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ADEQUATE (NON)PROVOCATION AND HEAT OF PASSION AS EXCUSE NOT JUSTIFICATION

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For a number of reasons, including the complicated psychological makeup of reactive homicide, the heat of passion defense has remained subject to various points of confusion. One persistent issue of disagreement has been the justificatory versus excusatory nature of the defense. In this Article, I highlight and categorize a series of varied American homicide cases in which the applicability of heat of passion was supported although adequate provocation (or significant provocation by the victim) was absent. The cases are organized to illustrate how common law heat of passion may apply in instances in which there is no actual provocation or the source of provocation is the victim. The rationale is that the emotional disturbance that interferes with one's rationality and self-control arises as an effect of the genuine belief that one has been seriously wronged, a perspective that can only be characterized as an excuse. In addition, I discuss how the rationale that this defense is a partial justification fails even in most situations in which the killer has really been seriously provoked by the victim. Finally, I clarify discrete psychological components of heat of passion homicide, and discuss how scholarly and judicial blurring of these forms of mental functioning may contribute to the longstanding confusion as to the nature of the defense. In sum, this Article contributes further evidence as to why it is correct to view heat of passion as a partial excuse.

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INTRODUCTION

The heat of passion (or provocation[1]) doctrine continues to be a topic of lively debate throughout Anglo-American criminal law. The very nature of the doctrine has remained unresolved—judges, lawmakers, and academics alike have struggled to properly gauge the doctrine's spirit, as well as the boundaries of its application. Among the many convoluted issues surrounding heat of passion, the debate as to whether the defense is one of partial justification or excuse[2] has been persistent.

The complete list of reasons why discussion of this issue has remained murky is long, though a few critical factors immediately come to mind. Fundamental to the confusion is the longstanding philosophical disagreement about the respective conceptual boundaries of justification and excuse, and how such boundaries may be determined. In addition, certain sociopolitical interests may have an interest in framing heat of passion as a partial justification.[3] Finally, another source of misconception is the muddling of the related but differentiable roles of cognition, emotion, and behavior in heat of passion homicide.

In the United States, the Model Penal Code (MPC) has taken an obvious stand with its "extreme mental or emotional disturbance" language, largely read to clearly frame heat of passion as an excuse.[4] However, numerous states have not adopted the MPC's language,[5] and there remains a divide among them as to their understanding of the nature of the defense and where and when it applies.[6] The persistence of this divide suggests that additional

1. The terms "heat of passion" and "provocation" are used synonymously throughout this Article when making reference to the partial defense.

2. Any reference to the heat of passion defense as a justification or excuse should be understood to mean *partial* justification or excuse in that the defense does not completely exonerate the defendant, but serves to reduce murder to manslaughter.

3. For instance, it may be favorable to treat heat of passion as a partial justification defense in an effort to see that adultery or romantic betrayal, *see* Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L. REV. 197 (2005), or homosexual advances, *see* Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992), be deemed inadequate provocation. This is not to say that there is no merit in analyses that place into question the adequacy of these (and other) examples of provocation, but rather that an interest in deeming them inadequate does not, and cannot, make the heat of passion defense one of partial justification, though these authors treat the defense as such.

4. MODEL PENAL CODE § 210.3(1)(b) (1980); MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE § 16 (2002).

5. Victoria F. Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1340 n.52 (1997).

6. *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 636–37 (1981); *see also* Nourse, *supra* note 5, at 1340 n.53.

analysis is required for American jurisdictions to come to some agreement as to whether the defense is one of justification or excuse.

In this Article, I provide further analytical evidence in favor of an understanding that places the traditional common law framing of heat of passion squarely in the excuse camp.[7] First, I provide a hierarchical categorization of heat of passion cases in which no real provocation by the victim exists (called "adequate *non*-provocation" cases) in order to (a) show the potential structural boundaries of heat of passion as a partial excuse defense, and (b) illustrate how a specific, previously unrecognized type of heat of passion killer who is cognitively biased may be similarly protected. This taxonomy is presented in order to show how, under common law, the heat of passion defense may be extended to apply to cases in which "adequate provocation" in the traditional sense of the term does not exist. Second, I introduce several novel considerations as to why heat of passion, from an analytical perspective, is accurately understood as an excuse and not a justification. Included among these considerations is an analysis of psychological components of heat of passion homicide and how treating these components as discrete areas of psychological functioning may clarify the excusing nature of the defense.

I. COGNITIVE DYSFUNCTION AND THE TRADITIONAL STANDARDS FOR ADEQUATE PROVOCATION

A majority of United States jurisdictions recognize, in some form, heat of passion as an affirmative, partial defense to murder by which a defendant, if he successfully satisfies the defense's criteria, is convicted of the lesser crime of manslaughter. The criteria for heat of passion vary by jurisdiction (both among and between common law jurisdictions and jurisdictions that have adopted the Model Penal Code's "extreme mental or emotional disturbance" language[8]). However, the defense is typically structured among common law jurisdictions such that the defendant must demonstrate that (a) he was adequately provoked, (b) as a direct result of

7. Because the nature of various debates about heat of passion differs considerably across Anglo-American jurisdictions, the present discussion focuses on United States criminal law. Also, it should be noted at the outset that this Article is in no way intended as a comprehensive review of arguments as to whether heat of passion is a justification or excuse, a clarification that I reinforce below. *See infra* note 10.

8. MODEL PENAL CODE § 210.3(1)(b) (1980); *see also* Nourse, *supra* note 5, at 1340 n.52.

said provocation, he became emotionally charged such that he lost self-control, (c) not enough time to "cool off" passed between provocation and killing, and (d) he did not, in fact, cool off prior to killing his victim(s).[9] *Adequate provocation* is considered to mean provocation by the victim that would be sufficient to significantly undermine the rationality of a reasonable person.

Because, in part, I find myself among American criminal law theorists who are comfortable with (or, rather, resigned to) the understanding that the doctrine is definitively one of excuse,[10] I now seek to move past this fundamental issue and onto more contemporary issues of heat of passion that have remained largely neglected. Those issues include how the structural framing of the heat of passion doctrine, as well as its application to individual defendants, may be informed by empirical research in psychology and other behavioral sciences. Elsewhere I have written about empirically substantiated psychological—or, more specifically, social cognitive—processes that may (and I argue should) be considered in the conceptualization and application of heat of passion (hereafter called the *social cognitive argument*).[11]

Before moving further, it should prove helpful to succinctly restate the social cognitive argument to illustrate the necessity of returning to the justification/excuse debate about heat of passion. In psychology, there is considerable empirical literature that demonstrates that aggressive (or violent) individuals are biased in favor of interpreting ambiguous provocations as definitively intentional, hostile, and provocative.[12] Specifically, in situations that are open to

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9. *Cf.* J. R. AVERILL, ANGER AND AGGRESSION: AN ESSAY ON EMOTION (1982); Marcia Baron, *Killing in the Heat of Passion, in* SETTING THE MORAL COMPASS: ESSAYS BY WOMEN PHILOSOPHERS 353–78 (Cheshire Calhoun ed., 2004); WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW (2d ed. 1986).

10. Joshua Dressler has been among the most reliable of such scholars. *See* Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002) [hereinafter Dressler, *Why Keep the Provocation Defense?*]; Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995) [hereinafter Dressler, *When "Heterosexual" Men Kill "Homosexual" Men*]; Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467 (1988) [hereinafter Dressler, *Provocation*]; Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982) [hereinafter Dressler, *Rethinking Heat of Passion*].

11. Reid Griffith Fontaine, *The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, and Heat of Passion Homicide*, 12 NEW CRIM. L. REV. 69 (2009) [hereinafter Fontaine, *Wrongfulness*]; Reid Griffith Fontaine, *Reactive Cognition, Reactive Emotion: Toward a More Psychologically-Informed Understanding of Reactive Homicide*, 14 PSYCHOL. PUB. POL'Y & L. 243 (2008) [hereinafter Fontaine, *Reactive Cognition*].

12. There is an abundance of scientific studies that have empirically supported this association, particularly with respect to aggressive youths. *See, e.g.*, Kenneth A. Dodge, John E. Bates & Gregory S. Pettit, *Mechanisms in the Cycle of Violence*, 250 SCI. 1678 (1990); Kenneth A.

being interpreted as benign or provocative as to the wrongfulness of the stimulus actor, violent individuals are significantly more likely to interpret them as provocative (hereafter called *provocation interpretational bias*). This empirical finding has been replicated across numerous social laboratories and with varied populations. More specifically, provocation interpretational bias has been uniquely linked with a subtype of violence typically referred to as "reactive violence."[13] As compared to instrumental violence, which tends to be self-initiated, premeditated, motivated by personal gain (e.g., attaining power, money), and relatively non-emotional, reactive violence is exemplified by a "heated" emotional retaliation that is enacted in response to a situation that is perceived to be wrongful or threatening. Thus reactive violence is normally engaged out of anger toward a perceived provoker (e.g., heat of passion) or fear of a perceived threat (e.g., self-defense).[14]

In its most serious form, provocation interpretational bias may be functionally limiting such that the reactive aggressor is able only to "read" the ambiguously provocative situation at hand as one that is seriously wrongful or otherwise offensive. For example, the father who was abused in his youth may immediately and definitively interpret a situation in which his child has been harmed as one in which the harm was caused intentionally by a third party. This is despite the real possibilities that the harm (a) may have been inflicted accidentally by a third party, (b) was not even caused by another person, but rather was due to the child's carelessness, loss of balance, or other unfortunate circumstance, or (c) was self-inflicted by the child.

It is unlikely, though, that an interpretation of serious provocation that stems from an interpretational bias would meet the typical standard of adequate provocation. A stimulus that is ambiguous as to whether it is seriously provocative is, all other things being equal, unlikely to be deemed sufficiently provocative (in that it is not necessarily provocative at all) by an ordinary or reasonable person. Rather, the *reasonable* person, who by definition is not

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Dodge & Joseph P. Newman, *Hostile Attributional Biases in Severely Aggressive Adolescents*, 99 J. ABNORMAL PSYCHOL. 385 (1990). Also, there is a recent meta-analysis of empirical findings that link provocation interpretational bias to aggressive behavior. Bram Orobio de Castro et al., *Hostile Attribution of Intent and Aggressive Behavior: A Meta-Analysis*, 73 CHILD DEV. 916 (2002).

13. *See, e.g.*, Nicki R. Crick & Kenneth A. Dodge, *Social Information-Processing Mechanisms in Reactive and Proactive Aggression*, 67 CHILD DEV. 993 (1996); Kenneth A. Dodge et al., *Reactive and Proactive Aggression in School Children and Psychiatrically Impaired Chronically Assaultive Youth*, 106 J. ABNORMAL PSYCHOL. 37 (1997); Dodge & Newman, *supra* note 12.

14. *See* Reid Griffith Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 PSYCHOL. PUB. POL'Y & L. 143 (2007).

cognitively biased or dysfunctional, may consider alternative interpretations of the stimulus, or, prior to reacting, investigate the situation further so that he may have sufficient information to confidently and more accurately interpret its nature. However, in a case where the cognitively-biased heat of passion killer (a) did not cause his cognitive bias, and (b) could not have reasonably foreseen how said bias would contribute to his reactive killing, it is unclear how he is any more culpable than the heat of passion defendant who killed in response to a provocative situation that does meet the reasonable person standard. This is the crux of the social cognitive argument.

Of course, the social cognitive argument presumes that heat of passion is a partial excuse defense. If heat of passion were a partial justification defense, then the argument would be moot. Essential to the conceptualization of heat of passion as a partial justification is that the killer must have been seriously wronged—there presumably must be adequate, *real* provocation in order to even attempt an argument that a reactive killing is at all justifiable.[15] Of important note, though, is that whereas provocation typically needs to be adequate (meaning that it must meet the reasonable person standard), it does *not* have to be real.

II. TO WHAT DEGREE IS PROVOCATION LAW ABOUT *PROVOCATION*?

In his influential 2002 article, Joshua Dressler stated "Provocation law is all about emotions, most notably anger."[16] However, provocation law is not *all* about emotions, per se, but rather is, at least to some extent, about provocation.[17] But what did Dressler mean by this assertion?[18] Below is a brief analysis of the respective degrees to which provocation law is *about* (or concerned with) provocation versus emotion, which may inform a proper determination as to the justificatory versus excusatory nature of heat of passion.

It is outside the scope of this Article to discuss all arguments as to whether heat of passion is a partial justification or excuse. In-

15. Below, I argue that even most instances of egregious, *real* provocation fail to justify, even partially, a reactive killing. *See infra* Part IV.

16. Dressler, *Why Keep the Provocation Defense?*, *supra* note 10, at 959 n.5.

17. Fontaine, *supra* note 14, at 150.

18. I believe that the meta-message of Professor Dressler's statement is right on point—the key component of heat of passion is emotion. Only via heightened emotional arousal are the killer's rational capacity and self-control undermined, and, therefore, culpability is mitigated.

deed, it is unnecessary to do so, as others have taken on this task elsewhere.[19] Presumably, for the doctrine to be one of partial justification, it would demand a higher standard than that of excuse, for it would mean that the action of the killer is a partially morally good or right (or at least partially acceptable) thing to do.[20] Certainly, the only component of heat of passion that could be argued to partially justify or *entitle*[21] one to kill another is that the killer was first wrongfully and substantially harmed by the victim. In heat of passion terms, this is the "criterion" of adequate provocation. As previously stated, American common law has been inconsistent in its treatment of the doctrine as one of justification or excuse.[22] Similarly, common law jurisdictions have varied considerably in their determinations as to what does and does not count as adequate provocation—so much so that I have carefully placed the word *criterion* in quotation marks, as adequate provocation itself is a standard of questionable meaning. In fact, analysis of American common law reveals that, across various types of reactive homicides, provocation by the victim is not at all necessary in order for the heat of passion defense to be recognized by the court. A taxonomic review of the more illustrative cases follows below.

A. Adequate Non-Provocation Found in Provocation Doctrine

There have been multiple cases in which, although no actual provocation by the victim is present, the court has recognized the applicability (or at least invokability) of the heat of passion defense. If adequate provocation is defined as *provocation by the victim sufficient to significantly undermine the rationality of a reasonable person*, then we may term these cases ones of "adequate non-provocation,"

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19. Among them, Dressler's is most widely recognized. *See* Dressler, *Provocation*, *supra* note 10, at 467–80. Although, much has been written related to the topic by Dressler and others in the last twenty years.

20. *See, e.g.*, J. L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y 1, 3 (1956–57), *reprinted in* JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW: A COLLECTION OF ESSAYS 3, 4–5 (Michael L. Corrado ed., 1994); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 16.03–04 (3d ed. 2001).

21. *See* Austin, *supra* note 20, at 5.

22. There are even cases that consider the doctrine as either. *See, e.g.*, People v. Wickersham, 650 P.2d 311, 321 (Cal. 1982) ("[H]eat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and . . . , consequently, no defendant may set up his own standard of conduct and *justify or excuse* himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man . . . ." (quoting People v. Valentine, 169 P.2d 1, 8 (Cal. 1946))) (emphasis added).

in that the adequate provocation standard is met but real provocation by the victim is absent. Adequate non-provocation cases may be organized into two categories (Mistaken Belief and External Source Provocation), each of which being further specified by two subtypes.

1. Category 1: Mistaken Belief

The first category is defined not by the absence of provocation by the victim altogether, but rather a mistaken belief as to the existence of a serious provocation by the victim. This category reflects the ability and inclination of courts to recognize the spirit of mistake of fact doctrine[23] as a part of heat of passion. As discussed below, this approach has been judicially supported in several American homicide cases, and has been reflected by statutory language in various instances, as well. In particular, the MPC's expression of heat of passion specifically makes this allowance in explaining its "extreme mental or emotional disturbance" language as requiring a "reasonable explanation or excuse" by which reasonableness is "determined from the viewpoint of a person in the actor's situation under the circumstances *as he believes them to be.*"[24]

a. Sub-Type: Reasonable Mistake

The first subtype of Category 1 includes instances in which there is a *reasonable* mistake as to provocation by the victim. Within this subtype, there exists perhaps no more influential opinion than that offered by the Supreme Court of Errors of Connecticut at the turn of the twentieth century in *State v. Yanz.*[25] In *Yanz*, the defendant came upon his wife in the intimate company of a male acquaintance in the woods, the latter of whom was known by the defendant, as well. The nature of the intimacy of the rendezvous was disputed, and there remained an unanswered question as to whether the defendant's wife and her companion were indeed engaged in sexual

23. Mistake of fact constitutes a defense when the defendant's mistake negatives the requisite mens rea of the alleged crime. Note, though, that whereas some states require that the defendant's mistake of fact must be objectively reasonable, many, in fact, do not. *See* MATTHEW LIPPMAN, CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES, AND CONTROVERSIES 316–17 (2007).

24. MODEL PENAL CODE § 210.3(1)(b) (1980) (emphasis added).

25. 50 A. 37 (Conn. 1901).

relations. The defendant, though, having interpreted that his wife had romantically betrayed him, fired upon the male acquaintance, killing him. In the majority opinion, the court in *Yanz* wrote:

> The law justifies a jury in calling it manslaughter when, on finding his wife in the act of adultery, a man, in the first transport of passion, kills her paramour. This is because from a sudden act of this kind, committed under the natural excitement of feeling induced by so gross an outrage, malice, which is a necessary ingredient of the crime of murder, cannot fairly be implied. *The excitement is the effect of a belief, from ocular evidence, of the actual commission of adultery. It is the belief, so reasonably formed, that excites the uncontrollable passion. Such a belief, though a mistaken one, is calculated to induce the same emotions as would be felt were the wrongful act in fact committed.*[26]

In essence, the court in *Yanz* reasoned that where there is a reasonable belief of being seriously provoked, whether accurate or mistaken, a person may experience the same level of arousal such that she is equally likely to become emotionally uncontrolled. The reasonable interpretation of significant provocation, then, gives rise to the defendant's heated killing, partially excusing the defendant's crime and reducing it from murder to manslaughter. Here, adequate provocation amounts to the reasonable belief that there existed serious aggravation, even in the case that the belief is, in fact, invalid.

Although *Yanz* is more than a century old, it is still actively cited,[27] reaffirming a reading of the doctrine that it is the reasonable, even if erroneous, belief that the victim was the source of serious provocation that is sufficient to satisfy the adequate provocation standard. In one recent case, *Howell v. State*,[28] the defendant killed his victim after the victim made statements that were interpreted by the defendant to link the victim to a third man, an alleged drug dealer, who had threatened and shot at the defendant

26. *Id.* at 39 (emphasis added).

27. *E.g.*, Howell v. State, 917 P.2d 1202, 1209 (Alaska Ct. App. 1996); People v. Martinez, No. B152518, 2002 WL 1482547, at *6 (Cal. Ct. App. July 11, 2002); People v. Brooks, 230 Cal. Rptr. 86, 89 (Ct. App. 1986); State v. Montanez, 894 A.2d 928, 939 (Conn. 2006); State v. Chicano, 584 A.2d 425, 430 n.12 (Conn. 1990); *cf.* People v. Contreras, No. F048014, 2006 WL 2942524, at *23 & n.24 (Cal. Ct. App. Oct. 16, 2006) (highlighting a difference in fact patterns).

28. 917 P.2d at 1205. In addition to *Yanz*, the court of appeals in *Howell* also cited *State v. Michael*, 82 S.E. 611, 614 (W. Va. 1914) (finding that if the defendant reasonably believed that the person standing next to the provoker was acting in concert with the provoker, a finding of manslaughter, and not murder, is correct). *Howell*, 917 P.2d at 1209.

earlier in the day. The court of appeals reversed Howell's murder conviction on the grounds that his belief that the victim was a "friend" of the alleged drug dealer may have been reasonable, even if incorrect, and thus the court should have instructed the jury on heat of passion. In further support of the reversal, the court of appeals cited Alaska statutory law,[29] which, consistent with *Yanz*, provides that a defendant on trial for murder may have her crime mitigated to manslaughter when a reasonable person in the defendant's circumstances would have believed that the victim had acted toward her in a seriously provocative manner.[30] That is, as long as the belief of serious provocation is a reasonable one, its validity is not required. In the case that the reasonable belief is incorrect, the killer's conduct may still be partially excused. The belief itself serves as adequate non-provocation.

b. Sub-Type: Unreasonable Mistake

Alternatively, the second subtype in Category 1 includes instances in which the killer's belief that he has been provoked is presumably *un*reasonable.[31] In *Howell*, there was some question as to whether the defendant's mistake as to the provoker was due, in part, to his intoxication, an issue that was disputed. Presumably because the degree, if any, of the defendant's intoxication was unknown, it did not play a role in the court of appeals' decision to reverse. Intoxication of the defendant in *State v. Mauricio*, however, was undisputed.[32] In *Mauricio*, the defendant, while intoxicated, killed his victim upon mistaking him for the bouncer with whom he had had conflict earlier in the night.[33] On appeal, despite hav-

29. *Id.* at 1208–09 (citing ALASKA CRIMINAL CODE REVISION, Part I, at 30 (Tent. Draft 1977)); ALASKA STAT. §§ 11.41.115(a), 11.41.115(f)(2) (1978). The current language of the statute leaves no question as to the correctness of the court of appeals' understanding of the legislature's intention: "'serious provocation' means conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, . . . , under the circumstances as the defendant reasonably believed them to be." ALASKA STAT. § 11.41.115(f)(2) (1988).

30. 917 P.2d at 1208.

31. Note that the social cognitive argument falls under this category of Class 1. Due to the cognitive dysfunction—or, more specifically, provocation interpretational bias—of the defendant, he may mistakenly and unreasonably (by definition) interpret the ambiguous provocation as substantially provocative and egregious. *See* Fontaine, *Wrongfulness*, *supra* note 11, at 72–79.

32. 568 A.2d 879, 881 (N.J. 1990). Not only did eyewitnesses agree that the defendant was intoxicated, but the defendant himself requested that the superior court judge instruct the jury as to the intoxication defense. The judge denied this request and the defendant raised the denial on appeal. *Id.* at 887.

33. *Id.* at 882.

ing recognized that the defendant was mistaken as to the provoker, and that the defendant was undisputedly intoxicated at the time of his mistake, the Supreme Court of New Jersey found that the superior court erred in its failure to instruct the jury as to the heat of passion defense.[34] Of course, a mistake, by definition, cannot be presumed reasonable if made when the maker is intoxicated. On the contrary, some courts have asserted that a non-sober judgment of provocation is necessarily inconsistent with reasonableness.[35] The supreme court's reversal in *Mauricio*, then, effectively recognized that a presumably unreasonable (due to intoxication) mistake as to provocation by the victim may be considered when determining adequate provocation in heat of passion.[36] Whereas *Mauricio* and the other Category 1 cases herein discussed are relatively infrequent, they do not reflect an exhaustive list of this interpretation of heat of passion. Of course, any argument that mitigation of culpability and punishment in this type of non-provocation scenario is grounded in justification must necessarily be quite confused.

2. Category 2: Misdirected Action due to Provocation

In the second category of cases, there is no question as to the existence of a real, substantial provocation causing the killer's heat of passion. However, just as clear is that the provocation is not caused by the victim, which is in direct opposition to the latter half of the

34. *Id.* at 887. The supreme court in *Mauricio* discussed the issue of intoxication in reference to whether the trial court erred in denying the defendant invocation of self-induced intoxication as a defense under New Jersey law, and not in reference to heat of passion. Nevertheless, having acknowledged that the defendant's intoxication at the time of the killing was, at trial, undisputed, the supreme court concluded "that the evidence was susceptible of different interpretations and that defendant's view of the case would have permitted a jury rationally to conclude that a reasonable person might, under the circumstances, have reasonably been provoked to the point of loss of control." *Id.* at 885.

35. For instance, and with specific reference to the "reasonableness" of interpreting provocation, the court of appeals in *Howell v. State* repeatedly explicated that reasonableness is inconsistent with intoxication: "[T]he existence of serious provocation must be determined through the eyes of a reasonable (and sober) person standing in the defendant's shoes." *Howell*, 917 P.2d at 1207. The court's qualifying language, "(and sober)," is here taken to mean that the reasonableness of one's determination of provocation is to be presumed *un*reasonable in the case that the determiner is intoxicated. *Id.*; *see also Contreras*, 2006 WL 2942524, at *22 (providing similar language). Lastly, the Alaska statute cited in *Howell*, ALASKA STAT. § 11.41.115(f)(2) (1988), reflects this exception to reasonableness: "other than a person who is intoxicated . . . ."

36. 568 A.2d at 887.

provocation "criterion"—wrongful aggravation *by the victim*.[37] In such cases, with respect to the victim there exists no provocation whatsoever.

a. Sub-Type: Unintentional Misdirection

Typically, a Category 2 case is one in which the killer is really and substantially provoked, and the defendant undisputedly intends to kill, but then *accidentally* kills a non-provoker.[38] Illustrative of this case type is *People v. Paredes*,[39] in which the defendant, after a dispute with another man and in the heat of passion, fired several bullets at his provoker as their respective cars traveled alongside each other on the freeway. Paredes was successful in shooting and killing his provoker, but he accidentally shot and killed a female passenger in the provoker's car, as well. The trial court instructed the jury on transferred intent and Paredes was convicted of two counts of voluntary manslaughter.[40] However, no issue as to provocation on the female companion's part was ever raised.

In *Paredes*, transfer of intent is interpreted to mean that, because the defendant's fury undermined his control and ability to form malice aforethought, his wrongful killing of the non-provoking victim (i.e., the female companion) is non-murderous. In essence, Paredes is convicted of the reduced crime of manslaughter because he wrongfully killed the female companion while in a heat of passion state. Here, mitigation must be seen as an excuse as it cannot be that the killing of the non-provoking victim was even slightly justifiable.

b. Sub-Type: Knowing/Intentional Misdirection

The second subtype of Category 2 raises the issue as to whether the heat of passion defense may be invoked in the case in which the defendant has been seriously provoked and, in an emotionally aroused state, knowingly or intentionally, kills a non-provoker. In

37. Note that because there remained a question as to whether the defendant in *Mauricio* had been adequately provoked by *anyone* (including the bouncer), it is not included as a Category 2 case.

38. *See* Dressler, *Rethinking Heat of Passion*, *supra* note 10, at 441 n.180.

39. No. B182323, 2007 WL 3015696 (Cal. Ct. App. Oct. 17, 2007).

40. On appeal, Paredes argued that this jury instruction was given in error and that he should be found guilty only of involuntary manslaughter with respect to the provoker's companion. The trial court's judgment was affirmed and both convictions were upheld. *Id.* at *3–5.

State v. Stewart,[41] the defendant became enraged when his ex-girlfriend (and mother of his toddler son) informed him that "she was either HIV-positive or had AIDS." The defendant stabbed his ex-girlfriend, who was pregnant by another man at the time, and his son to death. The jury found Stewart guilty of heat of passion manslaughter with respect to his ex-girlfriend and the unborn child, but guilty of first- and second-degree murder of his son. Note that Stewart was acquitted of first- and second-degree murder of both his ex-girlfriend *and* the unborn child, though the unborn child necessarily could not have provoked Stewart in any way. In fact, it is not clear from the record as to whether Stewart even knew that his ex-girlfriend was pregnant. So, with regard to the unborn child, we have a case of adequate non-provocation similar to that in *Paredes*—one of transfer of intent.

The conviction of first- and second-degree murder of Stewart's son, though, presents a different issue, which makes *Stewart* a unique case. Stewart testified that he did not remember killing his son (presumably because of his heightened emotional arousal), though he told police and his current girlfriend that he had first put his hand over his son's mouth because he was afraid his son's crying would attract attention.[42] Stewart appealed the murder conviction but the judgment was affirmed.[43] However, the Supreme Court of Minnesota, in its unanimous decision, was explicit in noting that its basis for upholding the conviction was *not* because Stewart's son was a non-provoker, writing that "the victim and the provocateur need not be the same person and that the mitigating consequences of heat of passion, provoked by one party, may be transferred to assaultive conduct toward someone other than the provocateur."[44] Rather, the court affirmed the murder conviction because Stewart's admissions to the police and his current girlfriend demonstrated that he killed his son "in a rational, calculating and controlled emotional state of mind—attempting to avoid detection for the crime he just committed."[45] Implied in this decision is that heat of passion may apply even when one kills a non-provoker knowingly and intentionally. In this way, *Stewart* provides a meaning that is distinct from that of *Paredes*, and serves to introduce a second subtype of Category 2 adequate non-provocation.

41. 624 N.W.2d 585 (Minn. 2001).
42. *Id.* at 588.
43. *Id.* at 587.
44. *Id.* at 589–90.
45. *Id.* at 591.

The court in *Stewart* referred not only to Minnesota statutory law, but to the MPC[46] as well. The MPC provides that one who would otherwise be guilty of murder is guilty only of the lesser offense of manslaughter if the killing was "committed under the influence of extreme mental or emotional disturbance [EMED] for which there is reasonable explanation or *excuse*."[47] The MPC's adaptation of heat of passion is carefully crafted to make sure that there is little question that the defense is an excuse. The objective standard of reasonableness of EMED is "subjectivized" or "determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be." Also of note is that there is no issue of adequate provocation; provocation need not even exist, never mind cause the emotional disturbance, be serious in degree, or meet any limitations applied in some common law jurisdictions (e.g., that the provocation need wrongfully cause injury or be otherwise unlawful). Rather, the defendant need only demonstrate a "reasonable explanation or excuse" for her emotional disturbance. In the MPC, the mechanism by which EMED excuses is in its diminishment of the actor's capacity to function in a fully (or at least sufficiently) rational manner. In essence, EMED reflects the limitation of diminished capacity that is at the core of the excusing nature of heat of passion.

B. "Heat of Passion Law," Not "Provocation Law"

Collectively, the Category 1 and 2 cases discussed above illustrate a varied range of adequate non-provocation scenarios. Furthermore, by design, the MPC has removed the requirement of adequate provocation and, via its EMED language, has emphasized the need to examine the role that psychological dysfunction plays. Therefore, to return briefly to my social cognitive argument, it appears that there is a broad foundation upon which to consider the role of cognitive dysfunction (e.g., provocation interpretational bias) in balance with the type of emotional interference that has been central to the defense since its conception. That is, one who is psychologically biased toward interpreting certain kinds of ambiguous or "open" social situations as unjust and harmful may become no less emotionally aroused, and therefore functionally

46. MODEL PENAL CODE § 210.3 (1980).

47. MODEL PENAL CODE § 210.3 (1980) (emphasis added). As Markus Dubber declared in his characterization of the MPC's version of heat of passion: "Provocation carries its excuseness on its sleeve . . . ." DUBBER, *supra* note 4, at 265.

limited, than do the types of heat of passion killers that have been discussed thus far.

It should be noted, though, that whereas the absence of neither actual provocation (Category 1) nor provocation by the victim (Category 2) precludes a defendant from invoking the heat of passion defense and reducing a murder charge to manslaughter, the absence of acting *in the heat of passion* certainly does. As inconsistent as American courts have been about the nature and application of the heat of passion defense, I am not aware of a single court that has been so disturbed in its understanding of the doctrine that it has allowed the provocation defense to be invoked in a case in which, although the provocation may have been obvious, real, and substantially egregious, the defendant did not kill in the heat of passion. The person who is provoked in the profoundest of manners, but does not experience passion as a result, is guilty of murder if she responds by intentionally killing another. Certainly, the MPC's EMED language prevents one from reasonably interpreting its version of heat of passion as a justification—rather, the MPC plainly focuses on emotion and eliminates the common law requisite of provocation altogether. Taken together, adequate non-provocation case law, corresponding statutory law, and the MPC serve to help us better glean what Dressler intended when he stated that "[p]rovocation law is all about emotions."[48] Though perhaps not *all* about emotion, what is clear is that provocation law is primarily and largely about emotion. This realization should provide some understanding as to how the non-traditional, varied cases that are comprised by Categories 1 and 2 could have evolved. In light of this focus on emotion, it may be argued that the term *heat of passion law* is a decidedly more accurate one than is *provocation law.*

III. ACTUAL PROVOCATION AND PROBLEMS WITH JUSTIFICATION

As stated at the beginning of this Article, the common law has been inconsistent in its treatment of heat of passion as either a partial justification versus excuse. The cases discussed in the previous section highlight the varied applications of heat of passion as an excuse. They do not by any means represent the entirety of U.S. jurisdictions, and one could just as easily present cases in which heat of passion is clearly treated as a justification, or a hybrid of justification and excuse components. The fact that many courts

48. Dressler, *Why Keep the Provocation Defense?*, *supra* note 10, at 959 n.5.

have understood heat of passion as a partial excuse, and have applied the doctrine across varied reactive-homicide scenarios, does not in itself *make* the doctrine one of excuse (i.e., the doctrine's nature exists independent of said cases). Just as clear, though, is that if the doctrine were one of justification (or even one that combines justification and excuse elements), it would necessarily mean that these courts, the corresponding statutory law, and the MPC all have heat of passion dead wrong, as heat of passion can only be argued to be a partial justification, or have a justification component, where there exists serious provocation (i.e., significant, wrongful harm).

However, taken collectively, the adequate non-provocation cases depict a broad scope within which common law heat of passion must be understood as a partial excuse. Unless these cases are all variations of the same mistake, they reflect a longstanding rationale as to the excusatory nature of the doctrine. The rationale is that if the doctrine may be conceptualized and applied as an excuse, then, even if it is represented and can be explained, at times, as a justification, it cannot be the latter because the former "admits to the existence of a social harm"[49] and to the wrongfulness of the act. In contrast, a justification is an assertion that the act is acceptable and makes no such concession. In this way, excuse is a lower moral standard than justification, and, as such, the defense cannot be a justification (requiring it to always meet this higher moral standard) if it can, at any time or in any instance, be rationalized and viewed as an excuse.[50] This understanding of distinction is not specific to heat of passion, but applies across affirmative defenses.[51]

It could be argued that a successful claim that heat of passion is indeed a partial excuse needs to demonstrate that in no way (or case) can heat of passion be reasonably construed to be a justification. Using the same reasoning, though, this assertion is mistaken because the moral standard of excuse lies below justification. However, this assertion does raise an important question: In what scenario, if any, can heat of passion be argued to be a partial justi-

49. *See* Dressler, *Rethinking Heat of Passion*, *supra* note 10, at 438.

50. This argument responds equally well to a third position, which states that heat of passion is sometimes an excuse and sometimes a justification. This "alternating" position is far less prominent than either of the "exclusive" arguments. I speculate that this is, at least in part, due to the realization by most theorists that because this issue is central to the nature of the defense (as it is to all affirmative defenses) that to treat it alternately as a justification and excuse is the equivalent of acknowledging two distinct defenses that have simply been assigned the same name.

51. For a recent example, Kyron Huigens made this same argument in retort to the claim that duress is a justification defense. Kyron Huigens, *Duress Is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303, 303–06 (2004).

fication? One can only be said to become morally entitled to react with violence in the case in which the victim first actually and intentionally causes the killer a serious, wrongful harm. Of course, acceptance of this characterization drastically limits the kind and number of cases to which heat of passion applies. More importantly, even this narrowly tailored depiction of heat of passion fails to sufficiently support the view that heat of passion is a justification.

Scenarios that qualify according to this narrow depiction of adequate provocation may be dichotomized into those in which a reactive killing would not prevent further unjust harm and those in which it would. If the reactive killing *does not prevent* further unjust harm, then in no way could it be argued that heat of passion is a partial justification. That is, the nature of the scenario does not entitle one to act in what would be an otherwise unlawful manner because no portion of the reactive killing may be said to prevent further unjust harm from occurring. Certainly, one who wrongfully provokes another may well deserve to be punished, but this does not entitle the recipient of said provocation to unlawfully punish (or engage in "retributive aggression" toward) him. Alternatively, if he becomes so enraged or otherwise emotionally disturbed due to said provocation, his reactive violence is, to some meaningful extent, understandable. It is because the reactive violence, though wrongful, is understandable that the reactor is partially excused. The understanding lies in the acknowledgment that, given the circumstances, a similarly placed individual would likely experience emotional disturbance similar to that of the defendant's, and that such an emotionally aroused state can undermine one's rationality and limit one's self-control.[52] This is the essence of the rationale underlying the adequate non-provocation cases, corresponding statutory law, and MPC.[53]

Let us consider reactive violence in the form of criminal battery, by which a person intentionally inflicts harm or injury upon another. If such a behavior is provoked, even egregiously, we do not justify the behavior when it would not prevent further unjust harm. However, this less serious form of reactive violence may be excused, either partially or fully, in light of the circumstances in which it is

52. The notion that the emotional response need be "understandable" given the circumstances reflects an objective standard by which the killer's mental functioning is assessed. This standard serves to distinguish wrongful killings for which there is some explicable reason from those for which there is none.

53. With respect to the MPC, this sentiment is reflected by the language "extreme mental or emotional disturbance *for which there is reasonable explanation or excuse.*" MODEL PENAL CODE § 210.3(1)(b) (1980) (emphasis added).

enacted. How could it be, though, that a reactive killing committed in the heat of passion is partially justified if a mere provoked battery that is enacted in a fit of rage is not?[54] The incompatibility of this juxtaposition is immediately evident.[55]

In the second instance in which the reactive homicide *does prevent* further unjust harm by the provoker from occurring, one may reasonably argue that the act is partially justified. For example, perhaps the reactive homicide prevents the provoker from causing further physical injury to a person (either the killer or another individual). In this case, a self-defense claim may fail because it is unreasonable to interpret the provocation as one that is likely to be imminently fatal (or at least to lead to grievous bodily harm). If so, one could argue that, in this scenario, killing in the heat of passion is partially justified. It would seem, though, that in the case in which someone is facing further significant injury, but not death, a more appropriate partial justification defense—if one is needed[56]—

54. It may be that, because of his wrongdoing (i.e., provocation), the provoker *deserves* to be punished. One may argue that the reactive aggressor is entitled or justified to retaliate. However, whereas this argument may hold moral water, it fails with respect to legality. For the punishment to be legal, it must be exacted according to due process of the laws. So, even to the degree that heat of passion homicide may be morally justifiable, it remains completely legally unjustifiable but partially excusable. Framed another way, unless the provoker poses the imminent threat of grievous bodily harm or death of another, he does not bestow upon another the legal right to react with violence.

55. One might argue that the Federal Sentencing Guidelines approximate a solution to this incompatibility; in its policy statement on victim's conduct, the Guidelines state: "If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (2008). This, however, does not resolve the U.S. inconsistency. This is an accommodation via sentencing, not verdict. As such, it is not a justification or excuse, but rather a factor that may mitigate the defendant's sentence (and, in this way, has a potential effect that resembles that of an affirmative defense, but only with respect to punishment). Carissa Byrne Hessick has argued that the Guidelines here provide what is "essentially a provocation defense for all violent crimes." Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 381 n.148 (2007). However, I believe this is a dangerous equation, because, unlike an affirmative defense (whether it be a justification or an excuse), sentencing guidelines have no bearing on the determination of the defendant's guilt. Though the defendant who benefits from the Sentencing Guidelines is subject to a shorter sentence, his verdict is no different from that of the defendant who has committed the same crime and for whom this mitigating sentencing policy does not apply.

56. Although self-defense and defense of others are typically all-or-nothing defenses, and the partial defense of "self-defense with excessive force" is unpopular, there are various scenarios that suggest that such a defense is proper. For example, one who has a reasonable though erroneous belief that an attacker is about to kill him may use excessive force in killing the attacker to defend himself. If granted a partial defense (e.g., murder reduced to manslaughter), it would be because his behavior is, in part, justified. If granted a full defense (i.e., he receives no punishment), it would be because his behavior is, in part, justified and, in part, excused. Of the two scenarios, the latter is more common, and often mistaken as a full justification.

is one in which a claim of self-defense with excessive force reduces murder to manslaughter.[57] In such a case, mitigation of culpability and punishment may well be partially justified, though said mitigation is partially justified via self-defense or defense of others, and not heat of passion.[58]

Traditionally, United States common law does not recognize a partial defense of self-defense with excessive force.[59] Instead, emotion is added to the equation, and the defendant who, in a state of uncontrolled rage, kills his provoker in self-defense with excessive force may invoke heat of passion. The added requirement of killing in a state of heated passion, though, transforms what may otherwise be argued to be a partial justification into a partial excuse. That is, the emotional disturbance reduces one's ability to act rightfully; or at least, it reduces his ability to refrain from acting wrongfully.

In addition, in the case that heat of passion is treated as a partial justification, there emerges a rather perverse implication. If it is required that the killer need experience substantial emotional upset as a result of his reasonable belief of provocation, and that, but for his emotional upset, he would not have lost self-control and killed the provoker, the provocation-resistant person (or person who maintains his control despite being seriously provoked) is placed squarely at a disadvantage. For it is the provocation-resistant person in this context who, though he has the reasonable belief that he has been seriously provoked, and therefore is entitled to some degree of retributive aggression, fails to meet the requirements of heat of passion and is convicted of murder. From a justification perspective, this is problematic because it means that the person who exhibits greater resolve (in that he maintains his

57. *See, e.g.*, Commonwealth v. Stokes, 374 N.E.2d 87, 95 (Mass. 1978); Commonwealth v. Kendrick, 218 N.E.2d 408, 414 (Mass. 1966) (reasoning that where excessive force is used in response to the original assailant, the responding individual becomes the attacker, and, "since death resulted from his use of excessive force, he would be guilty of manslaughter").

58. Although a fuller discussion is outside the scope of this Article, the doctrine of self-defense (and defense of others) is in need of similar analysis and reformation. In the case that a defendant charged with murder reasonably (self-defense) or unreasonably but genuinely (imperfect self-defense) makes the *erroneous* judgment that he is faced with an imminently fatal threat (or threat that is about to cause him grievous bodily harm), he cannot be said to be justified in his response. If the threat does not exist, then the perceived aggravator cannot be said to deserve, even partially, to be killed, and the defendant cannot be said to be entitled to his homicidal act. In fact, the defendant cannot be said to be defending himself at all. Indeed, I have attended to this matter elsewhere. *See* Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275858.

59. Cynthia K. Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 203 (1998).

rational self) is punished more severely, although, everything else being equal, he was wronged by the provoker every bit as much, and therefore was just as entitled to retaliate. From an excuse perspective, it makes good sense because the provocation-resistant person is controlled and rational when he kills the provoker, and, as a result, should not be partially excused.

Finally, the difference in moral meaning between the two serious provocation scenarios (i.e., one in which the harm caused by the provoker is complete prior to the retaliatory killing, and one in which the killing prevents the provoker from causing additional harm) is further reflected by their respective underlying motives. In the first scenario, the presumed motive is one conceived in anger in which the killer aims to harm the provoker. In the second scenario, the presumed motive is to defend oneself or another. Motive is normally not specified as an element of any level of criminal homicide.[60] However, the meaning of motive in homicide law is critical as a motive's content may often be used to infer how guilty the mind of the actor is. One may impute moral status to a reactive killer when considering an affirmative defense (such as heat of passion or excessive force in self-defense) in the same manner. In the first scenario, the defendant need show emotional dysfunction to excuse his angry retaliation. Given the circumstances, his reaction, though wrongful, may be understandable and therefore partially excusable. In the second scenario, the defendant need show no emotional arousal as the justifying nature of his motive (to defend himself or another and prevent further wrongful harm) makes moot questions of emotional disturbance and rational capacity. His action is justifiable to the degree that he acted as he *should* have (or, at least, was entitled to have) acted.

IV. JUSTIFIABLE EMOTIONS DO NOT MAKE JUSTIFIABLE BEHAVIORS

In cases in which a defense of oneself or another is disproportionately excessive in force and the defendant is found guilty of manslaughter, there is no need to demonstrate a certain level of emotion or lack of self-control.[61] Likewise, there is no requirement to negate mens rea. These defenses presume that the actor is rational at the time that she kills, whereas demonstrating emotional dysfunction and loss of self-control are central to heat of passion.

60. *Cf.* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 99–100 (2006).

61. For if there were, the defense would be, in essence, a variation of heat of passion.

From a retributive perspective—and make no mistake, heat of passion is founded upon retributive doctrine[62]—it is unclear as to why (or how) emotional disturbance or loss of self-control would ever be recognized, let alone required, by a partial justification defense. If the provocation is such that it partially justifies the reactive killing—in that it will lead to even greater unjust harm if not stopped—why would emotion be considered at all?[63]

This question goes to the issue of discerning individual psychological elements that the heat of passion doctrine specifically recognizes.[64] First, *cognition* is identified in the form of interpreting the social stimulus that is presented. One must discern the meaning of the situation at hand: Is someone else acting unjustly toward me? If so, is she doing it with the intention to harm me? If so, how serious is the harm (or potential harm)? The heat of passion killer's ability to make meaning of the social stimulus is directly relevant to the requirement of adequate provocation. As emphasized throughout this Article, *emotion* is central to heat of passion. The killer must have experienced such intense emotional arousal that her self-control is undermined. Finally, the killer's *behavior* is ultimately what forces the question of whether she acted in the heat of passion. That is, if she did not kill another, the issue as to whether she may invoke the defense is moot.

I believe that these three forms of human functioning are often confused in the consideration of the nature of heat of passion.

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62. As with all affirmative defenses, heat of passion is based on desert. It is not because a reduced sentence serves some utilitarian goal, but because the heat of passion killer is less deserving of punishment than is the murderer because the former killed out of a rationally-undermined, emotionally-charged state.

63. Indeed, in England, the Law Commission Report No. 304, LAW COMMISSION, REPORT NO. 304, MURDER, MANSLAUGHTER, AND INFANTICIDE ¶ 5.17 (2006), has specifically recommended eliminating the common law requirement of "loss of self-control" from the provocation defense. Abandonment of this requirement may be viewed as a step closer (though by itself insufficient) to reforming the provocation defense into a partial justification; likewise, it may also be viewed as overhauling the provocation defense so critically that it could no longer be termed heat of passion.

64. The mediational sequence described in this section is consistent with both appraisal theory and social-information processing theory in psychological science. *See, e.g.*, Nicki R. Crick & Kenneth A. Dodge, *A Review and Reformulation of Social Information-Processing Mechanisms in Children's Social Adjustment*, 115 PSYCHOL. BULL. 74 (1994); Richard S. Lazarus & Craig A. Smith, *Knowledge and Appraisal in the Cognition-Emotion Relationship*, 2 COGNITION & EMOTION 281 (1988). It is also consistent with the evaluative (as opposed to mechanistic) conception of emotion favored by Professors Dan Kahan and Martha Nussbaum in their influential work that distinguished alternative conceptions of emotion in the law. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996). The common assertion of these perspectives is that emotion is a product of cognitive appraisal (i.e., the assignment of understanding and meaning to a stimulus, event, or situation; an example is the interpretation that a stimulus actor intends to do harm and poses a threat of danger, which may, in turn, evoke emotions such as anger and fear).

Heat of passion reflects a mediated path by which there is an interpretation of provocation (cognition) that causes overwhelming anger (emotion), which, in turn, leads to a reactive killing (behavior). It is this mediated path that was so clearly articulated in the majority opinion in *Yanz*.[65] It is perhaps, in part, due to this clear delineation that *Yanz* continues to be cited more than a hundred years later.

Whereas *Yanz* provides a straightforward demarcation of the roles of cognition and emotion in heat of passion, some confusion about the nature of the defense likely stems from the blurring of emotion and behavior. Because emotion and behavior are typically closely related in reactive killings (i.e., a provoked killer is likely an angry or fearful one), their relatedness may be misunderstood as sameness and thus contribute to why the courts' inconsistent treatment of heat of passion as a partial justification versus excuse (or both) is so longstanding.[66] Although it may well be the case that a killer's emotional outrage at having been provoked is accepted as justified, reactive violence is another matter altogether. The killer could be entitled to be angry, but this entitlement does not extend to a violent retaliation. In fact, the degree to which one's emotions or feelings are justifiable have no bearing on the justifiability of the behavior which said emotions may inspire. Rather, the justifiability of an act depends on the balancing of the good and bad the act causes and the good and bad it prevents. This determination is completely independent of the act's emotional content, though such content may reflect the actor's subjective understanding of the act's moral status. In this way, justifiable emotions do not (and cannot) make otherwise wrongful behaviors justifiable.

It is not difficult to confuse the justifiability of emotion and behavior in heat of passion. Doing so, of course, has the obvious potential for creating an illusion that the doctrine is naturally justificatory. Surely, many, if not most, successful heat of passion cases involve a killer whose emotional outrage, though not homicidal behavior, appears to be at least somewhat warranted. It may be that the ease with which we identify with the outrage leads us, at times, to view the reactive killing as partially justified.[67] In the case of a

65. The key language from *Yanz* is quoted earlier in this Article. *See supra* note 26 and accompanying text.

66. *See* Fontaine, *supra* note 14, at 147 n.6.

67. This confusion between a moral judgment (or idea) and moral "feeling" is reflective of David Hume's ill-conceived notion that "[m]orality . . . is more properly felt than judg'd of; tho' this feeling or sentiment is commonly so soft and gentle, that we are apt to confound it with an idea." *See* DAVID HUME, A TREATISE OF HUMAN NATURE bk. III, pt. 1, § ii., at 470 (L. A. Selby-Bigge ed., Oxford: Clarendon Press 1965) (1888). Of course, psy-

particularly egregious provocation (e.g., violent sexual abuse of one's child by a neighbor), it may even be that we feel good to learn that the provoker was killed; we may think *he got what was coming to him, and he will not be able to commit such a heinous act again.* Whereas the law does not regulate how we think (the provoker deserves to die) and feel (happiness and relief that the provoker has been killed), it does indeed regulate how we act. The distinction is that, because thinking and feeling do not in and of themselves cause harm to others, one should be free to think and feel as one likes, but the same, of course, cannot be said of behavior.

Still, although emotional outrage cannot in and of itself justify the behavior it inspires, it may provide valuable information for assessing the wrongfulness of the behavior in question. It is our understanding of a person's emotional upset that gives rise to our inclination to consider this information in determining the excusability of the wrongful behavior. Such emotional upset may arise in a variety of scenarios, though it emerges from a genuine belief of having been subjected to an abuse or otherwise unjust treatment.

CONCLUSION

In the case of a defendant who has been charged with murder, he may invoke the heat of passion defense in an affirmative attempt to receive the lesser crime of manslaughter. Typically, the defendant is required to show that he was adequately provoked and, as a direct result of the provocation, became so emotionally aroused that he lost self-control and killed his provoker. It is not the provocation that mitigates the defendant's culpability and punishment, but the emotionally-charged effect that it has on him. Even in the case of the most egregious provocation imaginable, provocation does not reduce murder to manslaughter if it does not create for the killer emotional disturbance that undermines his rationality and self-control. In such a case, the defendant is guilty of the more serious crime of murder.

For a number of reasons, including the complicated psychological nature of reactive homicide, the heat of passion defense has remained subject to various points of confusion. One persistent

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chology has long demonstrated that Hume had it quite wrong. One has a feeling about morality *because* he has had an idea (or has made a judgment) about morality; that is, the feeling results from, and is a reflection of, the idea (the cognitive representation and meaning that he has ascribed to the perceived scenario). Lazarus & Smith, *supra* note 64, at 282–86.

issue of disagreement has been the justificatory versus excusatory nature of the defense. This Article attempts to highlight and categorize a series of varied American cases in which the applicability of heat of passion was extended to instances of reactive homicide although adequate provocation (or significant provocation by the victim) was absent. The cases are organized to illustrate that even in circumstances in which there is no actual provocation, or the provocation is not sourced to the victim, the heat of passion defense may still be raised. The rationale underlying these non-traditional cases is that the emotional disturbance that interferes with one's rationality and self-control arises as an effect of the genuine belief that one has been seriously wronged. The range of adequate non-provocation is interpreted to suggest that culpability that is characteristic of a yet additional scenario—in which the homicide is a function of *both* cognitive *and* emotional dysfunction—may be covered by the defense.

In addition, I have outlined new arguments for the excusatory nature of heat of passion, demonstrating how the defense fails as a partial justification even in most situations in which the killer has been seriously provoked by the victim. Finally, scholarly and judicial blurring of the discrete psychological components of heat of passion homicide may contribute to the longstanding confusion as to the nature of the defense. In sum, this Article contributes further evidence as to why it is correct to view heat of passion as a partial excuse.

Although the respective roles of cognition, emotion, and conduct in heat of passion are related in such a unique manner that nowhere else in criminal law are they similarly treated, some arguments presented herein have implications that extend beyond this specific doctrine. For example, distinguishing alternative types of individual functioning (e.g., cognition versus emotion) in duress may prove useful to clarifying the nature (i.e., justification or excuse) of the doctrine. In addition, the doctrines of self-defense and defense of others are not beyond debate as to their nature.[68] If a killer reasonably but erroneously believes that someone was about to kill him, is his killing justified? If not, is it excusable? If it is only excusable, is self-defense an excuse? Or does the non-justifiable nature of this scenario have no bearing on the nature of self-defense because it does not, by definition, reflect an act by which one *defended* himself? This line of questioning suggests that the framing of these doctrines may need to be reconsidered, in much

68. *See* Fontaine, *supra* note 58.

the same way that the social cognitive argument reviewed above places the common law framing of heat of passion into question.

Whether a defense is a justification or excuse, and how the law comes to some determination of the nature of a defense, may seem, at first glance, to be relatively unimportant concerns. For instance, one who is fully excused (as in the case of insanity) goes entirely unpunished, identical to the defendant whose actions are fully justified (as in the case of self-defense). Indeed, a proper discussion of why these topics are attributed considerable import has been provided elsewhere.[69] Perhaps most basic, as well as important, though, is that properly distinguishing justification from excuse is critical because it lies at the heart of what separates right from wrong, and, in this way, is natural to the very foundation upon which criminal law stands.

69. *See, e.g.*, 1 PAUL ROBINSON, CRIMINAL LAW DEFENSES §§ 31–39 (1984); Dressler, *Rethinking Heat of Passion*, *supra* note 10, at 444–50; Reid Griffith Fontaine, *On Passion's Potential to Undermine Rationality: A Reply*, 43 U. MICH. J.L. REFORM 207 (2009).