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ON PASSION'S POTENTIAL TO UNDERMINE RATIONALITY: A REPLY

Reid Griffith Fontaine*

I. INTRODUCTION

It is, of course, customary to express one's appreciation to his Symposium commentators for their thoughtful attention and contributions. In the present case, I find myself not only profoundly grateful, but distinctly honored by such a highly esteemed and accomplished group of legal thinkers and scholars. While we continue to disagree as to certain significant issues regarding the distinction between justification and excuse and, more specifically, the nature (and structural scope) of heat of passion,¹ my thinking on such subjects has been pushed yet further and for this I am indebted.

From the outset of my article, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*,² I had three primary goals in mind. First, I intended the article to stimulate discussion about the nature of heat of passion. Second, I provided a taxonomy of "adequate non-provocation" cases in the hope that the structural boundaries of the traditional common law framing of heat of passion, or the practical limits of its scope, would be placed in question. Third, I framed heat of passion such that the relevance of the social cognitive argument³ to the doctrine may be considered.

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

2. Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27 (2009). Throughout this Reply, I refer to the article as *Adequate Non(Provocation)*.

3. The social cognitive argument can be particularly useful in informing issues that are central to longstanding jurisprudential debates in criminal law. See Reid Griffith Fontaine, *The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias*,

This Reply is organized into several sections. Following the Introduction, I respond to my six distinguished commentators. In Section II, I consider Professor Chin's concern that the distinction between justification and excuse bears no practical relevance for the criminal law. In Section III, I respond to Professor Baron's argument that reasonable mistake of fact is consistent with justification—a view, she observes, that is generally reflected in the criminal law. Building on the discussion of whether mistake and justification are compatible, Section IV addresses Professor Pillsbury's treatment of heat of passion as a hybrid defense that uniquely incorporates components of both justification and excuse, including whether such a characterization is analytically valid. In Section V, I respond to Professor Westen's various criticisms of my arguments that heat of passion is a partial excuse. Next, in Section VI, I attend to Professor Morse's claim that the issue of the nature of heat of passion is "irreducibly normative," and, therefore, necessarily entirely non-analytical. In Section VII, I consider Professor Weisberg's extension of my earlier arguments that an understanding of the interdisciplinarity of psychology, philosophy, and law may be useful to the analysis of structural and functional issues of second-degree murder and personality disorders (or psychopathy).

II. MUCH ADO ABOUT SOMETHING ESSENTIAL: IN REPLY TO PROFESSOR CHIN

The title of Professor Chin's essay reads *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*.⁴ He quotes Professor Westen's assertion that "[t]he measure of any internally-consistent distinction between justification and excuse is its *usefulness*,"⁵ which Chin argues is unclear.⁶

Rather than respond directly to issues about which I wrote in *Adequate (Non)Provocation*, Chin opted to raise the foundational

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 PSYCH. PUB. POL'Y & L. 243 (2008) [hereinafter Fontaine, *Reactive Cognition*]. In addition, for a discussion of the psycholegal foundation of the social cognitive argument, see Reid Griffith Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 PSYCH. PUB. POL'Y & L. 143 (2007) [hereinafter Fontaine, *Disentangling*].

4. Gabriel J. Chin, *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*, 43 U. MICH. J.L. REFORM 79 (2009).

5. Peter Westen, *An Attitudinal Theory of Excuse*, 25 L. & PHIL. 289, 328 (2006).

6. Chin, *supra* note 4, at 80.

question of whether the distinction between justification and excuse is practically important.⁷ This issue, as recognized by other criminal law scholars,⁸ is one that is weighty and involved, and I too ascribe considerable significance to it. Chin recognizes that the distinction between justification and excuse may be important as a matter of legal philosophy.⁹ However, it is evident that the distinction's jurisprudential importance is of insufficient gravity to him. While I do believe that the distinction is practically important to criminal justice,¹⁰ I also believe that matters important to legal philosophy are also sufficiently important to be discussed and debated by legal thinkers and scholars.¹¹ Given that affirmative defenses stem from retributive principles—that is, they are all about desert¹²—they are by their nature a matter of retributive legal philosophy.

Whereas I disagree with Chin that the jurisprudential weight of the justification/excuse distinction is not sufficient, I further disagree with him that the distinction does not bear significant practical importance for the criminal law. In his essay, Chin first argues that “defenses need not be categorized and labeled as precisely as crimes, either for jurisprudential or for practical purposes.”¹³

7. *Id.*

8. E.g., Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1 (2003); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984). Greenawalt's paper is perhaps most well known for challenging the clarity, and in this sense validity, of the distinction between justification and excuse. Greenawalt, though, openly stated that, in multiple ways, “the basic distinctions between justification and excuse are important in the law.” *Id.* at 1898.

9. Chin, *supra* note 4, at 80.

10. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 16.03–16.04 (3d ed. 2001); 1 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 39 (1984); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1349 n.124 (1989); Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1167–74 (1987) [hereinafter Dressler, *Justifications and Excuses*]; Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 467–80 (1988) [hereinafter Dressler, *Provocation*].

11. In his recent visit to the University of Arizona's James E. Rogers College of Law, Supreme Court Chief Justice John Roberts emphasized a similar point, noting that the importance of the faculty's scholarly work does not depend on the degree to which Justices and Judges read and cite it, or its practical value, but on the degree to which it contributes meaningfully to intellectual knowledge and understanding. Chief Justice John Roberts, Address at the University of Arizona's James E. Rogers College of Law (Feb. 3, 2009).

12. Robinson provided a reminder during his recent presentation at the Symposium on Excuses and the Criminal Law at Texas Tech Law School in Lubbock, Texas on April 3, 2009. See Paul H. Robinson, *A System of Excuses: How Criminal Law's Excuse Defenses Do, and Don't, Work Together to Exculpate Blameless and Only Blameless Offenders*, 42 TEX. TECH. L. REV. (forthcoming 2009); see also Eugene R. Milhizer, *Group Status and Criminal Defenses: Logical Relationship or Marriage of Convenience?*, 71 MO. L. REV. 547, 572 (2006).

13. Chin, *supra* note 4, at 83.

Although Chin believes that “various crimes have different punishments and moral implications,”¹⁴ he contends that exceptions to such crimes, or at least the formal verdicts that reflect such exceptions, do not.¹⁵ This is perplexing. Chin is correct that all non-convictions have the same non-punitive result. He is further right to think that the formal verdict of *not guilty* typically does not speak to differences in wrongful conduct and social harm.¹⁶ However, to equate non-convictions with affirmative defenses in American criminal law is a shortsighted if not dangerous notion.

First, in any given case, the defendant’s invocation of a justification versus an excuse defense may have tremendous bearing on the likelihood that he is convicted or acquitted. This could cut both ways. The fact finder may be more or less understanding if the defendant makes the case that he acted rightfully (justification) or acted wrongfully but did so only because his rationality and self-control were undermined due to non-culpable reasons¹⁷ (excuse). Second, partial defenses, such as heat of passion, may not be equated to a scenario in which no defense was successfully raised either. In the case of a successful partial affirmative defense, the defendant is found less guilty and less punishable. Third, justification and excuse defenses brought at trial may affect the kind and degree of evidence presented at sentencing, having a direct potential effect on the type and length of punishment assigned to the defendant. Fourth, even in a case in which the defendant in question is acquitted—either on the basis of justification or excuse—and goes entirely unpunished, differential moral implications exist. The defendant who is acquitted because he acted justifiably may be said to have acted rightfully;¹⁸ in contrast, he who is acquitted by reason of excuse may be said to have acted wrongfully. There is no greater moral distinction than that between right and wrong, a distinction that is fundamental to the criminal law.¹⁹ As such,

14. *Id.*

15. *Id.*

16. Exceptions would include commonly recognized special verdicts such as not guilty by reason of insanity (or NGRI) and other possible special verdicts. See, e.g., PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 68–126 (1997); Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003) [hereinafter Morse, *Diminished Rationality*].

17. By *non-culpable*, I mean that the defendant neither actively caused them nor knew of them beforehand such that he should have taken care to prevent their effect.

18. By *rightfully*, I do not imply that the defendant necessarily acted in a pro-moral or pro-social manner, but rather within his legal rights.

19. This assertion was echoed by Professor Arnold Enker in his recent paper at the Symposium on Excuses and the Criminal Law at Texas Tech Law School. Arnold N. Enker, *In Support of the Distinction Between Justification and Excuse*, 42 TEX. TECH. L. REV. (forthcoming 2009).

Chin's assertion that "a single category [of defenses] is both accurate and sufficient"²⁰ is both morally and functionally invalid.

The second part of Chin's essay asserts that the distinction between justification and excuse bears no practical importance for criminal law.²¹ Chin takes issue with the position shared by Professors Joshua Dressler and Paul Robinson that the distinction is important in that it goes to the value of the law meeting its duty to send clear moral messages.²² Here, I believe that Chin has mistaken three issues: (i) the practical value in sending clear moral messages by distinguishing between justification and excuse applies only to acquittals, (ii) the distinction between morality and legality, and (iii) the distinction between negative and affirmative defenses, along with their differential moral meanings. I here take these in order.

First, Chin wrongly presumes that the distinction between justification and excuse is of practical value in sending clear moral messages only "in cases of acquittal."²³ The language "in cases of acquittal" is Chin's addition and it unfairly qualifies the point made by Dressler and others. For example, the defendant who raises an excuse defense, in effect, is making an assertion: "I carried out the legally wrongful act of which I am accused but I am not to blame for having done so, and therefore should not be punished." If a defendant is found not guilty by reason of insanity, the implication reflects the legal assertion he, in effect, made by invoking the applicable excuse. However, if he is convicted (i.e., a non-acquittal), the implication is that he not only acted criminally, but did so in a sufficiently rational and controlled manner and is to be held culpable for his wrongful act. Here, it is just as important that the law send clear moral messages with respect to non-acquittals as to acquittals.

Second, Chin is correct that an acquittal is generally neither a legal statement nor an implication that the defendant is innocent. However, he is wrong insofar as he does not acknowledge that it *is* indeed a legal statement that the defendant is not guilty. The moral message inherent in conviction versus acquittal is guilt versus non-guilt, which is the closest that legality can approximate morality when balanced with the presumption of innocence and the government's burden of proof.

20. Chin, *supra* note 4, at 83.

21. *Id.*

22. *Id.* text accompanying notes 32–39.

23. *Id.* at 83.

Third, and perhaps most important, I believe that Chin has conflated negative and affirmative defenses and overlooked their differential meanings. First, although it is true that an acquittal has the legal meaning of “not guilty” as opposed to “innocent,” I believe that the balance of the presumption of innocence and a *not guilty* verdict may together imply innocence (certainly it does at least in certain cases to certain audiences). But I shall leave this alone for the time being.

The larger issue here is that, even if an acquittal never implies innocence, this does not mean that the moral implications of different routes to acquittal are equivalent. In the case of an acquittal by negative defense, the implication is that the evidence in support of the prosecution’s case was insufficient to meet the standard of *beyond a reasonable doubt*. In the case of an acquittal by justification defense, the implication is that the defendant acted as he was so legally entitled. In the case of an acquittal by excuse defense, the implication is that the defendant did act wrongfully, as the prosecution charged, but not in a way for which he is to be legally blamed or punished.²⁴

For instance, when a defendant advances a negative defense, his legal assertion is: “I did not commit the criminal act that I am alleged to have committed.” When a defendant advances a justification-based affirmative defense, his legal assertion is: “I committed the alleged conduct but did not act wrongfully in doing so; that is, I was legally entitled to act as I did.” When a defendant advances an excuse-based affirmative defense, his legal assertion is: “I committed the wrongful act with which I am charged, but I am not to be held culpable or punished for having done so.” The moral implications of these alternative routes to acquittal are distinct and substantial.

The implications of the affirmative defense cases are surely different from the negative defense case in that there is no question that the defendant making an affirmative defense has met the *actus reus* element. The implications of the different types of affirmative defense cases are just as surely different in that the justification defendant sufficiently demonstrated that he did not act in a legally wrongful or socially harmful manner, whereas the excuse defendant demonstrated the exact opposite—that is, that he indeed did act in a wrongfully and socially harmful manner, but for reasons which he may not be held responsible.

24. An acquittal by justification may be equated to an exception to otherwise criminal conduct; in contrast, an acquittal by excuse represents no such exception.

Scholars have explained how and why the distinction between justification and excuse has practical implications for criminal law and justice, including how the distinction may impact issues of burden of proof, accomplice liability, rules of evidence, defense elements and structure, and applicability of a defense to alternative fact patterns.²⁵ One must conclude, of course, that Chin is not compelled by this body of work. One explanation of this skepticism is revealed in his analysis of Robinson's attempt to make the case in favor of the distinction's practical importance:

The justification/excuse distinction plays no significant role in contemporary criminal doctrine. . . . This point is illustrated in the authoritative treatise by Paul Robinson, which in Sections 31–39 (discussing “practical implications” of classification of defenses) focuses primarily on arguments and proposals for law reform, rather than setting out existing distinctions based on the justification/excuse distinction.²⁶

I agree with Chin that there is a difference between current practical relevance and potential practical importance. However, for Chin's argument to be successful, it would need to demonstrate not only that the distinction between justification and excuse does not play a substantial current role in the criminal law, but that it has little hope to play one in the future. An argument that accomplishes only the former carries little weight, as it would implicitly concede that the distinction may be practically important down the road.

In closing, I would like to build upon an idea elegantly discussed by Professor Baron.²⁷ In drawing the parallel of justification and excuse in law to justification and excuse in ethics, Baron wrote:

“[J]ustified” and “excused” are not quite on a par, morally. Given a choice between having some action of mine deemed justified and having it deemed excused, I would rather that it be deemed justified. Most people would presumably share this preference.²⁸

Although this is an empirical question for which I do not have relevant data, it is hard to imagine that Baron's presumption is

25. Dressler, *Justifications and Excuses*, *supra* note 10, at 1167–74; Dressler, *Provocation*, *supra* note 10, at 468, 477–79.

26. Chin, *supra* note 4, at 80 & n.10.

27. Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 389 (2005).

28. *Id.*

incorrect. Indeed, one might further presume that the ratio is even more disproportionate with respect to *legal* justifications and excuses, since they necessarily carry with them more numerous and weighty implications, not least of which are familial, public, and social. Even the harshest critics of therapeutic jurisprudence²⁹ would surely agree that it would be irresponsible to send a message that blurs the acceptability of the conduct in question. Likewise, even one who is far from psychologically-minded may easily imagine how an incorrect or ambiguous communication of this sort may differ in its individual effect as compared to a corresponding communication that is correct and clear. There is perhaps no more basic a practical implication than the mental (and, in turn, behavioral) effect legal communication has on its citizenly audience.

III. THE REASONABLE BUT UNJUSTIFIABLE MISTAKE OF ATTRIBUTING REASONABLE MISTAKE TO JUSTIFICATION: IN REPLY TO PROFESSOR BARON

The responses offered by Professors Baron and Pillsbury, although uniquely important, share a key substantive position. Baron and Pillsbury do not believe the question is whether heat of passion is a justification *or* excuse. They argue that the defense combines aspects of both—a perspective I hereafter call the “hybrid” version.³⁰ However, whereas Pillsbury focuses on making the case that heat of passion generally is based on components of both justification and excuse,³¹ Baron is more concerned with the adequate non-provocation cases I cited in *Adequate (Non)Provocation*, arguing that these cases do not support the position that heat of passion is solely excuse-based.³² The overlap in the respective arguments of Professors Baron and Pillsbury has to do, at least to some important degree, with the nature of, and relation between, mistake and justification. In particular, Baron’s essay is largely guided by the common law understanding that acts that are based

29. Therapeutic jurisprudence is a scholarly area of study and movement in legal practice that focuses on how and to what extent legal entities, mechanisms, and processes have therapeutic versus anti-therapeutic effects on individuals who are involved in, and subject to, the legal system. *See, e.g.*, David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125–34 (2000).

30. Marcia Baron, *The Provocation Defense and the Nature of Justification*, 43 U. MICH. J.L. REFORM 117, 117–18 (2009); Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 143–44 (2009).

31. Pillsbury, *supra* note 30. Pillsbury’s essay raises separate questions, which I address *infra* Part IV.

32. Baron, *supra* note 30, at 118.

on *reasonable* mistake are justified, which is where the primary problem with Baron's argument lies.

Baron goes further than to simply say that there are both justification and excuse components of heat of passion. She attributes greater weight to the role of emotion and the excuseness of the defense, asserting that "the traditional heat of passion defense is *mostly* an excuse, but has a justificatory component."³³ Rather than providing an underlying rationale for her conclusion, though, Baron attempts to demonstrate her point by arguing that the cases in *Adequate Non-Provocation* do not support the conclusion that the defense is one of excuse.³⁴

Baron is especially interested in how I treat reasonable mistake and justification as incompatible, a view that Baron finds "puzzling" in light of what she considers to be the criminal law's general reflection of just the opposite.³⁵ As Baron describes the general position of the criminal law, "[a] justification defense is compatible with a mistake of fact, provided that the mistake is reasonable."³⁶

I offer two initial cautions in response to Baron's perspective. First, the criminal law is not consistent in its treatment of reasonable mistake as justification, as Baron believes. Indeed, the criminal law often treats reasonable mistake as an excuse.³⁷ Second, if we were to assume the validity of Baron's understanding, I would nevertheless offer that, given the criminal law's many flaws, it would be prudent to take caution before immediately and definitively concluding that a position is right simply because it is regular to the criminal law.

As her primary example, Baron cites the common law's acceptance of reasonable mistake in its framing of the justification-based defense of self-defense.³⁸ Baron recognizes that I have attacked this

33. *Id.* at 117 (emphasis added). Consistent with the focus of this Symposium, Baron addresses the traditional common law framing of heat of passion, as opposed to the Model Penal Code's "extreme mental or emotional disturbance" variation. MODEL PENAL CODE § 210.3(1)(b) (1980).

34. Baron, *supra* note 30, at 118.

35. *Id.* at 119.

36. *Id.*

37. See, e.g., *People v. McCoy*, 24 P.3d 1210, 1215 (Cal. 2001); *People v. Navarro*, 160 Cal. Rptr. 692, 697 (Ct. App. 1979); *Brown v. State*, 74 A. 836, 838 (Del. 1909) ("That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offense at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England." (quoting *Queen v. Tolson*, (1889) 23 Q.B.D. 168)); *Noble v. State*, 223 N.E.2d 755, 758 (Ind. 1967); *Squire v. State*, 46 Ind. 459, 461-62 (1874); *Tyson v. State*, 619 N.E.2d 276, 294 (Ind. Ct. App. 1993); *Green v. State*, 221 S.W.2d 612, 614 (Tex. Crim. App. 1949).

38. Baron, *supra* note 30, at 122-23.

problem elsewhere,³⁹ as I have equal difficulty with the equation of mistake with justification with respect to self-defense (or defense of others, or any other defense framed as a justification) than I do with heat of passion. Baron states: "This is not the place to enter the debate on whether self-defense should be reclassified or reconfigured"⁴⁰ While I agree this discussion is outside the range of this Symposium, I am pleased that Baron sees the consistency with which I have treated the incompatibility of mistake and justification across both excuse-based (heat of passion) and justification-based (self-defense) defenses.⁴¹ In fact, the equation of reasonable mistake and justification by which Baron (and Pillsbury⁴² and others who agree with the common law or Anglo-American subjective approach⁴³) is guided is every bit as problematic for common law self-defense as it is for common law heat of passion. I would argue that it poses even more of a problem in that self-defense based on reasonable mistake is so commonly regarded (and misunderstood) as a justification.⁴⁴

Because Baron is correct that this Symposium cannot evaluate the larger discussion of how self-defense need be reformed,⁴⁵ I will address her question that links the two discussions: Why do I reject the idea that a socially harmful act that is committed out of a reasonably mistaken belief of fact is justified by the mistake's reasonableness? There are several reasons.

To begin, a legally justifiable act is one that the committer is entitled to perform. He has a legal right to act in such a way and, in many cases, the justifiable act is one that is viewed as good and to be encouraged, as opposed to prohibited and denounced, by the criminal law. If a wrongdoer aims his loaded gun in your direction, threatening your life, the criminal law's view is that you are justified in defending yourself. You are entitled to kill him, so as to prevent him from wrongfully taking your life, and the law views your defensive act as right, as it averts a significant social harm (the *wrongful* taking of your life) from occurring.

However, if your same fatal act is committed based on a mistaken understanding of your relationship with the person whom

39. *Id.* at 123 & n.22 (citing Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. (forthcoming 2010)).

40. Baron, *supra* note 30, at 123.

41. *Id.*; see also Fontaine, *supra* note 39.

42. Pillsbury, *supra* note 30.

43. See Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?*, 85 J. CRIM. L. & CRIMINOLOGY 295, 295-96 (1994).

44. I discuss and propose a solution in Fontaine, *supra* note 39.

45. Baron, *supra* note 30, at 123; Fontaine, *supra* note 39.

you perceive to be antagonizing (threatening, in the case of self-defense, or provoking, in the case of heat of passion) you with mortal harm, it is not clear how this has any bearing on a number of critical factors that go to the moral nature of the context in which your violent act must be considered.

First, the reasonableness of your mistake does not change the moral nature of the relationship between the perceived antagonist (PA) and you; that is, the presumed moral balance between the PA and you is not altered simply because you believe that the former has done something to alter it in your disfavor. Of course, because the PA has not acted wrongly toward you or done anything to upset the moral balance that defines the relationship between the two of you, he does not deserve to be the subject of your wrongdoing.

Likewise, the PA's non-wrongful action, whether you reasonably believe that he has acted wrongfully toward you, unreasonably believe that he has acted wrongfully toward you, or have no belief whatsoever as to his action or the possible wrongfulness thereof, in no way entitles you to act wrongfully toward him. In other words, your reasonable but erroneous belief that another person has acted wrongfully toward you in no way entitles you to act wrongfully toward him.

Lastly, and just as crucially as the prior listed reasons, it cannot be ignored that, in the case that violence is committed by one who is not so entitled, such an act produces a social harm.⁴⁶ For example, whereas no social harm is caused when you defend yourself by taking the life of one who wrongfully and fatally threatens your own, the same may not be said in the case of a mistaken threat (even if the mistake is reasonable), because the victim did not deserve to die and you were not entitled to take his life.

For these reasons, mistakenness cannot make a wrong act right,⁴⁷ nor a harmful act harmless. Nevertheless, in the case that your mistake is reasonable, it may be easily understood why you acted as you did and just as easily determined that you did not act out of a culpable mindset. Thus the act may be excused as one that is wrong and socially harmful but for which you are not to be held criminally responsible. Certainly, I am not alone in my view that

46. Even unsuccessful attempts to cause physical harm produce the social harm of danger.

47. It is important to remember that heat of passion, self-defense, and other affirmative defenses originated out of, and have continued to be guided by, retributive principles. See, e.g., Milhizer, *supra* note 12, at 572.

wrongful acts that are based on reasonable mistake are, at best, excusable, and never justifiable.⁴⁸

Baron also provides a detailed and scholarly analysis of the adequate non-provocation cases that I presented in *Adequate (Non)Provocation*.⁴⁹ Rather than respond in detail to each of her points, I here make two general concessions that apply equally to all of Baron's challenges to the adequate non-provocation cases as well as my interpretation of them and what they suggest for understanding the heat of passion doctrine.

The first concession is that it may well be that adequate non-provocation cases, as I define them, do not arise every day.⁵⁰ I realize this likelihood, and further realize that, with specific respect to the potential practical importance of cases such as those with which Chin is concerned, the argument meets this limitation. Elsewhere, I have recognized that such cases are uncommon, but I have done so in the interest of fairly projecting the extent to which the social cognitive argument may apply to and bear relevance for actual cases in contemporary American criminal law.⁵¹

Nevertheless, the presentation and taxonomy of the adequate non-provocation cases was not presented for the purpose of sending the reader into deep worry that modern judicial decision-making has applied heat of passion with reckless abandon. Rather, the presentation was intended to place in question the boundaries of the longstanding common law framing and, in this vein, reintroduce the question of the doctrine's nature so that some new ideas on the topic may be provided and considered.

Second, Baron raises some challenges to my presentations of the adequate non-provocation cases. In particular, she criticized my interpretation of *State v. Mauricio*,⁵² which I had represented as an unreasonable mistake case. My intention was to illustrate the incompatibility of intoxication and a presumption of reasonableness, as recognized by some courts, but I agree with Baron that intoxication was not the basis for the Supreme Court of New Jersey's reversal.

48. See, e.g., Stephen P. Garvey, *When Should a Mistake of Fact Excuse?*, 42 TEX. TECH. L. REV. (forthcoming 2009).

49. Baron, *supra* note 30.

50. At least with respect to the second type of Category 1 (Mistaken Belief) cases I discuss in *Adequate (Non)Provocation*, Baron clearly has "doubts" as to whether this brand of adequate non-provocation case is "at all common." Baron, *supra* note 30, at 130.

51. See Fontaine, *Reactive Cognition*, *supra* note 3, at 246–47 n.13.

52. 568 A.2d 879 (N.J. 1990). Professor Morse made a similar criticism of my treatment of *Mauricio* in his essay.

IV. BRINGING CLARITY TO MISUNDERSTANDINGS OF HEAT
OF PASSION, CRIMINAL RESPONSIBILITY, AND NATURALLY
EMPIRICAL MATTERS OF BEHAVIORAL SCIENCE:
IN REPLY TO PROFESSOR PILLSBURY

Like Professor Baron, Professor Pillsbury views heat of passion as a combination of justification and excuse.⁵³ However, in contrast to Baron, Pillsbury is indeed interested in making the case for the hybrid version.

Pillsbury does not frame the mitigating effect of heat of passion as one part justification, one part excuse. Rather, he paints heat of passion as mitigation via emotional dysfunction, just so long as said dysfunction is "justified."⁵⁴ By this account, emotional dysfunction, though itself a necessarily non-reasonable state, takes on an excuse-like existence only when it stems from reasonable cognitive functioning—that is, a reasonable judgment of provocation—and is thus justified. This is a complicated depiction, for sure, and one that deserves further attention.

Pillsbury's theory of justification rests on reasonableness (including reasonable mistakenness), not moral objectivity.⁵⁵ For example, if you kill someone because you reasonably believe you are entitled to, your reasonable judgment of entitlement makes you entitled. In other words, if you reasonably believe you have the right to kill your victim, your reasonable belief of a right creates the right.⁵⁶ However, with respect to heat of passion, Pillsbury seems to believe that reasonableness is only enough to justify emotional disturbance, and not by itself justificatory of any portion of the act of reactive homicide.⁵⁷ It is via emotional disturbance that heat of passion mitigates murder to manslaughter, but only in the case that such unreasonable emotionality is based on reasonableness. However, Professor Pillsbury has mistaken a position of *both* justification and excuse for what boils down to one of *neither* justification nor excuse. One could argue, of course, that the degree of mitigation that heat of passion affords is partially justified and partially excused, the combination of which is only enough to afford the degree of criminal and punitive relief represented by the decrement

53. Pillsbury, *supra* note 30, at 143.

54. *Id.* at 148–49. In *Adequate (Non)Provocation*, I explained that justified *emotion* does not make justified *behavior* (or, as Pillsbury prefers, *action*). I will not restate this argument here, but refer readers to Fontaine, *supra* note 2, at 46–48.

55. Pillsbury, *supra* note 30.

56. *Id.* As is likely abundantly evident in *Adequate (Non)Provocation* and from my more detailed rejection elsewhere, I do not accept this magical transformation of morality. *See, e.g.,* Fontaine, *supra* note 39.

57. Pillsbury, *supra* note 30.

of murder to manslaughter. Here, the defendant may be said to have acted slightly rightly and largely wrongly, though he is to be held less than fully responsible for the wrongful portion of his *conduct*.⁵⁸ This, in fact, would be a case of *both* partial justification and excuse. But this is not Pillsbury's position. Rather, Pillsbury's argument amounts to an interdependence of justification and emotion. He describes a scenario where the dimension of reasonable belief of provocation only justifies in its evocation of emotional disturbance, and the dimension of emotional disturbance only excuses if it arises out of a reasonable belief of provocation (enough to justify, according to Pillsbury).

This leaves open the question as to what, in the context of a criminal law that grew out of the basic distinction between right and wrong, Pillsbury's heat of passion actually is. Pillsbury's conflation of justification and excuse in the heat of passion context does not allow one to understand heat of passion as partially justified, because the conduct is somewhat right (or at least tolerable), *or* partially excused, because the defendant is only responsible for some of his fully wrongful conduct.⁵⁹

Of course, an understanding of justification that rejects the idea that mistakenness can generate the right to engage in otherwise criminal conduct does not pose such a dilemma. A justification theory that is based at least in part on moral objectivity⁶⁰ runs clear of the type of neither/nor complication of Pillsbury's heat of passion in that it necessitates that the defense be held as purely (partially) excuse-based. This observation points, once again, to the problematic nature of equating reasonable mistakenness with justification.

In addition to the blending of justification and excuse in the context of heat of passion and the inclusion of reasonable mistakenness under the justification umbrella, I must admit that I am further confused by Pillsbury's conflation of qualitatively distinct

58. For the sake of avoiding any further confusion, I here use the word *conduct* instead of *behavior*. Pillsbury believes that I incorrectly used the word *behavior*, which he views to be psychology-friendly, rather than *action*, that is law-friendly. Rather than address this point of contention in detail, as I do not believe that it would further this discussion, I hereafter use the word *conduct*, which, based on Pillsbury's response, I expect he would agree with me is one that is both psychology- and law-friendly. See *id.* at 169 n.68.

59. Of note is that Pillsbury rejects possible arguments for heat of passion as justification: "Neither [argument] would justify killing, but then provocation law does not either." *Id.* at 146. Nowhere in his essay does Pillsbury state that provocation law does not excuse killing. I believe this is because, ultimately, Pillsbury realizes that, even within his hybrid construction of the defense, it is via excuse that murder is reduced to manslaughter.

60. See George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293 (1975); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975).

and empirically discernible psychological states. For example, Pillsbury claims: "Fear and anger can be difficult to disentangle both as psychological states and as cognitive states. Having a reason to fear will also provide a reason to rage."⁶¹ As a scientific matter, researchers have empirically distinguished anger and fear, as well as the differential stimuli to which they correspond, for more than half of a century.⁶² Perhaps even more problematic within this assertion is the idea that psychological states do not include cognitive states, a notion with which I know no behavioral scientist who would agree. More to the point of Pillsbury's heat of passion argument, though, his take on the relatedness of cognition, emotion, and "moral sense" is concerning: "Professor Fontaine treats as separate and distinguishable parts of the human experience that are, *in my experience*, inextricably intertwined. It strikes me as equally plausible, per Hume and Adam Smith (among others), that our moral sense normally originates in our feelings."⁶³

Fatal to Pillsbury's position is that the interrelatedness of cognition, emotion, and what he refers to as "moral sense," which I take to mean a cognitive state having to do with one's understanding of moral matters, is an empirical matter, investigable and knowable only via systematic inquiry and examination as conducted in the neuro- and behavioral sciences. Of course, it is quite natural to take one's own experience into account when developing an idea as to the essence and meaning of a thing. I would not think to deny Pillsbury's, nor anyone else's, "personal phenomenology." However, one's subjective experiential state should not be confused with a scientifically-established empirical fact. Indeed, emotion scientists and psychophysicologists have increasingly returned to an understanding of emotions as founded in some underlying cognitive processing.⁶⁴ Our emotions may tell us something consciously

61. Pillsbury, *supra* note 30, at 147 n.13.

62. See, e.g., Albert F. Ax, *The Physiological Differentiation between Fear and Anger in Humans*, 15 *PSYCHOSOMATIC MED.* 433, 433–42 (1953); Robert W. Levenson, Paul Ekman & Wallace V. Friesen, *Voluntary Facial Action Generates Emotion-Specific Autonomic Nervous System Activity*, 27 *PSYCHOPHYSIOLOGY* 363, 363–84 (1990). For two recent meta-analyses, see Jeff T. Larsen et al., *The Psychophysiology of Emotion*, in *HANDBOOK OF EMOTIONS* 180, 180–95 (Michael Lewis et al. eds., 3d ed. 2008); Gerhard Stemmler, *Physiological Processes During Emotion*, in *THE REGULATION OF EMOTION* 33–70 (Pierre Philippot & Robert S. Feldman eds., 2004). Of course, one may experience the discrete emotions of fear and anger simultaneously. This, however, does not make the emotions one and the same, or even place them on the same side of the approach/avoid dichotomy. This may be said of many combinations of discrete emotions.

63. Pillsbury, *supra* note 30, at 170 (emphasis added).

64. Appraisal theory has been particularly generative in this realm. See RICHARD S. LAZARUS, *EMOTION AND ADAPTATION* (1991); Richard S. Lazarus, *Vexing Research Problems Inherent in Cognitive-Mediation Theories of Emotion—and Some Solutions*, 6 *PSYCHOL. INQUIRY*

about our moral convictions, but this does not mean that they did not originate out of (perhaps non-conscious, perhaps automatic) information processing (and, to be clear, by information processing I mean *cognition*).⁶⁵ A killer may very well have been angry at his victim. After the fact, he may derive a belief that, because of his angry feeling, his victim must have acted wrongfully toward him.⁶⁶ But, make no mistake, the killer would not have become angry in the first place had he not, at least at some basic or automatically-processed level, interpreted some stimulus (whether it be his victim or another individual) to have done something threatening, provocative, or otherwise aversive or unjust.⁶⁷

Before I conclude, I should say a few words to clarify my conception of criminal responsibility. Pillsbury writes: "Most fundamentally and most controversially, I disagree with Professor Fontaine's view of criminal responsibility."⁶⁸

Pillsbury believes that the "starting point for any study of criminal responsibility should be the function of the criminal law."⁶⁹ It is not so much that I find this to be unreasonable as much as it is unnecessary. One may derive an understanding of criminal responsibility from identifying the goal of the criminal law. However, one may also understand criminal responsibility by identifying how the criminal law was derived. Nevertheless, I am content to proceed by explaining criminal responsibility according to the criminal law's function. Here, though, I believe Pillsbury also gets it wrong. He introduces his notion: "Criminal responsibility should be constructed according to the social and political function of criminal law here, which is to resolve violent disputes nonvio-

183, 183–96 (1995); Richard S. Lazarus, *On the Primacy of Cognition*, 39 AM. PSYCHOLOGIST 124, 124–29 (1984) [hereinafter Lazarus, *On the Primacy of Cognition*]; Richard S. Lazarus & Craig A. Smith, *Knowledge and Appraisal in the Cognition-Emotion Relationship*, 2 COGNITION & EMOTION 281 (1988) [hereinafter Lazarus & Smith, *Knowledge and Appraisal*]; Craig A. Smith & Richard S. Lazarus, *Appraisal Components, Core Relational Themes, and the Emotions*, 7 COGNITION & EMOTION 233 (1993) [hereinafter Smith & Lazarus, *Appraisal Components*].

65. 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, 74–101 (1994); Reid Griffith Fontaine, *On-line Social Decision Making and Antisocial Behavior: Some Essential but Neglected Issues*, 28 CLINICAL PSYCHOL. REV. 17, 17–35 (2008); Lazarus, *On the Primacy of Cognition*, *supra* note 64.

66. Certainly, it is the case that emotion influences cognition. Elsewhere, I have argued that individual or *intrapersonal* systems of functioning, such as cognition and emotion, influence each other in an ongoing, dynamic fashion across time and development. See Reid Griffith Fontaine, *Applying Systems Principles to Models of Social Information Processing and Aggressive Behavior in Youth*, 11 AGGRESSION & VIOLENT BEHAV. 64, 64–76 (2006).

67. Lazarus & Smith, *Knowledge and Appraisal*, *supra* note 64; Smith & Lazarus, *Appraisal Components*, *supra* note 64.

68. Pillsbury, *supra* note 30, at 149.

69. *Id.* at 151.

lently.”⁷⁰ He later adds: “The criminal justice system exists to respond to serious wrongdoing in a way that prevents and precludes private revenge. This political and social function makes criminal responsibility potentially distinct from other forms of individual responsibility.”⁷¹

While I agree that the criminal justice system has multiple goals, including retribution and utilitarian objectives, the criminal law, which should not be equated with the larger criminal justice system, has as its goal retribution.⁷²

Although an unpopular acknowledgment in contemporary America, particularly, in the legal academy, Anglo-American criminal law has its roots in retribution and continues to have, as its purpose and jurisprudential foundation, retribution.⁷³ One who has done a criminally prohibited wrong for bad reasons is criminally culpable, and so he is punished in accordance with his criminal wrongdoing. Other components of the criminal justice system (e.g., diversion programs, probation, parole, rehabilitation) were designed to serve utilitarian interests, but these are not primary to the general and special categories of criminal law.

Affirmative defenses, such as heat of passion, likewise have retributive roots. In the case in which the defendant can counter the prosecution's *prima facie* case by arguing that he was entitled to act as he did (justification), it is said that he has done no wrong and so he is not punished. In the case in which the defendant shows that his admittedly wrongful conduct was not of his own rational doing, and that the limitation on his rationality was not itself culpable (e.g., such as in the case of voluntary intoxication), it is said that he is not responsible for his wrongful act and so he is not punished. The doctrines are entirely consistent with the retributive principle of penal proportionality, which states that one should be punished to the exact degree—no less, no more—to which he acted wrongfully and had the rational capacity and general ability by which he may have acted otherwise. Here, I agree with Professor Morse⁷⁴ that the key capacity by which criminal responsibility arises and may be determined is rationality.⁷⁵ The law presumes a general

70. *Id.* at 143.

71. *Id.* at 151 (citation omitted).

72. Sanford Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 264 (1987); Milhizer, *supra* note 12, at 628–29.

73. MODEL PENAL CODE § 1.02(2)(e) (1980); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 28–29, 83 (1997).

74. Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 251–68 (2000); Morse, *supra* note 16, at 289–308.

75. In psychology and neuroscience, we construct and study rationality (or rational capacity) in terms of information processing and decision-making. Via scientific understanding

capacity of rationality of the citizens it governs. In the case in which one does not meet this presumption of rational capacity—again, for non-culpable reasons (e.g., psychiatric disturbance)—he is not responsible for his criminally prohibited conduct. Of course, if one believes, as Pillsbury clearly does,⁷⁶ that the function of the criminal law is the purely socio-political one of dispute resolution (or, as he terms it elsewhere, prevention of “private revenge,”⁷⁷ which I must believe is simply a specific type of crime deterrence and a definitively utilitarian concern), then I understand how a theory of criminal responsibility that centers on the general capacity of rationality would be unsatisfying.

Pillsbury concludes his essay with the dismissive assertion: “This is a weak foundation for legal reform.”⁷⁸ It is unclear, though, as to what *this* entails. If Pillsbury is referring solely to the adequate non-provocation cases—and I understand he may be—then I would have to agree with his dismissal. The cases were presented solely to illustrate the outer bounds of common law heat of passion as an excuse, not as a comprehensive basis for which heat of passion, broadly considered, must or even should be viewed as an excuse. The article should be viewed in the larger context of a body of work that, taken collectively, makes a more thorough case for law reform.⁷⁹

The larger problem, at least with respect to Pillsbury’s dismissal, is that its underlying reasoning, like Baron’s, rests on the subjective position that justification can be created out of reasonable mistakenness. As I explained above and have argued in greater detail elsewhere,⁸⁰ a reasonable mistake as to objective reality does not: (i) change the moral balance or relationship between killer and victim in any way, (ii) entitle the killer, even partially, to take the

of individual differences in these psychological abilities and how they relate to variability in behavior, we may inform empirical issues that are central to longstanding discussions and debates in criminal jurisprudence and law. For example, individual differences in social interpretation (e.g., provocation interpretational bias) in relation to reactive anger and violence may be observed, giving rise to the “social cognitive argument” as applied to heat of passion and self-defense. In this way, rationality lies at the intersection of social cognitive science (psychology) and criminal responsibility (law). Kenneth A. Dodge & David A. Schwartz, *Social Information Processing Mechanisms in Aggressive Behavior*, in *HANDBOOK OF ANTISOCIAL BEHAVIOR* 171 (David M. Stoff, James Breiling & Jack D. Maser eds., 1997); Reid Griffith Fontaine & Kenneth A. Dodge, *Real-Time Decision Making and Aggressive Behavior in Youth: A Heuristic Model of Response Evaluation and Decision (RED)*, 32 *AGGRESSIVE BEHAV.* 604 (2006).

76. Pillsbury, *supra* note 30, at 159.

77. *Id.* at 151.

78. *Id.* at 173.

79. Fontaine, *Reactive Cognition*, *supra* note 3; Fontaine, *Wrongfulness*, *supra* note 3; Fontaine, *Disentangling*, *supra* note 3.

80. Fontaine, *supra* note 39.

life of, or harm in any way, his victim, (iii) make the victim deserving of harm, or (iv) eliminate the social harm that is caused by the act. As such, the killer's reasonable mistake in no way even slightly makes his harmful conduct acceptable or justifiable (though, again, it may function to *excuse* it to some degree). If it did, then I would likely be closer to agreeing with Pillsbury in his conclusion that my arguments are a weak foundation for legal reform. However, if it did, I would not have made these arguments in the first place.

V. HOW NOT TO UNDERSTAND *ADEQUATE (NON)PROVOCATION*:
IN REPLY TO PROFESSOR WESTEN

Professor Westen agrees with my conclusions—or, rather, what he interprets my conclusions to be—but he largely rejects my arguments.⁸¹ Westen's critique is a detailed one indeed; however, in my view, it was constructed out of a number of misunderstandings on Westen's part. There are three general misunderstandings that I believe explain some of the divide separating my stance on heat of passion as excuse and how Westen understands *Adequate (Non)Provocation*.

First, Westen misunderstands the underlying motivation for writing *Adequate (Non)Provocation*. It was not my intention to provide an exhaustive set of arguments that heat of passion is a partial excuse. Rather, in the interest of not reinventing the wheel, I recognized that others—in particular, Professor Dressler—had previously made an elaborate case for heat of passion as excuse, and presented my arguments more as a complement to these discussions.⁸² I offered a taxonomy of adequate non-provocation cases in order to (i) place into question the structural limits of *traditional common law* heat of passion, and (ii) raise the scenario of reactive homicide toward which the social cognitive argument is directed.

I continue to believe that these intentions were evident from the outset. In contrast to Westen, my interest in raising the applicability of psychology-law interdisciplinarity to heat of passion was so clear to Professor Weisberg that he constructed his entire essay on *Adequate (Non)Provocation* as an extension to the topic.⁸³

81. Peter Westen, *How Not to Argue That Reasonable Provocation Is an Excuse*, 43 U. MICH. J.L. REFORM 175 (2009).

82. See Fontaine, *supra* note 2, at 30.

83. Robert Weisberg, *The Values of Interdisciplinarity in Homicide Law Reform*, 43 U. MICH. J.L. REFORM 53 (2009).

The adequate non-provocation cases serve to illustrate how the boundaries of common law heat of passion *may* be widened, nothing more. As discussed in my article, the common law framing of heat of passion values the defense's external and internal components differently.⁸⁴ Whereas the external component (or actual provocation) is not absolutely necessary in that a reasonable, even if mistaken, belief of serious provocation suffices, the internal belief of provocation leading to emotional disturbance is essential and absolute. Indeed, it was the realization of this disproportionate weight favoring the internal process that allowed the various courts in the adequate non-provocation cases to extend this fundamental concept to non-traditional fact patterns.

Second, I fear that Westen misunderstands my conclusions. Westen describes what he believes is my first conclusion regarding the "substantive content"⁸⁵ of "the partial defense to murder of reasonable provocation"⁸⁶ as follows:

Fontaine implicitly concludes that, with respect to defenses framed in terms of "reasonable" or "adequate" provocation, an actor who kills one or more victims ought to possess a partial defense of reasonable provocation if, based upon what the actor believes (whether he believes it reasonably or unreasonably), the actor suffers an indignity or experiences an outrage that leaves him so emotionally aroused—and that in a jury's judgment would leave a person of reasonable values so emotionally aroused—that the actor finds it difficult, though admittedly not impossible, to resist the killing.⁸⁷

This was not at all my conclusion. With respect to the substantive content of heat of passion, I drew two conclusions. First, if we accept the traditional common law framing of heat of passion, a proper analysis of the construction of its elements demonstrates that the defense is a partial excuse.⁸⁸ Second, given the doctrine's allowance for reasonable mistakenness, as well as its possible applicability to "adequate non-provocation" cases by which the reasonableness of the killer's understanding of the subject social scenario itself is questionable, the social cognitive argument may

84. Fontaine, *supra* note 2, at 48.

85. Westen, *supra* note 81, at 175.

86. *Id.* Note that the defense is traditionally referred to simply as provocation or heat of passion.

87. *Id.*

88. See WAYNE R. LAFAVE, CRIMINAL LAW § 7.10 (3d ed. 2000); Fontaine, *supra* note 2, at 29–30.

be made, by which the cognitively-biased reactive killer's emotional wrongdoing may be considered in a morally equal light.⁸⁹ I do not conclude that the reactive killer "ought to possess a partial defense of reasonable provocation"⁹⁰ at all. The heat of passion doctrine itself provides for this, but *Adequate (Non)Provocation* was not a pro-heat of passion article per se.⁹¹ Rather, my point was that there is no legitimate moral distinction between reasonable mistakenness and non-reasonable mistakenness that stems from non-culpable cognitive dysfunction in the context of the doctrine.

Also, Westen describes a second conclusion, what he calls my "formal classification":⁹² "Fontaine concludes that the partial defense of reasonable provocation ought to be classified in its entirety as a partial excuse—and not even partly as a partial justification."⁹³ Here again, *Adequate (Non)Provocation* is more an analysis of the common law framing of heat of passion than it is a normative argument. Indeed, the analytical nature of my argument was sufficiently clear to Professor Morse that he focused his essay on the issue.⁹⁴ If we assume a specified set of elements and framing of heat of passion—as I set forth early in *Adequate (Non)Provocation*—then, via analytical inquiry and examination, we may determine its appropriate classification. Of course, some issues are by their nature normative, such as whether one is justified if he commits a serious harm against an undeserving other based on the former's reasonable mistake, but there is an analytical process that produces a conclusion of *is* as opposed to *ought* once such normative positions have been assumed or accepted.⁹⁵

Third, Westen's misstatement of my conclusions suggests that he misunderstands the nature of my primary argument. The principal approach of my article is analytical, not normative. The analysis, of course, is based upon the acceptance of certain normative positions, such as that wrongdoings based on mistake may be, at most, excused, and never justified.

Westen devotes much of his essay to presenting opposing arguments to those I made in *Adequate (Non)Provocation*. I will focus the rest of my response to clarifying and answering his opposing arguments. First, though, I should succinctly restate what justification

89. Fontaine, *supra* note 2, at 30.

90. Westen, *supra* note 81, at 175.

91. See Fontaine, *Reactive Cognition*, *supra* note 3; Fontaine, *Wrongfulness*, *supra* note 3.

92. Westen, *supra* note 81, at 175.

93. *Id.*

94. Stephen J. Morse, *The Irreducibly Normative Nature of Provocation/Passion*, 43 U. MICH. J.L. REFORM 193 (2009).

95. I explore this issue *infra* Part VI.

and excuse are (and how they differ). Conduct that is justified is right and good, or at least tolerable and within one's rights to enact. The justified actor is not blamed or punished because he has not committed a wrong or caused a social harm. Justifications apply equally to citizens aware of the circumstances that provide for exception to normally criminally prohibited conduct. In contrast, excused conduct is wrong and produces a social harm, though the actor is not blamed or punished because his subjective condition at the time of the act was such that it may not be said that he was responsible for the wrongdoing. As such, justification and excuse apply to quite different types of scenarios.

Westen appears to believe that justification and excuse can apply to the same conduct—or, rather, different instances of the same conduct.⁹⁶ It seems he misunderstands my position about the exclusive nature of justification and excuse to be related to instances of similar but morally different conduct within a jurisdiction. Justification and excuse are mutually exclusive, a truth that is not specific to instances of conduct or jurisdiction. If a defense is a justification or an excuse, it corresponds legitimately only to conduct that is justified or excused, respectively. A defense does not rightfully apply to instances of justified conduct *and* instances of excused conduct simultaneously. Westen erroneously believes that I “concede” the opposite, though, with respect to self-defense in the conclusion of *Adequate (Non)Provocation*.⁹⁷ Indeed, I have argued in detail elsewhere that common law self-defense doctrine is troubled in that it illogically includes instances of legitimately justified homicide *and* conduct that is not justified but excused, as in the case of reasonably mistaken defensive killings.⁹⁸ Westen, though, appears to believe that justification and excuse can apply to different instances of the same conduct. He writes:

Fontaine argues that if *any* homicides in reasonable heat of passion are partial excuses within a jurisdiction, including mistaken and accidental homicides, then *all* homicides in reasonable heat of passion must also be partial excuses within that jurisdiction. He takes this position because he thinks it follows from the premise that justification and excuse are mutually exclusive grounds of exculpation and hence cannot apply to the same conduct.⁹⁹

96. Westen, *supra* note 81, at 179.

97. *Id.*

98. See Fontaine, *supra* note 39.

99. Westen, *supra* note 81, at 178.

There are a few problems with this claim. First, I did not argue what Westen claims. Certainly, a jurisdiction can treat some instances of heat of passion as justification, some as excuse, and still others as a combination or hybrid of the two. In fact, I am sure that some have been inconsistent in their understanding and application of the doctrine. As discussed elsewhere and briefly stated above, justification and excuse apply to quite different kinds of conduct.¹⁰⁰ If legitimately justified and legitimately excused forms of conduct are covered by the same defense doctrine, this is a problem.

Now, if Westen here means that I claim that a defense cannot include *components* of both justification and excuse, this is equally wrong. In fact, I have made a detailed case for such a defense elsewhere, characterizing partially mistaken self-defense—that is, in the case in which (a) some but not mortal defense is needed, and (b) it is reasonably believed that mortal defense is needed—as a combination of justification and excuse components.¹⁰¹ Nevertheless, I do not believe that the traditional common law framing of heat of passion reflects such a combination, for the various reasons explained in *Adequate (Non)Provocation*, as well as others that have been explained elsewhere.¹⁰² As discussed above, I must believe that Westen mistook the purpose of my presentation of the adequate non-provocation cases to mean that if such clearly excuse-based cases exist, then all heat of passion cases within their corresponding jurisdictions must also be viewed as excuse-based. I neither intended nor asserted any such thing.

Next, Westen claims that my understanding of justification as prevention of further, unjust harm is wrong. He writes:

Justification is *not* confined to preventing “unjust” harms, for it also extends to a passerby who turns a runaway trolley into the path of a workman on the tracks where the alternative harm is to allow five workmen to die. And justification is *not* confined to preventing “further” harms, for it also extends to preventing original harms.¹⁰³

Westen's normative position clearly suggests a broader framework of justification than I could ever accept. Justification and excuse doctrines are born out of deontological retributivism.¹⁰⁴ As a

100. Fontaine, *supra* note 39.

101. *See id.*

102. *See, e.g.,* Dressler, *Justifications and Excuses*, *supra* note 10, at 1169–72.

103. Westen, *supra* note 81, at 181 (citation omitted).

104. *See* Milhizer, *supra* note 12, at 572; Robinson, *supra* note 12.

deontological retributivist, I would never accept Westen's statement that justification "also extends to a passerby who turns a runaway trolley into the path of a workman on the tracks where the alternative harm is to allow five workmen to die."¹⁰⁵ This behavior could only ever be said to be justified from a utilitarian perspective. As others have likewise misunderstood,¹⁰⁶ this is not a utilitarian discussion. Westen's point that justification extends to original harms is correct, of course. In *Adequate (Non)Provocation*, I specified *further* unjust harm because the case of heat of passion/provocation is one in which the conduct in question is reactive—that is, the killer's wrongdoing *follows* the perceived wrongdoing on the part of the provoker, and therefore could, at most, only serve to prevent *further* wrongdoing (and *not* the original wrongdoing as interpreted by the killer). The language "further unjust harm" was chosen because the discussion at hand was one that specifically addressed the heat of passion defense.

Next, Westen believes that I misunderstand scholars' opposition to heat of passion as excuse. He writes:

I am afraid that Fontaine misunderstands those who advocate the justification rationale. No one claims that partial justification is a *sufficient* rationale for the partial defense of reasonable provocation. Rather, the claim is that actors are not entitled to a substantial mitigation in punishment from murder to manslaughter unless their homicidal conduct is *both* . . . partially justified by virtue of the wrongful conduct of their victims; and partially excused by virtue of their emotional arousal.¹⁰⁷

This simply is not true. Oddly enough, Westen cites Professor Susan Rozelle in support of his statement. Professor Rozelle, in fact, is perhaps best known among scholars who view heat of passion as purely a partial justification. In her 2005 article that Westen footnotes, Rozelle concluded by asserting:

The provocation defense instead is properly grounded in justification. The mitigation from murder to manslaughter makes perfect sense in cases where the law permits some amount of force to be used (e.g., self-defense, defense of others, and resisting unlawful arrest). It would be unjust to

105. Westen, *supra* note 81, at 181.

106. See, e.g., Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197 (2005).

107. Westen, *supra* note 81, at 182–83 (footnote omitted).

punish one who killed for the full value of the force used (the murder) where some of the force used was permissible. Therefore, we offset the punishment for the full value of the force used by the amount the law permitted to be used.¹⁰⁸

Rozelle did not argue for a hybrid version of heat of passion by which components of justification and excuse are together at play. Rather, she clearly asserts heat of passion as a partial justification defense.¹⁰⁹ Rozelle's recognition of the emotion component is not that it functions to (partially) excuse, as Westen mistakenly believes, but as what she calls "emotion justification," by which one's reactive emotion may contribute to *mitigation by justification* only if the emotion itself is justified.¹¹⁰

Next, Westen argues that my comparison of reactive homicide to reactive battery (or assault, as Westen prefers) fails.¹¹¹ Westen believes that the two cannot be adequately compared because homicide is unique in its range of punishments and in the amount of legislative attention that is devoted to grading it.¹¹² However, it is quite common for jurisdictions to formally recognize legislatively graded levels of battery (e.g., battery one and battery two) and there is nothing stopping legislatures from devising an affirmative partial-justification defense by which a defendant may have his battery one charge mitigated to battery two. Westen suggests, though, that legislatures rather than judges resolve this issue by taking reasonable provocation into account at the sentencing phase.¹¹³ This may well be the case; however, if so, this does not resolve what would remain as an inconsistency in how *blame* is handled. That is, if heat of passion were a partial justification, it would serve to mitigate both blame and punishment in that it would reduce murder to manslaughter via the rationale that the defendant's violent act was partially warranted. In the case of the reactive batterer, though, a reduction in sentence that is based on the court's recognition that the defendant's violent act was partially warranted because it

108. Rozelle, *supra* note 106, at 233.

109. *Id.*; see also Morse, *supra* note 94, at 196. Morse articulates what he believes to be "the strongest possible argument for why provocation/passion is entirely or partially a partial justification." Note that Morse does not agree with this argument, but offers it as a conquerable alternative to his normative case that heat of passion is a partial excuse.

110. Rozelle, *supra* note 106, at 227–29.

111. Westen, *supra* note 81, at 183. In some jurisdictions, assault is merely the threat of imminent harm, and battery is the harmful act that typically follows the threat (hence the common term *assault and battery*). In addition, I suspect that instances of *reactive* battery are less likely to follow from assault as threat of imminent harm. As such, I chose *battery* over *assault* in *Adequate (Non)Provocation* and here do the same.

112. *Id.*

113. *Id.*

was enacted in response to reasonably interpreted provocation would only serve to mitigate punishment, not blame. As such, Westen's rebuttal to my comparison of reactive homicide and reactive battery as partial justifications is unpersuasive.

Next, Westen asserts that the subsection of *Adequate (Non)Provocation* in which I clarify the distinctions between cognition, emotion, and behavior/conduct as differentiable components or systems of human functioning does not demonstrate that advocates of heat of passion as partial justification are wrong.¹¹⁴ He writes:

Fontaine's final argument against justification being a rationale for reasonable provocation responds to the following question: "If justification is *not* the rationale, why are courts and commentators so eager to talk about 'justification' in connection with reasonable provocation?"

... [A]ll that Fontaine shows is that, if one agrees with him about the defense's substantive content, one can still invoke the language of "justification." He does not show that those who disagree with him about the defense's substantive content—and who use "justification" in its traditional sense—are mistaken.¹¹⁵

The purpose of this discussion, though, was merely to provide an explanation as to how advocacy of heat of passion as justification may persist despite compelling normative arguments and analytical evidence that it is excuse-based. When I wrote that "justifiable emotions do not make justifiable behaviors,"¹¹⁶ the intended point was that an act is either justified or it is not, a state that is entirely independent of any emotion that inspired it or is otherwise associated with it.

VI. DOES "IRREDUCIBLY NORMATIVE" PRECLUDE ANALYTICAL INQUIRY?: IN REPLY TO PROFESSOR MORSE

Like Westen, Professor Morse agrees with my conclusions, but rather takes issue with my argumentation. Unlike Westen, though, Morse's primary concern is not so much with how I went about

114. For a discussion of the interrelatedness of individual (or intrapersonal) systems of human functioning, see Fontaine, *supra* note 66.

115. Westen, *supra* note 81, at 184.

116. Fontaine, *supra* note 2, at 46.

making an analytical case that the common law framing of heat of passion is an excuse, but that I took an analytical approach at all. Morse believes that the issue as to whether heat of passion is a partial (or even entire) justification or excuse is necessarily and irreducibly normative and, one may infer, that to address it analytically is futile.¹¹⁷

I agree with Morse that, at their foundation, the matters upon which we focus in this Symposium are naturally normative. Should behaviors that are based on reasonable mistakes be viewed as justified or excused? Should the heat of passion doctrine fully exculpate murder, mitigate it to manslaughter, or be abolished? Should heat of passion mitigate murder to manslaughter because the killer was seriously provoked, his emotional arousal significantly undermined his rationality, or some combination or blending of both? At this basic level of inquiry, it is clear, as Morse says, that we are dealing with normative issues.

The first place at which Morse and I differ is that he sees no place for analysis in the discussion about the nature and structure of heat of passion. As Morse himself acknowledges, little to no headway has been made regarding resolution of some of these normative issues.¹¹⁸ Nevertheless, there certainly has been some agreement in American common law as to the structure of the heat of passion defense and its elements.¹¹⁹ Among the elements in the common law framing of the doctrine are that a reasonable person would have believed that there existed a serious provocation and that, as a direct result of the (reasonable belief of) serious provocation, the defendant became emotionally overwhelmed.¹²⁰ We may debate what the elements of heat of passion should be, how they should be stated, and what their function (i.e., justification or excuse, full or partial exoneration, etc.) should be. But if we assume the elements as they have been largely agreed upon in the common law, then we may go about analyzing their normative underpinnings and meaning.

This is exactly what I did in *Adequate (Non)Provocation*. I presented the common law framing of heat of passion and, via a top-down analytical approach, made a case for heat of passion as a partial excuse. I agree with Morse that the common law framing is itself a defense of a normative position. However, we can analyze the framing in order to understand what that normative position is—that

117. Morse, *supra* note 94, at 193.

118. *Id.* at 200.

119. See LAFave, *supra* note 88, § 7.10.

120. *Id.*

heat of passion mitigates murder to manslaughter by partially excusing the defendant because his rationality was undermined by emotional arousal at the time of his killing.

For the sake of argument and assessing the potential of analytical refutation of the case, Morse offers what he describes as “the strongest possible argument for why provocation/passion is entirely or partially a partial justification.”¹²¹ In this account, Morse claims that heat of passion *requires a serious provocation*. Of course, this is not at all the case—the defense requires only the reasonable belief of a serious provocation. In his role as advocate for heat of passion as justification, Morse states:

Although Professor Fontaine rightly notes the variation among jurisdictions concerning the criteria for provocation, he does not and cannot deny that the mitigation requires a provocation and that the provocation must always be serious.

....

In short, the provocation required by the provocation/passion mitigation must always be a serious physical, psychological or economic wrong.¹²²

The fact is that, according to the American common law framing of heat of passion/provocation, the reasonable belief of provocation suffices, even if erroneous.¹²³ If the strongest case for heat of passion as justification rests upon a misstatement of the doctrine, it is off to a poor start.

The point that only the reasonable belief of provocation is necessary was primary to my argument in *Adequate (Non)Provocation*. What is always required of heat of passion/provocation, though, is passion. Whereas one may successfully invoke the defense in a case where no serious provocation in fact existed, one cannot in the case where the defendant was not emotionally overwhelmed. If heat of passion/provocation were to require a real, serious provocation, the mitigating function of the doctrine may be understood as a justification, as this condition is universal and thus would apply equally to all citizens. However, because the absence of serious provocation does not preclude the invocation of heat of passion so long as provocation is reasonably believed, we find that emotional

121. Morse, *supra* note 94, at 196.

122. *Id.* at 197.

123. *E.g.*, Howell v. State, 917 P.2d 1202 (Alaska Ct. App. 1996); State v. Yanz, 50 A. 37 (Conn. 1901).

disturbance (and its effect of undermining rationality) is the indispensable, key ingredient; one that is not a universal condition, but entails a subjective mental state central to mitigation by excuse. The conclusion that heat of passion is a partial excuse thus must follow from this relatively simple analysis of the common law framing. In this way, one may analytically determine the normative position that the common law doctrine was designed to reflect.¹²⁴

Certainly, this sort of top-down analysis is not uncommon in criminal law theory. I am reminded of a compelling, simple example provided by Professor Michael Moore.¹²⁵ In making the argument that the purpose of the criminal law is retribution, Moore analyzed the structure of American homicide law:

More important is the shape of our criminal law doctrines themselves. If one were seeking to maximize deterrence, or incapacitation, we would not have the doctrines we do. Consider but one example, the differential punishment for intentional homicide. Typically under American state law, intentional killing may be first degree murder if it was premeditated, voluntary manslaughter if it was done in a rage brought on by the victim's provoking act, or second degree murder if it was neither provoked nor premeditated. On crime-prevention grounds of deterrence or incapacitation, these are hard distinctions to justify. The more impulsive the killing, the more punishment there should be on deterrence grounds, for such draconian measures may be the only way to get the impulsive killer to stop and think.¹²⁶

124. Markus Dubber engaged in a similarly analytical examination in his assessment of the Model Penal Code's "extreme mental or emotional disturbance" version of provocation, concluding that the MPC framing of heat of passion clearly reflects an excuse. MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE* 265–71 (2002) ("Yet an excuse it clearly is, at least in the Model Penal Code's scheme of things."). In *Adequate (Non)Provocation*, I likewise concluded that heat of passion is an excuse in the common law's scheme of things. Fontaine, *supra* note 2.

125. Indeed, Moore's example was reprinted in a foundational criminal law text co-written and co-edited by Morse. See Michael S. Moore, *The Nature of a Theory of the Criminal Law*, in *FOUNDATIONS OF CRIMINAL LAW* 57 (Leo Katz, Michael S. Moore & Stephen J. Morse eds., 1999) [hereinafter Moore, *Nature of a Theory*]. The article originally appeared as Michael S. Moore, *A Theory of Criminal Law Theories*, 10 TEL AVIV U. STUD. L. 115, 134–40 (1990).

126. Moore, *Nature of a Theory*, *supra* note 125, at 60–61. Note that Moore is making an assumption about a naturally empirical issue here—that punishment would more effectively deter impassioned, reactive killings (heat of passion manslaughter) than it would relatively non-emotional, instrumental killings (first-degree murder). See Fontaine, *Disentangling*, *supra* note 3.

Here, Moore has simply identified and accepted a structure or framing of, as Morse correctly states, irreducibly normative issues and, via an analytical approach, identified (correctly, in my view) that the framing in question reflects a normative position that places retribution at the foundation of criminal law. Just as Moore concludes that “[s]uch laws make sense only if they are seen as attempting to grade culpability,”¹²⁷ I conclude in *Adequate (Non)Provocation* that the common law framing of heat of passion makes sense only as a partial excuse.¹²⁸

I must admit that I find myself confused about Morse’s own argument that heat of passion is a partial excuse. That is, his argument does not exactly appear to be designed to reflect the normative position he claims to defend. Let us accept that Morse indeed does not believe that heat of passion/provocation requires a real, serious provocation, as this assertion was clearly grounded in his role as devil’s advocate for heat of passion as justification. Nevertheless, Morse believes that reasonable mistakes are squarely grounded in the justification camp. He writes:

I firmly believe that such agents [i.e., agents who act based on reasonable mistake] are justified because I adopt a particular, normative view of the action-guiding nature of criminal law rules. An agent who acts entirely reasonably for a justificatory reason has done all that any decent society can expect of him and therefore he is justified despite the regrettable mistake. *He has done nothing wrong.* Those who disagree, including, apparently, Professor Fontaine, are not illogical or incoherent, but neither is the view I defend. It is a normative choice. If one concludes that the reasonably mistaken agent is justified, then permitting the reasonably mistaken provoked and passionate agent to succeed with provocation/passion is not inconsistent with the partial justification version of the doctrine.¹²⁹

If, as Morse argues, (i) heat of passion requires a reasonable belief of serious provocation, and (ii) acts based on reasonable but erroneous beliefs are justified, it is difficult for me to understand how it is that Morse may conclude that “provocation/passion is best interpreted as a partial excuse.”¹³⁰ This argument seems more in line with an interpretation of heat of passion as part justification, part

127. Moore, *Nature of a Theory*, *supra* note 125, at 62.

128. Fontaine, *supra* note 2, at 50.

129. Morse, *supra* note 94, at 200 (emphasis added) (citations omitted).

130. *Id.* at 193.

excuse, by which each component is necessary but neither, by itself, is sufficient. Further perplexing is Morse's language that an agent "has done nothing wrong."¹³¹ Whereas I could understand (though not accept) the normative position that an act based on reasonable mistake is justified because the reason for acting was justified, I cannot figure out how the commission of killing an undeserving other could ever be viewed as "nothing wrong."

Finally, I will say a word in response to Morse's call for me to join him in the creation of a generic excuse doctrine.¹³² I have recognized the merits of Morse's *Guilty but Partially Responsible* (GPR) proposal elsewhere,¹³³ so I will not repeat the discussion in detail here. I will reiterate, though, that I do not believe the proposed reform of the American common law framing of heat of passion that I discussed in *Adequate (Non)Provocation* and other articles¹³⁴ is at all inconsistent with Morse's GPR verdict. Indeed, I believe Morse's proposal has merit, though I also believe that, as he himself recognizes, it faces various challenges.¹³⁵ My proposal is exceptionally narrowly tailored, whereas Morse's proposal is one that would require a thorough sweeping of excuse-based doctrines. I believe that our guiding purpose, though, is the same—that the criminal law be consistent in its theory and clear in its moral message.¹³⁶

VII. ON THE NATURAL AND CRITICAL INTERRELATEDNESS OF PSYCHOLOGY, PHILOSOPHY, AND LAW: IN REPLY TO PROFESSOR WEISBERG

Professor Weisberg is generally persuaded by my arguments in *Adequate (Non)Provocation* and agrees that heat of passion is properly understood as a partial excuse.¹³⁷ His essay, though, responds

131. *Id.* at 200.

132. *Id.* at 196. Morse first discussed in detail his proposal for a doctrine of generic partial responsibility mitigation (i.e., a doctrine that mitigates culpability and punishment via the excusing condition of non-culpable diminished rationality), called "Guilty but Partially Responsible," in Morse, *Diminished Rationality*, *supra* note 16.

133. Fontaine, *Wrongfulness*, *supra* note 3, at 88–89.

134. *See id.*; Fontaine, *Reactive Cognition*, *supra* note 3.

135. Morse, *supra* note 94, at 196.

136. Of course, Professor Joshua Dressler has been making this plea for quite some time as well. *See* Dressler, *Justifications and Excuses*, *supra* note 10, at 1169–72. In addition, this interest was emphasized by Dressler and Professor Paul Robinson in their addresses at Texas Tech University School of Law's recent Symposium on Excuses and the Criminal Law. Robinson pointed to several inconsistencies in excuse-based state statutes that he attributed to the inherent problem with post hoc law-making.

137. Weisberg, *supra* note 83, at 53.

not only to my *Adequate (Non)Provocation* arguments, but to the larger social cognitive argument that I addressed both within *Adequate (Non)Provocation* and other works.¹³⁸ Weisberg believes that, although my integration of psychology, philosophy, and law makes good sense as applied to heat of passion, I may want to take the argument further and explore its utility with respect to related science-and-law topics.¹³⁹ In particular, Weisberg discusses two topics where he expects my integrationist approach may prove useful: (i) the relatively neglected homicide category of second-degree murder, and (ii) the relation between an expanded heat of passion framing and the problem of personality disorders (and, more specifically, psychopathy).¹⁴⁰ I am delighted that Weisberg raises these topics as their introduction provides me with an opportunity to clarify some issues and possible points of confusion and offer further thoughts on the extensions to which Weisberg ascribes importance.

Weisberg is right that second-degree murder is a level of homicide that receives too little scholarly attention, compared to murder one and voluntary (heat of passion) manslaughter. Based on my reading of his essay, I understand that he may be surprised to find that I agree with him that this is an issue deserving greater inquiry. Weisberg seems to believe that I attribute little meaning or value to this level of homicide,¹⁴¹ and so I here attempt to correct his misunderstanding of my position. Commenting on a previous article of mine that examined the parallel of the murder/manslaughter divide in law and the instrumental/reactive violence dichotomy in behavioral science,¹⁴² Weisberg states:

Professor Fontaine pays brief rhetorical fealty to the mundane point that there are traditionally two levels of intentional murder—premeditated murder and plain vanilla intentional murder. This is the distinction at the heart of the first-degree/second-degree divide, but he suggests that the distinction is no longer very important. As a matter of positive law, he notes, some states have abolished it (as did the MPC). At several key points he insists on defining murder in terms of cool deliberation in a way that suggests that the premeditation

138. *Id.* at 54. See Fontaine, *Reactive Cognition*, *supra* note 3; Fontaine, *Wrongfulness*, *supra* note 3. In addition, for a discussion of the psycholegal foundation of the social cognitive argument, see Fontaine, *Disentangling*, *supra* note 3.

139. Weisberg, *supra* note 83, at 55.

140. *Id.* at 55, 66.

141. *Id.* at 55.

142. See Fontaine, *Disentangling*, *supra* note 3.

formula is more or less coincident with the definition of murder. The problem in doing so is that he leaves a big void in terms of second-degree intentional murder, and his thesis does not quite support erasure of the concept.¹⁴³

In my article, I focused on first-degree murder rather than second-degree murder because the parallel in law and psychology of instrumental and reactive homicide maps most clearly to the distinction between the former and voluntary manslaughter, and the purpose of the article was to clarify how the respective dichotomies in law and psychology are similar as well as where they depart. With respect to Weisberg's comment that I do not believe the distinction between first- and second-degree murder is no longer important, he very much misunderstands my position. I believe that Weisberg has confused my position with that of esteemed psychologists Professors Bradley Bushman and Craig Anderson, the introduction of whose 2001 article¹⁴⁴ I critiqued in *Disentangling*. Bushman and Anderson wrote:

More recently, Judge (later Justice) Cardozo . . . suggested that the distinction between first and second degree murder was too vague and obscure for juries to understand and should therefore be abolished. . . . In the Model Penal Code, no distinction is made between first and second degree murder. Both types of murder are now are [sic] simply classified as murder. The Model Penal Code has influenced some states to reform their criminal laws by, among other things, abandoning the premeditation-deliberation formula as a basis for distinguishing among degrees of murder.¹⁴⁵

In actuality, I agree with Weisberg that the distinction between first- and second-degree murder is important. I agree with him that any trend to abandon the distinction among the United States is minor at best. Indeed, in *Disentangling*, I wrote the following:

At present, all 50 states as well as the Model Penal Code (American Law Institute, 1962), continue to recognize different levels of unlawful killings on the basis of varying degrees of mens rea, most often by distinguishing between murder and manslaughter. In addition to the murder-manslaughter

143. Weisberg, *supra* note 83, at 55–56 (citations omitted).

144. Brad J. Bushman & Craig A. Anderson, *Is It Time to Pull the Plug on the Hostile Versus Instrumental Aggression Dichotomy?*, 108 PSYCHOL. REV. 273 (2001).

145. *Id.* at 273–74 (citations omitted).

distinction, many states continue to recognize even finer subdivisions of homicide in the forms of first and second degree murder. A few even recognize third degree murder.¹⁴⁶

I realize that this defense of levels of homicide falls short of satisfying Weisberg's interest in exploring the value of second-degree murder, but, again, the purpose of *Disentangling* was not one that called for a more detailed version.

Instead, I am interested in Weisberg's suggestion that I may view second-degree murder as nothing more than either (i) a default when premeditation is not established for murder one, or (ii) reactive homicide for which the defendant's invocation of heat of passion/provocation is unsuccessful.¹⁴⁷ While I do not believe that these negative reasons for second-degree murder are invalid, I agree with Weisberg that they are not the only legitimate reasons, and that rationally impulsive homicides may qualify for second-degree murder as a positive justification of this intermediate level of homicide.

Weisberg states that my social cognitive argument¹⁴⁸ "implicitly acknowledges that we need second-degree intentional murder as the default category of murder into which failed [heat of passion] claims fall, and that category can hardly be described as the set of dispassionate killings."¹⁴⁹ This is exactly right, which is why I do not and would not call for the abolition of second-degree murder as a formally recognized level of homicide, despite Weisberg's belief that I do. The core message of the social cognitive argument is that, for the purpose of logical and moral consistency in the criminal law, as long as reasonably mistaken provocations qualify as adequate provocation under the traditional common law framing of heat of passion, unreasonably mistaken provocations should not be excluded if they result from provocation interpretational bias, a scientifically established cognitive condition by which reactive aggressors tend to interpret ambiguous provocation scenarios as intentionally hostile, harmful, or otherwise wrongful. Currently, all unreasonably mistaken provocations, by definition, fail to qualify as adequate provocation; as a result, even the defendant who is cognitively biased for non-culpable reasons (e.g., the defendant suffered abuse as a child) is not afforded the mitigated culpability and pun-

146. Fontaine, *Disentangling*, *supra* note 3, at 153 n.10.

147. Weisberg, *supra* note 83, at 56–57.

148. See Fontaine, *supra* note 2, at 30–32; Fontaine, *Reactive Cognition*, *supra* note 3; Fontaine, *Wrongfulness*, *supra* note 3. In addition, for a discussion of the psycholegal foundation of the social cognitive argument, see Fontaine, *Disentangling*, *supra* note 3.

149. Weisberg, *supra* note 83, at 56–57.

ishment via the defense.¹⁵⁰ While heat of passion does not benefit this type of defendant, Weisberg is exactly correct that such a scenario is “hardly consistent with the image of the defendant as the cool decision maker, much less the long-calculating planner exhibiting what might formally count as premeditation.”¹⁵¹

Although I do not believe that second-degree murder is the logically and morally correct verdict for the cognitively biased reactive killer—rather, I believe that the traditional common law version of heat of passion should be reframed to include this type of defendant—it is clearly a less wrong verdict than is first-degree murder. Weisberg is entirely correct in his observation that the cognitively biased reactive killer looks little like the cold-blooded instrumental killer that is typically associated with murder one.¹⁵²

Not only is this negative case a justification for the intermediate homicide level of murder two, but there exists a positive case as well. Weisberg states that “modern homicide law focuses too narrowly on emotional dysfunctionality—hyper-passionate impulsiveness—as the paradigm of [heat of passion].”¹⁵³ While a reading of the history of heat of passion/provocation provides one with some understanding as to why the common law doctrine is so narrowly tailored,¹⁵⁴ it is less easy to understand how, given the inconsistencies such narrowness necessitates, this slim tailoring has persisted. Scholars have argued that the doctrine’s limited application to homicide makes little good sense.¹⁵⁵ In addition, Weisberg argues that the criminal law should consider emotional dysfunction more broadly, as opposed to the limited context of emotional reactivity to perceived provocation in heat of passion. Weisberg writes:

[O]ne category of second-degree murder is the killing which is rationally motivated but where, to use the non-legal term, the motive awaits the right opportunity to even come into the killer’s mind or it lies dormant until the opportunity induces its coming to consciousness (i.e., where the motive had not previously developed into a planned desire to kill, and hence could still be treated as premeditation).¹⁵⁶

150. Weisberg fairly suggests that we call such a scenario “‘imperfect heat of passion,’ by analogy to ‘imperfect self-defense.’” *Id.* at 57.

151. *Id.* at 56.

152. *Id.* at 61.

153. *Id.* at 54.

154. See JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* (Clarendon Press 1992).

155. *E.g.*, Morse, *supra* note 16, at 289.

156. Weisberg, *supra* note 83, at 60.

I support Weisberg's notion, and I would further support a formal expansion of legal doctrine to the degree that science has established an association between the emotional dysfunction in question and antisocial conduct. With respect to the principal issues of second-degree murder that Weisberg raises, he and I are more in agreement than he appears to realize.

Also in his essay, Weisberg emphasized the need to further pursue integrationist scholarship in psychology, philosophy, and law, particularly with respect to the psychiatric classification of personality disorders.¹⁵⁷ Weisberg is mostly concerned with psychopathy, though, which, as Weisberg recognizes, is not a personality disorder, but rather is sometimes associated with antisocial personality disorder in the scientific literature.¹⁵⁸ In fact, psychopathy is not a formally recognized psychiatric diagnosis of any kind. Nevertheless, it is a most serious topic, not only in terms of investigation in behavioral science, but as an issue of psychology, philosophy, and law—or “social cognitive jurisprudence”¹⁵⁹—as Weisberg observes.

Weisberg added his own thoughts on the section of *Disentangling*¹⁶⁰ in which I began to address the topic of what the science of psychopathy may have to say for mitigation of criminal responsibility.¹⁶¹ Whereas psychopathy is usually associated with instrumental antisociality in the scientific literature,¹⁶² there is no denying the impulsive tendency that psychopaths often display, a characteristic that is more closely associated with reactive aggression.¹⁶³ I addressed some of the legal and social policy implications of the science of psychopathy, and, in particular, empirical evidence that psychopaths typically display deficits that are fundamental to moral-cognitive development. In response to this discussion, Weisberg writes:

[Fontaine] is ambivalent about the relevance of psychopathy to his main concern [of balancing evidence from psychological science with retributive justice in criminal law]. He hints

157. *Id.* at 64.

158. Weisberg characterizes antisocial personality disorder as the “cousin” of psychopathy. *Id.* at 68; see also Robert D. Hare, Stephen D. Hart & Timothy J. Harpur, *Psychopathy and the DSM—IV Criteria for Antisocial Personality Disorder*, 100 J. ABNORMAL PSYCHOL. 391 (1991).

159. Social cognitive jurisprudence may be defined broadly as the application of social cognitive psychology to issues that are, by their nature, empirical and germane to legal philosophy and doctrinal law.

160. Fontaine, *Disentangling*, *supra* note 3, at 155–60.

161. Weisberg, *supra* note 83, at 68–72.

162. Fontaine, *Disentangling*, *supra* note 3, at 155–60.

163. See Stephen D. Hart & Rebecca J. Dempster, *Impulsivity and Psychopathy*, in IMPULSIVITY: THEORY, ASSESSMENT, AND TREATMENT 212 (Christopher D. Webster & Margaret A. Jackson eds., 1997).

of an association of the psychopath with the instrumental aggressor, and the latter with a cognitive deficit more than an emotional regulation deficit, with the possible implication that instrumental and perhaps psychopathic killers are actually less culpable than reactive ones for this reason. But if so, Professor Fontaine may have proved too much, because he may have implicitly expanded the HOP or partial excuse category more than he intended.¹⁶⁴

To the degree that psychopaths have psychological deficits or otherwise insufficient mental capacity by which they may not be deemed rational in the way the law presumes rationality of its citizens as social agents, it necessarily follows that they should not be assigned culpability or punishment in the way that the rational actor should. On this point I am not at all ambivalent, though I realize that this is an assertion that is likely all too uncomfortable for many readers. I expect that, generally, there exists an interest to punish the psychopathic wrongdoer to the fullest extent possible. Although it is necessarily an empirical issue, my suspicion is that this interest stems from the perception that the psychopath is fully rational and otherwise capable, but that he simply does not care to place legal restrictions or societal welfare above his own interests and desires. This conceptualization is consistent with the view that crimes of the psychopath are among the most evil—he commits them for the most culpable of motives and cares little if at all about the harms they have caused. Nevertheless, to the degree that these qualities are scientifically valid, are non-culpably caused, and sufficiently undermine rationality such that it must be said that the psychopath does not meet the level of rationality presumed by law, the psychopath cannot be justly punished as would be the sufficiently rational actor for the same criminally wrongful act.

However, unlike Weisberg, I do not believe that this is an issue that places heat of passion at risk for undue expansion. Rather, I believe that any mitigation for diminished rationality of the sort that may be fairly associated with the psychopath must be treated by a separate doctrine, if for no other reason that the relation between psychopathy and instrumental antisocial behavior places psychopathic behavior outside of the specific type of reactive violence scenario that is embodied by heat of passion manslaughter. At present, no such doctrine exists. Alternatively, a generic partial responsibility doctrine, such as the GPR verdict proposed by Morse and discussed above, may be useful to proper handling of this issue

164. Weisberg, *supra* note 83, at 66 (citations omitted).

in the criminal law. Of course, numerous issues with respect to the structure, function, and phenomenology of psychopathy, its scientific grounding, and how it may be properly interpreted in the context of criminal law persist.

VIII. CONCLUSION

I herein respond to the various observations and comments provided by my most distinguished colleagues. I again express my profound gratitude to them for their wisdom and participation in this Symposium. Indeed, it was no small task before me, as my colleagues provided responses to my article that were both rigorous in their analysis and critical review and widely diverse in scope and substantive attention. I am not only grateful to my colleagues for their scrutiny and thoughtful challenges to my arguments, but for their ideas as to how my core arguments may be useful to related areas of scholarly inquiry. While I am delighted by the enlightenment afforded me by their observations and contentions, I must admit that, in the end (though an end open to further development), I find myself only more certain that traditional American common law framing is properly understood as a partial excuse. Until legal reform of the doctrine shapes it otherwise (an unlikely event) and removes the clearly disproportionate meanings of the elements of provocation and heat of passion, I do not see another legitimate interpretation. As such, I continue to believe that the doctrine is most accurately referred to as *heat of passion*, as provocation is not quite the absolute or essential element which some insist upon believing. Rather, the internal process, characterized by the killer's belief of provocation, in turn leading to high emotional arousal, in turn serving to undermine his rationality, tells the story of how heat of passion functions to mitigate murder to manslaughter. Indeed, only by their recognition of this critical process were the courts in the adequate non-provocation cases I discussed able to apply the doctrine to the admittedly unusual fact patterns before them.