissonance occurs when an individual experiences an internal conflict between their impulses and the social norms expected of them, or when there is a gap between their actions and their self-image as a good person. This conflict may also arise from inconsistencies between the different beliefs they hold. This lack of consistency generates a sense of cognitive discomfort, prompting the individual to strive to restore balance within their inner world

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<sup>90</sup> *Ibid* at 57.

<sup>91</sup> *Ibid* at 55.

<sup>92</sup> Hanlon et al, *supra* note 70 at 933–35.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid*.

by seeking coherence between their emotions, beliefs, and behaviour. To achieve this, individuals tend to glorify their decisions, rationalize them, and reshape reality.<sup>95</sup>

Cognitive reason to avoid cognitive dissonance lies in the significant cognitive effort required to sustain two contradictory beliefs simultaneously, leading to cognitive discomfort.<sup>96</sup> To avoid this discomfort, *System 2* refrains from engaging in systematic thinking or conducting a substantial deliberative process. Instead, *System 1* fills informational gaps based on existing emotions, impulses, and beliefs, thereby maintaining cognitive consistency. New information is also interpreted in accordance with existing beliefs to preserve coherence.<sup>97</sup>

Psychological reason to avoid cognitive dissonance lies in the functioning of the "ego." The *ego* seeks to avoid feelings of guilt or anxiety stemming from an internal conflict between an individual's basic drives (the *id*) and the moral demands and social norms represented by the "*superego*." To this end, the *ego* employs defence mechanisms.<sup>98</sup> These defence mechanisms can operate both prior to the Perpetration of the murder, to facilitate the act, and after its commission, to provide justifications for the behaviour.<sup>99</sup>

In the case of the spontaneous murderer, strong inhibitory factors—negative vectors of systematic thinking, such as utilitarian, moral, or critical thought—may be present. However, these factors are deliberately and effortfully suppressed to avoid cognitive dissonance that could deter the individual from committing the act of murder. The spontaneous murderer seeks to act faster than their

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<sup>95</sup> Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford: Stanford University Press, 1957) at 1-31.

<sup>96</sup> *Ibid.*

<sup>97</sup> Kahneman, *supra* note 52 at 50-58, 62, 69.

<sup>98</sup> Freud, *supra* note 53; Anna Freud, *The Ego and the Mechanisms of Defence*, trans by Cecil Baines (New York: International Universities Press, 1966) at 5-10, 30-32 (originally published 1936).

<sup>99</sup> Arnon Edelstein, *Multiple Victim Homicides: A Sociological and Psychological Perspective* (Tel Aviv: Papyrus, Open University of Israel, 2010) at 155-56.

own thoughts, bypassing internal resistance in order to fulfill latent desires.

#### *4. Abolishing Premeditation as an Aggravating Circumstance:*

Criminal law traditionally distinguishes between premeditated murder and spontaneous murder based on the assumption that the existence of a genuine deliberation process involving systematic thinking indicates a higher degree of culpability and dangerousness. I argue that this distinction is flawed. There is no essential difference between the premeditated murderer and the spontaneous murderer, as both arrive at the event already fundamentally prepared to commit murder. A distinction based on the presence of systematic thinking near the act of murder fails to accurately reflect the fact that, in both cases, the individual exercises control over the decision to kill and disregards the full range of factors influencing their behaviour.

In my view, the difference between the spontaneous murderer and the premeditated murderer does not lie in an inability to engage in a genuine deliberation process, which would suggest a lack of control. Rather, the distinction lies in the relative weight of different elements within the thought process. While the spontaneous murderer may exhibit functional moral reasoning, this is absent in the premeditated murderer. Conversely, the premeditated murderer may engage in utilitarian reasoning, which is often lacking in the spontaneous murderer. In both cases, the failure of inhibitory mechanisms, such as moral or utilitarian thinking, stems from an unwillingness to develop and apply them properly, rather than from an inherent inability to do so.

#### *i. The Degree of Culpability of Spontaneous Murderers Is Not Lower Than That of Premeditated Murderers:*

Kremnitzer argues that premeditated murder excludes the possibility that the act was committed during an intense emotional outburst, implying that the two cannot coexist and collectively cover all possible states of intent.<sup>100</sup> However, in my view, the

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<sup>100</sup> Kremnitzer & Ghanayim, *supra* note 18 at 371.

absence of premeditation does not necessarily indicate an uncontrollable fit of rage. Even in situations of emotional excitement or anger, an individual may still engage in a systematic deliberative process and ultimately decide to kill. Von Holtendorff similarly notes that in many cases of homicide, both premeditation and emotional arousal coexist.<sup>101</sup>

A premeditated murderer, who engages in systematic thinking, is often perceived as a psychopath—an individual lacking empathy and possessing a weakened moral compass and *superego*. However, a lack of empathy does not imply a complete detachment from emotion, as emotion serves as the driving force behind every cognitive process. As David Hume argues, emotion points toward purpose.<sup>102</sup> In terms of Kahneman's framework, emotional arousal and impulse activation constitute the initial stage of intuitive thinking in "System 1," forming the foundation for all cognitive processes, including those that eventually evolve into systematic thinking.<sup>103</sup> The motive for murder is always emotional, as even the desire to fulfill material needs ultimately seeks to satisfy emotional and physical desires.

The distinction between a spontaneous murderer, acting based on intuitive thinking, and a premeditated murderer, relying on systematic thinking, pertains to the entire thought process rather than merely the impulses or emotions driving the act. The mere presence of inhibitory thoughts that were too weak to prevent the act does not necessarily warrant greater severity in sentencing. Conversely, the complete absence of inhibitory thoughts does not reflect higher morality but may indicate more severe antisocial tendencies.<sup>104</sup>

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<sup>101</sup> Franz von Holtendorff, *Das Verbrechen des Mordes und die Todesstrafe* (Leipzig: Duncker & Humblot, 1875) at 244, 252.

<sup>102</sup> David Hume, *A Treatise of Human Nature*, 2nd ed by LA Selby-Bigge (Oxford: Oxford University Press, 1978) at 415.

<sup>103</sup> Kahneman, *supra* note 52 at 62.

<sup>104</sup> Franz von Liszt, *Verbrechen und Vergehen wider das Leben*, in *Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts: Besonderer Teil*, vol 5 (Berlin: Guttentag, 1905) 67 at 63.

Killing another person without any moral hesitation or further reflection, in a spontaneous manner, is morally graver due to the inherent disregard for human life stemming from the absence of deliberation.<sup>105</sup> A key critique of the distinction between premeditated murder and spontaneous murder is that it often unjustifiably mitigates punishment for cruel and morally deficient murderers who are indifferent to the loss of human life or act out of unjustified rage.<sup>106</sup>

I argue that murderers should not be treated leniently due to subjective traits such as cognitive laziness, Strong beliefs, or a tendency to avoid cognitive dissonance. Individuals must be aware of their personal weaknesses and take responsibility for mitigating them when they involve violent behaviour. A society that allows individuals to act out of cognitive laziness and violent impulses without holding them accountable fosters increased danger and fails to protect the value of human life. Most people do not need to make a conscious effort to refrain from committing murder. Therefore, those driven by violent impulses are expected by society to resist such urges.

*ii. Spontaneous Murderers Are Not Less Dangerous Than Premeditated Murderers:*

There is a common assumption that premeditated murderers are more dangerous than spontaneous murderers. However, in my view, this assumption is incorrect for three main reasons: First, it is argued that a spontaneous murderer acts due to a personal conflict with a specific individual, driven by intense emotions that exist only in personal relationships, making them dangerous solely to that person. In contrast, a premeditated murderer acts without personal conflict, in cold blood, and is therefore considered more dangerous to society as a whole.<sup>107</sup> Second, it is claimed that the premeditated murderer lacks empathy and is emotionally detached, making them more dangerous.<sup>108</sup> Third, it is argued that spontaneous murderers

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<sup>105</sup> Peretz, *supra* note 28, s 2; Kremnitzer & Ghanayim, *supra* note 18 at 372-378.

<sup>106</sup> *Ibid* at 373.

<sup>107</sup> *Ibid* at 388.

<sup>108</sup> *Ibid* at 369-370.

are prone to regret their actions and are more likely to be rehabilitated, as the murder was a one-time lapse rather than a reflection of a fixed character. Conversely, in premeditated murderers, the murder reflects their inherently flawed character, making them resistant to rehabilitation.<sup>109</sup> However, in my view, spontaneous murderers can be just as dangerous, if not more so, than premeditated murderers, for the following reasons:

The assumption that murderers acting out of personal conflict are necessarily spontaneous murderers is incorrect. There are premeditated murderers who seek to resolve personal conflicts by planning the murder, driven by intense emotions such as anger or hatred. Furthermore, the notion that someone who kills due to personal conflict is less dangerous to other people is also flawed. A spontaneous murderer may kill strangers without any personal conflict or intense emotions, sometimes out of boredom or opportunism—for example, in cases of murder committed during theft. The spontaneous murderer poses a significant danger to society because they are like a "loaded gun" or a "ticking time bomb," unpredictable and capable of acting violently at any given moment.<sup>110</sup>

Kremnitzer argues that murder occurring within the context of an interpersonal conflict poses a lesser threat to the value of human life, as there is a more logical reason for the murder, and the victim has greater control over how events unfold during the conflict.<sup>111</sup> However, I believe that killing within an interpersonal relationship conveys a message of disregard for human life, as such relationships are expected to involve mutual trust and provide a sense of security.<sup>112</sup> In my view, perceiving murder arising from interpersonal conflict as less severe serves only male interests. Men are more likely to be murdered by strangers, while women are primarily killed by impulsive murderers in the context of personal

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<sup>109</sup> Edelstein, *supra* note 99 at 85; Kremnitzer & Ghanayim, *supra* note 18 at 388.

<sup>110</sup> Hanlon, *supra* note 70 at 933-35.

<sup>111</sup> Kremnitzer & Ghanayim, *supra* note 18 at 307-308, 327, 388.

<sup>112</sup> *Ibid* at 389.

conflicts.<sup>113</sup> Thus, for women, this situation presents a greater threat to their lives.

In his understanding of murderers driven by conflict, Kremnitzer makes assumptions about the notion of 'the good,' contrary to his assertion that it is inappropriate to examine the murderer's motive and character.<sup>114</sup> This perception aligns with the notion that the state should avoid defining 'the good'. In my view, the state cannot avoid defining 'the good,' as humans are incapable of doing so due to their subjective thinking processes. Since emotion points to purpose and morality is subjective,<sup>115</sup> there is no choice but to declare moral values and engage in debate about them with other members of society.<sup>116</sup>

I also disagree with the claim that a premeditated murderer is more dangerous due to being calculated and emotionally detached. In reality, uncontrolled emotion poses a greater danger than someone engaging in systematic thinking. While premeditated murderers tend to lack empathy, rational mechanisms such as utilitarian reasoning may deter them from acting. In contrast, spontaneous murderers, driven by strong impulses and emotions, struggle to engage in systematic thinking that could prevent them from committing murder.<sup>117</sup> In contrast, spontaneous murderers are less sensitive to the anticipated pain caused by punishment and social stigma. At the same time, they are highly sensitive to the immediate gratification derived from fulfilling their urges.<sup>118</sup> That is why they are more dangerous to society.

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<sup>113</sup> Rotem Kadosh, "Prosecution's Discretion to Close Cases of Domestic Violence against Women due to Lack of Public Interest" (7 April 2023) at 54-55, online: <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4389416](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389416)> [perma.cc/NHV7-DBSG].

<sup>114</sup> Kremnitzer & Ghanayim, *supra* note 18, at 319.

<sup>115</sup> Hume, *supra* note 102, at 415.

<sup>116</sup> Robert M Cover, "The Supreme Court, 1982 Term—Foreword: Nomos and Narrative" (1983) 97:1 Harv L Rev 4 at 4-6.

<sup>117</sup> Hanlon, *supra* note 70 at 933-35.

<sup>118</sup> Philip J Corr, Colin G DeYoung & Neil McNaughton, "Motivation and Personality: A Neuropsychological Perspective" (2013) 7:3 Social & Personality Psychology Compass 158 at 171.

Contrary to the claim that spontaneous murderers are more amenable to rehabilitation, in practice, it is more challenging to guide their behaviour due to their low sensitivity to deterrence. They are less influenced by punishment and tend to act on impulses driven by immediate gratification.<sup>119</sup> This stands in contrast to premeditated murderers, who are more likely to be deterred because they possess the ability to delay gratification and engage in utilitarian calculations regarding the feasibility of committing murder in light of potential punishment.

Another reason why spontaneous murderers are more dangerous than premeditated murderers is their higher prevalence. Most murders occur spontaneously, without prior planning.<sup>120</sup> This argument further supports the notion that imposing harsher penalties on premeditated murderers alone is unjustified. Since spontaneous murders happen more frequently, they pose a greater societal risk.

Kremnitzer argues that dangerousness should not be considered when determining the degree of culpability, as it involves predicting the likelihood of future criminal acts. He further contends that dangerousness should never replace culpability as a factor in legal evaluation.<sup>121</sup> However, I maintain that dangerousness is not a prediction of future behaviour but rather an assessment of the risk the defendant poses to society at the time of the act. Moreover, dangerousness should not be viewed as an alternative to culpability but rather as a complementary factor. Therefore, in cases where both culpability and dangerousness are present, the level of dangerousness can be used to determine the severity of guilt.

*iii. Behavioural Guidance:*

Research has shown that self-control over emotions and resistance to impulses can be improved. While genetics influence this ability, environmental factors such as parenting techniques also

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<sup>119</sup> *Ibid* at 165-166.

<sup>120</sup> Eric Goode, *On Deviance: The Sociology of Deviant Behavior* (Ra'anana: Open University of Israel, 2003) at 145 (in Hebrew).

<sup>121</sup> Kremnitzer & Ghanayim, *supra* note 18 at 306-310, 312-317.

play a significant role.<sup>122</sup> The brain can be conditioned toward restraint and avoidance of violent acts as part of the automatic "System 1" thinking process. Impulses can be weakened, and inhibitory cognitive vectors can be strengthened to counteract those impulses.

*iv. The Importance of Guidance and Deterrence:*

I agree with Dow Schmitt that criminal law should be used to reshape offenders' preferences to align with accepted social norms and prevailing moral standards,<sup>123</sup> thereby enhancing societal welfare.<sup>124</sup> I also concur with Leist's view that criminal law should serve an educational role by shaping emotions—weakening negative emotions that might lead to murder through deterrence driven by social stigmatization. Over time, individuals will refrain from committing murder not merely out of fear of punishment but because they no longer harbour the emotions or attitudes that drive such behaviour.<sup>125</sup>

In my view, individuals should be required to exert effort and engage in cognitive processes that prevent them from committing murder. It is essential to guide the behaviour of spontaneous murderers through education and deterrence, ensuring they do not resort to cognitive laziness but instead employ systematic thinking. They must learn to cope with the discomfort of cognitive dissonance rather than hiding behind the excuse of intense emotions, even when such emotions are reinforced by strong beliefs or sacred values.

To guide the behaviour of the spontaneous murderer, it is crucial to recognize that the absence of planning or systematic thinking does not lessen the severity of the act. Therefore, the element of premeditation should no longer be considered an aggravating factor. Instead, the absence of systematic thinking should be treated as evidence of disregard for the value of human

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<sup>122</sup> Leist, *supra* note 13; Kahneman, *supra* note 52 at 57.

<sup>123</sup> Leist, *supra* note 13 at 177.

<sup>124</sup> *Ibid* at 175.

<sup>125</sup> *Ibid* at 179.

life. This approach would better reflect moral culpability and contribute to a more just and effective sentencing policy.

### ***B. Abolishing the Doctrine of Provocation:***

I believe that the doctrine of provocation should be abolished as a mitigating factor in the offence of murder. In this subsection, I will examine the main reasons supporting this position. I will address the underlying assumptions that justify the doctrine of provocation and highlight their inherent flaws.

*Impending Loss of Control as a Mitigating Factor:* The defence of provocation is based on the claim that an intense emotional outburst triggered by provocation impairs an individual's cognitive awareness and self-control, similar to states such as sleep, insanity, or intoxication. This condition is perceived as diminishing the individual's capacity for free choice, thereby reducing their culpability.<sup>126</sup>

Walder describes affect as an intense and unexpected emotional response that impairs an individual's cognitive awareness and volition.<sup>127</sup> According to him, affect operates on deep levels of the unconscious mind, influencing reflexive behaviour devoid of conscious control. The individual becomes rigidly fixated on the target, disregarding normative considerations and the consequences of their actions.<sup>128</sup> In this sense, the doctrine of provocation parallels defences such as duress and insanity, where the act is unjustifiable but culpability is reduced due to impaired capacity to choose whether to commit the act or refrain from it.<sup>129</sup>

Kremnitzer argues that a significant emotional arousal is required to justify such a reduction in culpability—one that leads to a substantial loss of self-control. According to him, a murderer who succumbs to a strong emotional impulse and acts without deliberation is considered less culpable than someone who can act

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<sup>126</sup> Kremnitzer & Ghanayim, *supra* note 18 at 376-377.

<sup>127</sup> Hans Walder, "Der Affekt und seine Bedeutung im schweizerischen Strafrecht" (1965) 81 SchZStR 27 at 27-28.

<sup>128</sup> Kremnitzer & Ghanayim, *supra* note 18 at 428.

<sup>129</sup> Leist, *supra* note 13 at 131.

rationally but chooses not to.<sup>130</sup> I disagree with this characterization. While an affective outburst may result in impulsive action, it is not equivalent to a state of complete loss of control. As long as some level of control remains, culpability cannot be dismissed.

Moreover, cognitive stress resulting from provocation does not necessarily lead to a loss of control. On the contrary, in stressful situations, *System 2* tends to activate and operate analytically, enhancing an individual's ability to evaluate their actions and increasing the likelihood of overriding the intuitive response generated by *System 1*.<sup>131</sup> In such circumstances, the individual remains aware of their actions and retains control, even if they choose to act violently. Therefore, the activation of *System 2* under stress contradicts the assumption that provocation paralyzes self-regulatory capacities. In fact, when a person directs their anger toward a specific target, this behaviour demonstrates intentional goal selection rather than a complete loss of control.

I argue that allowing oneself to experience a fit of rage is an intentional, controlled act. Individuals choose to flood their minds with anger and fury when interacting with certain people, but refrain from such behaviour around others. This selective expression of anger further demonstrates that the process is under conscious control, serving the individual's interests by enabling reactive behaviour without regard for its consequences. The only subconscious element in the context of provocation is the individual's repression of the fact that violent outbursts of anger remain within their control. By denying this reality, the individual evades responsibility for actions taken in a state of rage. Thus, claims of impending loss of control due to provocation are conceptually flawed and should not diminish legal culpability.<sup>132</sup>

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<sup>130</sup> Kremnitzer & Ghanayim, *supra* note 18 at 382,429.

<sup>131</sup> Kahneman, *supra* note 52 at 71, 73-74, 77, 80-81.

<sup>132</sup> See section 16 of the Canadian *Criminal Code*, which sets out the defence of not criminally responsible on account of mental disorder (NCRMD). The model proposed in this article does not challenge the strict threshold of section 16, but rather reinforces the distinction between genuine cognitive

Self-control and cognitive effort indeed require significant mental exertion. As cognitive load increases due to factors such as fatigue, alcohol consumption, or sleep deprivation, self-regulatory capacity weakens.<sup>133</sup> In such states, individuals struggle with logical decision-making, succumb more readily to impulses, and may respond aggressively to provocation. However, diminished self-control is partly attributable to a loss of motivation rather than an absolute inability to resist impulses. Research demonstrates that individuals can overcome the effects of ego depletion when given

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incapacity and emotionally charged, yet deliberate, actions. While section 16 applies in cases of severe mental illness impairing one's ability to appreciate the nature or wrongness of the act, provocation typically involves a conscious choice to indulge in overwhelming emotion—sometimes to avoid confronting internal cognitive dissonance. Accordingly, provocation should not be equated with mental illness or used to reduce culpability. See *Criminal Code*, *supra* note 5, s 16; *R v Oommen*, 1994 CanLII 101 (SCC), judgment discussing the high threshold for applying section 16. This critique of provocation does not undermine the legal recognition of non-insane automatism as a valid defence in Canadian law. These are distinct categories: while provocation involves intense but deliberate emotional responses—often cultivated by the actor to override moral inhibition—automatism refers to genuine loss of volition and awareness, such as sleepwalking, neurological seizures, or physiological shock. See *R v Stone*, 1999 CanLII 688 (SCC). *R v Luedecke* 2008 CanLII 716 (ONCA). This critique of the provocation defence also aligns with feminist legal scholarship in Canada, which has long argued that section 232 of the *Criminal Code* legitimizes male emotional violence and perpetuates gendered narratives of anger and entitlement. Provocation claims often arise in cases of intimate partner homicide, where men who kill female partners seek reduced culpability by invoking sudden loss of control. By reframing culpability through cognitive dissonance and motive—rather than emotional volatility—this article challenges the normative foundation of provocation and supports efforts to abolish or severely limit its applicability. The proposed model, which emphasizes moral disengagement and internal alignment with the act, offers an alternative framework that better reflects principles of equality, personal responsibility, and protection of vulnerable victims. In this respect, the article contributes to broader feminist reform movements aimed at addressing the structural roots of gender-based violence within criminal law. See *R v Tran*, 2010 SCC 58; Elizabeth Sheehy, *Defending Battered Women on Trial* (Vancouver: UBC Press, 2014); Isabel Grant & Debra Parkes, “Equality and the Defence of Provocation: Irreconcilable Differences” (2017) 40:2 *Dal LJ* 455 at 456–458, 490–494.

<sup>133</sup> Kahneman, *supra* note 52 at 50.

strong incentives to do so.<sup>134</sup> Due to the fact that one can exert effort to maintain self-control and overcome violent impulses, it is not appropriate to be lenient with the provoked murderer.

When *System 2* endorses the actions initiated by *System 1*, conscious choice and control are present, even if systematic reasoning is not employed at the moment of decision-making. A provoked individual remains in control under three distinct circumstances: The first is when the intensity of anger reflects his strong beliefs and sacred values. The second is when he tends to cognitive laziness and refrains from engaging in systematic thinking. The third is when he uses anger to avoid cognitive dissonance that may be created between his actions and his beliefs about himself. In all three scenarios, the individual retains decision-making capacity, undermining the premise that provocation necessarily mitigates legal culpability.

***1. Sacred Beliefs in Provocation:***

I argue that the absence of systematic thinking is not caused by intense emotion or strong anger triggered by provocation. Rather, the decision not to activate *System 2* and suppress impulses stems from a conscious choice to accept the justifications provided by *System 1*. The anger and emotional outburst reflect the degree to which the individual is convinced of their beliefs.

When deeply rooted beliefs or sacred values are involved, *System 2* does not need to engage in systematic reasoning to justify the actions of a provoked individual. Decisions made during prior deliberative processes become automatic responses triggered in moments of provocation. The cognitive imprints formed in *System 1* are based on strong associative connections, creating a sense of certainty regarding these sacred beliefs.<sup>135</sup>

According to the theory of the "Vocabulary of Motives," individuals use the socially constructed language specific to their cultural context to explain, interpret, critique, or justify their

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<sup>134</sup> *Ibid* at 51.

<sup>135</sup> Kahneman, *supra* note 52 at 76.

motives and actions.<sup>136</sup> *System 1* thus provides explanations for impulses, which can either drive or inhibit behaviour.<sup>137</sup> A murderer may act according to the accepted explanations within their reference group, which defines the boundaries of permissible and impermissible conduct.

This belief system is shaped by the surrounding society and, at times, legitimizes violent behaviour. For instance, in traditional societies where women are perceived as inferior to men, disobedience may be regarded as justification for murder.<sup>138</sup> In these situations, men 'lose control' within the domestic sphere but not in public spaces or when facing authority figures, where their power is limited and regulated. The interpretation *System 1* provides for one's motives significantly influences their actions. If the system offers a socially and normatively acceptable justification, the individual may act on their impulses. Conversely, if *System 1* emphasizes the illegitimacy of the action, it may inhibit such behaviour. This demonstrates that motivation is not merely an internal impulse but a socially constructed phenomenon shaped by context, time, and place.<sup>139</sup> In such cases, anger does not signify a loss of control but rather reflects the individual's degree of commitment to their beliefs. The choice not to engage in systematic thinking and to escalate anger stems from adherence to these sacred values.

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<sup>136</sup> C Wright Mills, "Situated Actions and Vocabularies of Motive" (1940) 5 *Am Sociol Rev* 904 at 905-07.

<sup>137</sup> Edelstein, *supra* note 99, at 157.

<sup>138</sup> This article argues that in murder cases, sacred values—when they override internal moral restraints and inhibit systematic thought—should not mitigate culpability. While cultural defences often ask courts to consider divergent cultural norms, reliance on sacred values that suppress moral hesitation and facilitate violence should not reduce responsibility. Rather, such rigid value structures may indicate heightened dangerousness and moral disengagement. Leti Volpp, "(Mis)Identifying Culture: Asian Women and the 'Cultural Defense'" (1994) 17 *Harv Women's LJ* 57; *R v Gladue*, 1999 CanLII 679 (SCC).

<sup>139</sup> *Ibid* at 159.

### ***2. Cognitive Laziness in Provocation:***

The discussion in the previous section regarding cognitive laziness in the spontaneous murderer also applies to the provoked murderer. In my view, the avoidance of systematic thinking does not stem from an inability to engage in such processes, but rather from the provoked murderer's conscious decision to rely on intuitive processes driven by *System 1* to conserve mental effort.

### ***3. Avoiding Cognitive Dissonance in Provocation:***

The mental state of the provoked murderer can be understood through the psychological concept of *closure*, in which the individual experiences feelings of anxiety and shame resulting from a perceived physical or social threat.<sup>140</sup> To alleviate this distress, the individual resorts to swift and extreme action, disregarding the long-term consequences of their behaviour.<sup>141</sup>

The provoked murderer, similar to the spontaneous murderer, consciously and deliberately avoids engaging in systematic thinking to escape the cognitive dissonance that would arise if they confronted the reality of their actions. Anger serves as a psychological tool for suppressing rational thought, much like the use of alcohol or drugs.<sup>142</sup> An individual who chooses to kill in a moment of rage acts swiftly, before *System 2* can intervene and prevent the act. They place themselves in a state of *closure* and intense emotional turmoil, enabling them to act according to their true impulses while maintaining the justification that anger overwhelmed them and deprived them of full control. By doing so, the provoked murderer avoids acknowledging their actions as a conscious and deliberate decision, seeking to escape the psychological discomfort associated with cognitive dissonance. This mechanism allows them to preserve a positive self-image while granting themselves permission to engage in violent behaviour. To reduce the sense of guilt that might prevent the provoked murderer from committing the act, they redefine the act through socially

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<sup>140</sup> *Ibid* at 161.

<sup>141</sup> *Ibid* at 162.

<sup>142</sup> *Ibid* at 243-244.

accepted justifications and excuses.<sup>143</sup> This process can occur before, during, or after the murder.<sup>144</sup>

#### ***4. The Justification for Abolishing the Provocation Doctrine as a Mitigating Factor:***

I argue that the provocation doctrine should be abolished as a mitigating factor in the crime of murder. This doctrine is a remnant of outdated legal concepts that conflict with modern legal principles emphasizing self-control, personal responsibility, and the prevention of violence. The provocation defence, as currently framed, undermines these principles while generating gender and social inequality. In this section, I will discuss the primary arguments supporting the abolition of the provocation doctrine: the degree of culpability, the rhetorical framing of the provocation claim, unequal enforcement, the problematic shift in focus from the defendant's actions to those of the victim, the discriminatory impact on women, the treatment of provocation in cases involving fear and abuse, dangerousness and behavioural guidance considerations.

##### *i. The Degree of Culpability:*

There is an argument that the motive for the act of murder lies in the provocation itself, and absent the provocation, the murder would not have occurred. Therefore, it is claimed that the murderer cannot be said to have completely rejected the value of human life.<sup>145</sup> However, even a premeditated murderer might have refrained from committing the act under different external circumstances. External circumstances should not serve as the decisive criterion for determining the severity of the act, as every murder occurs within a particular contextual framework, and external triggers can be identified. Ultimately, every act of murder stems from internal motives and elements rooted in the murderer's personality, choices, and worldview.

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<sup>143</sup> *Ibid* at 152, 160, 163.

<sup>144</sup> *Ibid* at 151.

<sup>145</sup> Kremnitzer & Ghanayim, *supra* note 18 at 446.

ii. *The Rhetoric of the Provocation Claim:*

Originally, the provocation claim emerged from a culture of honour, where intense anger was perceived as a morally appropriate response to an affront to one's dignity. This reflects a "rhetoric of justification" for the act of murder.<sup>146</sup> Over time, this approach shifted to a "rhetoric of excuse," portraying rage as an overpowering emotion that overrides an individual's capacity for rational thought.<sup>147</sup> Although courts began framing provocation in terms of excuse, they continued to justify murders in circumstances they deemed acceptable under the objective test. The reform of homicide offences sought to abandon the examination of the justification or excuse for the act of murder itself—since murder can never be justified—and instead shifted the focus to the justification or excuse for the emotions that led to the murder.<sup>148</sup>

However, within the framework of examining provocation, judges continue to evaluate the content of emotions, rather than merely assessing the extent to which those emotions affected the perpetrator's self-control.<sup>149</sup> The shift from justifying the loss of self-control to justifying "the emotion that led to the near loss of self-control" represents a further stage in concealing the rationale of justification within the rhetoric of excuse.<sup>150</sup> In practice, this amounts to a covert legitimization of the murderer's motives. Yet, it is impossible to excuse the mental state while disregarding the act itself and its consequences. The discourse has evolved from justification to excuse, and ultimately to the rhetoric of excusing the motive—allegedly considered in isolation from the act and its consequences. These legal narratives obscure explicit moral considerations, making direct confrontation with them difficult.<sup>151</sup> Laypersons often fail to discern the nuanced transition from

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<sup>146</sup> Jeremy Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at 24.

<sup>147</sup> *Ibid*; Mitch Riley, "Provocation: Getting Away with Murder?" (2008) 1:1 Queensland L Student Rev 55 at 73.

<sup>148</sup> Kremnitzer & Ghanayim, *supra* note 18 at 438.

<sup>149</sup> *Ibid* at 408.

<sup>150</sup> *Ibid* at 408.

<sup>151</sup> Horder, *supra* note 146.

justifying the act to justifying the emotion that precipitated the act. Once someone is charged with Murder under mitigating circumstances, the average person may interpret this as a partial justification of the act itself. Thus, the implications for guiding behaviour resulting from such legal interpretations remain fundamentally the same.

In the homicide law reform, the objective test was replaced by a normative test.<sup>152</sup> This change was intended to expose the rhetoric used by judges who seek to apply subjective values and perspectives under the guise of objective facts. However, the shift is merely rhetorical. In practice, judges continue to apply their personal values and subjective opinions to the cases before them. Justice Barak attempted to conceal the judge's values behind the "reasonable person" standard and objective tests.<sup>153</sup> Kremnitzer, on the other hand, hides the judge's values behind arguments of subjectivity and considerations of human frailty.<sup>154</sup> In reality, this does not serve to excuse the defendant's actions but rather to justify them. Whether using subjective tests, objective tests, or referring to them as normative tests, judges ultimately interpret and process information through the prism of the values they were raised with and have internalized. Their determination regarding the emotions that led to the near-loss of self-control reflects a judgment not only about the appropriateness of the defendant's motives but also about the defendant's character.

The law accommodates a particular type of individual prone to losing self-control when angered, someone ready to commit murder in response to a trigger that could occur at any moment. This individual benefits from legal leniency, while the rest of the population is expected to develop mechanisms for self-regulation and anger management.<sup>155</sup> As a result, individuals who are not

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<sup>152</sup> Kremnitzer & Ghanayim, *supra* note 18 at 226.

<sup>153</sup> Aharon Barak, *Shikul Da'at Shiltoni* [Judicial Discretion] (Tel Aviv: Papyrus, 1987) (in Hebrew).

<sup>154</sup> Kremnitzer & Ghanayim, *supra* note 18 at 431, 446.

<sup>155</sup> Mordechai Kremnitzer & Liat Lebnon, "On the Element of Lack of Provocation in the Definition of 'Premeditation' Following CA 1141414

naturally prone to anger are disadvantaged, as they cannot claim the provocation defence.<sup>156</sup> In practice, there is no reason to grant preferential treatment to provoked murderers, as they have no need to deliberate over a specific act of murder, being already prepared and willing to commit murder as one of the available means to solve problems.

iii. *Shifting the Focus from the Defendant's Actions to the Victim's Conduct:*

The provocation defence assesses the victim's contributory fault by considering whether their actions provoked the perpetrator, thereby diminishing the perpetrator's responsibility.<sup>157</sup> This shift redirects the legal inquiry from the defendant's conduct to the victim's behaviour, undermining the principle that criminal law should evaluate the offender's actions, not the victim's. Labelling the victim's actions as provocation subjects them to moral judgment and assigns them partial responsibility for the murder.

*Gender Discrimination:* Women might be seen as provoking men who killed them by being "too independent" or deviating from traditional roles.<sup>158</sup> This perception is prevalent in cultures where men are granted rights while women are burdened with duties, such as the obligation to uphold "family honor."<sup>159</sup> In a society striving to reduce gender inequality, there should be no room for the

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*Biton v State of Israel*", in Dror Arad-Ailon, Yoram Rabin & Yaniv Vaki, eds, *David Weiner – On Criminal Law and Ethics* (Jerusalem: Nevo, 2017) 547 at 574, 577, online: <nevo.co.il>.

<sup>156</sup> Leist, *supra* note 13 at 91.

<sup>157</sup> Kremnitzer & Ghanayim, *supra* note 18 at 401.

<sup>158</sup> Rotem Kadosh, "Legislative Commentary: Grading of Homicide Offenses, the Provocation Element, and Femicide by Intimate Partners" (November 2011) *Hukim Bekitzara* at 10 (in Hebrew), online (pdf): <[https://law.huji.ac.il/sites/default/files/law/files/rotem\\_murder.pdf](https://law.huji.ac.il/sites/default/files/law/files/rotem_murder.pdf)> [perma.cc/7HKS-6HGS] [Kadosh, "Grading of Homicide Offences"].

<sup>159</sup> Manar Hasan, "The Politics of Honor: Patriarchy, the State, and the Murder of Women in the Name of Family Honor", in G Rosen, ed, *Gender, Sex, and Politics* (Tel Aviv: Hakibbutz Hameuchad, 1999) 267 at 274–75 (in Hebrew); Simone de Beauvoir, *The Second Sex*, vol 1: *Facts and Myths* (Tel Aviv: Babel, 2008) at 93–201 (in Hebrew).

provocation defence. Kremnitzer argues that requiring provocation to be socially accepted as a circumstance leading to near-loss of self-control ensures that judges will not misuse this defence to reinforce patriarchal notions of masculine honour.<sup>160</sup> However, I contend that judges are unlikely to meet this expectation. An illustrative example is the Azuelos ruling, authored by Chief Justice Barak, often considered a liberal and progressive judge, demonstrating that one cannot always expect rulings ensuring equal protection for women under the provocation doctrine. The concept of “losing self-control” due to the “Mediterranean man’s boiling blood” in a patriarchal society influenced the law, favouring male interests over women’s right to life.<sup>161</sup>

Judges’ empathy for male-centric interests and ingrained gender perceptions, such as the expectation that women must be loyal and submissive, leads to understanding the killer’s motives.<sup>162</sup> The position advanced in this article aligns with feminist critiques of the provocation defence in Canadian law. Section 232 of the *Criminal Code* allows a murder charge to be reduced to manslaughter if the accused acted in the heat of passion following a provocation that would cause an ordinary person to lose self-control.<sup>163</sup> Canadian feminist scholars and courts have highlighted the gender bias embedded in this defence, particularly in cases of intimate partner violence.<sup>164</sup> See *R v Tran*, 2010 SCC 58, where the Supreme Court emphasized the importance of interpreting section 232 in a manner consistent with contemporary values of equality and gender sensitivity.<sup>165</sup>

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<sup>160</sup> Kremnitzer & Ghanayim, *supra* note 18, at 418.

<sup>161</sup> *Ibid* at 408; Kadosh, “Grading of Homicide Offenses”, *supra* note 158 at 5.

<sup>162</sup> *Epstein v State of Israel*, CA 5718/06, § 6 (Isr 15 November 2004) (Levi J); *Eliaviev v State of Israel*, CA 759/97, 55(3) PD 459 at 471, § 14 (Procaccia J); *Shmulovich v State of Israel*, CA 30/73, 27(2) PD 598, § 3 (Cohen J.); *Azuelos v State of Israel*, CA 3071/92, 23(1) PD 377, § 10 (Barak P).

<sup>163</sup> *Criminal Code*, *supra* note 5, s 232.

<sup>164</sup> Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014).

<sup>165</sup> *R v Tran*, 2010 SCC 58 at paras 32–34.

From a doctrinal perspective, the 2015 amendment to s. 232(2) can be seen as a partial legislative response to these concerns. By limiting provocation to situations in which the victim's conduct amounts to a serious indictable offence punishable by at least five years of imprisonment, Parliament sought to curtail the availability of the defence in cases where the alleged provocation consists of non-criminal behaviour such as sexual infidelity or perceived disrespect. Yet feminist commentators have argued that this narrowing of the statutory definition does not fully resolve the deeper gendered dynamics of the doctrine, since it leaves intact the basic structure of a partial excuse for rage-based killings and continues to direct normative scrutiny toward the victim's conduct rather than the killer's decision to resort to lethal violence.<sup>166</sup>

A similar critique has emerged in Canadian jurisprudence regarding the requirement of a "sudden loss of self-control."<sup>167</sup> Although section 232 still presupposes this condition, Canadian courts—including the Supreme Court in *Tran*—have increasingly questioned the normative validity of this assumption. As held in *Tran*, the model of sudden rage risks legitimizing violent emotional reactions that are neither inevitable nor uncontrollable, but culturally conditioned and morally suspect.<sup>168</sup> The model I propose aligns with this critique by rejecting the myth of involuntary emotional breakdown and replacing it with an inquiry into the actor's conscious moral disengagement. In this sense, the Canadian feminist critique converges with cognitive and normative concerns: what appears as a loss of control is often a deliberate suppression of moral reasoning, particularly when framed by patriarchal notions of honour and male entitlement.

It is conceivable that future judges could invoke the provocation defence to revert to the *Azuelos* era.<sup>169</sup> The legal system thus serves as a tool for preserving male dominance and reinforcing women's subordinate status in society. To transform the law into a

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<sup>166</sup> Isabel Grant & Debra Parkes, "Equality and the Defence of Provocation: Irreconcilable Differences" (2017) 40:2 Dal LJ 455.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.* at paras 28–29, 32–34.

<sup>169</sup> *Ibid.*

tool for social change, a fundamental shift in legal concepts and principles is essential.<sup>170</sup> Therefore, judicial discretion should be curtailed, and the provocation defence should be abolished altogether.

*iv. Anger vs. Fear:*

The philosopher Immanuel Kant distinguished between action-driving emotions, such as anger and rage (which he termed “diabolic”), and action-inhibiting emotions, such as despair and fear (which he termed “non-diabolic”).<sup>171</sup> Kremnitzer describes anger as a natural and socially accepted human passion, contrasting it with unjustified desires for unnecessary things.<sup>172</sup> Historically, anger has been perceived as a response to injustice or harm rather than being classified as a negative motive.<sup>173</sup>

However, I argue that anger should not be regarded as a uniquely powerful emotion that justifies near-loss of self-control more than other emotions.<sup>174</sup> In my view, anger is a negative emotion that society should neither encourage nor justify as a basis for action. This contrasts with the emotional response of fear, which is considered more legitimate. Fear is a passive reaction aimed at protecting life, whereas anger reflects an ego-driven privilege that operates from an expectation of superiority. Modern society expects individuals to suppress emotions that endanger others. Anger and rage are not uncontrollable mental states or unavoidable reactions. They reflect conscious choices to remain

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<sup>170</sup> Noya Rimalt, “On Law, Feminism, and Social Change: The Prevention of Sexual Harassment Act as a Case Study”, in Daphne Barak-Erez, Shlomit Yanitzky-Dvir, Yifat Bitton & Dana Pugach, eds, *Gender and Feminism in Law* (Tel Aviv: Nevo Publishing Ltd, 2007) at 985–87, 1010; Yuval Marin, “A Feminist Perspective on Evidence Law: The ‘Gendered’ Truth and Silencing the Different Voice” (2011) 15 *HaMishpat* 97 at 99 (in Hebrew), online (pdf): <<https://hamishpat.colman.ac.il/wp-content/uploads/2018/11/05-YuvalMerin.pdf>> [perma.cc/84QY-VAG].

<sup>171</sup> Immanuel Kant, *Anthropologie in pragmatischer Hinsicht*, ed by Friedrich Vorländer (Leipzig: Felix Meiner, 1922) at 189.

<sup>172</sup> Kremnitzer & Ghanayim, *supra* note 18 at 398.

<sup>173</sup> *Ibid* at 400.

<sup>174</sup> Kremnitzer & Lebnon, *supra* note 155 at 577.

agitated, often serving as justifications for violent behaviour.<sup>175</sup> Therefore, anger should not be treated as a mitigating circumstance. Criminal law should condemn such behaviours and emphasize the offender's full responsibility for the consequences of their actions.<sup>176</sup>

v. *The Cumulative Provocation Claim:*

There is an argument suggesting that recognizing cumulative provocation could address gender discrimination in applying the provocation defence.<sup>177</sup> In the *Elbayev* ruling, the court acknowledged that prolonged and repeated provocations over an extended period could intensify feelings of anger and frustration, leading an individual to commit homicide following an additional provocation.<sup>178</sup> However, I contend that cases involving prolonged abuse should be treated separately as mitigating circumstances. The motivation behind such acts is not rooted in privileged emotions like anger, but rather in fear, despair, and self-defence. Killing an abuser should be considered either an act of self-defence or a distinct mitigating factor, rather than being categorized under provocation. As established in the reform, one of the offences of murder under mitigating circumstances was defined when the defendant was in a state of severe mental distress due to serious and prolonged abuse inflicted upon them or a family member by the person they killed.<sup>179</sup>

vi. *Dangerousness:*

A provoked killer poses a heightened danger because most criminal homicides stem from escalated personal disputes or conflicts.<sup>180</sup> A provoked killer is inherently more dangerous due to

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<sup>175</sup> Horder, *supra* note 146 at 144.

<sup>176</sup> *Penal Law, 1977*, *supra* note 21, s 301B(b)(3). Another mitigating circumstance in Israeli law already considers actions driven by fear: s 34J.

<sup>177</sup> Kremnitzer & Ghanayim, *supra* note 18 at 420.

<sup>178</sup> Kremnitzer & Ghanayim, *supra* note 18 at 426; *Eliaviev*, *supra* note 160 at 475-476.

<sup>179</sup> *Penal Law, 1977*, *supra* note 21, s 301B(a).

<sup>180</sup> Goode, *supra* note 120 at 145.

a stronger propensity for rage and violence. This perspective aligns with a utilitarian rationale, where harsher punishment serves to counterbalance the inclination toward violent acts driven by anger.<sup>181</sup>

*vii. Behavioural Guidance:*

Emotions are not reflexively translated into actions but rather involve an element of choice. Given this capacity for choice, yielding to anger should not be excused. In modern society, individuals are expected to suppress emotional reactions. People can be taught to engage in systematic thinking when faced with provocation, as this process is within their control. Creating a hierarchy of murder offences that does not show leniency toward the provoked murderer will motivate them to overcome deeply rooted beliefs that fuel intense anger and lead to murder.<sup>182</sup>

*viii. It is appropriate to guide behaviour:*

The deliberate choice not to engage in systematic thinking when experiencing anger cannot be considered a mitigating factor. A killer whose actions align with deeply held values bears greater culpability, as they act according to entrenched beliefs without exercising critical judgment. Flooding the mind with emotion to avoid the cognitive dissonance between self-perception as a good person and violent behaviour does not absolve one of blame. In light of the arguments presented, I conclude that the provocation defence should be abolished as a mitigating factor in the crime of murder. In the following section, I will propose alternatives to both the provocation defence and the premeditation doctrine, focusing on an assessment of motives and dangerousness.

## IV. THE MOTIVE

After previously arguing for the abolition of premeditation and provocation as criteria for assessing the severity of murder, I will now examine motive as a potential basis for determining criminal

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<sup>181</sup> Leist, *supra* note 13 at 169.

<sup>182</sup> Horder, *supra* note 146.

culpability. In this chapter, I will explore the relationship between motive and other concepts such as intent and purpose, while analyzing the conceptual and normative differences among various scholars. I will address the challenges and normative implications arising from considering motive in determining culpability and propose a critical analysis of existing definitions.

Canadian criminal law does not treat motive as an essential element of a criminal offence, nor does it consider it part of the mens rea required for conviction.<sup>183</sup> The Crown is generally not required to prove motive, and courts draw a formal distinction between motive and intent.<sup>184</sup> However, motive may still be relevant in certain contexts—particularly for assessing credibility in circumstantial cases and for determining appropriate sentencing.<sup>185</sup> In *R v. Lewis*, the Supreme Court of Canada confirmed that while motive is not an element of the offence, it may assist the trier of fact in evaluating the plausibility of guilt.<sup>186</sup>

A similar approach is taken in both American and Israeli criminal law. In the American MPC, the concept of "motive" is not explicitly defined as one of the elements of a criminal offence. "Motive" may arise in the context of aggravating or mitigating circumstances during the sentencing phase, but it is not considered part of the core definition of criminal liability under the MPC.<sup>187</sup> Similarly, in Israeli criminal law, motive is not recognized as a distinct form of mens rea.<sup>188</sup> Therefore, it has been argued that motive is irrelevant to determining criminal liability and does not constitute a general mental element of the offence.<sup>189</sup>

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<sup>183</sup> Roach, *supra* note 20 at 111–112.

<sup>184</sup> *Ibid* at 81; *R v Lewis*, 1979 CanLII 19 (SCC) at 831.

<sup>185</sup> *Ibid* at 831; Roach, *supra* note 20 at 81–83; Stuart, *supra* note 14 at 174–75.

<sup>186</sup> *Lewis*, *supra* note 184 at 831.

<sup>187</sup> *Model Penal Code*, *supra* note 11, § 1.02(2).

<sup>188</sup> Leist, *supra* note 13 at 20.

<sup>189</sup> *Ibid* at 50, 19.

**A. *The definition of motive:***

This article will first examine the commonly accepted definition of motive and propose a desirable definition. Can motive be conceptualized independently of intent and purpose? Scholars are divided on the relationship between motive, intent, and purpose, and can be categorized into two main approaches.

***1. The First Approach – Motive as Distinct from Intent and Purpose:***

Feller distinguishes between motive and purpose. In his view, motive is an internal and subjective factor, such as an emotion or a belief, that drives the action on an emotional or intellectual level and is not necessarily linked to an external goal.<sup>190</sup> In contrast, purpose is an external, measurable, and future-oriented objective that the individual seeks to achieve.<sup>191</sup> Hurd and Moore acknowledge the conceptual distinction between emotion (motive) and will (purpose) but argue that this differentiation does not justify assigning different levels of culpability. They assert that will (purpose) provides a reason for action, whereas action driven by emotion, as a feeling, is not necessarily intended to achieve a specific future result.<sup>192</sup> To eliminate this conceptual distinction, they proposed reducing emotion to volition, suggesting that offences motivated by emotion (such as hatred) should be treated the same as offences driven by a deliberate intent to achieve a particular goal.<sup>193</sup>

***2. The Second Approach – No Distinction Between Motive and Intent/Purpose:***

Kugler and Duff argue that motive, purpose, and intent describe the same range of cases.<sup>194</sup> Kugler maintains that there is

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<sup>190</sup> Feller, *supra* note 31, at 446, 486-487.

<sup>191</sup> *Ibid* at 21.

<sup>192</sup> Heidi M Hurd & Michael S Moore, "Punishing Hatred and Prejudice" (2004) 56 *Stan L Rev* 1081 at 1117-30.

<sup>193</sup> Leist, *supra* note 13 at 83.

<sup>194</sup> Yitzhak Kugler, *Intention and the Doctrine of Virtual Certainty in Criminal Law*

no meaningful difference between motive and purpose.<sup>195</sup> Duff further asserts that motive is inherently part of intent because it constitutes an integral component of the pursuit of a particular goal, making a clear distinction between them untenable.<sup>196</sup>

### 3. *Leist's Critique:*

Leist criticizes Kugler's assertion that there is no legal distinction between motive and purpose. Even Kugler himself acknowledges that this equivalence exists only concerning future-oriented motives, not actions driven by emotion. Therefore, his approach fails to clearly define the term.<sup>197</sup> In practice, Kugler agrees with Leist that a past-oriented motive is conceptually distinct from purpose.<sup>198</sup> Leist also critiques Feller, who differentiated between an internal motive and an external purpose but applied this distinction inconsistently. In certain cases, Feller defined behaviour as a "motive" even when it involved an aspect of a specific goal-oriented desire, contradicting his initial definition.<sup>199</sup> Consequently, Leist argues that the absence of external materialization is not a valid criterion for distinguishing motive from purpose.<sup>200</sup>

Leist proposes recognizing a distinct culpability category based on motive, separate from purpose, using temporal orientation as the defining criterion. He defines motive as an "emotion or belief that led to behavior," describing a past-oriented mental process unrelated to the action's intended outcome.<sup>201</sup> In contrast, purpose

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(Tel Aviv: Nevo Publishing, 1997) at 142-43 (in Hebrew) online: <Nevo.co.il>; RA Duff, "Principle and Contradiction in the Criminal Law: Motives and Criminal Liability", in Antony Duff & Stuart Green, eds, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) 170-71.

<sup>195</sup> *Reich v State of Israel*, CA 5640/97, § 184 (Isr) (Ilan J).

<sup>196</sup> Duff, *supra* note 194 at 170-171.

<sup>197</sup> *Ibid* at 57.

<sup>198</sup> *Ibid* at 48, 58, 62-63, 66, 70-71.

<sup>199</sup> *Ibid* at 55-58.

<sup>200</sup> *Ibid* at 22-27.

<sup>201</sup> *Ibid* at 130.

is defined as a "strong desire to achieve a specific future result," representing the aspiration to realize a specific goal through action. Thus, motive focuses on the driving force behind the action, while purpose describes the intended future outcome.<sup>202</sup>

I agree with Leist that motive is a past-oriented mental process. In my view, motive consists of impulses, emotions, and the reasoning provided by *System 1* in response to sensory input, emotions, and the impulses they trigger. This unconscious process occurs through associative recall and includes past calculations made by *System 2* that have been embedded in *System 1*, eliminating the need for further effortful thinking. Therefore, it encompasses not only *id*-driven impulses but also sacred values and *superego* considerations. In contrast, purpose is formed within the conscious part of thinking when *System 2* approves the explanation provided by *System 1*. This approval can occur either without engaging in systematic thinking or after employing systematic reasoning, including utilitarian thinking, moral reasoning, *superego* considerations regarding societal expectations, and critical thinking. That is, in my view, the concept of motive also includes the conscious part of thought in which *System 2* selects the reasons for action. This is distinct from the next stage in the process, where intent and purpose to bring about a specific outcome take shape—a stage that occurs solely within the conscious part of thought.

To explain motive using statistical concepts, I will reference Gross's example concerning a father-of-the-bride's concerns about potential grooms.<sup>203</sup> I will distinguish between different motives of prospective brides. The question is whether the groom's father should be concerned about the motives or intentions of two prospective brides: one who wants to marry his wealthy but unattractive son and another who wants to marry his handsome but poor son. The father questions the motive of the bride seeking to marry his wealthy but unattractive son, even though her intention to marry him is clear. The motive functions as the explanatory variable, while her intention or purpose — marrying the son — is the

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<sup>202</sup> *Ibid.*

<sup>203</sup> Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) at 111.

explained variable, representing the outcome (0 = she does not marry him, 1 = she marries him).

Conversely, the father wonders about the intention of the bride interested in his handsome but poor son because it is unclear whether she truly intends to marry him. The motive is the explanatory variable, while her intention or purpose – whether she plans to marry him – is the explained variable, indicating the outcome (0 = she does not intend to marry him, 1 = she intends to marry him). Thus, the relationship between motive and intention/purpose is a causal one, reflecting the link between an explanatory variable and an explained variable. Motive serves as the explanatory variable that influences intention and purpose to commit murder – representing the explained variable.

### ***B. The Relevance of Motive to Determining the Degree of Culpability:***

The prevailing view holds that motive is irrelevant to determining culpability and should be considered only at the sentencing stage. Contrary to this approach, I argue that the criminal law should recognize motive as a constituent element of the offence within the mental element. I base my position on several arguments. First, motive is an essential factor for determining culpability and its degree, as it forms part of the decision-making process leading to the act of killing. Second, the legal system already considers motive in practice, though it fails to acknowledge this explicitly. Third, human beings are inherently incapable of resolving such issues without making a moral judgment about character. Finally, I will explain why the legal system conceals the fact that, in reality, motive is used to determine culpability, and how criminal law inevitably engages in normative judgments about what is good, right, and appropriate.

#### ***1. The Essential Role of Motive in Determining Culpability:***

I argue that understanding the process of forming the decision to kill in the crime of murder requires considering motive. Motive is an essential factor in assessing the degree of culpability, as intention and purpose cannot be fully understood without examining the underlying motive. Without motive, the criminal

mindset cannot be formed. Motive explains why a person chooses to commit murder. Sometimes the motive is direct, such as deriving pleasure from violence, while at other times, it may involve an indirect pursuit of material benefits that can be gained through the act of killing. Even the enjoyment derived from material gains ultimately constitutes psychological gratification.

Motive reflects the impulses and emotions that drive action, completing the full picture of the decision-making process. This process includes a backward-looking motive formed within *System 1*, and proved by *System 2*, whether through systematic thinking or automatic approval by the conscious "self" without questioning *System 1*'s impressions, alongside a forward-looking purpose or intent formed within *System 2*. It is crucial to examine the negative thought vectors that could have inhibited action in response to the impulse to kill. It is appropriate to examine whether they existed or were sufficiently strong. The decision to kill is influenced by the offender's character, thought patterns, deeply held beliefs, and specific tendencies for avoiding cognitive dissonance. Therefore, the formation of goals, motives, and the offender's character cannot be separated from the act of murder itself.

A similar view is presented by Norrie, who argues that disregarding motive at this stage undermines the principle of individual justice, as it fails to distinguish between offenders driven by fundamentally different moral impulses. Norrie contends that if motive has significance at the sentencing stage, it should also carry weight when assessing culpability.<sup>204</sup> Leist supports his view that motive is relevant in determining culpability by emphasizing that motive reflects an increased risk to the protected legal value—for example, actions driven by hatred.<sup>205</sup>

Furthermore, motive is directly and closely linked to the commission of the offence, unlike factors such as prior criminal history or community service, which reflect character traits not directly connected to the criminal act itself.<sup>206</sup> Finally, Leist asserts

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<sup>204</sup> Alan W Norrie, *Crime, Reason and History*, 2nd ed (Cambridge: Cambridge University Press, 2001) at 35–58.

<sup>205</sup> Leist, *supra* note 13 at 89, 94.

<sup>206</sup> *Ibid* at 126.

that motive reflects the degree of harm caused to the protected legal value, much like the distinction between intent and recklessness.<sup>207</sup> He explains that just as there are good and bad purposes, there are also good and bad motives. Leist agrees with Norrie that an act driven by a reprehensible emotion fundamentally differs from one motivated by another type of emotion.<sup>208</sup> Additionally, Leist argues that if motive can serve as a mitigating factor, it should likewise be considered as an aggravating factor.<sup>209</sup>

## *2. A Critique of the Rejection of Motive Recognition:*

The prevailing view holds that motive is irrelevant to determining culpability and should be considered only at the sentencing stage. This perspective is based on the principle of "retributive justification," according to which the purpose of criminal law is to punish individuals based on their conscious choices, rather than on the internal beliefs or emotions that motivated their actions.<sup>210</sup> This approach also draws on Immanuel Kant's categorical imperative, which prohibits treating a person as a means to convey moral messages about undesirable motives.<sup>211</sup> Thus, recognizing motive as relevant to culpability might seem to contradict this principle by framing the individual as a means for communicating normative values.<sup>212</sup>

However, I argue that motive should be recognized as an essential component of the mental element in criminal offences. First, contrary to the claim that punishment should be based solely on conscious choices, it must be acknowledged that when *System 1* presents its conclusions to *System 2*, those conclusions become conscious and directly influence the formation of the criminal decision. The selection of reasons for action by *System 2* is part of the motive stage; only afterward do intent and purpose take shape.

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<sup>207</sup> *Ibid* at 127.

<sup>208</sup> *Ibid* at 166.

<sup>209</sup> *Ibid* at 91.

<sup>210</sup> *Ibid* at 115, 147, 154.

<sup>211</sup> Immanuel Kant, *The Metaphysical Elements of Justice*, translation by John Ladd (Indianapolis: Bobbs-Merrill, 1966) at 99-107.

<sup>212</sup> Leist, *supra* note 13, at 155.

Second, examining motive does not reduce a person to a means but rather respects their humanity by considering their choices within the full context of their values, impulses, and personal circumstances. Disregarding motive risks leaving the criminal process devoid of a deep understanding of the act and undermining the ability to properly assess the defendant's moral responsibility.

This normative justification for considering motive can be aligned with the constitutional framework of Canadian criminal law. Recognizing motive as a component in the evaluation of culpability would not contravene Section 7 of the Canadian *Charter of Rights and Freedoms*, which guarantees that no one shall be deprived of life, liberty, or security of the person except in accordance with the principles of fundamental justice.<sup>213</sup> Canadian courts have held that these principles require laws to be clear, proportionate, non-arbitrary, and procedurally fair.<sup>214</sup> The requirement to prove motive—when it is part of the offence definition, as in hate crimes or terrorism—has been upheld as consistent with these principles.<sup>215</sup> In *R v Khawaja*, the Supreme Court confirmed the constitutionality of requiring an ideological or religious motive under anti-terror legislation, finding that such a requirement limits the law's scope to only the most serious offences and promotes fairness.<sup>216</sup> Thus, incorporating motive as a criterion for culpability—particularly where it refines moral distinctions between offenders—can be justified as enhancing, rather than violating, the principles of fundamental justice.<sup>217</sup>

### *3. The Legal System Already Considers Motive in Determining Culpability:*

Another reason justifying the recognition of motive as a fundamental component of the mental element lies in the fact that

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<sup>213</sup> *R v Ruzic*, 2001 SCC 24 at paras 37–43 [*Ruzic*]; *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act (UK)*, 1983, c11.

<sup>214</sup> *R v Ruzic*, 2001 SCC 24 at paras 37–43.

<sup>215</sup> *R v Khawaja*, 2012 SCC 69 at paras 39–45.

<sup>216</sup> *Ibid* at paras 39–45.

<sup>217</sup> *Khawaja*, *supra* note 215 at paras 39–45; *Ruzic*, *supra* note 213 at paras 37–43.

criminal law already takes motive into account, albeit not explicitly. An open acknowledgment of this consideration would enable the development of consistent and transparent legal doctrine, reducing interpretative discrepancies and establishing a solid theoretical foundation for assessing culpability and its degree.

Leist demonstrates in his book that, in practice, certain doctrines and categories of offences in substantive criminal law examine the emotion driving the act, rather than merely the desire to achieve a specific goal, when determining culpability.<sup>218</sup> For instance, the law in Israel, England, and several U.S. states explicitly considers Past-Oriented motives stemming from emotions or beliefs that led to the act.<sup>219</sup> In his book, Leist discusses several key doctrines where motive plays a central role in establishing criminal liability, including hate crimes,<sup>220</sup> the provocation defence,<sup>221</sup> exemption from criminal liability for attempt due to repentance, offences involving attempts, aiding, and solicitation,<sup>222</sup> as well as justificatory and excuse defences.<sup>223</sup>

Leist demonstrates that criminal law accounts for motive when determining culpability, both as an aggravating factor, such as in hate crimes, and as a mitigating factor, such as in the provocation defence or exemption from criminal liability based on repentance.<sup>224</sup> Norrie further argues that motive is, in fact, considered in certain cases, both explicitly – in doctrines such as hate crimes and justificatory defences, and implicitly – when courts consider motives in acquitting defendants by finding that the required intent was not established. Therefore, motive should be consistently considered in all relevant cases, not selectively.<sup>225</sup>

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<sup>218</sup> Leist, *supra* note 13, at 94, 151.

<sup>219</sup> *Ibid* at 124.

<sup>220</sup> *Ibid* at 116-119, 128.

<sup>221</sup> *Ibid* at 132.

<sup>222</sup> *Ibid* at 101.

<sup>223</sup> *Ibid* at 51, 105, 107.

<sup>224</sup> *Ibid* at 94.

<sup>225</sup> Norrie, *supra* note 204 at 35-58.

*i. The Limitations of Human Reasoning:*

In practice, human beings are incapable of evaluating an action without considering the motive behind it, and criminal law must acknowledge this reality. This limitation stems from two primary reasons: the inherent need for narrative and the inability to reason otherwise.

*ii. The Need for Narrative:*

Humans are unable to evaluate and judge actions without understanding the narrative behind them—the context and reasons that motivated the actor. Judges, being human, are no exception. They seek to comprehend the full story behind the act and consider the motives, even if they are unaware of doing so or fail to articulate it explicitly. Requiring open acknowledgment of motive in judicial decisions would help judges become aware that they are indeed evaluating motive. It would also enable them to present the full range of considerations underlying their rulings. This would promote transparency and allow for more reasoned critique of their decisions.

*iii. The Inability to Reason Otherwise:*

The rules governing the evaluation of evidence in criminal law must align with human cognitive capabilities. Thus, requiring a judge to be entirely objective is unrealistic. Instead, we should demand that the inherently subjective judge provide reasoned justifications for their decisions, enabling meaningful critique and debate. The legal system should reflect the human capacity to understand the motives behind actions, rather than pretending that absolute objectivity is achievable.

***4. The Irrelevance of Motive in Criminal Law as a Rhetorical Façade:***

The prevailing view holds that motive is irrelevant in criminal law, based on the principle of state neutrality in liberal democracies. According to this principle, the state shall not judge individuals'

conceptions of the good or the motives behind their actions, but rather only their actions defined as offences.<sup>226</sup>

However, I argue that the notion of "state neutrality" is a rhetorical façade masking the true purposes of criminal law. According to the conflict theory perspective, the neutrality of criminal law is an illusion, as the legal system ultimately serves the interests of dominant power groups. The ideal of state neutrality is designed to maintain social order and prevent uprisings among marginalized groups. The state intervenes—or refrains from intervening—according to the interests of those in power.<sup>227</sup> For example, motive is recognized as a mitigating factor in cases of provocation but is dismissed as an aggravating factor in cases of murder driven by sexual motives, under the claim that the "liberal state does not pass judgment on notions of the good."

This distinction reveals the inherent lack of neutrality in criminal law, which is shaped by political and social considerations. The state regulates what is convenient for it to regulate while hiding behind the neutrality principle. Value judgments occur even when the legal system portrays itself as objective.<sup>228</sup> Explicit recognition of motive, alongside an open acknowledgment of the normative judgments underlying culpability determinations, would enhance transparency and enable more reasoned critique of judicial decisions. It would also prevent selective use of motive based on hidden social interests, establishing a more equitable legal system attuned to the moral considerations inherent in criminal adjudication.

This conclusion is also supported by Kahan and Nussbaum, who argue that criminal law is inherently filled with value judgments.<sup>229</sup> Therefore, examining the nature of emotions that led to an action for the purpose of determining culpability and its degree does not contradict individual rights.<sup>230</sup> According to them,

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<sup>226</sup> Leist, *supra* note 13 at 155, 166, 196.

<sup>227</sup> Goode, *supra* note 120 at 113.

<sup>228</sup> Norrie, *supra* note 204 at 35–58.

<sup>229</sup> Daniel M. Kahan & Martha C. Nussbaum, "Two Conceptions of Emotion in Criminal Law" (1996) 96:2 Colum L Rev 296 at 362–359.

<sup>230</sup> Leist, *supra* note 13 at 179.

even those unwilling to assess the moral quality of the emotion motivating the action are, in fact, making a judgment about the good. By refusing to evaluate motive, they implicitly assume that there is no moral distinction between someone who killed to protect their child and someone who killed another person over a parking space. This assumption is far from neutral; it constitutes a covert normative stance.<sup>231</sup> In contrast, it would be preferable to evaluate the nature of the emotions driving the action openly when determining culpability and its degree.<sup>232</sup> Similarly, Norrie emphasizes that elites use criminal law as a tool for social control over marginalized groups.<sup>233</sup> Thus, motive is considered relevant in criminal law when it aligns with the interests of powerful social groups and is deemed irrelevant when it conflicts with those specific interests.<sup>234</sup>

In light of the analysis presented, considering motive within the mental element of criminal law is not merely a philosophical or moral question but also a legal and practical necessity. Motive, as a representation of impulses, values, and beliefs, reflects the psychological mechanism driving the decision-making process, making it essential for determining the degree of culpability. Ignoring motive creates an illusion of legal neutrality, while in practice, it serves the interests of strong groups. Moreover, human beings, including judges, are incapable of separating an action from the context that motivates it. Therefore, criminal law must openly acknowledge motive. Such an approach would enhance transparency, allow for criticism of judicial decisions, and enable the development of a clear and consistent theory regarding the use of motive, leading to a more equitable law enforcement system.

### ***5. Why It Is Possible and Appropriate to Consider Motive in Determining Guilt Despite the Challenges:***

In this chapter, I will address the conceptual difficulties that ostensibly preclude considering motive in determining guilt. These

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<sup>231</sup> *Ibid* at 167.

<sup>232</sup> *Ibid* at 167.

<sup>233</sup> Norrie, *supra* note 204 at 35-58.

<sup>234</sup> Leist, *supra* note 13 at 199.

include distinctions between emotion and impulse, as well as between fleeting impulses and emotions versus fixed character traits. Following this, I will discuss theoretical challenges that allegedly negate the examination of motive for determining guilt, such as difficulties in identifying and proving the emotions and impulses driving an action and whether the motive consistently aligns with and leads to the intended goal and volition. In this context, I will also explore weak-willed desires and the proposal to eliminate the volitional axis. Lastly, I will address evidentiary difficulties associated with proving motive. In this section, I aim to explain why, despite these challenges, examining motive remains appropriate and essential in determining guilt.

*i. Conceptual Difficulties in Defining Motive:*

*The Distinction Between Emotion and Impulse:* A central debate concerns whether motive can be influenced. According to the "mechanical theory of emotions", emotions are indistinguishable from impulses because they involve no evaluative judgments about the world, arising solely from genetic predispositions and remaining unaffected by social perceptions. From this perspective, examining motive is unwarranted, as emotions are considered immutable and socially unmodifiable.<sup>235</sup> However, adopting the "evaluative theory of emotions" leads to a different conclusion. Emotions are distinct from impulses because they are shaped by beliefs about specific objects or situations. They are not static genetic conditions but dynamic states influenced by environmental and social contexts.<sup>236</sup> Consequently, considering motive becomes relevant in assessing culpability, as emotions can be socially influenced and behaviour can be guided accordingly.

*Distinguishing Between Fleeting Impulses and Emotions, and Stable Character Traits:* A central debate in legal theory concerns whether motive reflects transient emotions and impulses or stable character traits. Some scholars view motive as indicative of enduring personality traits, arguing against examining the defendant's

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<sup>235</sup> *Ibid* at 133.

<sup>236</sup> *Ibid* at 134.

character in criminal proceedings.<sup>237</sup> Others regard motive as consisting of momentary emotions, asserting that such ephemeral states lack legal relevance.<sup>238</sup>

I contend that both stable character traits and transient emotions leading to the criminal act warrant consideration, provided the focus remains strictly on components relevant to the commission of the offence. This approach acknowledges that both impulses and enduring traits form part of an integrated cognitive process from which the decision to commit a crime emerges. An impulse to act violently is required, which does not exist in everyone, alongside the absence of impulse-inhibiting factors. Factors such as moral reasoning, social expectations, utilitarian calculations, and critical thinking. The tendency to avoid employing systematic thinking, or the weakness of the negative vectors of systematic thinking, stems from habit and character.<sup>239</sup> Fixed tendencies are part of the thought process.<sup>240</sup> Motive arises from deeper motivational systems embedded in one's personality, including reward-seeking tendencies and the avoidance of punishment.<sup>241</sup>

I believe that the attempt to portray motive as either momentary emotions or fixed character traits stems from scholars' desire to avoid acknowledging that criminal law passes moral judgment on the character of the murderer. I argue that the state makes determinations of right and wrong even when it pretends to be neutral. Because motive encompasses both momentary emotions and stable character traits. In my view, it is appropriate to openly acknowledge that the state exercises moral judgment over both a person's character and momentary emotions. It is important to note

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<sup>237</sup> Kremnitzer & Ghanayim, *supra* note 18 at 330; Hyron T Huigens, "Homicide in Aretic Terms" (2002) 6 Buff Crim L Rev 92; Michael S Moore, *Act and Crime: The Philosophy of Action and Its Implications for the Criminal Law* (Oxford: Oxford University Press, 1993) at 149-55; Thomas Morawetz, *The Philosophy of Law* (Belmont, CA: Wadsworth Publishing, 1980) at 226-30.

<sup>238</sup> Kremnitzer & Ghanayim, *supra* note 18, at 332.

<sup>239</sup> *Ibid* at 292.

<sup>240</sup> Corr, DeYoung & McNaughton, *supra* note 118 at 159-160.

<sup>241</sup> *Ibid* at 164.

that I claim that motive should be examined only in relation to elements relevant to the commission of the offence and not to general personality traits unrelated to the specific act. In this way, personal beliefs or tendencies, such as religious faith or sexual orientation, when they are unrelated to the offence, will not weigh against the individual when assessing culpability.

ii. *Theoretical Challenges in Explaining Motive:*

*Does Motive Always Correspond to Intention and Purpose?* A central debate concerns whether every motive necessarily leads to an intention or a specific goal. Some scholars argue that wherever a motivating emotion exists, intention and purpose are always present.<sup>242</sup> Others maintain that a motivating emotion does not invariably translate into intention and purpose.<sup>243</sup> Proponents of an intermediate view assert that while emotion and intention are distinct and do not always co-occur, intention typically arises where emotion is present.<sup>244</sup>

I believe that perceiving motive and purpose as a single component involves a fundamental error. While the existence of both motive and purpose is required to complete a full thought process, they are inherently distinct components. The motive is formed within the framework of *System 1* as impulses and emotions that arise in response to certain input, along with the explanation that *System 1* provides for that input, impulses, and emotions. It also includes the conscious selection of reasons for action by *System 2*. In contrast, the purpose is formed through *System 2*. However, not all impulses and emotions ultimately lead to Volition. If negative thought vectors are present, such as competing impulses and emotions or *superego* considerations and Strong beliefs embedded in *System 1*, or systematic thinking components of *System*

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<sup>242</sup> Duff, *supra* note 194 at 170-171.

<sup>243</sup> Moore, *supra* note 237 at 149-155. Rollin M Perkins, "Rationale of Mens Rea" (1939) 52 Harv L Rev 905 at 921-23; Keren Shapira-Ettinger, "Recklessness in Criminal Law - Does Opinion Matter?" (1998) 14 Mehkarei Mishpat 179 (in Hebrew) online: <Nevo.co.il>.

<sup>244</sup> Kent Greenawalt, "Reflections on Justifications for Defining Crimes by Category of the Victim" (1992-93) 79 Ann Surv Am L 617.

2, these vectors may prevent the formation of a purpose based on a specific motive. Nevertheless, wherever a purpose has been formed, there is a motive that preceded it in the thought process.

*Choosing Reasons for Action:* An argument often raised is that individuals lack control over the reasons motivating their actions, and thus should not be held accountable for them.<sup>245</sup> However, even if one cannot fully control initial impulses, individuals retain control over the decision whether to act upon them.<sup>246</sup> This control is exercised through a process of evaluating reasons, in which the "conscious self" either endorses or rejects impulses based on existing beliefs and values.<sup>247</sup> The offender maintains control over selecting justifications for action, and it is this justification that constitutes the causal factor leading to the commission of the act.<sup>248</sup> Therefore, reasons for action are relevant to assessing criminal liability and should be considered when determining culpability.<sup>249</sup>

In my view, the severity of guilt does not stem merely from acting out of a negative emotion. But rather from the fact that the murderer allowed that emotion to prevail and lacked inhibitory mechanisms capable of controlling inappropriate impulses and emotions. The ability to control impulses depends on two variables: First, impulse control is achieved by weakening the cognitive connections associated with those impulses. The more a person refrains from acting on a particular impulse, the lower its frequency and intensity become. Conversely, repeated engagement with and reinforcement of an impulse will lead to its intensification. Second, impulses can be controlled by strengthening the "negative vectors" of the thought system. This strengthening includes activating systematic thinking, encouraging utilitarian and moral reasoning, developing *superego* mechanisms, and fostering critical thinking. Through this approach, resistance to undesirable impulses and the

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<sup>245</sup> Michael S Moore, *Educating One's Self in Public* (Cambridge: Cambridge University Press, 2000) at 172-77; WD Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930) at 4-5.

<sup>246</sup> Greenawalt, *supra* note 243 at 617, 624-625.

<sup>247</sup> Joseph Raz, "Facing Up: A Reply" (1989) 62 S Cal L Rev 1153 at 1174-78.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

ability to refrain from acting on them become possible. This enables individuals to consciously choose the reasoning for action.

*The Elimination of the Volitional Axis:* Leist argues that in criminal law, there is no room for attributing volitional intent toward outcomes when it comes to weak desires, such as indifference or recklessness. This is because they base criminal liability on desires, in the weaker sense, that are not directly expressed in the action and have no causal connection to the prohibited act. The indifferent actor believes that the outcome will occur, but neither desires it nor takes any action to prevent it. The reckless actor, on the other hand, hopes that the outcome will not occur. Their motivation to act in a particular way is not directed toward a specific outcome but stems primarily from a lack of attention or disregard for the consequences. What grants relevance to strong desires is the intrinsic link and causal connection between these desires and the criminal act. Thus, only a motive that constitutes an emotion or belief that led to the act bears significance for assessing the perpetrator's criminal culpability.

This axis of volitional can be directed not only toward the outcomes of the act but also toward its circumstances.<sup>250</sup> The American MPC allows for the attribution of volitional intent toward the circumstances of a criminal offence. According to the MPC, intent toward such circumstances may be established through a mere "hope" that they exist. However, Leist contends that attributing "purpose" based on hope is conceptually flawed. He argues that hope may constitute a weak desire, a passive expectation that falls short of a genuine will to achieve the relevant circumstance. Therefore, Leist maintains that the MPC should explicitly define volitional intent toward the circumstances of a crime as acting due to a real desire for the circumstance to exist, rather than relying on hope alone.<sup>251</sup>

While I agree with Leist that the volitional intent toward circumstances should be examined, I do not agree with his approach to eliminating the volitional axis with respect to outcomes. Even those who act out of volitional intent in the weaker

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<sup>250</sup> Leist, *supra* note 13 at 213.

<sup>251</sup> *Ibid* at 212, 220.

sense, such as indifference or recklessness, bear criminal responsibility. The absence of a clear intent regarding a specific outcome does not absolve from criminal liability those who act with disregard for the protected value or without commitment to it. Conduct carried out while ignoring severe consequences, even without directly intending them, reflects a moral failure that justifies the imposition of legal responsibility.

The indifferent offender demonstrates no commitment to the protected value of human life. He is willing to accept the loss of human life to achieve his goals, whether material or psychological, such as alleviating boredom. Although he may lack a strong desire to cause harm, it cannot be said that he is committed to preserving human life. His conduct reflects a profound moral indifference toward the value of life. The indifferent offender's culpability arises from a fundamental lack of empathy toward others.

The reckless offender acts with a conscious choice to endanger the protected value, relying on the hope that the harmful outcome will not occur. However, this hope reflects a childish illusion and moral immaturity, demonstrating a failure to take responsibility for the consequences of his actions. His decision to take an unreasonable risk disregards the high probability of the harm materializing. By doing so, he exhibits disregard and a lack of commitment to the protected value. Had he been truly committed to the value of human life, he would have exercised greater caution to preserve it. His choice to engage in dangerous conduct reveals "cracks" in his positive motivations and an inherent indifference toward the potential consequences of his actions.

I believe that the thought process should be examined in its entirety, and therefore, I disagree with Leist's position on eliminating the volitional axis with respect to outcomes. In cases of recklessness or indifference, while the impulse and desire to act may be weak, it is the absence of strong inhibitory mechanisms—"negative vectors" of thought—that allows the prohibited act to be carried out. Weak motives and desires may influence *System 2* to choose to commit an offence when these inhibitory forces, such as utilitarian reasoning, moral considerations, or *superego* mechanisms, are insufficient. For example, an indifferent or reckless person may fail to consider the consequences of their

actions due to weak utilitarian thinking or fail to recognize another's right to life due to weak moral reasoning. A civilized society is not only required to suppress violent impulses but also to develop empathy, morality, and utilitarian thinking that strengthen the negative vectors preventing violent acts. Thus, there is justification for imposing criminal liability even in cases of weak volitional intent, as the absence of internal inhibitory mechanisms enables the offence to occur.

**Table 3: The Complete Thought Process of the Reckless and Indifferent Offender**

<i>System 1</i>	<i>System 2</i> Automatically Adopting the Conclusions of Thinking System <i>1</i>	<i>Or - System 2</i> Engaging in Systematic Reasoning
Impulse to Commit an Act Resulting in the Loss of Human Life $5 = X$		The Utilitarian Reasoning of the Reckless and Indifferent Offender Is Weak; They Fail to Consider the Consequences of Their Actions. $1=x$
Emotion Driving the Commission of an Act Resulting in the Loss of Human Life $0 = X$		The Moral Reasoning of the Reckless and Indifferent Offender Is Weak; the Value of Human Life Is Not Significant Enough to Deter Them from Committing the Act. $1=x$
Absence of Conflicting Impulses and Emotions $0 = X$		The Critical Thinking of the Reckless and Indifferent Offender Is Weak; They Fail to Identify Alternative Ways to Achieve Their Goals Without Endangering Human Life. $1=x$
The explanation provided by Thinking System <i>1</i> is that the impulse and emotion driving the act that may	Thinking System <i>2</i> does not engage in systematic	$3=1+1+1$

<p>result in the loss of human life are justified because the person either hopes that the harmful outcome will not occur or is indifferent to human life, making this possibility irrelevant as a factor that would prevent them from committing the act. 5=x</p>	<p>reasoning because the act aligns with the individual's deeply held beliefs, stems from laziness, or reflects a desire to avoid cognitive dissonance. X0=</p>	
<p>15=5+5+5</p>	<p>10&lt;15-0 When Thinking System 2 Fails to Engage in Systematic Reasoning: The Reckless Offender Will commit manslaughter, and the Indifferent Offender Will Commit Murder.</p>	<p>10&lt;15-3 When Thinking System 2 Engages in Systematic Reasoning but Still Confirms the Conclusions of Thinking System 1: The Reckless Offender Will commit manslaughter, and the Indifferent Offender Will Commit Murder.</p>

iii. *Challenges in Proving Motive:*

Some suggest that proving motive is impossible when the offender is unaware of the motive themselves.<sup>252</sup> However, I contend that proving motive is possible despite these difficulties. First, an individual may be aware that they are acting to satisfy feelings of anger and rage. This occurs when *System 2* consciously acknowledges and approves the impressions formed by *System 1* regarding the emotion of anger, enabling the formation of both intention and purpose. Second, even when specific motives remain

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<sup>252</sup> Adam Candeub, "Motive Crimes and Other Minds" (1994) 142 U Pa L Rev 2071 at 2120-21.

unconscious, the conscious *System 2* ultimately controls the decision to commit murder by approving the subconscious suggestions generated by *System 1*. In this context, the conscious acknowledgment of justifications provided by the individual to themselves and others is sufficient to establish motive.

It is argued that establishing a causal link between motive and action is challenging, as determining the specific motive that led to the act is often difficult.<sup>253</sup> However, I contend that motive is not limited to the emotion or impulse driving the act but also includes the justification provided by *Thinking System 1* for those emotions and impulses, explaining why they seem reasonable and justified. Therefore, the existence of multiple motives or the presence of a dominant motive leading to the act is irrelevant, as the entire thought process must be examined rather than the motive in isolation. The explanations and justifications provided by *System 1* and approved by *System 2* incorporate and weigh all motives, both primary and secondary. The decision to commit or refrain from murder reveals whether competing impulses outweighed the central motive or were ultimately too weak to prevent the act.

It has been argued that even when motive resides in the subconscious, this does not mean it cannot be proven. Intense and expressive emotions, such as extreme rage or burning racial hatred, are particularly identifiable.<sup>254</sup> I add another layer to this argument, contending that just as it is possible to prove a genuine deliberative process and the formation of the decision to kill, it is also possible to prove specific thought processes within the framework of forming that decision. The challenge of proving motive is no different from other difficulties in proving mental elements, such as intent, which are also inferred from external signs and circumstances. Psychological and criminological research can provide tools for identifying connections between motives and actions, including behavioural patterns exhibited by offenders. Psychological analysis can infer subconscious mental processes based on acts, behaviours, and statements. For example, acts of torture and mutilation of a body, contrasted with expressions of

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<sup>253</sup> Edelstein, *supra* note 99 at 62.

<sup>254</sup> Leist, *supra* note 13 at 193.

empathy toward the victim, can reveal significant aspects of the offender's psychological state.<sup>255</sup>

Finally, I maintain that even when motive cannot be explicitly proven, this does not imply its absence, nor does it mean that judges refrain from inferring motives based on circumstantial behaviours to construct a coherent narrative of events. In my view, such inferences should be openly acknowledged rather than concealed under the pretense of judicial objectivity that claims to operate independently of causal explanations. Recognizing and articulating these inferred motives would enhance the transparency and intellectual integrity of judicial reasoning.

Based on the analysis presented, it is clear that examining motive to determine culpability in the offence of murder is essential and attainable, despite the practical and theoretical challenges involved. After discussing the proper conceptualization of motive and presenting the argument for its consideration when determining the degree of culpability in committing murder, I will now explain how, in my view, motive influences the severity levels of the act.

## V. A NEW MODEL FOR RANKING CULPABILITY BASED ON MOTIVE AND COGNITIVE DISSONANCE

I wish to present a position asserting that motive constitutes a central component in assessing culpability for the offence of murder and enables differentiation between varying degrees of severity of the act. This approach could broaden the legal discourse in legal systems (such as the Canadian, American and Israeli systems), which currently focus on elements such as "premeditation" and "provocation" to grade culpability but do not explicitly acknowledge the importance of examining motive in determining the degree of culpability.

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<sup>255</sup> *Ibid* at 180.

**A. Examining the Type of Motivating Emotion (Anger or Fear) in Mitigating Murder Circumstances:**

I argue that the type of motivating emotion leading to homicide should be considered, distinguishing between emotions such as anger and rage, referred to as "demonic effects," and emotions like despair and fear, referred to as "non-demonic effects."<sup>256</sup> This perspective aligns with Norrie's assertion that social anger or frustration cannot serve as legitimate motives justifying mitigation of criminal culpability.<sup>257</sup> Additional support for this view is found in Greenawalt's statement that the degree of evil inherent in an assault varies depending on its motivating reason, with assaults driven by altruistic motives being less severe than those driven by selfish motives.<sup>258</sup>

In evaluating mitigating motives in the crime of murder, the motive of fear or despair arising from a state of extreme helplessness warrants consideration. These motives may reflect profound psychological distress that compelled the offender to act under a perceived existential threat or in the absence of any viable alternative. For example, a prolonged experience of fear or sustained abuse could be recognized as a mitigating factor if it demonstrates an enduring sense of imminent danger to the offender's life or physical integrity.

A clear distinction must be drawn between cases where the offender acted out of legitimate psychological fear and those where the killing resulted from motives such as anger, revenge, or hatred. This distinction ensures that only motives reflecting authentic psychological distress are considered mitigating circumstances.

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<sup>256</sup> Kremnitzer & Ghanayim, *supra* note 18 at 340.

<sup>257</sup> Norrie, *supra* note 204 at 35-58.

<sup>258</sup> Kent Greenawalt, "Distinguishing Justifications from Excuses" (1986) 49 L & Contemp Probs 89 at 92-93.

***B. Examining Motive to Identify the Absence of Cognitive Dissonance in Aggravated Murder:***

The motive in the crime of murder serves as a central indicator of the offender's attitude toward the protected value of human life and the extent to which societal values are rejected.<sup>259</sup> The degree of threat to this protected value directly stems from the motives that led to the crime and significantly impacts the assessment of criminal culpability.

For example, circumstances such as causing physical or psychological suffering to the victim, violating the victim's dignity, or targeting a group based on race or nationality reveal deeper implications. These actions reflect violations of fundamental principles like equality and human dignity.<sup>260</sup> Incorporating a graded scale of subjective attitudes toward the circumstances within the mental element of the crime would enable a clearer distinction between degrees of severity. This would ensure that the crime is established only when the offender's intent demonstrates a specific, ethically significant attitude toward the protected value, beyond a mere intention to commit the act.

***1. Problematic Criteria for Differentiating Degrees of Severity in Murder:***

Before discussing what I consider to be the most appropriate criterion for distinguishing between degrees of severity in murder, it is important to address several commonly debated criteria often applied in this context.

*Premeditation vs. Spontaneity:* As I mentioned at the beginning of the article. In criminal law, premeditated murder is traditionally considered more severe than spontaneous murder. However, premeditation does not necessarily indicate greater culpability. A premeditated murderer may still experience cognitive dissonance, reflecting an internal conflict with their actions. In contrast, a spontaneous murderer might avoid cognitive dissonance due to the discomfort it causes, cognitive laziness, or because the act reflects

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<sup>259</sup> Kremnitzer & Ghanayim, *supra* note 18 at 333.

<sup>260</sup> *Ibid* at 53.

their sacred beliefs or deeply held convictions. As I explained in the previous chapters of the article.

*Purpose vs. Means:* The distinction between murder committed to achieve a specific purpose, such as material or personal gain, and murder where killing itself is the intended goal, driven by emotions like hatred or rage, does not inherently reflect differing levels of severity. Both forms represent a profound violation of the value of human life. Killing a person to achieve any objective constitutes an extreme disproportionality between the act of taking a life and the aim of deriving personal benefit.<sup>261</sup>

*Psychological vs. Material Motives:* There is no inherent moral distinction between psychological motives, such as anger or frustration, and material motives, such as the pursuit of financial gain. A person driven by greed is just as culpable as one acting to satisfy psychological desires. Ultimately, every material motive is rooted in an emotional drive, as individuals seeking money or tangible benefits aim to fulfill a sense of pleasure or satisfaction.

In my view, rather than relying on criteria such as premeditation, emotional motives, or murder as an ultimate goal, it is more appropriate to assess the presence or absence of cognitive dissonance as a measure reflecting both the degree of culpability and the level of dangerousness. This approach allows for a more nuanced evaluation of the murderer's attitude toward the value of human life and the threat they pose to society. In the following subsection, I will explain the distinction between a murderer experiencing cognitive dissonance and one acting without such dissonance.

## ***2. The Absence of Cognitive Dissonance as an Aggravating Criterion:***

A person who commits murder despite experiencing cognitive dissonance differs from a murderer who is fully reconciled with their actions, as their psychological structure and attitude toward the value of human life are distinct. The absence of cognitive dissonance indicates that the offender acts with internal coherence, without inhibitions or moral conflict regarding their actions. This

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<sup>261</sup> Kremnitzer & Ghanayim, *supra* note 18 at 311.

reflects a profound rejection of social values and the internalization of attitudes opposed to accepted social norms. In contrast, an offender experiencing cognitive dissonance undergoes internal conflict, and certain mechanisms may prevent them from committing murder again. The presence of cognitive dissonance, manifested through feelings of remorse or internal struggle, may reduce the offender's level of social dangerousness.

This distinction allows for grading the severity of the offence according to the offender's psychological structure, examining whether their attitude toward the protected value is entirely negative and dismissive or contains internal contradictions indicating potential for change.<sup>262</sup> It is possible that under certain circumstances, the offender would not have committed the crime, suggesting a less absolute rejection of the protected value. Three primary psychological patterns concerning the protected value of human life can be proposed, enabling differentiation between the base offence and aggravated circumstances: the ambivalent, the apathetic, and the cruel.

*i. The Ambivalent Murderer – The Existence of Cognitive Dissonance:*

The ambivalent murderer is characterized by cognitive dissonance resulting from a significant internal conflict between violent impulses and moral beliefs or personal principles. This dissonance arises from the gap between the individual's self-perception as someone committed to moral values and their violent actions. Such a gap may stem from a clash between uncontrollable impulses or intense emotions and systematic thinking or a commitment to humanitarian values. Indicators of cognitive dissonance in the ambivalent murderer may include expressions of remorse, an active conscience, feelings of guilt, noticeable hesitation before or after committing the act, showing empathy toward the victim, or attempting to minimize unnecessary suffering. These characteristics likely indicate an internal struggle between violent impulses and protected values such as human dignity, equality, and the prevention of suffering. Internal moral considerations or adherence to certain principles may still exist,

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<sup>262</sup> *Ibid* at 264.

even if they stem from the murderer's need to perceive themselves as a moral person.

Aristotle distinguishes between two types of wrongdoers in his ethical theory: the "weak-willed" and the "morally corrupt." The "weak-willed" individual experiences cognitive dissonance and acts against their moral beliefs when yielding to impulses or momentary needs. In contrast, the "morally corrupt" individual feels no remorse or cognitive dissonance, as their actions are fully aligned with their beliefs.<sup>263</sup> A person who yields to conflicting inclinations, impulses, or emotions that contradict their moral values and perception of the good is considered "weak-willed." Despite their failure to act in accordance with their moral values, they are regarded as ethically distinct from the "morally corrupt" individual. This distinction arises because the "weak-willed" individual possesses good intentions and moral awareness, even if they fail to actualize them, whereas the "morally corrupt" individual lacks such moral grounding.<sup>264</sup>

From a legal classification perspective, the basic offence of murder is characterized by the presence of an internal moral struggle within the perpetrator. In line with Aristotle's ethical theory, the weak-willed person, who experiences cognitive dissonance, is regarded as posing a lesser threat to protected values compared to the morally corrupt person, who acts in full alignment with their negative impulses and without remorse.<sup>265</sup> The existence of an internal conflict in the weak-willed person signifies a connection to moral values, even if they fail to uphold them in practice. Cognitive dissonance may arise in various contexts of murder, including premeditated acts, spontaneous murder, murders committed to achieve another goal, murders driven by a passion for killing, and those motivated by psychological or material factors. In such cases, the perpetrator's internal struggle between negative impulses and moral values serves as an indicator

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<sup>263</sup> Aristotle, *Nicomachean Ethics*, bk 7, translated by Yosef G Libes (Jerusalem: Magnes Press, Hebrew University, 1985) at 158, 187 (in Hebrew).

<sup>264</sup> Leist, *supra* note 13 at 182.

<sup>265</sup> Aristotle, *supra* note 262 at 158, 187.

of their ethical complexity and distinguishes them from morally corrupt offenders.

*Does a Murderer Who Shows Empathy Toward Victims Experience Cognitive Dissonance?* In the book "In Cold Blood", Truman Capote describes how one of the murderers exhibited a certain emotional connection to his victims, driven by impulses of consideration. These expressions raised questions about the murderers' potential for inner conflict.<sup>266</sup>

Certain actions by murderers, such as caring for the victims' comfort in their final moments, raise questions about the existence of a moral conscience or recognition of others' emotions and rights. Do such actions indicate an internal conflict within the perpetrator, or are they an attempt by the murderer to justify themselves as a moral person in their own eyes? It can be argued that if a person lacks empathy toward others from the outset, they have no need to justify non-empathetic behaviour. However, such justifications may also be used by psychopaths devoid of empathy, as part of a mechanism to achieve their goals. Thus, concern for the victim does not always reflect genuine recognition of others' needs and feelings. Sometimes, it stems from narcissism and the murderer's focus on themselves and their self-image, either in their own eyes or in the eyes of the world. On the other hand, it could be argued that anyone attempting to resolve cognitive dissonance acts out of selfish motives. Either way, these voices restrain behaviour that harms others, suggesting a lesser negation of the value of human life compared to someone who tortures the victim. Therefore, in my view, cognitive dissonance should be acknowledged even when genuine empathy for the victim is absent.

*Behavioural Guidance in the Regretful Offender:* There is an assumption that spontaneous murderers regret their actions more than premeditated murderers. In other words, spontaneous murderers experience cognitive dissonance, while premeditated murderers are at peace with their act of murder.<sup>267</sup> However, regret may also occur among premeditated murderers. The cognitive

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<sup>266</sup> Truman Capote, *In Cold Blood* (New York: Vintage International, 2009) at 134.

<sup>267</sup> Hanlon, *supra* note 70 at 933-35.

discomfort that people feel when acting spontaneously stems from a lack of time to activate rationalization mechanisms – to provide justifications for the chosen course of action and diminish the importance of the alternatives not taken – rather than from regret over the specific choice made. This process aims to enable cognitive comfort with the decision already made.

Fletcher and Duff argue that regret occurs because the initial will was not strong enough, indicating that the person is not inherently dangerous.<sup>268</sup> However, in my opinion, regret may also arise in someone with strong impulses if they possess systematic thinking that opposes those impulses. Kremnitzer and Ghanayim assert that it is impossible to determine whether the avoidance of murder stems from moral motives or utilitarian ones, such as fear of punishment. According to their view, someone who refrains from murder due to fear of punishment has fulfilled their obligation.<sup>269</sup> Seemingly, a person whose moral considerations prevent them from committing murder is less culpable and less dangerous than someone deterred by utilitarian motives. However, it is also possible that someone influenced by utilitarian considerations has a lower impulse for violence. Therefore, when considering the full thought process, such a person might be less dangerous than someone capable of moral reasoning. In my opinion, in order to guide behaviour, people should be encouraged to avoid murder for any reason. Any negative thought vector that deters murder is worth encouraging, not just empathy.

ii. *The Apathetic Murderer – Indifferent to the Victim's Suffering and Dignity:*

This murderer is not driven by violent impulses but by utilitarian considerations serving material or psychological goals, such as financial gain, intimidating others, or achieving a sense of control. Their actions may include killing intended to facilitate other offences, cover up previous crimes, or avoid punishment. Their indifference to protected values stems from disregard for

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<sup>268</sup> RA Duff, *Criminal Attempts* (Oxford: Oxford University Press, 1996) at 70-72.

<sup>269</sup> Kremnitzer & Ghanayim, *supra* note 18 at 333.

basic moral principles rather than a specific focus on the victim. Although they have no direct intention to violate the protected value of human dignity, they are willing to do so if it serves their purposes, as the victim's life holds no value in their eyes. The apathetic murderer does not experience cognitive dissonance, as their actions do not conflict with their values, since they do not attribute any worth to human life. Aristotle did not address the apathetic murderer as a separate category from the cruel murderer, grouping both under the category of the "morally corrupt."<sup>270</sup>

From a legal classification perspective, the apathetic murderer's willingness to sacrifice human life to achieve another goal indicates a mental state of severe disregard for the value of human life.<sup>271</sup> This reflects a lack of moral restraint and a fundamental distortion of basic values.<sup>272</sup> Such a murderer disregards the victim's dignity and humanity, viewing the victim merely as an obstacle to achieving their goals – nothing more than an object to be removed without remorse.<sup>273</sup> This mental state of intentional disregard for the value of human life warrants serious condemnation and strict legal treatment. Therefore, in my opinion, such a murderer should be classified under aggravated circumstances.

### *iii. The Cruel Murderer:*

The cruel murderer acts out of a strong emotional impulse of hatred, anger, revenge, or even pleasure derived from violence, with the primary goal of causing suffering to their victim. This category includes acts of torture, abuse, and extreme cruelty toward victims. Such a murderer may act without systematic reasoning, driven by a strong belief in the righteousness of their actions, or alternatively, employ systematic reasoning to coldly plan the murder, completely devoid of *superego* mechanisms and internal moral conscience. This description aligns with Aristotle's definition of a person with a vicious character, who acts in harmony between emotion and reason, with full intent and without any internal conflict or

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<sup>270</sup> Aristotle, *supra* note 262 at 158, 187.

<sup>271</sup> Kremnitzer & Ghanayim, *supra* note 18 at 309.

<sup>272</sup> *Ibid* at 306.

<sup>273</sup> *Ibid* at 307.

remorse.<sup>274</sup> The cruel murderer's actions constitute aggravating circumstances due to their absolute negation of protected values—human life, the victim's dignity, and their right to equality. Such an individual lacks moral inhibitions, and their actions require especially severe legal measures.

**Table 4: The Mathematical Formula of the Weak-Willed Person**

System 2	System 1
<b>Utilitarian Consideration:</b> "They will punish me, so it's not worth committing murder." 1X1-	A strong impulse to act violently. 5X1
<b>Moral Consideration:</b> "It is immoral to commit murder." 1X1-	A strong feeling of anger and offence. 5X1
<b>Superego Considerations:</b> "The victim has their own needs and desires that must be respected." 1X1-	Justifying the emotion and impulse as rational. 5X1
<b>Critical Thinking Considerations:</b> "This is not the only or necessary course of action given the circumstances." 1X 1-	
=4-	=15
11=15-4	
<b>Statistical Threshold for Action:</b> 11= 15-4	

<sup>274</sup> Aristotle, *supra* note 262 at 158, 187.

Table 5 - The Mathematical Formula of the Morally Corrupt Person

<i>System 1</i>	<i>System 2</i>
A Strong Impulse to Act Violently. 5X1	<b>Utilitarian Consideration:</b> "They will punish me, so it's not worth committing murder." 0X1-
A Strong Feeling of Anger and Resentment. 5X1	<b>Moral Consideration:</b> "It is immoral to commit murder." 0X1-
<b>Beliefs and Reasons for Action:</b> Explaining the emotion and impulse as rational. 5X1	<b>Superego Considerations:</b> "The victim has their own needs and desires that must be respected." 0X1-
	<b>Critical Thinking Considerations:</b> "This is not the only or necessary course of action given the circumstances." 0X1-
=15	=0
15=15-0	
<b>Statistical Threshold for Action:</b> $10 \leq X$	

### 3. Cognitive Dissonance as a Criterion for Distinction:

Kremnitzer argues that it is preferable to use the criterion of premeditation, which covers the most severe cases, rather than relying solely on specific aggravating circumstances.<sup>275</sup> However, I believe that the absence of cognitive dissonance is a better distinguishing criterion. This is true both normatively, due to greater culpability and higher dangerousness, and practically, for the purpose of classification and differentiation between basic murder offences and murder under aggravated circumstances.

<sup>275</sup> Kremnitzer & Ghanayim, *supra* note 18 at 297.

*Normative Distinction – Increased Culpability:* The purpose of the criterion of "premeditated intent" is to distinguish between those whose decision is fully resolved and those who act without such resolution. However, the existence of a deliberate thought process does not necessarily indicate greater readiness to commit murder compared to its absence. As I have explained throughout the article, due to the human tendency to avoid engaging in systematic thinking when one's actions align with deeply held beliefs—whether to avoid cognitive dissonance or out of mental laziness—this criterion is insufficient. In contrast, the absence of cognitive dissonance serves as a more precise criterion for distinguishing degrees of culpability, as it indicates that the murderer made their decision with full internal resolve and without moral struggle. Such a murderer does not experience moral dilemmas or feelings of guilt, reflecting a higher degree of culpability and enabling the attribution of greater criminal responsibility. Thus, cognitive dissonance serves as a more practical distinguishing criterion, capturing most of the severe cases of murder.

*Danger-Based Distinction:* The absence of cognitive dissonance indicates an individual with strong willpower and well-defined, dangerous motives, acting decisively and without inhibition. In contrast, an individual experiencing cognitive dissonance may pose a lesser threat, as the internal conflict serves as a restraining factor.<sup>276</sup>

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<sup>276</sup> This comparison raises the possibility of a reform in Canadian law, whereby the consideration of dangerousness would be integrated already at the stage of determining guilt, rather than solely at the sentencing stage under Part XXIV of the *Criminal Code*. The model proposed here seeks to challenge the traditional separation between culpability and future risk, and to incorporate the assessment of dangerousness into the very structure of criminal blame—through interpretation of the motive, means, and profile of the act. This approach aims to identify normative and social dangerousness already at the adjudication stage, even in the absence of prior convictions. Sections 231(4)–(6) of the *Criminal Code* already reflect a recognition that certain circumstances—such as the killing of a police officer, or a murder committed during a sexual assault or kidnapping—indicate an elevated public risk that justifies a more severe classification of the offence, even without prior planning. This provides a solid foundation for extending the existing

#### 4. *Proving Cognitive Dissonance:*

The process of actual deliberation and forming a decision to kill occurs in the person's mind and is challenging to prove. To address this, case law in Israel has relied on presumptions such as the existence of a temporal sequence between forming the decision and executing the act,<sup>277</sup> deliberation over time that is more than a fleeting thought, although prolonged deliberation is not

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normative rationale systematically into the structure of criminal culpability itself. Distinctions made at the stage of conviction may indirectly influence parole boards, even though they are not part of the formal mechanism for declaring an individual a “dangerous offender” under Part XXIV of the *Criminal Code*. The model proposed in this article seeks to differentiate, already at the conviction stage, between varying degrees of moral culpability and inherent dangerousness—through the analysis of negative motives, the absence of cognitive dissonance, or exceptional cruelty. These distinctions may shape parole boards’ perceptions regarding the offender’s level of risk and prospects for rehabilitation, thereby influencing decisions concerning early release, even without a formal “dangerous offender” designation. See Frederick Schauer, “The Ubiquity of Prevention”, in Andrew Ashworth & Lucia Zedner (eds), *Prevention and the Limits of the Criminal Law: Principles and Policies* (Oxford: Oxford University Press, 2013). In addition, the absence of cognitive dissonance may have implications not only for assessing moral culpability and future dangerousness, but also for individualized sentencing decisions. Offenders who act without experiencing cognitive dissonance—particularly when motivated by impulsive aggression, hatred, or ideological rigidity—may be perceived as less deterrable, due to the absence of internal restraints or moral hesitation. These characteristics may justify harsher sentencing from a utilitarian perspective, aimed at specific deterrence and public protection. Integrating such considerations into the sentencing phase would allow the distinctions proposed in this model to inform both the structural definition of culpability and the practical implementation of sentencing policy. Moreover, the absence of cognitive dissonance, when accompanied by rigid cognitive tendencies—such as impulsivity, moral or ideological rigidity, and emotional dysregulation—may serve not only as indicators of heightened culpability and inherent dangerousness, but also as markers of persistent moral risk and limited rehabilitative potential. While some traits such as impulsivity may respond to therapeutic or behavioural interventions, deep-seated rigidity combined with the absence of inner conflict may reflect structural personality deficits that indicate difficulty in achieving meaningful change or transformation of values.

<sup>277</sup> Kremnitzer & Ghanayim, *supra* note 18 at 375; Peretz, *supra* note 28, §§ 5–6 (Hendel, J.); Zhimov, *supra* note 30, §§ 17,27-28,30,31; Sarari, *supra* note 30, § 29.

required.<sup>278</sup> Case law also refers to the content of the deliberation, not necessarily normative or moral deliberation.<sup>279</sup> These presumptions allow for drawing conclusions about the person's internal mental process. Accordingly, I believe it is possible to prove the presence or absence of cognitive dissonance, which is also an internal mental process, through presumptions and indications. Just as the prosecution is currently required to present indications of actual deliberation, it could similarly be required to present indications of a specific deliberative process, namely the presence or absence of cognitive dissonance. This does not entail a broader evidentiary burden than that required under existing frameworks, such as “planned and deliberate” in Canadian law. Just as courts currently infer mental states based on circumstantial and behavioural indicators, the assessment of cognitive dissonance or moral conflict can be made with or without expert testimony, depending on the nature of the dispute and the clarity of the facts.<sup>280</sup>

If indications of cognitive dissonance are found, the perpetrator would be charged with the basic offence, provided none of the special aggravating circumstances, which complete the inclusive offence of the absence of cognitive dissonance, are present. Conversely, if indications of the absence of cognitive dissonance are found, the perpetrator would be charged with an aggravated offence.

The murder could be classified as aligning with the basic offence based on the following indications: expressions of remorse or feelings of guilt manifested through statements or behaviours shortly after committing the crime; The cognitive dissonance that should be considered occurred before, during, or immediately after the act of murder. Expressions of remorse in court will not necessarily indicate the presence of cognitive dissonance, and the judge will be required to assess their credibility, steps taken to avoid committing the act, such as attempts to distance oneself from the victim or seeking alternative solutions; behaviour demonstrating

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<sup>278</sup> Zhirmov, *supra* note 30, § 28; Peretz, *supra* note 28, § 6 (Hendel, J.).

<sup>279</sup> Zhirmov, *supra* note 30, § 29.

<sup>280</sup> *R v Oickle*, 2000 SCC 38.

psychological discomfort; personal documentation or reports of doubts—such as diaries, letters, or testimonies from close individuals—reflecting inner conflicts or contradictory emotions; expressions of compassion, concern, or respect toward the victim before, during, and after the murder.

The murderer could be classified as aligning with the aggravated offence based on the following indications: absence of any signs of remorse or hesitation during and after the act; evidence of prior statements indicating the adoption of moral norms supporting the murder or harm to others, such as racist remarks, misogynistic expressions, or affiliation with hate groups; indications of a lack of empathy toward the victim; signs of indifference to the victim's rights, such as human dignity; avoidance of any emotional interaction with the victim; verbal or behavioural expressions of absolute certainty and a reduction of emotional complexity; calm and composed body language before, during, and after the act, showing no emotional response to the violence and murder. This calmness reflects internal control and the absence of tension arising from a moral dilemma. A clear motive and strong drive expressed through intensity and determination to achieve the goal of ending a human life. When the defendant rationally explains their motives without hesitation—an individual who feels comfortable explaining why they chose to commit murder and presenting their purpose clearly—this conveys that they are at peace with their actions.

Several indicators established in case law for a "substantial process of deliberation and decision-making to kill" can also be used to demonstrate the absence of cognitive dissonance:<sup>281</sup> when the plan to kill spans a prolonged period;<sup>282</sup> the time the defendant had to reconsider their plan before executing it;<sup>283</sup> detachment from the event, allowing the defendant to contemplate their actions; a weapon that is drawn and ready for use, indicating a decision to kill; walking resolutely toward the victim, surprising the victim from behind, and stabbing directly in the heart; pursuing the victim until

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<sup>281</sup> Zhirnov, *supra* note 30, s 29.

<sup>282</sup> *Abu Alhasana v State of Israel*, CA 5995/21, § 31 (Isr 16 June 2022).

<sup>283</sup> Zerensai, *supra* note 29, s 19.

they collapse.<sup>284</sup> All of these may demonstrate that the murderer was determined in their intent and did not experience conflicting thoughts about committing the act of murder.

Planning may also indicate the absence of cognitive dissonance. In Israeli case law, planning a murder has been defined as a sequence of actions requiring time and effort.<sup>285</sup> When the defendant deliberately and consciously took steps in advance to create the conditions that would enable or facilitate the commission of the crime.<sup>286</sup> Planning reflects a high degree of awareness, internal control, and focus on the goal. Detailed planning includes actions such as selecting an appropriate time,<sup>287</sup> bringing the victim to the murder scene, preparing the murder weapon in advance,<sup>288</sup> setting up the murder scene, taking measures to escape after the murder,<sup>289</sup> procuring tools for concealing the body,<sup>290</sup> hiding the murder weapon,<sup>291</sup> changing clothes, and washing the weapon.<sup>292</sup> These actions require organized behaviour over time and the absence of conflicting thoughts that could confuse the murderer or disrupt focused and orderly thinking.

Planning serves as evidence of absolute focus on the goal and the absence of significant conflict during the decision-making process or while carrying out the acts. Actions such as acting with equanimity after the murder,<sup>293</sup> boasting about committing the murder,<sup>294</sup> and failing to call for emergency assistance<sup>295</sup> further

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<sup>284</sup> Peretz, *supra* note 28, s 8 (Hendel, J.).

<sup>285</sup> Zerensai, *supra* note 29, s 19.

<sup>286</sup> Mario, *supra* note 33.

<sup>287</sup> Zhimov, *supra* note 30, § 25.

<sup>288</sup> *Wahidi v State of Israel*, CA 3308/17, § 22 (Isr 15 June 2020) (Stein J).

<sup>289</sup> *Rozhkov v State of Israel*, CA 5066/18, § 67 (Isr 4 September 2022). Mario, *supra* note 33, s 21, 29.

<sup>290</sup> *Awni Ziadat v State of Israel*, CA 8199/20, § 40 (Isr 30 April 2023) [Zhadat]. Mario, *supra* note 33, s 29.

<sup>291</sup> *Ibid.*

<sup>292</sup> Zerensai, *supra* note 29, s 19.

<sup>293</sup> Ziadat, *supra* note 290, s 40.

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid*; Mario, *supra* note 33, s 20, 29.

reinforce the conclusion that the individual acted with composure and confidence, without feelings of guilt or internal struggle.

Clear and tangible indications of the absence of internal conflict are particularly challenging to demonstrate. Additionally, interpretative disagreements may arise among experts, particularly in psychology, regarding what can be considered evidence of the absence of cognitive dissonance. While certain aspects of the defendant's behaviour might suggest the presence of dissonance, the overall behavioural pattern may indicate its absence. Such disagreements can lead to inconsistencies in judicial decisions. Therefore, requiring positive proof of the absence of cognitive dissonance, rather than merely noting the lack of evidence for its presence, is crucial. This approach raises the evidentiary threshold, ensuring that conclusions about cognitive dissonance are based on substantiated findings rather than implicit assumptions. Establishing a high standard of proof ensures that defendants are not convicted of aggravated offences simply because the system failed to identify indications of cognitive dissonance.

### ***C. Additional Aggravating Circumstances:***

Proving the absence of cognitive dissonance can be complex and does not encompass all severe scenarios in murder offences.<sup>296</sup> Therefore, a possible solution lies in the model developed by Kremnitzer and Ghanayim which was adopted in the reform of homicide offences in Israel. This model recognizes additional aggravating circumstances based on dangerousness, serving as complementary criteria for cases that do not fall under the primary criterion. The aggravating circumstances in the Israeli model can be divided into four aspects of risk: the act itself, the perpetrator, the specific motive, and the potential harm to certain populations.<sup>297</sup> In the American MPC, these aggravating circumstances are considered during the sentencing phase rather than during the determination of guilt.<sup>298</sup> In Canadian law, as in the American

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<sup>296</sup> Kremnitzer & Ghanayim, *supra* note 18 at 314.

<sup>297</sup> *Ibid* at 299-328.

<sup>298</sup> *Model Penal Code*, *supra* note 11, § 210.6

MPC, aggravating circumstances such as dangerousness, motive, or risk to vulnerable populations are generally considered during the sentencing phase, rather than during the determination of guilt.<sup>299</sup> However, Canada has developed a parallel framework under Part XXIV of the Criminal Code, which allows courts to designate individuals as "dangerous offenders" based on risk-related factors—though this designation occurs post-conviction and does not alter the structure of criminal liability.

Despite the importance of guilt as a central criterion for aggravation,<sup>300</sup> I believe it is also appropriate to consider dangerousness as a factor to enhance the assessment of guilt. Addressing risk enables a transparent and direct reflection of societal interests in protecting populations at heightened risk, such as women, minors, and vulnerable individuals. This is not a dichotomous decision between guilt and risk, as the element of risk can be considered to determine aggravating circumstances in cases where guilt exists.

### *1. Special Dangerousness of the Perpetrator:*

In cases where the perpetrator can be attributed with awareness of the specific dangerousness of their actions, this reflects particular moral blameworthiness. When an individual is willing to harm the most fundamental societal value—human life, to achieve a trivial or negative goal, it indicates exceptional dangerousness.<sup>301</sup> However, it is important to distinguish between the perpetrator's general dangerousness, inferred from their past and behaviour after the act, and concrete culpability stemming from the specific circumstances of the offence.<sup>302</sup> In my view, the special dangerousness of the perpetrator is evident in murderers without cognitive dissonance. This group aligns with the "cognitive dissonance clause" as a catch-all provision for such cases.

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<sup>299</sup> Roach, *supra* note 20 at 111-112, 730-735; *Criminal Code*, *supra* note 5, Part XXIV.

<sup>300</sup> Kremnitzer & Ghanayim, *supra* note 18 at 231-233.

<sup>301</sup> Throughout the article, I addressed the arguments opposing the examination of the offender's dangerousness.

<sup>302</sup> Kremnitzer & Ghanayim, *supra* note 18 at 299.

## 2. *Risk in the Act:*

The most severe degree of the offence of taking human life should reflect cases that cause the greatest harm to the value of human life, from the perspective of protecting public safety. These cases include acts that demonstrate an extreme and disproportionate relationship between the means—taking a human life—and the end goal, particularly when the goal is perceived by society as lacking value or as having negative value.<sup>303</sup> Thus, an act involving high risk may still be classified as murder under aggravated circumstances, even if cognitive dissonance is present. Several circumstances fall under the category of risk inherent in the act itself, including: brutal and cruel killing,<sup>304</sup> desecration of the body,<sup>305</sup> multiple murders,<sup>306</sup> killing by dangerous means,<sup>307</sup> killings committed to facilitate another crime or escape from justice,<sup>308</sup> and killings carried out using vile methods.

*Killing by Vile Means:* This element is not recognized in Israeli law, the American MPC, or Canadian criminal law. I believe that this element should be acknowledged as an aggravating circumstance during the determination of guilt. This is because the manner of execution serves as a clear indicator of heightened severity, reflecting an aggravating motive and reprehensible

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<sup>303</sup> *Ibid* at 313.

<sup>304</sup> *Penal Law*, 1977, *supra* note 21, ss 301A(a)(7); *Model Penal Code*, *supra* note 11, § 210.2(1)(c). *R v Luxton*, 1990 CanLII 83 (SCC); Kremnitzer & Ghanayim, *supra* note 18 at 332.

<sup>305</sup> *Ibid* at 332; Asaf Harduf, “Did You Murder and Desecrate Too? The Dignity of the Deceased and Criminalization of the Living: On Criminalizing Harm to a Corpse Following CA 7128/16 *Anonymous v State of Israel*” (2020) 15 *Mishpatim Online* 1 at 23, online: <Nevo.co.il>; *Tenn Code Ann* § 39-13-204(i)(13) (2023).

<sup>306</sup> *Model Penal Code*, *supra* note 11, §§ 210.2(1)(b) and (c); *Criminal Code*, *supra* note 5, s 745.51; Edelstein, *supra* note 97 at 10; Kremnitzer & Ghanayim, *supra* note 18, at 320.

<sup>307</sup> *Ibid* at 321-322; *Penal Law*, 1977, *supra* note 21, s 301A(a)(9); *Model Penal Code*, *supra* note 11, § 210.2(1)(d). *Criminal Code*, *supra* note 5, s 231(3).

<sup>308</sup> Kremnitzer & Ghanayim, *supra* note 18, at 306-310; *Penal Law*, 1977, *supra* note 21, s 300(b)(2); *Model Penal Code*, *supra* note 11, §§ 210.2(1)(e) & (f); *Criminal Code*, *supra* note 5, s 231(5)(d)-(e).

character of the perpetrator. Conclusions about the perpetrator's nature can be drawn from the way the act is carried out. An example of a vile means is an ambush attack on a civilian settlement inhabited by defenceless families and children. This indicates a morally reprehensible character, as the perpetrator exploits a clear advantage against the victims and their total inability to defend themselves.<sup>309</sup>

### **3. Risk in Motive:**

Motives that reflect extreme harm to protected values may serve as grounds for aggravation when the act arises from improper purposes, such as hate based on racism or ideology. These motives demonstrate not only heightened dangerousness but also particular reprehensibility due to the severe harm caused to the fundamental values of society.<sup>310</sup> Thus, an act with a high-risk motive may be considered murder under aggravated circumstances even when cognitive dissonance is present. There are several circumstances involving specific dangerous motives: a racist motive,<sup>311</sup> killing as part of organized crime activity,<sup>312</sup> a terrorist motive,<sup>313</sup> with the

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<sup>309</sup> *Ibid* at 317. This concept parallels the perception of a duel as an "honorable" act compared to a vile ambush, which is considered an unfair and dishonorable tactic.

<sup>310</sup> Kremnitzer & Ghanayim, *supra* note 18, at 306-316.

<sup>311</sup> *Ibid* at 312, 325, 307. The following provision highlights that an offence is considered more serious when motivated by bias, prejudice, or hatred based on race, religion, sex, sexual orientation, or other protected grounds: *Penal Law, 1977, supra* note 21, s 300(b)(4).; *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, Pub L No 111-84, §§ 7A(1), 7A(2), 123 Stat 2835 (2009); *Criminal Code, supra* note 5, s 718.2(a)(i). This Canadian provision requires courts to treat as an aggravating factor any evidence that the offence was motivated by bias, prejudice, or hate based on personal characteristics such as race, religion, gender, or sexual orientation.

<sup>312</sup> *Racketeer Influenced and Corrupt Organizations Act, 18 USC §§ 1961-1968 (1970) [RICO]. Criminal Code, supra* note 5, s 467.1 – defines a "criminal organization." *Criminal Code, RSC 1985, c C-46, s 231(6.1)* – provides that murder committed in connection with the activities of a criminal organization may be classified as first-degree murder even if it was not planned or deliberate.

<sup>313</sup> *Penal Law, 1977, supra* note 21, s 300(a)(10); 18 USC § 2332a (2023) – use

purpose of instilling fear, imposing behavioural norms, or punishing,<sup>314</sup> killing for its own sake without reason and enjoyment of murder,<sup>315</sup> and a sexual motive.

*Sexual Motive:* For example, to facilitate sexual acts with the victim, to ease the commission of such acts while the victim is alive, or to target the victim's body post-mortem.<sup>316</sup> This element is not addressed in Israeli law but is recognized in both U.S. and Canadian law.<sup>317</sup> I believe this element should be examined as an aggravating circumstance during the determination of guilt, even in cases where cognitive dissonance is present. This is because it constitutes a severe violation of human dignity, reflects a profound disregard for the value of human life by reducing the victim to a mere means for satisfying the perpetrator's desires, and completely disregards the victim's humanity.<sup>318</sup> Such acts shock the public conscience and provoke deep anxiety, particularly among women and children, who are potential targets of such offences. Furthermore, sexual motivation is often particularly strong and characterized by a tendency toward recidivism, necessitating

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of weapons of mass destruction. 18 USC § 2332b (2023) – acts of terrorism transcending national boundaries. *Criminal Code*, *supra* note 5, s 231(6.01) – murder committed in the course of a terrorist activity is classified as first-degree murder. *R v Khawaja*, 2012 SCC 69. Kremnitzer & Ghanayim, *supra* note 18 at 313, 324.

<sup>314</sup> *Ibid* at 326, 31; *Penal Law*, 1977, *supra* note 21, s 300(a)(5); 18 USC § 249 (2023) – *Hate Crimes Prevention Act*. 18 USC § 2331 (2023) – provides statutory definitions of terrorism under U.S. federal law. While Canada does not have a specific provision paralleling these sections, comparable motives may be considered in the context of terrorist activity, organized crime, or psychological assessments of dangerousness. See *R v Khawaja*, 2012 SCC 69.

<sup>315</sup> *Model Penal Code*, *supra* note 11, § 210.2(1)(b). There is no formal category for sadistic motive under Canadian criminal law.; Kremnitzer & Ghanayim, *supra* note 18 at 313, 327.

<sup>316</sup> *Ibid* at 312.

<sup>317</sup> *Model Penal Code*, *supra* note 11, § 210.2(1)(e); *Criminal Code*, *supra* note 5, s 231(5)(b) – classifies murder committed during the commission or attempted commission of a sexual assault as first-degree murder, even if not premeditated.

<sup>318</sup> Kremnitzer & Ghanayim, *supra* note 18 at 312, 332.

significant deterrence to prevent such acts.<sup>319</sup> The severity of these actions also stems from the extreme disproportion between the goal—sexual gratification or asserting control—and the means—the taking of a human life.<sup>320</sup>

***4. Risk to Certain Populations:***

This refers to the special status of the victim or the need to provide them with enhanced protection.<sup>321</sup> When actions are directed toward harming particularly vulnerable populations, such as children, women, or minority groups, this should be reflected in the aggravating circumstances. Such acts endanger not only the specific individual attacked but also societal resilience. Enhanced protection for vulnerable populations is necessary to safeguard their right to equal protection.<sup>322</sup> Therefore, murder that endangers marginalized populations may be considered murder under aggravated circumstances, even when cognitive dissonance is present. Several circumstances fall under the category of risk to

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<sup>319</sup> *Ibid* at 312.

<sup>320</sup> *Ibid* at 312.

<sup>321</sup> *Ibid* at 300, 302.

<sup>322</sup> *Ibid* at 300.

certain populations, including: a witness in a trial,<sup>323</sup> a public servant,<sup>324</sup> intimate partners,<sup>325</sup> and a minor or helpless person.<sup>326</sup>

### ***5. Recommendations for Reform:***

I believe it is appropriate to stop relying on the components of premeditation, spontaneous murder, and provocation to determine the severity of the offence. Instead, the severity of murder offences should be assessed based on the type of motive—fear or anger, the presence or absence of cognitive dissonance, and the particular dangerousness of the act, the motive, and its impact on vulnerable populations. The proposed structure includes:

Murder under mitigating circumstances: When the motive stems from fear and concern for one's life, or when the victim abused the perpetrator.

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<sup>323</sup> *Penal Law, 1977, supra* note 21, s 300(a)(3). In Canada, this circumstance is considered an aggravating factor and may elevate the offence to first-degree murder.

<sup>324</sup> Kremnitzer & Ghanayim, *supra* note 18, at 301-303. 18 USC § 1114 (2023) – protection of officers and employees of the United States. 18 USC § 1121 (2023) – killing of state or local law enforcement officers. Under Canadian law, the murder of a police officer or prison employee is explicitly classified as first-degree murder. *Criminal Code, supra* note 5, s 231(4) – applies to peace officers, prison employees, and similar officials.

<sup>325</sup> *Penal Law, 1977, supra* note 21, s 300(a)(6). In Canada, while intimate partner homicide is not explicitly designated as first-degree murder under the homicide provisions, there is extensive legislative and judicial recognition of such circumstances as aggravating in sentencing. *Criminal Code, supra* note, s 718.2(a)(ii) – provides that abuse of a spouse or intimate partner shall be considered an aggravating factor at sentencing.

<sup>326</sup> *Penal Law, 1977, supra* note 21, s 300(a)(8); 18 USC § 3592(c) (2023) – enumerates aggravating factors for the imposition of the death penalty under U.S. federal law. 18 USC § 1111 (2023) – defines murder under U.S. federal criminal law. In Canada, the murder of a child or vulnerable person may qualify as first-degree murder if committed during the course of a sexual assault or serious abuse. In all cases, such circumstances are treated as aggravating for sentencing purposes. *Criminal Code, supra* note 5, s 231(5)(e) – classifies murder as first-degree when committed during the commission of a sexual offence against a child. s 718.2(a)(i) – recognizes abuse of a vulnerable person as an aggravating factor.

Murder as a baseline offence: When there are indications of cognitive dissonance.

Murder under aggravating circumstances: In the absence of cognitive dissonance, which indicates internal coherence regarding the act of murder, or when there is particular dangerousness in the act, the motive, or towards specific populations.

The proposal requires legislative adjustments in Canada, the United States and Israel. These adjustments include defining murder motivated by fear and terror as mitigating circumstances, defining "the existence of cognitive dissonance" as a baseline offence, and defining "the absence of cognitive dissonance" as an aggravating circumstance. Additionally, specific motives should be added as aggravating circumstances at the stage of determining guilt. Examples include: Desecration of the corpse: should be added to Israeli law and to the American and Canadian criminal codes. In the U.S., it appears only in several state laws; in Canada, it is not codified as an element of culpability. Multiple murders: should be added to Israeli law; while addressed in Canadian sentencing and parole eligibility, it is not recognized as a distinct aggravating element at the guilt phase. Murder by heinous means should be added to both Israeli, U.S., and Canadian law as a factor aggravating culpability, not only sentencing. Sexual motive: should be added to Israeli law. It is already recognized in U.S. and Canadian law as grounds for first-degree murder, but its moral weight should be explicitly tied to guilt determination. In Canadian law, this aggravation arises only where the killing occurs *in the course of* or *while attempting to commit* sexual assault under s. 231(5) of the Criminal Code; the law does not treat sexual motive itself as an aggravating mental element.<sup>327</sup> Killing for its own sake: should be added to Israeli law, while U.S. and Canadian law should clarify that such killings may occur even when the method was not particularly cruel. Public officials in the line of duty should be added to Israeli law. These are recognized in U.S. and Canadian criminal codes as grounds for elevating the offence to first-degree murder. Spouses, addressed only in state legislation in the U.S. and in Canadian sentencing principles, should be incorporated into the

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<sup>327</sup> *Criminal Code, supra* note 5, s 231(5).

MPC and considered in the structure of culpability itself. These aggravating circumstances should apply even when there are indications of cognitive dissonance in the perpetrator.

*Integrating the Dual-Process Model within Contemporary Trends in Canadian Criminal Law:* In recent years, Canadian criminal law has become increasingly open to incorporating insights from cognitive science and legal psychology—particularly in contexts involving automatism, mental disorder (NCRMD), and diminished responsibility. However, the legal focus has often remained on the threshold question of cognitive capacity—whether the accused understood the nature of the act or acted voluntarily—rather than on the internal quality of the cognitive processes that led to the formation of intent.

The dual-process model proposed in this article seeks to address this gap by distinguishing between actions driven by intuitive, impulsive cognition (*System 1*) and those arising from reflective, value-sensitive deliberation (*System 2*). This framework enables courts to assess not only behavioural outcomes and cognitive capacity but also the psychological depth of internal conflict, the presence or absence of inhibitory moral mechanisms, and the actor's alignment with the values embedded in the act. In this sense, the model reframes legal assessments of moral blameworthiness through a cognitively-informed lens.

Beyond its theoretical value, the model has concrete implications for Canadian criminal law. In the context of automatism, it offers a principled basis for distinguishing between genuine loss of control due to mental illness and voluntary surrender of moral restraint in emotionally driven acts. With regard to intoxication, the model challenges the assumption that a state of intoxication necessarily precludes the formation of specific intent, arguing instead that intent may be formed in advance and that reflective deliberation at the moment of action is not always required. In the domain of cultural defences, the model warns against the automatic mitigation of responsibility when the motive is rooted in sacred or collective values, especially when such motives reflect a complete internal identification with the act and an absence of cognitive dissonance. Finally, the model supports the integration of dangerousness assessments into the adjudicative

phase—not only the sentencing phase—by distinguishing between offenders who retain moral conflict (and therefore rehabilitation potential) and those whose stable personality structures lack inhibitory moral vectors, indicating a higher level of moral danger.

Importantly, the proposed model is consistent with the principles of fundamental justice under section 7 of the Canadian *Charter of Rights and Freedoms*. By enabling courts to assess moral blameworthiness through empirically grounded cognitive tools—such as motive analysis and the presence or absence of cognitive dissonance—it ensures that criminal liability is imposed in a fair, individualized, and proportionate manner.

In doing so, the dual-process model not only aligns with emerging trends in Canadian jurisprudence but also offers a new architecture for understanding gradations of intent and culpability—grounded in the moral-cognitive complexity of the actor, rather than in formal categories of planning, deliberation, or spontaneity.

*The Contribution of the Proposed Model to Feminist Reform in Canadian Homicide Law:* The model of motive and cognitive dissonance presented in this article seeks to offer a normative framework for reassessing moral culpability in homicide cases, particularly in contexts of gender-based violence and intimate partner killings. As discussed in the section addressing the critique of the provocation doctrine, frameworks that rely on emotions such as anger, humiliation, or wounded honour fail to provide a just or gender-sensitive basis for evaluating culpability. These narratives risk perpetuating patriarchal norms that protect aggressors while ignoring the structural dimensions of gendered violence. In contrast, this article proposes a conceptual framework based on three components: the nature of the motive, the presence or absence of cognitive dissonance, and the offender's degree of internal moral alignment with the act. This approach allows for a more principled distinction between cases involving fear, helplessness, or psychological distress, and those driven by domination, control, or moral superiority. The model can contribute to Canadian legal reform on four levels: (1) supporting the critique and potential abolition of section 232 of the *Criminal Code* (provocation); (2) incorporating dangerousness assessments at

the conviction stage, not only at sentencing; (3) recognizing extreme gender-based motives as aggravating factors akin to hate crimes or public official killings; and (4) adopting a new triadic model—Fear ↔ Dissonance ↔ Absence of Dissonance—instead of the formal distinction between “planned” and “spontaneous” killings, which often shields gendered violence from full accountability. As such, the model aligns with feminist legal efforts in Canada to transform homicide law in a way that better reflects the values of equality, self-control, and protection of vulnerable victims.

## VI. CONCLUSION

This article critically reexamines the legal criteria used to assess *mens rea* in murder offences and their role in grading culpability. It challenges the conventional reliance on premeditation, spontaneity, and provocation, arguing that these categories fail to reflect the true degree of moral guilt and societal dangerousness posed by the offender. Instead, the article proposes an alternative evaluative framework that centers on motive, cognitive dissonance, and specific dangerousness.

The article demonstrates that the distinction between premeditated and spontaneous murder rests on the flawed assumption that deliberation inherently indicates higher culpability. Both types of murderers may act with full awareness and volitional control. Similarly, the doctrine of provocation is based on a misinterpretation of loss of control. The analysis shows that even in emotionally intense states, murderers retain the capacity for volitional decision-making, rendering provocation an inappropriate mitigating factor.

Drawing on Kahneman’s dual-process theory, the article explains how prior cognitive processes—rather than deliberation at the moment of the act—shape motives and decisions. The absence of cognitive dissonance is revealed as a key factor enabling murder without internal conflict, thus serving as a powerful indicator of full readiness to kill.

The core legal question addressed is: How should degrees of culpability in murder offences be structured to reflect moral

responsibility and protect societal values? This article proposes a three-tiered model:

*Mitigating Circumstances:* Evaluate whether the motive is based on fear or anger, recognizing only fear as a mitigating emotion due to its self-protective nature.

*Base vs. Aggravated Murder:* Distinguish between the base offence and aggravated murder through the presence or absence of cognitive dissonance. Its presence indicates internal conflict and lesser guilt; its absence reveals entrenched justification and heightened culpability.

*Additional Aggravation:* Identify further aggravating factors based on the offender's specific dangerousness, including character traits, belief systems, and resistance to normative inhibition.

This proposed model offers a more precise and morally coherent alternative to the current Israeli, Canadian, and U.S. frameworks, which rely on outdated binaries. By foregrounding motive as an integral part of *mens rea* and interpreting cognitive dissonance as an evidentiary proxy for internal moral struggle, the model facilitates a more accurate and just assessment of criminal liability. It also underscores the importance of behavioural guidance through legal norms, emphasizing that legal systems must not excuse impulsive violence rooted in entrenched beliefs or cognitive avoidance.