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Joshua Dressler

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CRIMINAL LAW

RETHINKING HEAT OF PASSION: A DEFENSE IN SEARCH OF A RATIONALE

JOSHUA DRESSLER*

I. INTRODUCTION

It has variously been described as "*le crime passionnel*,"¹ "chance-medley,"² and "heat of passion."³ It was perhaps the first type of killing recorded in history,⁴ and has remained an extremely common type of homicide over the centuries. In previous days, such a killing occurred as a result of drunken saloon brawls in England or in our Wild West, or it was the "solution" to an attack on one's honor.⁵ Today, criminal homicides commonly involve relatives, lovers, and friends, as both perpetra-

* Professor of Law, Wayne State University Law School. B.A., J.D., University of California at Los Angeles. All of the research was conducted while I was a member of the faculty of Hamline University School of Law. I also acknowledge the excellent research work performed by my student assistants, Elizabeth Cheyney, J.D., Ph.D., and Julie Brown, class of 1983.

¹ See, e.g., DE GREEFF, *L'ETAT DANGEREUX DANS LES CRIMES PASSIONNELS* (1953); L. Radzinowicz, *CRIME PASSIONNEL* (1931); Rawlinson, *Le Crime Passionnel*, 103 *SOLICITORS' J.* 515 (1959).

² Also spelled "chaunce-medley," the term is a corruption of "chaud melée," and applies to killings in sudden quarrels, 4 BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 184 (1769) [hereinafter cited as BLACKSTONE]. It is the English progenitor of the "heat of passion" doctrine. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defense to Murder in English Law*, 7 *AM. J. LEGAL HISTORY* 310, 310-11 (1963).

³ It is also called the "provocation doctrine." Although differences may have existed at one time between the various phrases, they will be used interchangeably in this article to signify the doctrine commonly denominated in modern United States statutes as "heat of passion." See, e.g., CAL. PENAL CODE § 192 (West) (voluntary manslaughter is defined as present "upon a sudden quarrel or *heat of passion*" (emphasis added)).

⁴ The first crime reported in the Bible was the killing of Abel by Cain. *Genesis* 4:1-8. Although the facts surrounding the event are less than clear, in light of the fact that this was a familial killing, in which jealousy appears to have been a factor, this may constitute *le crime passionnel*.

⁵ Brown, *supra* note 2, at 312.

tors and victims.⁶ Frequently, such homicides are committed in the heat of passion.⁷

From an early time in Anglo-American common law, such killings have been treated differently from the meditated variety. The latter constituted murder. The former was denominated as the lesser crime of manslaughter.⁸ Today it remains a lesser crime than murder in England,⁹ 49 of the 50 states in this country,¹⁰ and in other portions of the world.¹¹ Heat of passion, as a concept, is an old and well accepted doctrine.

But why is the impassioned killer consistently treated more leniently than the calm killer? Is it because he¹² is less dangerous, or less deserving of punishment? If it is the latter, is it because the wrongdoing of the killing is less than in traditional killing, or is the wrongdoing as great, but the actor less blameworthy? If it is the latter, why is he less blameworthy?

It appears that the doctrine was developed by common law judges in order to mitigate the harshness of the mandatory death penalty that

⁶ Based on 1972 statistics, among reported and successfully investigated homicides, approximately one-quarter involved familial killings. Another 7.1% of the homicides involved "lovers' quarrels" or "love triangles." These figure compare to 27.4% homicides involving related felonies. U.S. DEP'T JUSTICE, FEDERAL BUREAU OF INVESTIGATION CRIME REPORTS 9 (1973) [hereinafter cited as CRIME REPORTS]. In Detroit in the years 1926 through 1968, the largest contribution to homicide rates was among "domestic relations," with love affairs and killings among friends also very common. Bourdouris, *A Classification of Homicides*, 11 CRIMINOLOGY 525, 531-38 (1974). International statistics may also conform to United States findings. See, e.g., Landau, Drapkin, & Arad, *Homicide Victims and Offenders: An Israeli Study*, 65 J. CRIM. L. & C. 390, 392 (1974) (in Israel, primary group contacts result in most homicides); Sornarajah, *Commonwealth Innovations on the Law of Provocation*, 24 INT'L AND COMP. L.Q. 184, 199 (1975).

⁷ It is reasonable to assume that familial killings are usually committed in a state of unusually high emotion. Furthermore, beyond the 7.1% "lovers' quarrels," see *supra* note 6, F.B.I. statistics indicate that a full 41.2% of 1972 homicides, beyond the familial and "lovers' quarrels" homicides, occur as a result of "arguments." CRIME REPORTS, *supra* note 6, at 9.

⁸ See *infra* notes 35-56 and accompanying text for the historical roots of the defense.

⁹ Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 3 (such killings constitute manslaughter).

¹⁰ In Washington a heat of passion killing is second degree murder. WASH. REV. CODE ANN. § 9A.32.050 (West 1977); *State v. Palmer*, 104 W. 396, 176 P. 547 (1918).

¹¹ See, e.g., New Zealand Crimes Act, 1 REP. STAT. N.Z. §§ 169-70 (1961) (manslaughter); INDIA PEN. CODE § 300 (manslaughter); Tasmanian Criminal Code § 160 (1934) (as amended) (manslaughter) (*reported in* Lee, O'Loughlin, *et al.*, *Self Defense, Provocation and Duress*, 51 AUSTL. L.J. 437, 441 (1977)); Queensland Criminal Code 1899, 3 QUEENSL. STAT. § 304 (1964) (as amended) (manslaughter) (*reported in* Lee, O'Loughlin, *et al.*, *supra*, at 441); New South Wales Crimes Act 1900, 3 STAT. N.S.W. § 23 (1959) (as amended) (manslaughter) (*see* Lee, O'Loughlin, *et al.*, *supra*, at 441); Papua Criminal Code § 304 (manslaughter) (*reported in* O'Regan, *Provocation and Homicide in Papua and New Guinea*, 10 U.W. AUSTL. L.R. 1, 1-2 (1971)).

¹² Male personal pronouns are used to describe all hypothetical persons. No sexist connotation is implied thereby. It is difficult to use the term "reasonable man," as the courts so often do, see *infra* note 113 and accompanying text, and yet call him "her."

was previously invoked in all cases of homicide.¹³ This rationale, however, fails to explain the doctrine's continued viability. Capital punishment has been abolished in England,¹⁴ and in fifteen American states.¹⁵ Constitutionally, even states which continue to authorize the penalty can no longer make it mandatory.¹⁶ In any case, the law's avoidance of the death penalty for provoked killers is only an objective manifestation of a societal belief that such actors should be treated leniently. It does not tell us why this attitude exists.

Unfortunately, the common law sheds little light on the topic. It has been observed that the doctrine "suffers from the common defects of a compromise."¹⁷ Indeed, the defense¹⁸ originated "[l]argely [for] reasons of the heart and of common sense, not the reasons of pure juristic logic."¹⁹ Accurately described by the candid Lord Diplock of the House of Lords as an anomaly in the law,²⁰ the doctrine has lacked any clear or consistent rationale. Making matters worse, a heat of passion killing can look like a self-defense homicide²¹ as easily as it can look like the act of a crazed or "crazy" killer.²² Thus, the doctrine roams the legal terrain,

¹³ Regina v. Cunningham [1959] 1 Q.B. 288; Holmes v. D.P.P., 2 All E.R. 124, 126; Ashworth, *Sentencing in Provocation Cases*, 1975 CRIM. L.R. 553, 553; ROYAL COMM'N ON CAPITAL PUNISHMENT REPORT, CMD. NO. 8932, para. 144 (1953) [hereinafter cited as ROYAL COMM'N]. See also *infra* notes 39-51 & accompanying text.

¹⁴ Murder (Abolition of Death Penalty) Act, 1965, 8 Halsbury's Statutes of England 541.

¹⁵ Thirty-five states currently authorize capital punishment for some aggravated murders. Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 101-19 (1981) (listing the states and applicable statutes).

¹⁶ Roberts v. Louisiana, 431 U.S. 633 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). A mandatory death penalty law *may* be constitutional, however, in the limited case of a murder by a person already serving a life sentence. *Id.* at 637 n.5; Lockett v. Ohio, 438 U.S. 586, 604 n.11 (1978).

¹⁷ ROYAL COMM'N, *supra* note 13, at CMD. NO. 8932, para. 144.

¹⁸ "Heat of passion" will be interchangeably described as a "defense" and as a "partial defense." Of course, in one sense it may be neither. Under some circumstances, proof of an absence of heat of passion may be an element of the crime of murder, which the government must prove beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975). It is properly described as a defense, however, not only because a defendant may have the burden of persuasion regarding the issue pursuant to some legislative codifications of homicide law, *see* Patterson v. New York, 432 U.S. 197 (1977), as it may have been his burden at original common law, Mullaney v. Wilbur, 421 U.S. 684, 694 (1975), but also because the defendant usually has the initial burden of producing evidence regarding provocation, regardless of who has the ultimate burden of persuasion. *Id.* at 701-02 n.28.

The "defense" is both whole and partial. It is partial in that its proof does not result in complete exoneration. It is complete in that it results in acquittal of murder.

¹⁹ D.P.P. v. Camplin, [1978] 67 Crim. App. 14, 27 [House of Lords].

²⁰ *Id.* at 17.

²¹ *See, e.g.*, Regina v. Porritt [1961] 1 W.L.R. 1372; State v. Partlow, 4 S.W. 14 (Mo. 1887).

²² A person who kills in a rage may do so because of provocation which would incense a normal person, meriting a provocation, manslaughter conviction, *see infra* notes 58-64 and accompanying text. The same rage or similar emotion, however, may be the result of a

touching all levels of homicide—excusable, justifiable, and criminal.²³ Modern statutory law, based as it is on common law, is generally as flawed or as confused as its common law roots.

Remarkably, scholars have demonstrated little interest in entering the quagmire to search for a legitimate rationale for this widespread doctrine.²⁴ It is time for scholars to make such an effort. Such a search is necessary not only to resolve an historical enigma; it is also a matter of profound significance to modern day jurisprudence. First, the results of many provocation cases should and do depend upon the rationale for the rule.²⁵ At the least, such cases should follow a consistent theoretical approach; at best, the courts should follow the most morally acceptable approach. Often they have not. Second, the relationship of this doctrine to other defenses,²⁶ and to crimes other than homicide,²⁷ are all tied to the search for a proper provocation rationale, as is the role of the legislature vis-à-vis the judge and jury.²⁸ Third, a rethinking of this rule could prompt others to conduct a similar inquiry into the reasons for other common law—criminal law doctrines too often clouded by confusion.²⁹ In short, a quest for internal coherence would benefit the substantive criminal law.

This article attempts such an analysis of the heat of passion doctrine. After a very brief review of the historical foundations of homicide law and the heat of passion doctrine,³⁰ the article will develop the basic legal parameters of *le crime passionnel*.³¹ It will then lay out the conflicting stated and unstated rationales for the doctrine, demonstrating in the process the sloppy analysis of the common law courts.³² Next, this piece

mental peculiarity of the actor, which the law may entirely ignore, treat as an exculpatory act of insanity, or mitigate as a form of diminished capacity. See e.g., *People v. Poddar*, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974); *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

²³ For the meaning of the terms "excuse" and "justification," see *infra* notes 148-56 and accompanying text. For discussion of excusable and justifiable homicide at common law, see *infra* notes 36-42 and accompanying text.

²⁴ What interest has been demonstrated is largely found in British circles. Among the best English scholarly articles are Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292 (1976) [hereinafter cited as Ashworth II]; and Brett, *The Physiology of Provocation*, 1970 CRIM. L.R. 634. See also G. FLETCHER, *RETHINKING CRIMINAL LAW* § 4.2.1 at 242-50 (1978).

²⁵ See *infra* notes 163-80, 205-14 and accompanying texts.

²⁶ See *infra* notes 221-34 and accompanying text.

²⁷ See *infra* notes 218-20 and accompanying text.

²⁸ See *infra* notes 215-17 and accompanying text.

²⁹ For example, can the rule regarding the inapplicability of duress as a defense in homicide cases withstand careful analysis? See *infra* notes 223-25, 281-87, 293-98 and accompanying texts.

³⁰ See *infra* notes 35-56 and accompanying text.

³¹ See *infra* notes 57-89 and accompany text, for English law; and *infra* notes 90-109 and accompanying text, for United States law.

³² See *infra* notes 113-35 and accompanying text.

will suggest an appropriate mode of philosophical analysis which clarifies the rule's true rationale.³³ Finally, the article will offer wording for a model heat of passion homicide statute, consistent with the suggested analysis of the doctrine.³⁴

II. THE DOCTRINE'S ORIGINS AND PARAMETERS

A. ORIGINS OF THE PROVOCATION DEFENSE

The historical roots of homicide law are well known and require only brief and partial exposition. Homicide is of three types: justifiable, excusable, and criminal.³⁵ At early common law justifiable homicide consisted of killings either commanded by the government or authorized by law.³⁶ Because such killings were proper, the actor was fully exonerated.³⁷ Justifiable killings were originally limited to killings in war, to executions of felons, and to killings necessary to prevent felonies or to arrest felons.³⁸ Until approximately the twelfth century, all other killings were criminal, and punished by death.³⁹ Gradually, however, non-justifiable, but excusable cases of killing were developed in order to mitigate the severity of the law's response to homicide.⁴⁰

Excusable homicide was of two types: homicide *per infortunium* and homicide *se defendendo*. The former involved accidental killings, the latter intentional killings in self-preservation.⁴¹ Although an excused homicide did not result in corporal penalty, it did result in moral blame and forfeiture of property.⁴²

An unexcused, unjustified homicide was denominated as the crime of criminal homicide, or murder, and was punished by death. Murder was defined as the killing of a human being by another human being with malice aforethought.⁴³ The original import of the term "malice" is hard to ascertain.⁴⁴ An "evil design in general," or a killing dictated by "a wicked, depraved and malignant heart" apparently was considered

³³ See *infra* section IV.

³⁴ See *infra* notes 304-15 and accompanying text. For reasons why the defense should not be abolished, see *infra* note 235.

³⁵ 4 BLACKSTONE, *supra* note 2, at 177.

³⁶ R. PERKINS, CRIMINAL LAW 33 (2d ed. 1969).

³⁷ 4 BLACKSTONE, *supra* note 2, at 182.

³⁸ *Id.* at 178-82.

³⁹ G. FLETCHER, *supra* note 24, § 4.1 at 237.

⁴⁰ *Id.*; *Mullaney v. Wilbur*, 421 U.S. 684, 692 (1975).

⁴¹ 4 BLACKSTONE, *supra* note 2, at 182-84.

⁴² *Id.* at 188; G. FLETCHER, *supra* note 24, § 5.1.1 at 343-44.

⁴³ 4 BLACKSTONE, *supra* note 2, at 195; R. PERKINS, *supra* note 36, at 34.

⁴⁴ Partially, this is because the term served more to indicate what must be absent (namely any excuses, justifications or alleviations), than what must be present, in order to convict. 4 BLACKSTONE, *supra* note 2, at 201; G. FLETCHER, *supra* note 24, § 4.4.1 at 276; R. PERKINS, *supra* note 36, at 47.

malicious.⁴⁵ However, the term soon came to be an “‘arbitrary symbol’”⁴⁶ for an intentional killing, or one committed recklessly or even accidentally during the perpetration of another felony.⁴⁷

By the sixteenth century in England, however, intentional killings as a result of drunken brawls and breaches of honor had become all too common. The death penalty was viewed as an inappropriate and excessive response to deaths occurring in such fights.⁴⁸ Perhaps theorizing that malice implies a premeditation, and that sudden quarrels, or chance-medley, lacked such planning,⁴⁹ and certainly figuring that wickedness of heart was absent in such homicides,⁵⁰ the common law developed the crime of manslaughter, or a homicide without malice aforethought, for which the penalty was handburning and forfeiture of one's goods, but not death.⁵¹ Provoked killings constituted the primary, although not exclusive,⁵² basis for line-drawing between the two forms of criminal homicide.⁵³

In the early common law, the presence of the doctrine frequently made the process of drawing the lines between the excusable homicide of *se defendendo* from the felonious homicide of manslaughter, from the felonious homicide of murder difficult. If an innocent actor was attacked, and immediately responded with deadly force, or if he started a minor fight but declined to proceed further and instead withdrew, then a killing in self defense was excused. If the slaying occurred as a part of a mutual brawl—chance-medley—then it was manslaughter.⁵⁴ However, if the slayer actually killed out of revenge, only using the brawl as an excuse, then the chance-medley was converted into a murder.⁵⁵ Although chance-medley, as such, was abolished in 1828,⁵⁶ the concept of

⁴⁵ 4 BLACKSTONE, *supra* note 2, at 199.

⁴⁶ II MODEL PENAL CODE & COMMENTARIES § 210.2 at 14, Comment (Official Draft and Revised Comments 1980) [hereinafter cited as MODEL PENAL CODE].

⁴⁷ R. PERKINS, *supra* note 36, at 46.

⁴⁸ Brown, *supra* note 2, at 312.

⁴⁹ *Id.* at 53; II MODEL PENAL CODE, *supra* note 46, § 210.3 at 54.

⁵⁰ 4 BLACKSTONE, *supra* note 2, at 190.

⁵¹ *Id.* at 193. The first reported manslaughter verdict appears to have occurred in the Salisbury's case, as described in E. PLOWDEN, LES COMMENTARIES 100 (1578). For an excellent discussion of the development of homicide law, see Kaye, *The Early History of Murder and Manslaughter*, 83 LAW Q. REV. 365 (1967).

⁵² An unlawful act, or a lawful one committed without due caution and circumspection, which results in death, constitutes the “second branch” of manslaughter, which is similarly punished. 4 BLACKSTONE, *supra* note 2, at 192-93. It is commonly denominated as “involuntary manslaughter,” to distinguish it from the chance-medley form of “voluntary manslaughter.”

⁵³ *Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975).

⁵⁴ 4 BLACKSTONE, *supra* note 2, at 183-84.

⁵⁵ *Id.* at 191.

⁵⁶ 9 Geo. 4, c. 31 (1828).

provocation and resultant killing in passion—*le crime passionnel*—has persisted.

B. ENGLISH CASE LAW AND STATUTORY MODIFICATION

Because the United States provocation law is based on the English common law, and because English courts have spent far more time than their American counterparts considering the confines of the defense,⁵⁷ it is essential to review British provocation law. Very early English provocation law focused on the defendant and his subjective degree of rage, in order to decide if the actor lacked malice aforethought.⁵⁸ After one false start,⁵⁹ however, English law became committed to an objective aspect to the crime, namely that "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man. . . ."⁶⁰ Although language in the early cases seemed to largely treat the objective test as mere evidence of subjective passion,⁶¹ it gradually became clear that the "reasonable man" test was an independent and indispensable substantive element. The provocation defense came to include both subjective and objective elements. Murder was only mitigated to manslaughter if the defendant in fact subjectively became enraged⁶² and remained so at the time of the crime.⁶³ Further, this rule applied only if it was objectively reasonable to feel such passion both at the time of the provocation and at the subsequent time of the killing.⁶⁴

Based on this understanding of the defense, English case law centered primarily around two controversies. First, what constituted ade-

⁵⁷ The House of Lords has frequently made efforts to provide reasoning to support the doctrine of heat of passion. American court opinions are usually devoid of original reasoning, relying instead on oft-repeated explanations of the defense.

⁵⁸ See *D.P.P. v. Camplin*, [1978] 67 Crim. App. 14, 17-18.

⁵⁹ *Regina v. Kirkham*, [1837] 8 Carrington & Payne's Rep. 115, 117.

⁶⁰ *Regina v. Welsh*, [1868] 11 Cox Crim. C. 336, 338.

⁶¹ "[T]here must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion." *Id.* at 338 (emphasis added).

⁶² Although anger is the usual emotion alleged in provocation cases, some modern courts have enlarged the doctrine to include any "[v]iolent, intense, high-wrought, or enthusiastic emotion." *People v. Borchers*, 50 Cal. 2d 321, 329, 325 P.2d 97, 102 (1958); *State v. Jones*, 185 Kan. 235, 341 P.2d 1042 (1959). To the extent that fear qualifies as an adequate emotion, see *Reeves v. State*, 186 Ala. 14, 65 So. 160 (1914); *People v. Otwell*, 61 Cal. Rptr. 427 (Cal. App. 1967), however, it may be difficult to justify the differences in approach by the common law courts between the provocation doctrine and the duress defense. See *infra* note 278 for physiological evidence regarding fear; see generally *infra* notes 223-25, 281-87, 293-98 and accompanying text.

⁶³ *Cavanaugh v. Commonwealth*, 172 Ky. 799, 805, 190 S.W. 123, 127 (1916).

⁶⁴ Thus, provocation must be adequate to cause anger in the reasonable person, and the actor must not have had reasonable time to cool off. *Sanders v. State*, 26 Ga. App. 475, 106 S.E. 314, 315 (1921). See W. LAFAVE & A. SCOTT, *CRIMINAL LAW*, § 76 at 573 (1972).

quate provocation, or provocation as would be "excited, . . . in the mind of a reasonable man."⁶⁵ Early courts treated this issue as a question of law for the judge to resolve.⁶⁶ The early courts, therefore, informed us of who or what was the "reasonable man," and how he would react to provocations. Early case law teaches us what the reasonable person was not: exceptionally belligerent;⁶⁷ voluntarily drunk;⁶⁸ physically deformed;⁶⁹ or mentally deficient.⁷⁰ Nor was the "reasonable man" pregnant.⁷¹ As a result of the nature of the reasonable man, only a few types of conduct constituted adequate provocation. A blow to the face or an assault upon a relative,⁷² and the sight of, but probably not words informing of,⁷³ adultery,⁷⁴ were sufficient. A boxing to the ears,⁷⁵ insulting words,⁷⁶ and the sight of unfaithfulness by one's fiancé, however, were inadequate.⁷⁷ Moreover, the reasonable prudent person intentionally killed only his provoker and not innocent third persons.⁷⁸

Second, English courts concerned themselves with the techniques used by defendants to kill provokers. It was concluded that "the mode of resentment," or the weapon used by a defendant, must bear a reasonable relationship to the provocation.⁷⁹ Although some claim the language is elliptic,⁸⁰ the rationale of such a proportionality requirement seems to have been that reasonable people do, and, therefore, should,

⁶⁵ See *supra* note 60.

⁶⁶ *D.P.P. v. Camplin*, [1978] 67 Crim. App. 14, 18.

⁶⁷ *Mancini v. D.P.P.*, [1941] 3 All E.R. 272, 277.

⁶⁸ *Regina v. McCarthy*, [1954] 2 All E.R. 262.

⁶⁹ *Bedder v. D.P.P.*, [1954] 38 Crim. App. 133; *but see Regina v. Raney*, [1942] 29 Crim. App. 14, 17 (in measuring provocation, jury may consider fact D was one-legged).

⁷⁰ *Rex v. Lesbini*, [1914] 11 Crim. App. 7.

⁷¹ *Regina v. Smith*, [1914] 11 Crim. App. 36.

⁷² *Rex v. Mawgridge*, [1707] Kel. 119, 130-37.

⁷³ *Homes v. D.P.P.*, [1946] 2 All E.R. 124, 127; *Rex v. Palmer*, [1913] 2 K.B. 29, 31.

⁷⁴ *Manning's Case*, [1793] 83 Eng. Rep. 112.

⁷⁵ *Stedman* (1704), an unpublished case, reported in 1 E. EAST, PLEAS OF THE CROWN 234 (1803).

⁷⁶ *Rex v. Palmer*, [1913] 2 K.B. 29; *Huggett's Case*, [1666] Kel. 59, 84 Eng. Rep. 1082.

⁷⁷ See *Rex v. Greening*, [1913] 3 K.B. 846, 23 Cox Crim. Cas. 601 (1913) (couple living together as if husband and wife); *Rex v. Palmer*, [1913] 2 K.B. 29.

⁷⁸ *Rex v. Scriva* [1951] Vict. L.R. 298 (held the victim must be the provoker, or one reasonably believed to be the provoker, or among the group committing the provocation, or he must be killed by accident while the defendant was intending to kill one of the above categories of persons); *Regina v. Duffey*, [1949] 1 All E.R. 932, 932. ("Provocation is some act, or series of acts, done by the dead man to the accused . . ." (emphasis added)); *R. v. Simpson*, [1915] 11 Crim. App. 218, 220. ("No authority has been cited to support the proposition that provocation by one person, followed by the homicide . . . of another person, is sufficient . . ."). See also J. SMITH & B. HOGAN, CRIMINAL LAW 235 (3d ed. 1973). See also *infra* notes 173-80 and accompanying text.

⁷⁹ *Mancini v. D.P.P.*, [1941] 3 All E.R. 272, 277; *R. v. Duffy*, [1949] 1 All E.R. 932, 933.

⁸⁰ *Phillips v. Queen*, [1968] 2 A.C. 130, 137.

lose self-control in degrees relative to the provocation committed.⁸¹ To the extent, therefore, that one acts disproportionately to the provocation, one may conclude either that the killing was not in fact subjectively provoked,⁸² but was instead caused by wickedness of the heart, or that the killer did not act as a reasonable person.⁸³

In 1957, after much debate, the English modified by statute the common law defense. Under Section 3 of the Homicide Act,

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked [whether by things done or by things said or by both together] to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to the determination by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which in their opinion it would have on a reasonable man.⁸⁴

Although it was not immediately obvious, the statute was interpreted to have profound impact on English common law: (1) it permits words alone to constitute adequate provocation;⁸⁵ (2) it gives to the jury the question of what is adequate provocation whenever there is any evidence, however slight, of provocation;⁸⁶ (3) it rejects the rigid common law rules regarding the characteristics of the "reasonable man," thereby permitting the incorporation of the unusual physical characteristics of the defendant into the "reasonable man;"⁸⁷ (4) it treats the "mode of resentment" or proportionality rule only as a factor, not a prerequisite, in judging whether a reasonable man would have acted as the actor did;⁸⁸ and (5) it authorizes the defense to be used even if a third person, not the victim, is the provoker.⁸⁹

C. UNITED STATES CASE LAW AND STATUTORY MODIFICATION

United States case law has generally proceeded along the same lines as its English forbear. Unlike England, however, American common law has not been affected by any national statutory redrafting—or, therefore, reconsideration—of the law. Statutory modification of common law doctrine has only occurred at the state level, and this has not been common.

⁸¹ *Id.* at 137-38.

⁸² See 1 E. EAST, *supra* note 75, at 234.

⁸³ Phillips v. Queen, [1968] 2 A.C. 130, 137.

⁸⁴ Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 3.

⁸⁵ Phillips v. Queen, [1968] 2 A.C. 130, 137.

⁸⁶ D.P.P. v. Camplin, [1978] 67 Crim. App. 14, 19.

⁸⁷ *Id.* at 20-21.

⁸⁸ Regina v. Brown, [1972] 2 Q.B. 229.

⁸⁹ R. v. Davies, [1975] 1 All E.R. 890.

As in England, the common law defense is only applicable if the provocation "would render any ordinarily prudent person for the time being incapable of that cool reflection that otherwise makes it murder."⁹⁰ The reasonable American is much like his English counterpart. He is provoked by a serious battery,⁹¹ and the sight of adultery.⁹² He is not provoked by words,⁹³ or the sight of only *impending* adultery⁹⁴ or upon finding one's girlfriend with another man.⁹⁵ Apparently, the ordinary or reasonable American who kills in passion is also not homosexual,⁹⁶ and is wholly devoid of "extraordinary character and environmental deficiencies."⁹⁷ The United States has not explicitly implanted the old English proportionality requirement⁹⁸ into law.⁹⁹ However, American common law, like its English counterpart, permits application of the defense only if the defendant intends to kill the apparent provoker, and not a third person.¹⁰⁰ Misdirected retaliation is generally unprotected.

Statutory drafting of the heat of passion defense has not generally affected the law or enlightened the analysis in this country. A number of states do not define the crime of manslaughter, relying instead on common law interpretation.¹⁰¹ Other jurisdictions define manslaughter

⁹⁰ *Addington v. United States*, 165 U.S. 184, 186 (1897) (jury instruction apparently approved); *Fields v. State*, 52 Ala. 348, 354 (1875) ("in the mind of a just and reasonable man [would] stir resentment to violence endangering life"); *People v. Webb*, 143 Cal. 2d 402, 415, 300 P.2d 130, 139 (1956) (provocation "as would naturally tend to arouse the passion of an ordinarily reasonable man").

⁹¹ *Stewart v. State*, 78 Ala. 436 (1885).

⁹² *State v. Saxon*, 87 Conn. 5, 86 A. 590 (1913); *Mays v. State*, 88 Ga. 399, 14 S.E. 560 (1891).

⁹³ *People v. French*, 12 Cal. 2d 720, 744, 87 P.2d 1014, 1026 (1939); *Aguilar v. State*, 240 Ga. 830, 833, 242 S.E.2d 620, 624 (1978); *State v. Castro*, 92 N.M. 585, 592 P.2d 185 (1979). Some modern decisions treat as adequate words informing of a provocation, whereas insults remain inadequate. *Commonwealth v. Berry*, 461 Pa. 233, 336 A.2d 262 (1975); *Commonwealth v. Greene*, 372 Mass. 517, 362 N.E.2d 910, 913 (1977).

⁹⁴ *State v. Saxon*, 87 Conn. 5, 86 A. 590, 594 (1913). In Texas, however, discovery of completed adultery is sufficient. *Pauline v. State*, 1 S.W. 453 (1886).

⁹⁵ *Commonwealth v. McGuirk*, 380 N.E.2d 662 (Mass. 1978).

⁹⁶ *People v. Washington*, 58 Cal. 3d 620, 130 Cal. Rptr. 96 (1976).

⁹⁷ *People v. Morse*, 70 Cal. 2d 711, 735, 452 P.2d 607, 621, 76 Cal. Rptr. 391, 405 (1969).

⁹⁸ See *supra* notes 79-83 and accompanying text.

⁹⁹ But see 1 F. WHARTON, *CRIMINAL LAW* § 586 at 805 (12th ed. 1932), in which he asserts that a homicidal response to "slight provocation" is disproportionate, and therefore presumably is not manslaughter. The English doctrine, however, is more specific, in that it focuses on the specific mode of killing used. See *supra* notes 89-93 and accompanying text.

¹⁰⁰ *State v. Fowler*, 268 N.W.2d 220 (Iowa 1978); *Smiley v. Commonwealth*, 235 Ky. 735, 32 S.W.2d 51 (1930); *Tripp v. State*, 374 A.2d 384 (Md. 1977); *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979); *White v. State*, 44 Tex. Cr. R. 346, 72 S.W. 173 (1902); *W. LaFAVE & A. SCOTT, supra* note 64, § 76 at 581-82.

¹⁰¹ See, e.g., 3A *Md. Crimes and Punishments Code Ann.*, art. 27 § 387 (1976); MASS. GEN. LAWS ANN., ch. 265, § 13 (West 1970); MICH. COMP. LAWS ANN. § 750.321 (West 1968); N.C. GEN. STAT. §§ 14-18 (1969); R.I. GEN. LAWS § 11-23-3 (1956); TENN. CODE ANN. § 39-2410

as "heat of passion," but do not substantially define it further.¹⁰² Still other states have been more specific, but only by expressly codifying common law principles,¹⁰³ or only slightly expanding upon them.¹⁰⁴ Even in the latter states, however, there is no evidence that legislators carefully scrutinized the underlying rationale of their legislation.

A fairly significant minority of states have enacted manslaughter statutes similar to that proposed by the American Law Institute in its Model Penal Code.¹⁰⁵ As a result, these states have effectuated a significant departure from common law. The Model Penal Code treats as manslaughter any intentional killing:

committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.¹⁰⁶

This version of the defense is substantially broader than the common law, in that: (1) it abandons the preconceived notion of what constitutes adequate provocation, giving the jury wider scope¹⁰⁷ and (2) it makes the test more, although not entirely, subjective, by requiring the jury to test the reasonableness of the actor's conduct, "from the viewpoint of a person in the actor's situation."¹⁰⁸ Thus, the actor's sex, sexual preference, pregnancy, physical deformities, and similar characteristics are apt to be taken into consideration in evaluating the reasonableness of the defendant's behavior.¹⁰⁹ Nevertheless, except in Model Penal Code ju-

(1975); VT. STAT. ANN. tit. 13, § 2304 (1974); VA. CODE § 18.2-35 (1975); W. VA. CODE § 61-2-4 (1977).

¹⁰² See, e.g., CAL. PENAL CODE § 192 (West 1970) ("upon a sudden quarrel or heat of passion"); IDAHO CODE § 18-4006 (1979) ("upon a sudden quarrel or heat of passion"); NEB. REV. STAT. § 28-305 (1979); N.J. STAT. ANN. § 2C:11-4 (West 1978) ("committed in the heat of passion resulting from a reasonable provocation"); N.M. STAT. ANN. § 30-2-3 (1978) ("sudden quarrel or in the heat of passion"); S.D. COMPILED LAWS ANN. § 22-16-15 (1979).

¹⁰³ See, e.g., ALASKA STAT. § 11.41.115-120 (1980); COLO. REV. STAT. § 18-3-104 (1978); GA. CODE ANN. § 26-1102 (1972); IOWA CODE ANN. § 707.4 (West 1979); LA. REV. STAT. ANN. § 14:31 (West 1974); ME. REV. STAT. ANN. tit. 17A, § 203 (West 1975); NEV. REV. STAT. § 200.040-.050 (1979).

¹⁰⁴ See, e.g., MINN. STAT. § 609.20 (1980) ("provoked by such *words* or acts . . .") (emphasis added).

¹⁰⁵ See, e.g., ALA. CODE tit. § 13-1-90 (1977); ARIZ. REV. STAT. ANN. § 13-1103 (West 1978); ARK. STAT. ANN. § 41-1504 (1977); CONN. GEN. STAT. ANN. tit. 53a §§ 53a-54a, 53a-55 (West Supp. 1980); DEL. CODE ANN. tit. 11, § 632 (1979); HAW. REV. STAT. § 707-702 (1976); KY. REV. STAT. §§ 507.030-.050 (1975); N.H. REV. STAT. ANN. § 630:2 (1974); N.Y. PENAL LAW §§ 125.15, .20 (McKinney 1975); N.D. CENT. CODE § 12.1-16-02 (1976); OR. REV. STAT. § 163.115 (1979); UTAH CODE ANN. § 76-5-205 (1978).

¹⁰⁶ II MODEL PENAL CODE, *supra* note 46, § 210.3 at 43 (1980).

¹⁰⁷ See, *id.* § 210.3 at 61.

¹⁰⁸ *Id.* at 49-50, 61-62.

¹⁰⁹ *Id.* at 62.

risdictions, American statutory law remains largely common law in nature.

III. SEARCHING FOR A RATIONALE

As already pointed out the doctrine of heat of passion was originated in order to avoid the harshness of the mandatory death penalty.¹¹⁰ That reason for the defense is no longer applicable,¹¹¹ so *le crime passionnel* is now a doctrine in search of a modern-day rationale. We may generalize the situation, and say that the provocation doctrine exists because society believes that the penalty which follows a conviction of first degree murder is too harsh. We are left with the question, however, of "why?" The courts have not been successful in resolving the question. Indeed, courts have suggested multiple, and at times conflicting, rationales for the defense; at times, a single court opinion has unwittingly suggested several different reasons.¹¹² Put bluntly, courts have dealt sloppily, disinterestedly or, worst of all, incompetently with the doctrine.

A. INCONSISTENT LANGUAGE IN THE CASES

The initial evidence of the failure of the common law courts to adequately wrestle with the doctrine is the courts' imprecise description of the elements of the defense itself. The objective standard by which provocation is measured, for example, is variously described in the cases. Starting with the least significant point, it is a "man" or, more modernly a "person," who is described.¹¹³ More significant is the description of the man/person. He is ordinary,¹¹⁴ reasonable,¹¹⁵ just and reasonable,¹¹⁶ ordinary and reasonable,¹¹⁷ ordinarily reasonable,¹¹⁸ ordinarily prudent,¹¹⁹ average,¹²⁰ of fair and average mind,¹²¹ or an ordinary per-

¹¹⁰ See *supra* notes 48-53 and accompanying text.

¹¹¹ See *supra* notes 14-16 and accompanying text.

¹¹² See *infra* notes 161-62 and accompanying text.

¹¹³ D.P.P. v. Camplin, [1978] 67 Crim. App. 14, 18. In *Holmes v. D.P.P.*, [1946] 2 All. E.R. 124, both terms are used. *Id.* at 126. In view of the fact that the term "man" has often been used generally to mean "person," this criticism is relatively trivial. Juries were apt until recently to understand the term in its broader sense; modern feminism has probably made the public more sensitive to the fact that the word "man" may, but need not, exclude "woman," however. In modern cases, it may be more important for the courts to use the word which it intends.

¹¹⁴ See, e.g., *State v. Kidd*, 24 N.M. 572, 577, 175 P. 772, 774 (1917).

¹¹⁵ See, e.g., *Holmes v. D.P.P.*, [1946] 2 All E.R. 124, 126; *Mancini v. D.P.P.*, [1941] 3 All. E.R. 272, 277.

¹¹⁶ See, e.g., *Holmes v. State*, 88 Ala. 26, 30, 7 So. 193, 194 (1890).

¹¹⁷ *Reg. v. Welsh*, [1869] 11 Cox C.C. 336, 339.

¹¹⁸ *People v. Webb*, 143 Cal. App. 2d 402, 415, 300 P.2d 130, 139 (1956).

¹¹⁹ *Addington v. United States*, 165 U.S. 184, 186 (1897).

¹²⁰ *People v. Golsh*, 63 Cal. App. 609, 614, 219 P. 456, 458 (1923).

¹²¹ *State v. Watkins*, 147 Iowa 566, 568, 126 N.W. 691, 692 (1910).

son of average disposition.¹²² Assuming that conscientious jurors use words according to their common meaning, these different descriptions can result in inconsistent messages being delivered. "Ordinary" means "usual," either a statistical judgment, or a value judgment implying deficiency in quality. "Reasonable," however, means moderate or fair, a normally positive value statement. "Prudent" means "wise" or "circumspect;" "ordinary" people are not necessarily "prudent." Nor is prudence necessarily "average." It is also not obvious that "moderate," "just," or "wise" people kill in passion.

Also, common law courts imprecisely inform juries and legal observers regarding the nature of sufficient provocation by variously saying that provocation is sufficient if it "might,"¹²³ "is likely to,"¹²⁴ "would,"¹²⁵ "would naturally tend to,"¹²⁶ "could,"¹²⁷ "ordinarily,"¹²⁸ or "is liable to"¹²⁹ cause the person to act violently. The likelihood that provocation is adequate (*i.e.*, causes violence) will vary, depending upon which of these terms or phrases is used. It is far more difficult, for example, to prove that a particular provocative act "would" cause violence, than that it "might" do so.

Worse still, the case law is inconsistent in its language regarding what the ordinary or reasonable man or person might, would, or could do under sufficient provocation. In some cases, it is asserted that the provocation must create a "blind and unreasonable fury,"¹³⁰ or "excite the passions beyond control."¹³¹ Elsewhere, however, there is language which expressly indicates, or from which it can be reasonably inferred, that the person's control need only be partially undermined. Thus, it is said that the anger must "obscure,"¹³² not destroy, reason; that it "dominate volition, but . . . not entirely dethrone the actor's reason,"¹³³ that there be a "loss of self-control to the degree and method of violence

¹²² *State v. Manus*, 93 N.M. 95, 99, 597 P.2d 280, 284 (1979).

¹²³ *Rivers v. State*, 75 Fla. 401, 404, 78 So. 343, 345 (1918).

¹²⁴ *State v. Watkins*, 147 Iowa 566, 568, 126 N.W. 691, 692 (1910).

¹²⁵ *Addington v. United States*, 165 U.S. 184, 186 (1897).

¹²⁶ *People v. Webb*, 143 Cal. App. 2d 402, 415, 300 P.2d 130, 139 (1956).

¹²⁷ *Holmes v. D.P.P.*, [1946] 2 All. E.R. 124, 126.

¹²⁸ Wisconsin Jury Instruction-Criminal 1 (1962), reported in Comment, *Required State of Mind under Wisconsin's Manslaughter Statute*, 1963 WISC. L. REV. 636, 646.

¹²⁹ *People v. Lilley*, 43 Mich. 521, 527, 5 N.W. 982, 986 (1880).

¹³⁰ *Disney v. State*, 72 Fla. 492, 495, 73 So. 598, 601 (1916).

¹³¹ *State v. Watkins*, 147 Iowa 566, 568, 126 N.W. 691, 692 (1910); *State v. Borders*, 199 S.W. 180, 183 (Mo. 1917); *Regina v. Duffy*, [1949] 1 All E.R. 932 ("cause . . . a sudden and temporary loss of self-control, rendering the accused so subject to passions as to make him or her for the moment not master of his mind").

¹³² *State v. Harrison*, 81 N.M. 623, 630, 471 P.2d 193, 199 (1970); *Rivers v. State*, 75 Fla. 401, 403, 78 So. 343, 344 (1918).

¹³³ *Whidden v. State*, 64 Fla. 165, 167, 59 So. 561, 561 (1912).

which produces death."¹³⁴ At other times, anger is thought to affect cognition, not volition, so that passion must be such "as to cause the defendant . . . to be unable to judge rightly as to the nature, quality, and consequences of his acts. . . ." ¹³⁵ Such differences may only be the result of judicial sloppiness, or inattention to detail. More seriously, however, it may be either a symptom of the common law court's disinterest in developing a coherent justification for the defense of heat of passion, or its inability to do so. The need for such a justification becomes clearer as we turn away from the symptoms and look directly at the possible rationales for the defense.

B. A PROVOCATION RATIONALE—THE BASICS

The search for a provocation rationale must be conducted within the doctrinal matrix which makes up the common law components of a crime.¹³⁶ It is here that the courts have struggled unsuccessfully for a

¹³⁴ *Holmes v. D.P.P.*, [1946] 2 All E.R. 124, 126.

¹³⁵ *State v. Barrington*, 198 Mo. 23, 49, 95 S.W. 235, 261 (1906).

¹³⁶ An alternative path, less traveled, by which to find the underlying rationale for the provocation defense, is by application of utilitarian doctrine. Adherents of this philosophy believe that people attempt to augment personal pleasure, and to diminish personal pain. Society, through its laws, should act similarly in its collective behalf. Bentham, *An Introduction to the Principles of Morals and Legislation* in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 791, 843 (E. Burt ed. 1939). In the realm of criminal law, utilitarianism calls for the use of punishment, a form of pain, to deter crime, another form of pain, when the use of the former deters the latter, so that there is more societal pleasure (*i.e.*, absence of crime) than there is pain (*i.e.*, punishment). *Id.* at 843. Utilitarianism justifies as much punishment as, but no more than, is necessary to deter crime more painful than the punishment itself. *Id.* at 843-46. Such crime suppression may result because the punishment of one person deters others from committing crimes (*i.e.*, general deterrence), or because it deters the punished actor (*i.e.*, specific deterrence); or utilitarianism may be fulfilled by rehabilitation of the wrongdoer. *See generally* H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 39-58 (1968).

This article makes no effort to justify the provocation defense by use of such a calculus. There are a number of reasons for this. First, utilitarianism as a philosophical doctrine post-dates the initiation of the defense by more than a century. Even a reading of more recent provocation cases results in "deafening silence" regarding utilitarian justification.

Second, it is difficult to make an impressive case for the defense under this theory. Looking first at specific deterrence, one would have to conclude that impassioned killers are dangerous, but less so, than their less angry cousins. Various criminologists, beginning with the Italian positivist school of the nineteenth century, so viewed impassioned killers. Ancel, *Le Crime Passional*, 73 *LAW Q. REV.* 36, 37 (1957); Sornarajah, *supra* note 6, at 199. Many modern criminologists disagree, however. *Id.* at 37-38; *see* Wechsler & Michael, *A Rationale of the Law of Homicide II*, 37 *COLUM. L. REV.* 1261, 1284 (1937). It is by no means criminologically clear, therefore, that specific deterrence justifies the defense. Intuitively, mitigation of punishment should *weaken* both the general and specific deterrent effect of the law, resulting in more, not less anger. P. FITZGERALD, *CRIMINAL LAW AND PUNISHMENT* 128 (1962). In light of the frequency of impassioned homicides, *see supra* note 67 and accompanying text, it can be persuasively argued that, absent clear scientific evidence to the contrary, the law ought to *increase*, not decrease, punishment in cases of anger, so that people will learn to control their temper, thereby reducing homicides. *See* *Maher v. People*, 10 Mich. 212, 220 (1862). On the other hand, if such killings are undeterrable because they are the result of irresistible impulses

consistent explanation for the defense. In order to interpret the struggle, a brief review of the basic underlying doctrines of the substantive criminal law is necessary.

To convict a person of a crime, the prosecution must demonstrate that harm has occurred,¹³⁷ and that the accused is personally and morally to blame for the harm.¹³⁸ We do not punish persons merely for their bad thoughts;¹³⁹ nor does punishment¹⁴⁰ ordinarily flow solely from proof that the actor caused social harm.¹⁴¹

The "harm" portion of the crime is the physical or external element of the crime, the *actus reus* of the crime.¹⁴² Although, in a sense, this portion of the crime is objectively perceivable, "harm" constitutes society's judgment that certain conduct or consequences are bad and undesirable.¹⁴³

which even the "reasonable person" would express, then any punishment at all may be disutile.

The point is not that one cannot posit a hypothetical utilitarian explanation for heat of passion, but rather that there is little scientific evidence or intuitive reasoning to support such an explanation; maybe more pertinently, there is less evidence still that the common law or the modern legislatures have drafted the doctrine with such considerations in mind. There is no reason to believe, for example, that statistics on deterrence would affect the historically consistent position that the heat of passion killer is deserving of serious, but not maximum punishment.

¹³⁷ J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 213 (2d ed. 1947); Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. REV. 266, 266 (1975).

¹³⁸ *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945); *Sauer v. United States*, 241 F.2d 640, 648 (9th Cir. 1957); H. PACKER, *supra* note 135, at 62; G. FLETCHER, *supra* note 24, at 461. To say that the "accused is personally morally to blame," however, needs further clarification. See *infra* notes 144-47, 245-47 and accompanying text.

¹³⁹ *Commonwealth v. Kennedy*, 170 Mass. 18, 20, 48 N.E. 770, 777 (1897).

¹⁴⁰ I speak interchangeably of the prerequisites to conviction and to punishment because, of course, punishment cannot be implemented unless and until there is a criminal conviction. *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977).

¹⁴¹ Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1101 (1955). Of course, the common law requirement of *mens rea* has been abrogated by some so-called "strict liability" offenses. Such crimes are constitutional. *United States v. Balint*, 258 U.S. 250 (1922). Some scholars treat such statutes as "civil" offenses, not crimes. R. PERKINS, *supra* note 36, at 799-809. However rationalized, they are at most an infrequent aberration from ordinary principles of criminal law.

¹⁴² The term "*actus reus*" is used in the literature to mean either or both a voluntary act (the actor's conduct) or to mean the consequences of such conduct (the social harm). J. HALL, *supra* note 137, at 222-28. I use the term in the latter context.

¹⁴³ Although all agree that "harm" or "social harm" is a prerequisite to criminal liability, the nature of "harm" is exceedingly controversial, and has been subjected to rigorous discussion and debate. See, e.g., J. HALL, *supra* note 137, at 213-22; Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQUESNE U.L. REV. 345 (1965); Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 IND. L.J. 206 (1959). Due to the nature of this ambiguity, one can ask whether the crime of attempt, for example, involves any harm; or whether consensual adult sexual crimes involve any harm.

It is not my purpose to enter this debate, as it does not affect the issues at question in this

Because mere thoughts are not punishable, there can be no blameworthiness except in relationship to the harm committed.¹⁴⁴ If social harm has occurred, however, the personal blameworthiness prerequisite to punishment is proven when it is shown that: (1) the harm was committed intentionally, or with a similar blameworthy mental state;¹⁴⁵ (2) the accused's personal causal involvement in the harm was substantial;¹⁴⁶ and (3) the accused's act causing the social harm was committed voluntarily—*i.e.*, he chose to do it.¹⁴⁷

Ordinarily, of course, a person is punishable for a crime if it is shown that the actor voluntarily caused the social harm with the statutory or common law mental state, or *mens rea*, deemed serious enough to make the harm punishable. If the government proves beyond a reasonable doubt, for example, that the actor intentionally killed a human being by a voluntary act, the government has proven murder. It is murder because such a death is morally bad and undesirable, and because the actor's voluntary and intentional conduct causing that result makes him morally blameworthy for the social harm.

Such proof only fulfills the *prima facie* case of the crime of murder. The defendant may raise a claim of the existence of a defense. It is here that the concepts of "justification" and "excuse" materialize. Today, unlike in Blackstone's time,¹⁴⁸ proof of either defense results in total acquittal. The theories underlying the two defenses differ substantially, however. With a justification, society indicates its approval of the actor's conduct, stating thereby that, in fact, there has been no social harm.¹⁴⁹ With homicide, for example, the existence of a justification

article. It is for that reason that I speak of "harm" rather broadly, as "conduct or consequences." Nor do I wish to enter the debate regarding the source of this societal judgment. Whether "harm" is solely a moral judgment, or includes a utilitarian factor, it is beyond dispute that homicide is "harm." It is also clear that harm, however defined or calculated, includes harm to persons, property, and society itself. Harm can be both tangible and intangible. Robinson, *supra* note 137, at 267 n.7.

¹⁴⁴ When an act is of such a description that it would be better that it should not be done, it is quite proper to look at the motives and intentions of the doer, for the purpose of deciding whether he shall be punished But when an act . . . is desirable . . . , it is absurd to inquire into the motives of the doer. . . .

7 *The Works of Lord Macaulay* 552-53 (H. Trevelyan ed. 1866).

¹⁴⁵ This is the common law requirement of *mens rea*. See note 141 *supra*.

¹⁴⁶ The defendant must ordinarily be an actual and proximate cause of the harm. W. LAFAVE & A. SCOTT, *supra* note 64, § 35 at 246-47. Because the implications of criminal liability are drastic, the relationship between the harm and the defendant's participation should not be insubstantial. See J. HALL, *supra* note 137, at 254-57; H. HART & A. HONORE, CAUSATION IN THE LAW 58-64 (1959).

¹⁴⁷ The term "voluntary" has both a narrow and broad meaning. See *infra* notes 278-80 and accompanying text.

¹⁴⁸ See *supra* notes 39-42 and accompanying text.

¹⁴⁹ G. FLETCHER, *supra* note 24, at 759; J. HALL, *supra* note 137, at 233; Robinson, *supra* note 137, at 272.

implies that under the circumstances of the justification, society either does not believe that the death of the human being was undesirable, or that it at least represents a lesser harm than if the defendant had not acted as he did. Unlike early common law,¹⁵⁰ self-defense is now generally viewed as a justification.¹⁵¹ This means that when the defendant kills the victim in self-defense this consequence, although presumptively socially undesirable, is in fact a non-harmful, albeit not affirmately desirable, result.¹⁵² Put another way, any justification negates the existence of social harm.

A defendant asserting an excuse admits to wrongdoing, but asserts that he should not be punished because he is not morally blameworthy for the harm. Thus, excuses focus on the actor, not on the act. In other words, excuses only exist in circumstances where the conduct is unjustified. The insane killer, for example, avoids punishment, not because there was no harm in the killing, but because his mental disease renders his conduct in some fashion morally blameless. Various theories can explain why he is blameless: that he did not intend to cause the harm;¹⁵³ that, in a sense, the disease, not the accused, is the cause of the harm;¹⁵⁴ most commonly, that the act was in some sense involuntary.¹⁵⁵ In short, an excuse negates the existence of the defendant's blameworthiness for the proven harm.¹⁵⁶

¹⁵⁰ See *supra* note 41 and accompanying text.

¹⁵¹ J. HALL, *supra* note 137, at 233; W. LAFAYE & A. SCOTT, *supra* note 64, § 53 at 391; I MODEL PENAL CODE, *supra* note 46, § 3.04.

¹⁵² Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 U.C.L.A. L. REV. 293, 306 (1975). For a discussion of the reason why a dead human does not constitute a social harm, see *infra* notes 151-55 and accompanying text.

¹⁵³ See, e.g., if an actor, due to a cognitive disorder, believes that the victim whom he is killing is in fact a dog, then he lacks the intent to kill, see also Trial of Edward Arnold in 16 State Trials 596, 764 (1724) (defendant should be acquitted if the killing, due to insanity, was not "malicious"); State v. Jones, 50 N.H. 369, 382 (1871). See also W. LAFAYE & A. SCOTT, *supra* note 64, § 36 at 270. So viewed, mental disease does not serve as an excuse, but as evidence of the lack of a prima facie element of the crime mens rea.

¹⁵⁴ "Wasn't Hamlet wrong'd Laertes. Never Hamlet . . . Who does it, then? His madness . . . This madness is poor Hamlet's enemy." W. SHAKESPEARE, HAMLET, Act V, Scene II, ll. 234-40. The insane person is possessed by another. G. FLETCHER, *supra* note 24, at 837. To the extent that insanity is so theorized, the defense is really not an excusing claim, but is rather based on the theory that the court lacks jurisdiction to criminally prosecute the actor, Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1272 (1974); or that no moral judgment can be made regarding the insane actor, because he is not really a person fit to be judged by the criminal court or jury. H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 131-32 (1972).

¹⁵⁵ See United States v. Currens, 290 F.2d 751, 773-74 (3d Cir. 1961). The "involuntariness" is used here in the broader sense of the term. See note 147 *supra*, and *infra* notes 278-80 and accompanying text. Insanity is further discussed at *infra* notes 277-80 and accompanying text.

¹⁵⁶ G. FLETCHER, *supra* note 24, at 759, 811; Robinson, *supra* note 137, at 274-75; J.L. AUSTIN, A PLEA FOR EXCUSES, "The Presidential Address to the Aristotelian Society, 1956,"

C. JUSTIFICATION OR EXCUSE: THE DOCTRINAL FORK IN THE ROAD

A careful analysis of the language and of the results of common law heat of passion cases demonstrates that there is uncertainty whether the defense is a sub-species of justification or of excuse. The uncertainty is well expressed by Austin.

Is [the provoker] partly responsible because he roused a violent impulse or passion in me so that it wasn't truly or merely me "acting of my own accord" [excuse]? Or is it rather that, he having done me such injury, I was entitled to retaliate [justification]?¹⁵⁷

Austin's question regarding provocation may be answerable upon deeper analysis.¹⁵⁸ His primary point, though, is correct, that "there is genuine uncertainty or ambiguity as to what we mean" when we speak of "heat of passion."¹⁵⁹ The partial defense may be based on the theory that the social harm of killing is unmitigated but the defendant is less blameworthy; or it may be that *le crime passionnel* implicates, as Austin suggests, a partial justification, in that the actor was entitled—*i.e.*, had a right—to respond because of the victim's provocative conduct towards him. Under this theory, the social harm of the provoker's death is for some reason less substantial than is the death of an "innocent" person.¹⁶⁰

Unfortunately, courts have often failed to coherently state which doctrinal path is involved; or worse, they have rationalized the doctrine under both theories. It must be remembered that ordinarily a defense cannot be properly viewed simultaneously as a justification and an excuse because the latter, by definition, admits to the existence of social harm. It is possible, though not easy, to imagine a dual rationalization of a *partial* defense which is both justification and excuse based. While not erroneous such a rationalization is, nonetheless, convoluted. It could be claimed, for example, that there is less harm in provocation cases, and, besides that, to the extent that the homicide remains somewhat harmful, the lesser harm is excused further as a result of some blameworthiness factor.¹⁶¹ In short, if we reduce punishment in a provocation

"Proceedings of the Aristotelian Society, 1956-1957," Vol. LVIV, *reprinted in* ORDINARY LANGUAGE 42 (V. Chappel ed. 1964) [hereinafter cited as AUSTIN].

¹⁵⁷ AUSTIN, *supra* note 156, at 43; *see also* Iliffe, *Provocation in Homicide and Assault Cases: The Common Law and Criminal Codes*, 3 INT'L & COMP. L.Q. 23, 25 (1954) (in which it is said both that the question is "how far the victim brought the disaster upon himself," as in self-defense; and whether "by a sense of justice [it is] 'excusable'").

¹⁵⁸ *See infra* notes 256-70 and accompanying text, rejecting the provocation doctrine as a justification. *See infra* notes 288-92 and accompanying text, for an excusing theory, which fails to explain adequately the defense. *See infra* notes 293-303 and accompanying text, for correct analysis.

¹⁵⁹ AUSTIN, *supra* note 156, at 43.

¹⁶⁰ For the possible reasons why this is so, *see infra* notes 168-69 and accompanying text.

¹⁶¹ *See* *Inge v. United States*, 356 F.2d 345 (D.C. Cir. 1966) (D used excessive force in self-

case by, for example, ten years, some portion of it could be explained as a result of lesser wrongdoing, and another portion of the mitigation could be excuse-based. No court has explicitly rationalized the defense this way, and it is unlikely any judge or legislature has thought about it in this intricate, even torturous, fashion.

Thus, for example, in one provocation case, indeed in one sentence, Lord Goddard talks out of both doctrinal sides of his mouth, when he intones that "the violence used by the appellant as a result of the provocation could possibly be *excusable*, . . . While this provocation would no doubt have *excused* . . . a blow . . . , it could not have *justified* the infliction of such injuries as [resulted in death]."¹⁶² If he intended to prove that a passionate killing is both partially justified and excused, he did not do so. Rather, he seemed to treat as synonyms the words "excuse" and "justification". That is the problem: justifications and excuses are generally mutually exclusive, and courts do not appear to realize that in heat of passion cases the differences between the two classes of defense need to be fleshed out.

A reasonable interpretation of some common law precedent can support the thesis that heat of passion is a partial justification.¹⁶³ All of the common law forms of "adequate provocation"¹⁶⁴ have one thing in common; they all involve unlawful conduct by the provoker. Lawful conduct, no matter how provocative, is never adequate provocation.¹⁶⁵ It is possible, of course, to defend this rule with excusing language,¹⁶⁶ but it is far easier¹⁶⁷ to explain it as justification based, by contending that it is the unlawfulness of the provocation which makes the response (killing) less socially undesirable. As Aristotle said, "it is apparent injustice that occasions rage."¹⁶⁸ The typical victim in a heat of passion case

defense case, so as to be entitled to partial self-defense; *held*: if D acted in heat of passion, and his excessive force was reasonable under the circumstances of the passion, D might be entitled to *full* self-defense claim).

¹⁶² Regina v. McCarthy, [1954] 38 Crim. App. 74, 78 (emphasis added).

¹⁶³ Few cases directly say as much, although this theory has not been totally lost on the commentators. G. FLETCHER, *supra* note 24, at 245; Ashworth, *supra* note 13, at 553; Ashworth II, *supra* note 24, at 307.

¹⁶⁴ See *supra* notes 65-78 and accompanying text.

¹⁶⁵ Regina v. Mawgridge, [1707] Kel. J. 119, 128, reprinted in 84 Eng. Rep. 1107, 1111 (throwing of bottle by victim is not adequate, because it was "justifiable and lawful"); State v. Manus, 93 N.M. 95, 100, 597 P.2d 280, 285 (1979).

¹⁶⁶ *E.g.*, reasonable, blameless actors never become enraged by lawful conduct. See excuse analysis, generally at *infra* notes 294-304 and accompanying text.

¹⁶⁷ If I observe my previously virginous college student daughter having consensual intercourse with her 45 year-old male professor, and I kill the latter, I may be killing a person acting lawfully, but my fatherly anger at finding her "taken advantage of" by her teacher may be entirely reasonable.

¹⁶⁸ ARISTOTLE, NICOMACHEAN ETHICS, Bk. V, 8, quoted in, Ashworth II, *supra* note 24, at 292.

is someone who has "asked for it." The attacker is, in a way, only "restor[ing] the balance of justice."¹⁶⁹ Because of this, the defense often skirts the line of the full, justificatory defenses of self-defense and defense-of-others.

Specifically, the "sight of adultery" cases add support to the justification thesis. As described earlier,¹⁷⁰ a married person who kills upon sight of adultery commits manslaughter, but an unmarried individual who kills upon sight of unfaithfulness by one's lover or fiancé is a murderer. Only a highly unrealistic belief about passion can explain this rule in terms of excusing conduct. It is implausible to believe that when an actor observes his or her loved one in an act of sexual disloyalty, that actor will suffer from less anger simply because the disloyal partner is not the actor's spouse. Instead, this rule is really a judgment by courts that adultery is a form of injustice perpetrated upon the killer which merits a violent response, whereas "mere" sexual unfaithfulness out of wedlock does not. Thus, it has been said that adultery is the "highest invasion of [a husband's] property,"¹⁷¹ whereas in the unmarried situation the defendant "has no such control" over his faithless lover.¹⁷²

Another justification-oriented rule is the misdirected retaliation doctrine, wherein it is said that the defense is only applicable when it is an "act . . . by the dead man," not a third person, which provokes the accused.¹⁷³ Although the character of the dead person may be irrelevant, his blame as it relates to the final act, is not only pertinent, but usually necessary.¹⁷⁴ Assume, for example, that a father observes his daughter being seriously injured by a reckless driver. If the enraged parent then kills the driver, the homicide may be manslaughter; but if the father kills an innocent bystander who tried to protect the driver, that homicide is murder, even though the killing was committed as a result of

¹⁶⁹ Ancel, *supra* note 136, at 36.

¹⁷⁰ See *supra* notes 72-77 and accompanying text.

¹⁷¹ Regina v. Mawgridge, [1707] Kel. J. 119, 137, reprinted in 84 Eng. Rep. 1107, 1115.

¹⁷² Rex v. Greening, [1913] 23 Cox Crim. C. 601, 603. Other cases, less clearly, may perhaps view provocation in justificatory fashion. For example, one American court has ruled that a calm killing of a spouse's intended lover, for the purpose of preventing the adultery, constitutes justifiable homicide; whereas an enraged killing in the same circumstances is only manslaughter. Scroggs v. State, 94 Ga. App. 28, 93 S.E.2d 583 (1956). The reasoning in the opinion is frustratingly absent, but one plausible interpretation of the case is that the conjunction of the clearly justification-based crime prevention defense with heat of passion, means that this court viewed a provoked killing as justifiable, but believed that the justification should be rendered incomplete when the actor's motive is clouded by anger. It is also possible, however, that the rage would totally convert the justified act into an excuse, no more. On whether "bad motive" should have any affect on a justification, see conflicting analyses in Robinson, *supra* note 137 (it should not affect it) and Fletcher, *supra* note 152 (it should at times affect it).

¹⁷³ See *supra* note 78 and accompanying text.

¹⁷⁴ See Rex v. Duffy, [1949] 1 All E.R. 932, 932.

the same rage.¹⁷⁵

Similarly, when an emotionally over-wrought father kills his sleeping, terminally ill child after the father had learned that his wife has been unfaithful to him, the father is not entitled to a manslaughter claim.¹⁷⁶ In both cases the provocation is great, the rage or similar emotion is understandable, but the victim of the killing is wholly innocent of bringing on the rage. Under an excuse theory, as will be developed later,¹⁷⁷ the father could argue that he is less blameworthy than the usual calm killer, because his anger was understandable, and his inability to completely separate innocent from guilty victims was similarly less blameworthy under such circumstances.¹⁷⁸ A manslaughter conviction seems plausible, therefore, by application of an excusing theory. The homicide of any entirely innocent person, however, is not capable of mitigation under any rational theory of partial justification,¹⁷⁹ so the "dead man" rule is necessarily justificatory based.¹⁸⁰

There is substantial basis, then, for the claim that heat of passion is, at least at times, viewed as a partial justification, although the precise reason why it is so remains undeveloped. There is also substantial support, however, for the assertion that the defense is based on a theory that the harm is the same as with murder, but that the accused's personal blameworthiness is less than that of the murderer. The language, if not always the result, in provocation cases is usually excuse oriented. The problem, however, is that court opinions vary in their excuse reasoning. Even one opinion might merge different excuse theories or fail to make

¹⁷⁵ *Rex v. Scriva* (No. 2), [1951] *Vict. L.R.* 298.

¹⁷⁶ *Rex v. Simpson*, [1915] 11 *Crim. App.* 218. *See also* *State v. Speyer*, 182 *Mo.* 77, 81 *S.W.* 430 (1904) (D, in fit of emotion, killed his sleeping son because he was arrested for a crime, and he feared for this child's well-being).

¹⁷⁷ *See infra* notes 294-304 and accompanying text.

¹⁷⁸ *But see* *Tripp v. State*, 36 *Md. App.* 459, 466-67, 374 *A.2d* 384, 389-90 (1977) (quoting *W. LAFAVE & A. SCOTT, supra* note 64, at 582, reasoning that a reasonable man is never so provoked so as to intentionally strike out at an innocent victim). *See generally infra* the excuse analysis at notes 294-304 & accompanying text.

¹⁷⁹ *See infra* notes 255-69 and accompanying text for justification analysis.

¹⁸⁰ Some cases permit the defense when the actor attempts to kill the "proper" person, but in fact kills only an innocent person. *See supra* note 78 and accompanying text; *see also* *W. LAFAVE & A. SCOTT, supra* note 64, at 581-82. Thus, where an actor erroneously, but reasonably, believes that the victim was the provoker, but in fact it was another person, (or, in fact, no provocation occurred), or where the actor's aim is bad and he accidentally kills a bystander, the defense may still be permitted. As the victim did not deserve to die, the results in these cases can only be defended, if at all, under an excuse theory. This does not mean, however, that the pure defense, devoid of such mistakes or accidents, is excuse-based. If an actor mistakenly believes he is entitled to the justifying condition of self-defense, for example, he may still be entitled to claim self-defense. *G. FLETCHER, supra* note 24, at 689; *W. LAFAVE & A. SCOTT, supra* note 64, at 583-84. Nonetheless, the ordinarily justification-oriented defense of self-protection ought in such cases be converted into an excuse. *G. FLETCHER, supra* note 24, at 684, 762-69; *Robinson, supra* note 137, at 283-84.

any theory explicit.¹⁸¹ Many theories have been used to explain an excuse.

First, it has been said often that the passion serves to mitigate the punishment because the actor is "so dethroned of reason" that he either cannot premeditate or form the specific intent to kill. In essence, heat of passion negates the required mens rea of murder, thereby lessening the actor's blameworthiness.¹⁸²

Second, the language of many opinions implies that the blameworthiness of the actor is reduced because the killing is largely involuntary.¹⁸³ Moreover, the requirement that the killing be sudden, before the actor can reasonably calm down,¹⁸⁴ supports this voluntariness thesis, because if the defense were predicated on the injustice that initiated it, or on the mental state of the actor at the time of the killing, then the timing of the killing would seem largely irrelevant.¹⁸⁵

A third, common reason given for the defense is that it represents a concession to human weakness.¹⁸⁶ Of course, this may merely be a preface to a voluntarism theory, but at times there appears to be a different idea in mind. It is that the killing, although perhaps voluntary, does not stem from a "bad or corrupt heart, but from infirmity of passion to which even good men are subject."¹⁸⁷ In essence, it may be reasoned

¹⁸¹ The earlier noted sloppiness in court language, *see supra* notes 113-35 and accompanying text, may in fact represent inconsistency in excuse theory; or, of course, the effort in this section to parse out separate excuse theories may be a misguided attempt to give more credence to poorly worded court opinions than is deserved.

¹⁸² *E.g.*, *Holmes v. D.P.P.*, [1946] 2 All E.R. 124, 127; *Rex v. Hayward*, [1833] 6 Carrington & Payne's Rep. 157, 159, *reprinted in* 172 Eng. Rep. 1188, 1189; *Rivers v. State*, 75 Fla. 401, 78 So. 343 (1918); *Johnson v. State*, 129 Wis. 146, 162, 108 N.W. 55, 61 (1906); *Roman v. State*, 41 Wis. 312, 315 (1877); MODEL PENAL CODE *supra* note 46, § 210.3, Comment (1980). *Contra*, *Regina v. Walker*, [1969] 1 All E.R. 767; *Lee Chun-Chuen v. Regina*, [1963] 1 All E.R.73.

¹⁸³ *E.g.*, *Rex v. Duffy*, [1949] 1 All E.R. 932, 932; *Regina v. Kirkham*, [1837] 8 Carrington & Payne's Rep. 115, 118-19, *reprinted in* 173 Eng. Rep. 422, 424; *Phillips v. Queen*, [1969] 2 A.C. 130, 137-38; *Regina v. Welsh* [1869] 11 Cox Crim. C. 336, 339; *People v. Borchers*, 50 Cal.2d 321, 328, 325 P.2d 97, 101-02 (1958); *People v. Harris*, 8 Ill.2d 431, 434-34, 134 N.E.2d 315, 317 (1956); *State v. Watkins*, 147 Iowa 536, 126 N.W. 691 (1910); and *Commonwealth v. Drum*, 58 Pa. 9, 17 (1968). *See also supra* notes 130-35 and accompanying text.

¹⁸⁴ *See supra* notes 62-64 and accompanying text.

¹⁸⁵ The timing of the killing might be relevant to prove that the actor killed because of the justifying condition, and not out of revenge. It is not clear, however, whether a revenge motive negates the right to invoke the justification. *See supra* note 172.

¹⁸⁶ *E.g.*, *Holmes v. D.P.P.*, [1946] 2 All E.R. 124, 128 (*but see supra* this court's contrary reasoning at 137 of the opinion, as discussed in note 182); *Andersen v. United States*, 170 U.S. 481, 510 (1898); *Addington v. United States*, 165 U.S. 184, 186 (1897); *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913); *People v. Bourne*, 385 Mich. 170, 188 N.W.2d 573 (1971); *State v. Hill*, 20 N.C. (4 Dev. & Bat.) 629, 633-34 (1839); *E. EAST*, *supra* note 75, at 234; II MODEL PENAL CODE, *supra* note 46, § 210.3, Comment (1980); ROYAL COMM'N, *supra* note 13, at CM. No. 8932, para. 144.

¹⁸⁷ *State v. Cook*, 3 Ohio Dec. Reprint 142, 144 (1859).

that the character of the defendant is not as bad as that of a murderer, so the actor's guilt should be reduced.¹⁸⁸

Finally, there are courts which use all of the above theories, and the kitchen sink, to explain the defense.¹⁸⁹ Common law heat of passion doctrine, therefore, has elements of justification and of excuse. There is language, and there are holdings or doctrinal rules in both the United States and in England, from which one can justify the doctrine under each theory.

D. EFFECT OF STATUTES ON DOCTRINAL ANALYSIS

Although the English Homicide Act of 1957¹⁹⁰ does not directly confront the issue, the statutory version of the provocation defense is more excuse oriented than its common law counterpart. The defense is theoretically applicable even if the victim was not a provoker. This rids the law of one justification-based rule. Moreover, the repeal of the rigid rules regarding the nature of adequate provocation makes it possible for juries to ignore previous justification-based precedent. Because the law is not explicit, however, juries will not receive appropriate guidance regarding the relevance of the justification-excuse distinction, and they could therefore resolve provocation cases in a justificatory fashion.

In this country most states, by statute, still apply common law doctrine.¹⁹¹ The rationale for heat of passion in this country is therefore no clearer nor more coherent than its murky source. Various state manslaughter statutes appear to be excuse oriented, expressly applying a voluntarism language.¹⁹² Others expressly reject the excuse theory that the anger negatives the intent to kill.¹⁹³ Still other statutes retain the justifi-

¹⁸⁸ Ancl, *supra* note 136, at 36; Brown, *supra* note 2, at 311; Wechsler & Michael, *supra* note 136, at 1281. A character theory may also explain the denomination of the objective person as a "just and reasonable" person. See *supra* note 116 and accompanying text. This "character" theory can also be used to develop a utilitarian analysis to the question. See *supra* note 136.

¹⁸⁹ Wisconsin Jury Instruction, *supra* note 128:

The phrase "heat of passion" . . . is such mental disturbance caused by a reasonable, adequate provocation, as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason, making him incapable of forming and executing that distinct intent [*mens rea?*] to take human life . . . , to cause him uncontrollably [*voluntarism?*], to act from the impelling force of the disturbing cause rather than from any real wickedness of heart or cruelty or recklessness of disposition [*character?*]

¹⁹⁰ See *supra* notes 84-89 and accompanying text.

¹⁹¹ See *supra* notes 101-09 and accompanying text.

¹⁹² *E.g.*, ARIZ. REV. STAT. ANN. § 13-1101(4) (West 1978); COLO. REV. STAT. § 18-3-104 (1978); GA. CODE ANN. § 26-1102 (1972); IOWA CODE ANN. § 707.4 (West 1979); NEV. REV. STAT. § 200.040 (1979).

¹⁹³ *E.g.*, ALASKA STAT. § 11.41. 120 (1980) (an intentional, knowing, or reckless killing committed in passion is manslaughter); KAN. STAT. ANN. § 21-3403 (1974) (intentional killing upon a sudden quarrel or in heat of passion).

cation-based requirement that the victim be the provoker.¹⁹⁴ Some of these same states, however, also use the excuse oriented voluntarism theory.¹⁹⁵ It is fair to state, therefore, that the United States statutory law has not resolved the perplexities remaining from its heritage.¹⁹⁶ Only in the minority of states which have codified the Model Penal Code,¹⁹⁷ is it reasonably clear that the mitigation is excuse oriented. The Code expressly requires that the accused offer a "reasonable explanation or *excuse*."¹⁹⁸ There exists no explicit justification-based limitations to the type of provocation which qualifies. Using character oriented excuse-like reasoning, the Model Penal Code commentary states that the defense is properly perceived as a "concession to human weakness,"¹⁹⁹ and that the homicide is "attributable to the extraordinary nature of the situation. . . [and not to] the moral depravity of the actor."²⁰⁰

E. THE IMPORTANCE OF DISTINGUISHING JUSTIFICATIONS FROM EXCUSES

A killing in passion may be partially justified or partially excused. In the United States such a killing is mitigated with no clearer reason to support the decision than at common law, when the reasons given, if at all, were contradictory. Worse still, there is no evidence that modern legislatures, in drafting manslaughter legislation, or the courts, in applying the common law, have seriously thought about the rationale for this age-old defense in terms of the justification-excuse dichotomy.

It can be argued, however, that the distinction is irrelevant except to scholarly nitpickers,²⁰¹ because either way it mitigates the punishment. Frequently, courts²⁰² and commentators²⁰³ dismiss the impor-

¹⁹⁴ *E.g.*, ALASKA STAT. § 1.41.115a (1980); ARIZ. REV. STAT. ANN. § 13-1103 (West 1978); COLO. REV. STAT. 18-3-104 (1978).

¹⁹⁵ *E.g.*, Arizona and Colorado. *See supra* notes 192, 194 & accompanying text.

¹⁹⁶ I am not suggesting that each state must agree upon the rationale of the defense. It is not wrong, as a matter of logic, that two states mitigate provoked killings but do it for different reasons. My point is that: (a) most states still apply common law doctrine, with its internal confusion; (b) some states expressly give off conflicting signals, *see supra* note 195 and accompanying text; and (c) it is likely that state legislators have not given any more, or better, consideration than have the courts to the sophisticated moral and practical differences between justifications and excuses, so that any "resolution" they have reached is as likely to be a matter of fortuity as it is principled analysis. For the reasons why such analysis is needed, *see infra* section III.

¹⁹⁷ *See supra* notes 105-09 and accompanying text.

¹⁹⁸ II MODEL PENAL CODE, *supra* note 46, § 210.3(1)(b) (1980) (emphasis added).

¹⁹⁹ *Id.*, § 210.3 Comment (1980).

²⁰⁰ *Id.*

²⁰¹ But, I like scholarly nitpickers.

²⁰² *See, e.g.*, United States v. Peterson, 483 F.2d 1222, 1228 n.35 (D.C. Cir.), *cert. denied*, 414 U.S. 1007 (1973).

tance of the dichotomy.²⁰⁴ Perhaps this is done because there is superficial reason to believe the distinction is now irrelevant. At early common law, excuses did not result in acquittal; now they do. Or, the apathy may result from the desire of twentieth century legal observers to explain and justify the body of criminal law primarily on the basis of utilitarian grounds, rather than to take note of the intrinsic moral reasoning originally underlying the substantive doctrines. In fact, however, it is of profound importance that courts and commentators doctrinally analyze the heat of passion defense and that a clear and consistent rationale emerge. This analysis is important to society and to the passionate killer. It is also important to the law of heat of passion and to the whole of the substantive criminal law.

The distinction is important in provocation cases for a number of reasons. First, as already demonstrated,²⁰⁵ there are certain common factual situations, such as misdirected retaliation, and common legal issues, such as what constitutes adequate provocation, which cannot be properly resolved without seriously considering the justification-excuse issue. Other factual circumstances not noted earlier are also affected by the analysis. For example, some cases involve indirect provocation. An enraged father kills the man who commits a sexual act upon his son.²⁰⁶ A son kills a person who is in a sudden quarrel with his father.²⁰⁷ An onlooker sees a crime committed on a stranger and kills the criminal.²⁰⁸ Should the defense apply in these cases? Must one be a relative to the aggrieved party? The answers might depend on whether we are measuring the injustice committed by the provoker (justification), or, instead, the reasonableness of the defendant's rage (excuse).

Similarly, the common law has had to wrestle with cases of provoked provocation; that is, the victim "asks for it," but the accused "asks the victim to ask for it." For example, Defendant goes to Victim in order to blackmail him, Victim becomes enraged, a fight ensues, and

²⁰³ W. LAFAVE & A. SCOTT, *supra* note 64, at 374-75 (in discussion of necessity and duress); J. MILLER, *HANDBOOK OF CRIMINAL LAW* 199 (1934).

²⁰⁴ Some recent commentators are not guilty of making such a mistake. Robinson, *supra* note 137, at 277-79, does an excellent job of demonstrating the importance of the dichotomy. The distinction has particularly been discussed in the narrow area of the differences between necessity (justification) and duress (excuse) in prison escape cases. See Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape*, 26 U.C.L.A. L. REV. 1355 (1979); Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free From Sexual Assault*, 49 S. CAL. L. REV. 110 (1975); Comment, *Intolerable Conditions as a Defense to Prison Escapes*, 26 U.C.L.A. L. REV. 1126 (1979).

²⁰⁵ See *supra* notes 65-78, 163-80 and accompanying text.

²⁰⁶ Regina v. Fisher [1837] 8 Carrington & Payne's Rep. 182, reprinted in 173 Eng. Rep. 452.

²⁰⁷ Irby v. State, 32 Ga. 496 (1861).

²⁰⁸ Rex v. Mowers [1921] 57 D.L.R. 569.

eventually Defendant, now enraged as well, kills Victim.²⁰⁹ Assuming Victim's conduct would have otherwise constituted adequate provocation, do Defendant's unclean hands in the situation affect the analysis? The answer may depend on whether the defense is a justification or an excuse, and on why it is one or the other.²¹⁰

Second, the culpability of accessories in homicides could be affected. Suppose Mr. Jones and Friend arrive at Jones' home and find Ms. Jones sleeping with Victim. Enraged, Mr. Jones turns to calm Friend, and says, "Hold down the s.o.b., while I kill him." Friend obliges.²¹¹ Of what crime is Friend guilty? If the killing is somewhat partially justified, Friend is an accessory to a partially justified homicide. It is arguable, therefore, that he is guilty of only manslaughter.²¹² If the provocation defense is an excuse, however, the excuse relates to the actor, not to the act,²¹³ and the defense would appear to be inapplicable to calm Friend. Under this reasoning he ought to be guilty of murder, whereas Jones would be guilty only of manslaughter.²¹⁴

Third, the proper institutional roles of the legislatures, trial judges, and juries in provocation cases may depend on the rationale. A justified act is one which is societally desirable or, at least, not affirmatively undesirable. Ordinarily we use the written criminal code to express such judgments, either by leaving certain behavior outside the code, or by codifying the classes of cases in which harmful behavior is negated by the presence of justification.²¹⁵ It is entirely appropriate for the legislature, as society's representative, to determine which classes of killing are less undesirable than the usual homicide, and to codify those judgments. If heat of passion is a justification, then it is appropriate for the legislature to adopt clear lines determining what is adequate provocation.²¹⁶ If the defense is an excuse, however, a legislature cannot as easily declare in advance the cases which qualify for mitigation, because the issue is

²⁰⁹ *Edwards v. Regina* [1972] 3 W.L.R. 893.

²¹⁰ If one looks at the three different types of excuse reasoning already mentioned, *see supra* notes 181-89 and accompanying text, the problem can be seen. For example, if the rationale is that the requisite *mens rea* is absent, it would not seem relevant to this excuse theory that the defendant came into the situation with unclean hands. The same argument can be made if the defense is entirely a matter of voluntarism. If the defense is character based, the result could be different. If the defense is justification-based, the correct analysis depends on why heat of passion is a justification. *See supra* notes 182-89 and accompanying text. *See also infra* notes 256-62 and note 309 and accompanying text, for further discussion of this type of case.

²¹¹ *Compare Irby v. State*, 32 Ga. 496 (1861) (D, son of X, kills V, when he observes X and V in a serious fight).

²¹² *See G. FLETCHER, supra* note 24, at 667-70.

²¹³ *See supra* the text immediately preceding note 153.

²¹⁴ *See Parker v. Commonwealth*, 180 Ky. 102, 201 S.W. 475 (1918); *Moore v. Lowe*, 180 S.E. 1 (W. Va. 1935); *see generally* 1 F. WHARTON, *supra* note 99, at 765.

²¹⁵ *Robinson, supra* note 137, at 271-72.

²¹⁶ Of course, jury nullifications may always occur.

not the desirability of a particular act, but rather is the blameworthiness of the actor's emotional state, character, or level of self-control—all matters which must be left to factfinders at trial. Even if the excuse is to have an objective component, it is not obvious that this must, or even should, be resolved by legislation. Under an excuse theory, what conduct society deems harmful is not at issue. Rather, the issue is whether the actor lived up to a standard of how "reasonable" people act. Although a legislature may properly codify an objective excusing component, it is more plausible to leave its definition (*i.e.*, what is adequate provocation) to jurors, who represent that objective standard.

Fourth, closely related to the last point, is the question of whether provocation should be a defense at all, or merely a mitigating circumstance to be given as much weight as the sentencing authority deems appropriate.²¹⁷ It follows from the discussion above, that if the doctrine is a justification it should be codified as society's judgment regarding social harm. Similarly, if it is an excuse objectively defined, legislative action is appropriate. If the defense is an excuse based solely on the actor's personal blameworthiness, the case for codification is less compelling.

Fifth, the efficacy of the defense to crimes other than homicide depends on its rationale. If the provocation doctrine is based on an excuse concept that rage negates the specific mens rea of murder, it follows that similar rage should negate other crimes requiring malice.²¹⁸ Likewise, the emotion arguably negates other intentional conduct, such as the specific intent in assault with intent to kill. Such reasoning could result in total acquittal, if there is no lesser offense. On the other hand, if the defense is based on a theory that an enraged actor's character is not as bad as that of the calm person, attempted murder should be reducible to attempted voluntary manslaughter. Such a result is meaningless, however, if one views the defense as negating the mens rea of intent to kill.²¹⁹ It is also inappropriate if the purpose of the defense is only to

²¹⁷ "Extreme mental or emotional disturbance," which presumably includes passion (as it is also the language used in the Model Penal Code to incorporate the provocation doctrine, II MODEL PENAL CODE, *supra* note 46, § 210.3(1)(b) (1980)), is used as a statutory mitigating circumstance in capital sentencing hearings in many states. *E.g.*, ARK. STAT. ANN. § 41-1304(1) (1977); CAL. PEN. CODE § 190.3(d) (Supp. 1979); FLA. STAT. ANN. § 921.141(6)(b) (West Supp. 1979); ILL. ANN. STAT. ch. 38 § 9-1(c)(2) (Smith-Hurd 1979); UTAH CODE ANN. § 76-3-207(b) (1978). *See also infra* note 235.

²¹⁸ *See Regina v. Cunningham*, [1959] 2 W.L.R. 63 (defense inapplicable to crime of malicious wounding); *Rex v. Newman* [1948] Vict. L.R. 61 (Australian court holds the defense is applicable to crime of "wounding with intent to murder").

²¹⁹ The defense has been held inapplicable in *Regina v. Bruzas* [1972] Crim. L.R. 367; it has been applicable in *Regina v. Smith* [1964] N.Z.L.R. 834; *State v. Norman*, 580 P.2d 237 (Utah 1978). *See also People v. Horn*, 12 Cal.3d 290, 524 P.2d 1300, 115 Cal. Rptr. 516 (1974)

avoid the death penalty, and no more.²²⁰ If the defense is a partial justification because the victim in homicide cases partially "asks for it," then it is plausible that if the actor controls his rage so as to only strike the victim, the defense to charges of assault and battery should be total.

The search for a rationale for the heat of passion defense should also benefit the criminal law generally. Such careful analysis can demonstrate the relationship between different justifications or excuses. Or, such analysis may contribute to an increased awareness of inconsistencies in criminal law theory.²²¹ Specifically, as will be developed further, our understanding of the defenses of self-defense and duress can be informed by the dialogue relating to provocation.²²² For example, if heat of passion is deemed to be an excuse, courts and legislators ought to directly confront the fact that duress and heat of passion, two superficially similar excuses, are handled contradictorily at common law. If A puts a gun to B's head and threatens to kill B unless the latter kills C, and if B does kill C due to this coercion, the usual rule is that B is guilty of murder.²²³ Duress is inapplicable in homicide cases. Yet, if A commits a provocative act against B and B kills A out of rage, B is guilty of the lesser crime of manslaughter. Can this dissimilarity be adequately explained? Perhaps,²²⁴ but it requires a very careful scrutiny of the law of provocation and of duress. Such scrutiny can only strengthen the whole of the substantive criminal law, by developing more fully the moral theories surrounding excuse law.²²⁵

There is similar benefit in the analysis of heat of passion as it pertains to self-defense. In cases in which the actor alleges heat of passion, he can and often does raise a claim of self-defense.²²⁶ If provocation is an excuse, the defendant is in the position of making simultaneous conflicting²²⁷ claims that his conduct is wholly justified, or partially excused. This may only represent alternative defense theories based upon conflicting factual claims. But, if it is clear that the defendant acted in rage, the relationship of the conflicting defenses requires careful scru-

(issue of diminished capacity used to reduce conspiracy to commit murder to conspiracy to commit voluntary manslaughter).

²²⁰ See WILLIAMS, TEXTBOOK OF CRIMINAL LAW 500-01 (1978) [hereinafter cited as WILLIAMS' TEXTBOOK].

²²¹ AUSTIN, *supra* note 156, at 43 (in which he calls for such analysis in order to correct older and hastier theories). Austin also specifically points out that analysis of excuses is beneficial because a careful look at the abnormal sheds light as well on the normal. *Id.* at 45.

²²² For self-defense heat of passion discussion, see *infra* notes 251-66 and accompanying text; for duress heat of passion discussion, see *infra* notes 281-87, 293-99 and accompanying text.

²²³ *Abbott v. Regina* [1976] 3 W.L.R. 462.

²²⁴ See *infra* notes 295-99 and accompanying text.

²²⁵ See *supra* note 221.

²²⁶ *E.g.*, *Regina v. Porritt* [1961] 1 W.L.R. 1372.

²²⁷ See *supra* note 161.

tiny. Does it mean, for example, that an otherwise good or neutral act (*i.e.*, to kill in self-defense) is converted into a bad one if it can be demonstrated that the rage clouded the actor's motive for the killing?²²⁸ There also exists the interesting matter of the relationship, if any, between the provocation defense and the so-called "incomplete" or "imperfect right" of self-defense. This partial right doctrine²²⁹ is used in a number of contexts.²³⁰ One context is particularly pertinent. If A is about to unlawfully strike B, and B retaliates by trying to kill A and then A responds to this excessive force by not retreating, but rather by calmly killing B, it is often (although not always) said that A has a partial or incomplete justificatory self-defense claim, resulting in conviction for manslaughter.²³¹ Yet, is this type of case any different than a provoked provocation?²³² Nonetheless, some cases treat the two situations differently.²³³ Of course, if provocation is a partial excuse, then the discrepancy is not as obviously an error.²³⁴

It can thus be seen that an effort to find a coherent explanation for the provocation defense is at least as important as the propriety of the eventual resolution. If lawyers become more sensitive to the importance of the justification-excuse distinction, the whole of the substantive criminal law will necessarily be made more coherent. Not only will the prov-

²²⁸ For a case nicely raising the general point, *see* *Scroggs v. State*, 94 Ga. App. 28, 93 S.E.2d 583 (1956).

²²⁹ To say that a person has a partial right or justification of self-defense has been criticized as a contradiction in terms. *R. PERKINS*, *supra* note 36, at 1016-17. Perkins would call it a partial excuse. *Id.* at 1017. In itself, then, this common law rule needs to be put under the microscope in order to give it its proper label. Such a defense can be defended as a partial justification, however, as discussed in text following notes 252-53 & accompanying text *infra*.

²³⁰ Besides the example noted in the text, the "partial right" is less often invoked when a defendant honestly, but unreasonably believes he is under lethal attack, or that the only way to save his life is by lethal response. *W. LAFAVE & A. SCOTT*, *supra* note 64, at 583-84. Even if a partial justification can be defended, *see supra* note 229, when the "partial right" is used in these narrower mistake contexts, it should be viewed as an excuse, not a justification. *See* note 180 *supra*.

²³¹ *State v. Ryan*, 492 S.W.2d 116, 121 (Mo. App. 1973); *State v. Winslow*, 90 Mo. 608, 620, 4 S.W. 14, 19 (1887); *Mason v. State*, 72 Tex. Crim. 501, 163 S.W. 66 (1914). *See also* *F. WHARTON, CRIMINAL LAW AND PROCEDURE*, 499-500 (1957); *Beale, Homicide in Self-Defense*, 3 *COLUM. L. REV.* 526, 536-39 (1903); *contra*, *Palmer v. Regina*, [1971] A.C. 814.

²³² *See supra* notes 209-10 and accompanying text.

²³³ In *Edwards v. Regina* [1973] A.C. 648, D, as blackmailer, was attacked by V, so D killed V. The court did not recognize an incomplete self-defense privilege where D's response was excessive in light of V's attack; but the provocation plea was permitted if V's response to the blackmailing was unpredictable.

²³⁴ It still may pose less obvious problems. If a person is partially justified in killing under these circumstances, why does his rage not excuse or mitigate further the already partially justified act? *See supra* note 161. Or, on the other hand, why does the rage not demonstrate a bad motive by defendant so as to wholly deny the actor the use of the justifying condition, leaving him with an excuse, or nothing at all? *See supra* discussion of *Scroggs v. State*, 94 Ga. App. 28, 93 S.E.2d 583 (1956) at note 172.

ocation rules be made more consistent, but their repercussions can be appropriately resolved.

IV. FINDING THE PROPER RATIONALE

It is now manifest that heat of passion as a concept has been analyzed in terms of both justification and excuse, and it should now be evident why it is important to decide which approach to use. The purpose of this section is to suggest which path the law should take.²³⁵ There is an obvious limitation to such an excursion. Whether heat of passion is a justification or an excuse is a matter of community judgment. A legislature could properly take either road. Nonetheless, the effort in this section is to suggest a (not "the") correct approach to the philosophical quagmire, and to offer statutory language to implement the heat of passion defense. The thesis here is that an answer in a vacuum is unacceptable. One must analyze more carefully the rationale for justification and for excuses, in order to decide where heat of passion fits into the mosaic. Unfortunately, as with provocation, common law courts have not always coherently or consistently stated why certain acts are justified or why certain actors are excused. It is only possible to state various bases, not a single one, for justifications and for excuses at common law.

A. HEAT OF PASSION AS A JUSTIFICATION

The basic theory of justification is that if an act is justified there has been no social harm, or, at least, less social harm than if the actor did not act as he did. In order to decide whether heat of passion ought to be considered a sub-species of justification, it is necessary to decide why conduct, presumptively harmful, loses this characteristic upon proof of a justifying condition. A close look at a few justifications to a homicide charge provides insight. Self-defense is a modern day justification often

²³⁵ I assume that a provocation defense in some form will be retained. Because the provocation defense remains firmly intact in this country, and elsewhere, see *supra* notes 9-11 and accompanying text, it is not realistic to believe that the defense will be abolished. Such a legislative action could well result in unjustified jury acquittals in murder prosecutions. See generally Roberts, *The Unwritten Law*, 10 KY. L.J. 45, 46 (1922).

Should it be retained, however? It can be argued, for example, that in a "civilized" system of criminal justice, we should not countenance violent behavior. This is true. Consequently as developed at notes 264-70 & accompanying text *infra*, the doctrine should not be retained as a justification for killing. (As for utilitarian analysis, see *supra* note 136.) Once one clearly understands, however, that the defense exists, not in order to commend the actor for his behavior, but rather to give recognition to the actor's reduced personal blameworthiness, as is developed in section IVB *infra*, then the presence of the doctrine as a statutory defense is on as firm grounding as any other excusing defense, such as insanity or duress. To permit the defense is not to put societal imprimatur on the behavior, but only to recognize human weakness.

asserted in provocation cases.²³⁶ The common law defenses of crime prevention, and of arrest of a felon, are historical examples of justified homicides. These defenses, therefore, are educational.

Suppose Victim pulls a gun and is about to kill Actor, so the latter kills Victim. At modern common law, Actor's conduct is justified in self-defense. The defense is entirely lost, however, if: (a) Victim only pulled the gun after Actor initially threatened Victim with lethal force;²³⁷ or (b), Victim was about to kill Actor because the latter was threatening the life of another person, or was about to commit some other major wrongdoing.²³⁸ The defense is at least partially lost if Actor used more force than was apparently necessary to save himself.²³⁹ In such cases Actor is guilty of murder or manslaughter. Self-defense is apparently fully applicable, however, even if Victim's initial deadly aggression was the result of mental disease.²⁴⁰ Pursuant to the "incomplete" defense doctrine previously explained,²⁴¹ if Actor initiates sub-lethal aggression upon Victim and Victim escalates the conflict by pulling the gun, Actor's use of deadly force will usually result in a manslaughter conviction.²⁴² Finally, deadly force in response to a threat of minor assault constitutes murder or manslaughter, often the former.²⁴³

²³⁶ A compelling argument can be made that self-defense ought to be viewed, as in Blackstone's time, as an excuse, not a justification. Nonetheless, it commonly is treated today as a justification. See *supra* notes 148-52 and accompanying text.

²³⁷ See BLACKSTONE, *supra* note 2, at 185; Wallace v. United States, 162 U.S. 466 (1895); State v. Hill, 20 N.C. (4 Dev. & Bat.) 629 (1839).

²³⁸ One may only lawfully combat unlawful force. United States v. Peterson, 483 F.2d 1222 (D.C. Cir. 1973). An actor cannot take advantage of a necessity he produced. Beale, *supra* note 231, at 533. Obviously, an unlawful deadly threat upon another, would constitute force which may lawfully be repelled, so actor cannot respond with deadly force under such circumstances. Nor, may one use deadly force, at least without withdrawing, if one's "blame-worthy" conduct is such as would naturally cause such an attack by another. *Id.* at 534; 1 F. WHARTON, *supra* note 99, §§ 612-15 at 770-78. Of course, the nature of such aggressive conduct is unclear, as not every unlawful act constitutes aggression. R. PERKINS, *supra* note 36, at 1008.

²³⁹ Allen v. United States, 164 U.S. 492 (1896); Beard v. United States, 158 U.S. 550, 560 (1895); Eiland v. State, 52 Ala. 322, 328 (1875); State v. Donnelly, 69 Iowa 705, 27 N.W. 369 (1886); Commonwealth v. Kendrick, 359 Mass. 203, 210-11, 218 N.E.2d 408, 413-14 (1966).

²⁴⁰ See Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 378-80 (1973). As a killing by an insane actor is an unlawful killing (*i.e.*, immoral or harmful), a person may repel such unlawful force.

²⁴¹ See *supra* notes 229-31 and accompanying text.

²⁴² *Contra*, Palmer v. Regina [1971] A.C. 814. Furthermore, it is not always clear the partial defense will be afforded because the partial defense is premised on the view that a minor assault is not sufficiently blameworthy conduct so as to naturally cause a deadly response. See *supra* note 238. Depending upon the nature of the assault by Actor, a deadly response by Victim could be foreseeable, so as to wholly deny Actor the self-defense claim.

²⁴³ Allen v. United States, 164 U.S. 492, 497-98 (1896) (murder); People v. Johnson, 2 Ill.2d 165, 117 N.E.2d 91 (1954) (murder); Shorter v. People, 2 N.Y. 193 (1849) (murder); 1 F. WHARTON, *supra* note 99, § 612 at 771 (constitutes at least manslaughter). Part of the difficulty in evaluating the rule in such cases is the inability of courts to differentiate the self-

At common law, the "crime prevention" and "arrest" defenses were rather clear-cut. If Victim committed a felony, or fled an arrest therefrom, Actor could kill Victim, if necessary to prevent the felony or to effectuate the arrest.²⁴⁴ What can we make of these common law rules? What do they tell us about the underlying rationales of the justifications of self-defense and arrest? What can the rationales tell us about justification generally, and about heat of passion, specifically?

Actor's conduct in killing Victim in self-defense, in crime prevention or in arrest, is justifiable either because of something relating to the Victim's personality, or because of the circumstances surrounding Victim's conduct. It is rather clear that the former is not the case. Whatever the nature of Victim as a human being, even if he is a scoundrel, his death does not ordinarily become morally acceptable or desirable.²⁴⁵ A person's egregious personality is generally not admissible as evidence at a homicide trial;²⁴⁶ and when it is, it is not for the purpose of proving that he "deserves" to die.²⁴⁷ The defenses of self-defense, crime prevention, and arrest apply equally to the nice and the not-so-nice. It is Victim's conduct, then, as it pertains to the situation—his intention to kill another, or to commit a felony—which supports the basis for the conclusion that his death does not constitute a social harm.

Courts and commentators have offered a rather consistent explanation for the rules permitting intentional killing of felons. In view of the early common law rule that all felonies resulted in the forfeiture of the

defense doctrine from a heat of passion case. *See, e.g.*, *Inge v. United States*, 356 F.2d 345, 348 (D.C. Cir. 1966) (in which court went so far as to hold that "belief which may be unreasonable in cold blood, may be actually and reasonably entertained in the heat of passion," and therefore entitle a *full* defense); *State v. Partlow*, 90 Mo. 608, 4 S.W. 14 (1887).

²⁴⁴ *Stinnett v. Virginia*, 55 F.2d 644, 645 (4th Cir. 1932); 1 F. WHARTON, *supra* note 99, §§ 626, 629 at 799-801, and 803. In order for such killings to be justified it may be necessary that the victim actually be guilty of the felony. *Petrie v. Cartwright*, 114 Ky. 103, 109, 70 S.W. 297, 299 (1902). However, if there is a reasonable mistake, some jurisdictions will approve such defenses, particularly if the killing is committed by a police officer, rather than a private party. *Wiley v. Memphis Police Dep't*, 548 F.2d 1247, 1253 (6th Cir. 1977); R. PERKINS, *supra* note 36, at 981-82. But, even if the defense is so permitted, under such circumstances it involves a mistake regarding a justification, and ought therefore to convert the justification into an excuse. *See supra* note 180 and accompanying text.

²⁴⁵ *State v. Cook*, 3 Ohio Dec. Reprint 142, 148 (1859) ("Allusion has been make [*sic*] to the character of the deceased, and it is proper that I should say to you that is as much a crime to kill the lowest and most degraded person, as the highest and most respectable . . .") Moral arguments can be made, of course, that in egregious cases, such as with Adolph Hitler, death is justifiable because of his egregious character. The law, however, has never countenanced such a position. In any case, what makes Hitler's murder "justifiable" is not really his character or personality, *per se*, but rather that his future existence will cause great harm, as predicted by his prior conduct.

²⁴⁶ *See, e.g.*, CAL. EVID. CODE § 1101(a) (1966).

²⁴⁷ *Id.*, § 1101(b) (Character evidence is admissible in order to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . [but not to show] his disposition to commit such acts.").

felon's property and of his life, it was reasoned that the would-be felon, or fleeing felon, forfeits his right to life, or forfeits his right to complain if a law-abiding citizen finds it necessary to conduct a "premature execution of the inevitable judgment."²⁴⁸ Although the precise reason why such forfeiture occurs is not often explained, to be consistent with criminal law doctrine, the reason should be based on the premise of choice. That is, the criminal law is premised upon the idea that persons possess free will, and that they are initially entitled to personal autonomy. When an actor chooses to act in an anti-social fashion, however, absent any excuse for such behavior, we blame the actor because we assume that he intends the natural and probable consequences of his action.²⁴⁹ It may follow from this, therefore, that such an actor-felon forfeits certain human rights.²⁵⁰ Although the forfeiture doctrine, particularly as it applies to the modern day crime prevention and arrest situations, is susceptible to substantial criticism,²⁵¹ it does represent a theory once used

²⁴⁸ Note, *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582, 583 (1929). See also *Mattis v. Schnarr*, 547 F.2d 1007, 1011 n.7 (8th Cir. 1976) (vacated on other grounds, *sub nom.* *Aschcroft v. Mattis*, 431 U.S. 171 (1977)); *Petrie v. Cartwright*, 114 Ky. 103, 109, 70 S.W. 297, 299 (1902); BLACKSTONE, *supra* note 2, at 180; Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L. REV. 361, 365 (1976).

²⁴⁹ See generally Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 SW. L.J. 1063, 1073-75, 1079-81 (1981) [hereinafter cited as *Proportionality and Justice*]; Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17, 32-34 (1979); Morris, *Persons and Punishment*, 52 THE MONIST 475, 477-79 (1968); Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979); See also *supra* notes 148-56 and accompanying text.

²⁵⁰ Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 415-23 (1971) (forfeiture analysis discussed in context of justifying punishment predicated on negligence); Goldman, *The Paradox of Punishment*, 9 PHILOSOPHY & PUB. AFF. 42, 43 (1979).

²⁵¹ The death penalty may not constitutionally be invoked for felonies other than murder. *Coker v. Georgia*, 433 U.S. 584 (1977). Consequently, it can no longer be said that the killing of a felon merely accelerates the punishment process. See 4 BLACKSTONE, *supra* note 2, at 182 (the law would not "suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death") (emphasis in original). For a modern criticism of the arrest defense on this, and other grounds, see *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976); Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L. REV. 360 (1976). For a similar, but less modern criticism, see *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582 (1929).

Moreover, the forfeiture theory can run amiss of the constitutional proportionality doctrine, see *Coker v. Georgia*, 433 U.S. 584 (1977), and its moral counterpart, see *Proportionality and Justice*, *supra* note 249, at 1073-81, unless it is denied that one only forfeits as many rights as one has denied (or, at least, attempted to deny) to others. Goldman, *supra* note 250, at 45; Richards, *supra* note 249, at 1436. With felonies other than murder, therefore, an unadulterated moral forfeiture doctrine is indefensible in the twentieth century.

The point, however, of noting the forfeiture doctrine is not to defend it, or the rule, but rather to demonstrate one moral theory, used to defend at least some justification defenses, which ought to be scrutinized in the effort to see if it explains the provocation doctrine. I perform such scrutiny at notes 255-56 & accompanying text *infra*. Such scrutiny, however,

to explain some justification defenses.

What, however, explains the self-defense rules? It is probably uncontroversial to suggest that self-defense is based on the moral premise that each person has a right to life, and a concomitant right to protect that right, unless and until the original actor unjustifiably violates another person's same or equivalent right. When Victim threatens Actor's right to life, then, the value of Victim's life, in societal terms, is reduced. The harm which flows from his death is negated or, at least, reduced. What is not certain is why Victim's violation of Actor's right to life has this effect.

One possible theory, as with arrests and crime prevention, is the forfeiture doctrine. When a person chooses to threaten another person's life it may be theorized that he must accept the repercussions of his choice, which is that he forfeits his legal right to protect his own life from the person he threatened. His death is no longer socially undesirable.

Such a doctrine, however, does not appear to be at the core of self-defense. The forfeiture theory is both over- and under-inclusive. It is under-inclusive in the case of an insane aggressor. If Victim threatens Actor because of a mental disease which makes him unable to conform his conduct to the law, Victim's subsequent death cannot be justified under a forfeiture theory based on choice, because Victim's aggression was not freely willed.²⁵² Nonetheless the common law presumably permits the killing of such an insane aggressor. Conversely, if forfeiture explained the defense, an aggressor would forfeit the right to complain when the other party attempted to kill him, even when such a killing was unnecessary; yet lethal self-defense does not result in acquittal when the person attacked can avoid his own death by less extreme tactics.

Another theory comes closer to rationalizing the various self-defense rules. It may be called the "comparative moral wrongdoing" theory. That is, society may evaluate the harm of a person's death by comparing the wrongdoing of the parties in conflict with one another. Thus, in the ordinary case, when Victim is aggressor, his conduct is wrong, whereas Actor's conduct is wholly innocent. Actor is fully entitled to the self-defense claim. Victim's death is not socially undesirable. Similarly, this theory explains adequately the insane aggressor situation,

also helps to demonstrate the need for similar analysis of the arrest and crime prevention defenses.

²⁵² Fletcher, *supra* note 152, at 305-06. *See supra* discussion of insanity as an excuse at notes 153-56 and accompanying text, and *see infra* at notes 278-80 and accompanying text. Of course, the same criticism can be leveled against the forfeiture doctrine in the crime prevention-arrest fields. This represents another reason why those defenses, if based on a forfeiture theory, are particularly susceptible to attack. *See supra* note 251 and accompanying text.

because it is the wrongdoing of the conduct, not the Victim's choice to forfeit his rights, which is the focus of the theory. The comparative moral wrongdoing theory also may be consistent with the doctrine of an "incomplete" self-defense privilege, which says that the claim of self-defense is limited "according to the magnitude of [the defendant's] own wrong."²⁵³ Thus, if Actor attempts to hit Victim, causing the latter to improperly try to kill Actor, Actor's wrongdoing in starting a fight results in a lesser right to invoke self-defense, even though Victim's conduct was more blameworthy.

To the extent that a lethal response to a minor assault, or the use of obviously unnecessary deadly force to counter a lethal attack, constitutes manslaughter rather than murder,²⁵⁴ the "comparative moral wrongdoing" theory explains all of the self-defense rules. Jurisdictions, however, which reject the "incomplete self-defense" theory, and which therefore wholly deny the self-defense claim, cannot explain such denial under the "comparative moral wrongdoing" theory.²⁵⁵ Lethal self-defense, therefore, seems generally, but perhaps not perfectly, premised upon a comparative wrongdoing theory; the crime-in-progress defenses are generally premised upon a forfeiture theory.

Does either theory explain heat of passion as a partial justification? It does not seem plausible to explain the partial defense in terms of partial forfeiture. Either the victim forfeited his right to life (or his right to complain if the Actor attempts to take his life), or he did not. It is anomalous to say he has somewhat forfeited it. Forfeiture is based on choice. One chooses to act despite one's awareness that a particular result will, or reasonably may, occur. Committing a felony means one will, or reasonably may, die at the hands of the executioner, so the timing and source of the execution becomes a *de minimus* matter.²⁵⁶ What about the provoker? He ordinarily does not intend that the provoked actor will respond lethally. Although we say that the victim "asked for it," in fact he did not. He did not choose to die. So understood, the

²⁵³ *Reed v. State*, 11 Tex. Crim. 509, 518 (1882); *State v. Partlow*, 90 Mo. 608, 620-21, 4 S.W. 14, 19-20 (1887) (quoting *Reed* with approval).

²⁵⁴ See *supra* notes 239 and 243 and accompanying text.

²⁵⁵ A separate theory could justify a total loss of the self-defense claim when deadly force is used to repel a minor assault. Self-defense could be premised on a causal basis; in light of the sanctity of human life, "harm" is arguably evaluated by deciding who caused the deadly affray, stressing here the lethal aspect of the affray. Under this analysis the cause of the escalation of the affray from battery to homicide would be on the shoulders of Actor, not Victim, resulting in unmitigated harm. This theory, however, would fail to work in the cases of "incomplete" self-defense where, under this theory, Victim's deadly escalation of the affray should result in acquittal of Actor. Similarly, the unnecessary use of deadly force by Actor in response to Victim's lethal attack, should result in acquittal under the causation theory, not a total or partial loss of the defense.

²⁵⁶ But see *supra* note 251 and accompanying text.

harm is total and unmitigated. His conduct does make such a response foreseeable, however. He knows, or should know, it may happen. If forfeiture is based on the decision to do something for which it is reasonably foreseeable that a killing will occur, then the harm should be perceived as entirely absent. The defense should be total. Forfeiture, then, should serve to make the defense complete or non-existent, not partial.

Intuitively, the theory of comparative moral wrongdoing seems to neatly prove that the provocation defense is a justification. The paradigm heat of passion case, after all, is one in which Victim acts immorally, and thereby unintentionally incites a disproportionately lethal reply. Victim is neither a "good guy," deserving of our full protection, nor a "bad guy," meriting the law's total disinterest. From a moral perspective, the killing involves a gray situation, so the punishment is muted.

One must be cautious, however, in assuming that the defense is explained in this fashion. First, one must remember that the basis for adjudging harm is not supposed to be Victim's character or personality.²⁵⁷ To ask if Victim, or Actor, for that matter, is a "bad guy," is to ask the wrong question.²⁵⁸ We must, instead decide if the defense involves a measurement of comparative, bad conduct. It could be that provocation, like the incomplete self-defense privilege, reduces a full defense because of "the magnitude of defendant's own wrong."²⁵⁹ Case law, however, does not support the defense in such terms. For example, in one case Actor unlawfully attempted to blackmail Victim. Victim pulled a knife on Actor. Actor, enraged, killed Victim. The court held that if Victim's reaction had been a predictable response to blackmailing (such as use of his fists), Actor would not have been entitled to any provocation claim; where the reaction was extreme and unpredictable, as here, however, the heat of passion defense was applicable.²⁶⁰ Yet, in either case Actor clearly committed a very serious moral wrong which

²⁵⁷ See *supra* notes 245-47 and accompanying text.

²⁵⁸ Occasionally courts appear to forget this. Thus, in one case where a defendant attempted to mitigate punishment on the grounds of sexual assault upon his wife, the court noted:

When a man marries a woman to escape prosecution for her defilement, and takes his wife into an immoral resort, and absents himself from her, and leaves her to come in personal contact with the lecherous libertines who congregate in such places, he has no one but himself to blame if she is improperly approached.

Caples v. State, 3 Okla. Crim. 72, 91, 104 P. 493, 501 (1909). Although the ostensible purpose for the jury considering such information was in order to decide if Defendant was really enraged, it does not require a giant leap of faith to conclude that the court may have had more in mind.

²⁵⁹ *Reed v. State*, 11 Tex. Crim. 509, 518 (1882). See also *supra* note 253 and accompanying text.

²⁶⁰ *Edwards v. Regina* [1973] 1 All E.R. 152.

caused Victim to pull his knife. Either way, Actor provoked the provocation. If the comparative moral wrongdoing theory applied, then consistent with the "incomplete" self-defense privilege doctrine, Actor's right to kill should be reduced according to the magnitude of his own wrong.²⁶¹ As his wrong was to blackmail Victim, Actor's rights should be the same, regardless of whether Victim's reaction was predictable or not.

In fact, however, such reasoning fails to work in provocation cases because heat of passion is *not* like "incomplete" self-defense. If provocation is a justification, it is an "incomplete" self-defense privilege sitting on its head. With self-defense, Actor tries to do a perfectly proper thing—save his life—but his right to do so is limited if his behavior was marginally to blame for causing the necessity. With provocation, however, we do not have a situation in which it can be said that the killing is proper but that Actor loses part of his right to invoke his rights. Rather, it is quite the opposite. Victim's provocation represents an injustice, and Actor is righting the wrong, albeit excessively. Thus, Victim's death is harmful, but the harm is reduced by the magnitude of the immoral nature of Victim's provocative conduct. Thus, the justification, under this reasoning, is partial.

Provocation can be defended on such terms, of course. A legislature can, consistent with such a comparative wrongdoing theory, treat provocation as if it were a partial justification. Nonetheless, a substantial moral problem exists with this approach. It is morally questionable to suggest that there is less societal harm in Victim's death merely because he acted immorally. One must remember that Victim's immoral conduct in no way jeopardized the life of the defendant or anyone else.²⁶² He may have committed an injustice, one that merits a response by defendant (or someone). However, if the law believes that killing Victim is an inappropriate response to the injustice he committed, as in provocation cases, then his immoral conduct should not make his life less deserving of protection by society. Rather, the injustice Victim committed should be directly punishable by society.²⁶³

It is here that one must carefully separate justification from excuse. It may be that because the injustice enraged a defendant, he is less de-

²⁶¹ This is precisely what occurred in *Reed v. State*, 11 Tex. Crim. 509 (1882), in which it was held that an adulterer who kills the enraged husband, should have his self-defense claim reduced according to the magnitude of his wrong; if Defendant's act constituted a felony, he would wholly lose his claim; if it was a misdemeanor, his defense should be partial.

²⁶² If it did, self-defense or defense-of-another would be applicable.

²⁶³ Much the same argument can and has been made in "incomplete" self-defense cases. Rather than give Actor only a partial right to defend himself, he could be fully acquitted of the homicide, but simultaneously convicted of the original assault or battery he committed upon victim. *R. PERKINS, supra* note 36, at 1017.

serving of punishment than in the usual killing. But if heat of passion is a partial justification, the injustice, not the passion, is the primary focus. Are we to say that immoral conduct, albeit non-life endangering, should make a person's life less deserving of society's protection? Such a position runs counter to most common law theories of criminal culpability. It runs counter to the high value we place on life, as developed in self-defense theory, wherein we only justify killing of deadly aggressors when it is necessary to do so to protect the lives of innocent persons. Similarly, the intentional killing of a misdemeanor in order to prevent his flight, or in order to recapture him, is ordinarily a murder.²⁶⁴ The misdemeanor's wrongdoing does not even partially justify a homicide. Nor does the moral wrongdoing of a property thief partially justify his killing.²⁶⁵ Likewise, the comparative negligence of Victim in getting into a predicament does not ordinarily reduce a defendant's culpability for harm caused to negligent Victim.²⁶⁶ Put simply, we value life too much to justify, even partially, a person's death, on the grounds of that individual's immoral conduct.

Even if this is not a morally unacceptable premise, and if heat of passion is to be so explained, it must also be recognized that the title of the defense is then a misnomer. Its focus is wrong. Under a justificatory theory, it is not the defendant's mental state but Victim's conduct, which primarily explains the rule. To be consistent, passion should not be required. At most, the rage should serve as evidence that the actor's response is caused by the injustice.

Such a justification rule would also have anomalous results in many cases. For example, suppose Actor walks in and finds his wife in bed with Victim, under circumstances in which it is unclear to the observer whether the intercourse is consensual or not. Actor kills Victim.²⁶⁷ As a matter of excuse, it may be easy to partially excuse Defendant in either case.²⁶⁸ But if the issue is Victim's moral right to life, the proper answer might depend on whether Victim's conduct in fact constituted rape, adultery or fornication, and perhaps on whether Victim was, or should have been, aware of the woman's marital status. It is not plausible to speak of the heat of passion doctrine, at least as we now know it, as being affected by these subtleties. In short, heat of passion either cannot be defended in justification terms, or one must accept a morally ques-

²⁶⁴ *Reed v. Commonwealth*, 125 Ky. 126, 100 S.W. 856 (1907); *Jett v. State*, 151 Ark. 439, 236 S.W. 621 (1922); *People v. Klein*, 305 Ill. 141, 137 N.E. 145 (1922). See also *Noback v. Montclair*, 33 N.J. Super. 420, 110 A.2d 339 (1954).

²⁶⁵ AM. JUR. 2d HOMICIDE § 180 (1968) (and cases cited therein).

²⁶⁶ W. LAFAYE & A. SCOTT, *supra* note 64, at 410.

²⁶⁷ See, e.g., *Ditmore v. State*, 49 Okla. Crim. 81, 293 P. 581 (1930).

²⁶⁸ See *infra* notes 293-314 and accompanying text.

tionable premise which makes the Actor's rage largely irrelevant to the analysis and creates a defense which is not recognizable as the doctrine used over the centuries.

If the society wishes to partially justify a homicide because of the victim's wrongdoing, it should do so independently of the heat of passion defense. One virtue of such separate treatment is that these two different defenses would not be confused with one another. Also, their separate codification would require the society to directly confront the moral implications of justifying killings on the basis of the victim's non-homicidal wrongdoing. The moral question would not be "hidden" in the provocation doctrine. It would be necessary to draft a law that says, in effect:

a homicide which would otherwise be murder is manslaughter if the victim committed an injustice or wrongdoing for which he deserved to be the subject of a severe, but not homicidal, response by another.²⁶⁹

In any case, such a defense is not, *le crime passionnel*. Heat of passion, as such, must find its roots in excuse law.²⁷⁰

B. HEAT OF PASSION AS AN EXCUSE

Heat of passion as a defense has something to do with anger. Without it, heat of passion must be a partial justification, and probably an unacceptable one at that. One must look, then, to why and how anger affects culpability. Heat of passion must first be distinguished from diminished capacity. The Model Penal Code homicide provision, codified by a number of states,²⁷¹ merges the two concepts.²⁷² They should not be merged.²⁷³ Diminished capacity involves a mental disturbance which peculiarly involves the killer. Heat of passion is a concession to human weakness,²⁷⁴ to a universal human condition. Diminished ca-

²⁶⁹ Such a justifiatory-defense would seem to also logically require that the jurisdiction recognize the "incomplete" self-defense privilege. Jurisdictions which treat the cases differently, *see supra* notes 229-34 and accompanying text, cannot defend such a difference if provocation is based on a justification theory. As Actor's rage is largely irrelevant, the only difference between the two situations is that with provocation, Victim's wrongdoing reduces the harm of this death, whereas with the other defense, Actor's wrongdoing reduces the right to use his self-defense claim. It appears more difficult to morally justify the former result than the latter. *See supra* notes 262-68 and accompanying text. Therefore, if the former result does merit a reduced punishment, it follows a fortiori that latter should be partially justified.

²⁷⁰ As a result, we can now resolve a number of the questions raised earlier. *See supra* section III(E), regarding the importance of the justification-excuse analysis. It is easier to understand the answers while and after the excuse analysis is developed immediately, *infra*, however. For the answers to those questions, therefore, *see infra* notes 304-09 and accompanying text.

²⁷¹ *See supra* notes 105-06 and accompanying text.

²⁷² II MODEL PENAL CODE, *supra* note 46, § 210.3, Comment (1980).

²⁷³ WILLIAMS' TEXTBOOK, *supra* note 220, at 495.

²⁷⁴ *See supra* note 186 and accompanying text.

capacity is an effort to reduce punishment because the actor is not like all humans, whereas heat of passion reduces punishment because the actor is, unfortunately, like most humans. If the criminal law is to coherently deal with the provocation defense, any attempt to define or understand heat of passion should be conducted separately from diminished capacity.

Why, then is heat of passion an excuse? "Excuse," as we saw,²⁷⁵ generally involves situations where an actor is not blameworthy, although he committed a harmful and undesired act. Ordinarily we assume an actor acts voluntarily, and that he intends the natural and probable consequences of his act. He is consequently fully to blame for his actions. His maximum punishment is predicated on that theory. When we conclude, however, that the actor is not fully blameworthy for his actions, we reduce punishment accordingly. A person is blameless when the thing which makes him blameworthy—*i.e.*, intentional, voluntary, substantial involvement in the wrongdoing²⁷⁶—is absent.

Insanity, and duress, two common excuses, serve well to demonstrate why and how excuses so affect blameworthiness. Insanity has already been briefly explained.²⁷⁷ At times, mental disease serves to show that the actor did not intend the harm he caused. One can also argue that the actor's participation in the harm is remote because "another person"—the disease—in actuality caused the harm.

Insanity, however, more often demonstrates that the harm was caused involuntarily. The term "involuntary" is used in the criminal

²⁷⁵ See *supra* notes 152-56 and accompanying text.

²⁷⁶ Of course, mens rea, proximate causation, and a voluntary act are prima facie elements of most crimes. It can be said, therefore, that "excuses" really are not defenses at all. Thus, for example, when a defendant demonstrates that he pulled the trigger on the gun as result of a mistaken belief that the firearm was unloaded, his mistake of fact, frequently denominated as a excuse, serves to prove that the defendant did not possess the requisite intent to kill. The "excuse" of mistake is really not a defense. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 67 at 184 (2d ed. 1961) [hereinafter cited as WILLIAMS' GENERAL PART]. I use the term "excuse," however, in a broader sense of the term. Regardless of who has the ultimate burden of persuasion, see *supra* note 18, excusing conditions are circumstances which tend to run counter to the normal assumption that people act voluntarily, intentionally, and that they are personally responsible for harm which occurs as a result of their conduct. In that way they are excuses.

My inclusion of "proximate cause" as an excuse is particularly controversial. See *supra*, *e.g.*, H. HART & A. HONORE, note 146, at 97-102; Green, *Contributory Negligence and Proximate Cause*, 6 N. C. L. REV. 3 (1927). It is not my purpose here to enter that debate. My point, again, is far more limited. At times it can be demonstrated that, despite Actor's participation in the crime, there is another cause for the social harm which is so substantial that it seems unfair to cast blame on Actor for the harm caused. We say that Actor's personal involvement in the crime, although existent, is so remote that it seems unfair to blame the actor for the harm caused.

²⁷⁷ See *supra* notes 153-56 and accompanying text.

law in both a special and a general fashion.²⁷⁸ Specifically, although the term is not without ambiguity, conduct is voluntary if it is the result of a non-reflexive willed movement of a muscle of the body.²⁷⁹ An act which is the result of epilepsy, therefore, is involuntary because the conduct is due to brain malfunction, not a willed decision to act.

"Involuntariness," however, can exist in a far more general way. Conduct of an actor may be the result of a willed decision of the brain. Nonetheless, it can be said that the actor's choicemaking capabilities have been so seriously undermined that the actor cannot be justly blamed for the harm caused. Proof of mental disease tends to prove involuntariness in this general sense. Whether a disease affects volitional or cognitive human capabilities, the result is the same. The person's ability to make meaningful choices is dramatically reduced.²⁸⁰

Duress, too, adds insight to the meaning of excuses. If X threatens to kill Actor imminently unless Actor slaps Victim, and if Actor does strike Victim, Actor is not guilty of battery upon Victim, because of the coercion. Why? The social harm is present, and Actor did intend to cause it.²⁸¹ One cannot reasonably say that the slap was the result of a non-willed movement of his hand. Rather, the actor is blameless because his conduct is involuntary in the broader sense. But, it is involuntary in a way quite different than with insanity. Unlike insanity, it is not said that Actor lacks the *capability* to make a meaningful choice.²⁸² After all, Actor could have chosen to die, or turn upon X.²⁸³ Indeed, at times people do make such choices. Instead, however, we believe that, for no fault of his own, Actor's choice-making *opportunities* have been substantially undermined.²⁸⁴ The Actor's choices are all so bad that society feels it is unfair to cast blame upon the actor,²⁸⁵ at least if Actor's choice-opportunities were undermined to an extent whereby it may be said that a "person of ordinary firmness" would have been similarly af-

²⁷⁸ G. FLETCHER, *supra* note 24, at 803.

²⁷⁹ W. LAFAVE & A. SCOTT, *supra* note 64, at 180; I MODEL PENAL CODE, *supra* note 46, § 1.13(2); R. PERKINS, *supra* note 36, at 547-49; *see generally* J. HALL, *supra* note 137, at 171-80; HART, PUNISHMENT AND RESPONSIBILITY 90-112 (1968).

²⁸⁰ H. PACKER, *supra* note 136, at 134; *see also supra* G. FLETCHER, note 24, at 837.

²⁸¹ D.P.P. v. Lynch, [1975] A.C. 653, 692; WILLIAMS GENERAL PART, *supra* note 276, § 247 at 751.

²⁸² *But see* J. HALL, *supra* note 137, at 436 ("capacity to attain a desired objective . . . is a major factor in the definition of . . . coercion"). Also, for psychological evidence regarding duress, *see infra* note 287.

²⁸³ *See supra* WILLIAMS' TEXTBOOK, note 220, at 578 (discussing views of Aristotle).

²⁸⁴ D.P.P. v. Lynch, [1975] A.C. 653, 692 (Lord Simon of Glaisdale: "There is power of choice between two alternatives; but one of those alternatives is so disagreeable that even serious infraction of the criminal law seems preferable."); WILLIAMS' GENERAL PART, *supra* note 276, § 242 at 751; Waslik, *Duress and Criminal Responsibility*, 1977 CRIM. L. REV. 453, 454.

²⁸⁵ D.P.P. v. Lynch, [1975] A.C. 653.

fected.²⁸⁶ Although the capability-opportunity distinction between insanity and duress may be in error from a scientific perspective,²⁸⁷ it demonstrates well how choice may be affected differently so as to exculpate a wrongdoer.

Does heat of passion as a defense find its correct analysis by application of any of these excusing theories? Various courts explain the doctrine on the basis that the provoked killer lacks the specific intent to kill.²⁸⁸ This is an acceptable excusing theory, but not in provocation cases. Provocation not only causes anger; it motivates the actor to want to kill the provoker. Proof, then, of adequate provocation does not negate intent. It magnifies it. Case law to the contrary is erroneous. Nor is the provoked killing involuntary in the special sense of the term. The provoked actor does not respond reflexively. No brain malfunction is involved. The killing actions are entirely willed in the narrow sense involved here. To the extent that courts imply by their frequent involuntariness language²⁸⁹ that heat of passion causes truly involuntary behavior, then they are wrong or, at least, misled.

Some cases also have used language which suggests that the provoked killer is less blameworthy because he has demonstrated fewer blameworthy character flaws than are usually observed in killers.²⁹⁰ Such a killer acts due to anger, not evilness. He acts much like other humans. Although this reasoning brings the analysis closer to the defense's true theory, the reasoning cannot, as stated, adequately explain

²⁸⁶ I MODEL PENAL CODE, *supra* note 46, § 2.09 (1980).

²⁸⁷ Findings of modern science raise the serious possibility that the feeling of fear, no doubt present in many coercive situations, causes a physiological reaction not dissimilar to the anger felt in provocation cases. M. WOLFGANG & F. FERRACUTI, *THE SUBCULTURE OF VIOLENCE* 142 (1967). Freudian and other psychoanalytic theory also speaks of a "fight-flight" reaction which results in an understanding of the emotions of fear and anger which often overlap each other. *See generally* Danesh, *Anger and Fear*, 134 AM. J. PSYCHIATRY 1109 (1977); Saul, *A Psychoanalytic View of Hostility: Its Genesis, Treatment and Implications for Society*, 12 HUMANITIES 171, 175-77 (1976). To the extent that fear in duress affects choice-capabilities, and not mere choice-opportunities, then duress and insanity are not dissimilar in their involuntariness. More significantly, as is developed at notes 295-99 and accompanying text *infra*, anger, like insanity, affects choice-capabilities, not just choice-opportunities. If duress also involves the former impairment, then the distinction between the defenses blur. The common law rule that killing under coercion is murder, whereas killing in anger is manslaughter necessarily loses much of its force. *See supra* notes 222-25 and accompanying text, for the issue raised. *See infra* notes 293-303 and accompanying text, for the issue further discussed. At the least, then, close scrutiny of heat of passion should require courts, legislatures, and commentators to decide whether the differing rules regarding provocation and duress can be properly justified. (THE ENGLISH HOMICIDE ACT OF 1975, for example, excludes fear from the breadth of the provocation doctrine. Ashworth II, *supra* note 24, at 297.) *See also infra* note 299, regarding the importance, if any, of science to our understanding of excuses, generally, and provocation, specifically.

²⁸⁸ *See supra* note 182 and accompanying text.

²⁸⁹ *See supra* notes 183-85 and accompanying text.

²⁹⁰ *See supra* notes 186-88 and accompanying text.

the doctrine. As already demonstrated,²⁹¹ general character—good or bad—is not the issue in the criminal law. We blame people for willfully causing social harm. We do so because they have chosen to act in this anti-social fashion. Although people who do this may have bad character, it is not their character which we blame, but their intentional and voluntary conduct. So, we must look beyond character.²⁹²

How, then, do we partially mitigate a provoked killing? If it is not a matter of *mens rea*, pure voluntariness, or good character, what does explain it?²⁹³ Refocusing on the duress defense provides the answer. A coerced actor who kills to save his own life is a murderer. An angry actor who kills due to provocation is a manslayer. Why? The character of the coerced actor is certainly not that of a murderer. He killed out of fear, not ill-will.²⁹⁴

Perhaps the duress rule in the homicide field is wrong.²⁹⁵ Maybe it should constitute at least a partial defense.²⁹⁶ But, the different common law rules for these two doctrines can be explained in a fashion that gets at the heart of the provocation rule. The explanation comes from looking at the general voluntariness theory. With duress, only Actor's choice-opportunities are reduced. As such, we demand that the unlucky Actor accept his unenviable choices, and make the morally "right" decision, to die or turn upon the coercer.²⁹⁷ He is capable of making such a decision.²⁹⁸

In provocation cases, however, the involuntariness resulting from anger is like insanity, not duress. Our common experience²⁹⁹ informs us

²⁹¹ See *supra* notes 245-47 and accompanying text.

²⁹² Even if character were the issue, it does not follow that provoked killings should result in mitigated punishment. Anger, after all, is not a positive, or desirable human characteristic when it results in violence. Calm reasoned behavior is preferable to angry violent behavior.

²⁹³ The causation excusing theory, as described at notes 146 and 276 & accompanying texts *supra* cannot explain the provocation case. Although the victim is also a cause of his own death, it cannot fairly be said that the killer's participation is remote.

²⁹⁴ Nor can a suitable explanation be found in the fact that the coerced actor kills an innocent victim, whereas the provoked actor ordinarily kills the provoker. To focus on the nature of the victim, and not the pressures on the actor, is to analyze the defenses in justificatory, not excusing, terms.

²⁹⁵ See *supra* note 287.

²⁹⁶ The actor is traditionally denied any defense because we expect him to choose to be heroic or to turn upon the coercer. As long as the actor is not incapable of making such a choice, and as long as we place such a high value on human life, the actor "ought rather to die himself, than kill an innocent." 1 M. HALE, PLEAS OF THE CROWN 51 (1736). Nonetheless, although we should expect greater will-power of ourselves when the demands made upon us are more extreme, it is difficult to argue, regardless of whether duress involves reduced choice-opportunities or choice-capabilities, that the coerced actor is as blameworthy as the uncoerced one.

²⁹⁷ See *supra* note 296.

²⁹⁸ But see *supra* note 287.

²⁹⁹ I do not rely on science in this article to inform the analysis regarding the nature of

that anger affects choice-capabilities, not mere opportunities. Anger makes us less *able* to respond in a legally and morally appropriate fashion.

In short, provocation is an excuse premised upon involuntariness based upon reduced choice-capabilities. If the doctrine is to be defensible, however, it must follow that the anger which undermines choice-capability is itself formed under circumstances in which the actor cannot be fairly blamed for his anger. Otherwise, we have a case of voluntary anger, no more morally deserving of mitigation than voluntary intoxication. If the ordinary law-abiding person would not become angry by a particular provocative situation, then the defendant's violent response as a result of his anger is subject to moral condemnation, because the anger itself is deserving of moral condemnation.³⁰⁰ Although anger need not be truly involuntary, it ought to be sufficient that the feeling of anger that Actor experienced is both a normal and expected human response to the situation. Put differently, for heat of passion to

anger as it affects human conduct. Science offers no reasonably uncontroversial insight into the cause of aggression. Various theories abound. M. WOLFGANG & F. FERRACUTI, *supra* note 287, at 140. Probably no single theory will satisfactorily explain the cause of all violence. *Id.* at 161. Among the schools of thought regarding its causes are: (1) Psychoanalytic theories which suggest that all humans possess an instinctual drive to aggress. C. HALL & G. LINDZEY, THEORIES OF PERSONALITY 39-41 (2d ed. 1957). Waelder, *Critical Discussion on the Concept of an Instinct of Destruction*, 6 BULL. PHILADELPHIA PSYCHOANALYTIC ASS'N 97 (1956). Aggression is caused by anxiety which threatens the integrity of the ego, and which requires a response to protect it. H. FINGARETTE, THE SELF IN TRANSFORMATION 75-78 (1963). Psychoanalysts, however, disagree among themselves regarding this unproven theory, particularly as to whether it is innate. M. WOLFGANG & F. FERRACUTI, *supra* note 287, at 141-42; (2) Learning theories which suggest that aggression is wholly learned. *Id.* at 192. *See generally* J. GORDON, PERSONALITY AND BEHAVIOR 278-81 (1963); Bandura, *Behavior Modifications Through Modeling Procedures*, in RESEARCH IN BEHAVIOR MODIFICATION 320 (L. Krasner & L. Ullman eds. 1965); and (3) Frustration-aggression theory which asserts that frustration produces anger, which results in drive-specific behavior necessary to reduce frustration. M. WOLFGANG & F. FERRACUTI, *supra* note 287, at 143-46.

Nor does science offer substantial certainty regarding the physiological affects of anger. Most studies necessarily involve non-human subjects. Furthermore, although we know that angry animals experience increased pulse rate, blood pressure, and blood glucose, and a decreased flow of blood through certain vital organs, including the kidney, A. STORR, HUMAN AGRSSION 12 (1968); E. GELLHORN & G. LOOFBOURROW, EMOTIONS AND EMOTIONAL DISORDER 72-73 (1963), it is not clear if the anger causes these reactions or whether the anger occurs parallel with these reactions. *Id.* at 140. Moreover, differences in such physiological reactions exist among human individuals. A. STORR, *supra* at 73-74. Furthermore, even in this area, controversies abound regarding the nature of and the functioning of the rage-controlling centers in the human body. *See supra* GORDON, at 60-67; M. WOLFGANG & F. FERRACUTI, *supra* note 287, at 194-201.

In any case, science can only provide useful insight into our moral judgments; it cannot replace it without substantially undermining the moral-based nature of our system of criminal law.

³⁰⁰ *Contra*, if the anger is the result of an intrinsic subjective peculiarity or mental disturbance which implicates the entirely separate defense of diminished capacity. *See supra* notes 271-74 and accompanying text.

serve as a valid partial excuse, we must require as an initial prerequisite that the provocation be sufficiently egregious that the juror or ordinary, usually law-abiding person would be expected to become enraged. Under such circumstances, one is not saying that the anger is right or good (*i.e.*, justified), but rather than an angry Actor cannot be blamed for feeling angry.

However, that certainly is not enough. We all become angry at times and it is the killing, not the anger, which is punished. Our common sense and experience tell us, however, that people lose self-control to different degrees.³⁰¹ Sometimes anger is so great that the actor's ability to choose how to respond to the provocation, whether by killing, assaulting, insulting, acting in an inner-directed fashion, or calming oneself down, seems to be completely absent. We say of such a person that he is in a frenzy. The point here is not that there is indisputable physiological evidence that the rage-control centers in the frenzied person wholly fail to function in such circumstances.³⁰² Nor is the conduct involuntary as in epilepsy. Rather, we are expressing, albeit imprecisely, the conclusion that some anger is so great that it is unrealistic to expect that the anger can be controlled by the actor during its peak (*i.e.*, before the "cooling off time" has arrived). Some anger, however, is less severe. At its peak the person cannot calm down, but he nonetheless is in sufficient control of his behavior so that he can distinguish between, and can to some extent control, the level and type of anger-reducing behavior he will exhibit. We say in these cases that the Actor suffers from a "partial loss of self-control." The question which remains is whether the defense of *le crime passionel* should apply in either or both circumstances.

If the jury believes that the ordinarily law-abiding person would probably become angry, but that he would remain fully capable of controlling (*i.e.*, not externalizing) his anger, then the provocation is not sufficient to merit reducing the punishment at all. The killer should be fully to blame for his homicidal conduct.

An opposite result should flow, however, from a finding that the actor was so angry at the time of the killing that he was incapable of controlling his conduct. If the provocation was so great that it would probably cause the ordinarily law-abiding person to wholly lose his ability to control himself, then we are suggesting that the choice-capabilities of the actor are, and in the ordinary person would be, absent. It follows from this premise, that the provocation should wholly, not just partially,

³⁰¹ Phillips v. Regina [1969] 2 A.C. 130, 137-38. Such an assertion has been condemned as unrealistic. Brett, *supra* note 24, at 636. Such criticism, however, is premised on certain scientific theories which are, in fact, subject to profound criticism. See *supra* note 299. See also *supra* Ashworth II, note 24, at 305.

³⁰² See *supra* note 299.

excuse the actor. This is because the degree of anger felt by the defendant was a normal, non-blameworthy human response, and because the consequences of such a response were largely beyond the control of the actor or other ordinary humans. If we condemn the actor, we condemn him for being a normal human being. It is cruel to punish a person for acting no better than the ordinary person.³⁰³

This position is not inconsistent with homicide-duress law. The coerced killer is given no defense, partial or otherwise, because the common law understands the actor to be in full control of his choice-making functions. His opportunity for full choice has been substantially undermined, but he is capable of reasoning out his options. He chooses to save his life at the expense of another. Society tells such a person that he is blameworthy if he does not choose the heroic option. Heat of passion, however, premised as it is on lack of choice-capability rather than choice-opportunities, negates blameworthiness if such capability is wholly lost under non-blameworthy circumstances.

There is also a morally reasonable place for heat of passion as a partial excuse. Its parameters flow naturally from the previous discussion. Heat of passion only makes sense as a partial excuse when the jury can say that the ordinarily law-abiding person would have become so sufficiently angry that he would have been unable to fully control his anger. Partial loss of self-control is involved. It is a way of expressing the idea that the ordinarily law-abiding person would also have externalized his anger to release his anxiety.

This idea, however, is not precise enough. When angry one might externalize his emotions by hitting his head against a wall, by throwing a tantrum, or by throwing a pot, pan, or uttering an epithet. Likewise, a person might throw the pot at a wall, at his provoker, or at an innocent person. The point of the partial defense should be that if the ordinarily law-abiding person would be expected to be in sufficient control of his emotions so as to respond in an inner directed fashion, or to respond externally, but non-violently, then homicidal conduct by the actor may be fairly perceived as an unreasonable response to reasonable anger. This homicidal conduct would not be entitled to any mitigation. If, however, the provocation is so great that the ordinarily law-abiding person would be expected to lose self-control to the extent that he could not help but act violently, yet he would still have sufficient self-control so that he could avoid using force likely to cause death or great bodily

³⁰³ The assertion that the provoked killer is entitled to a full defense under such circumstances is revolutionary on its face. In fact, however, it is unlikely to result in many acquittals because most jurors are not apt to believe that they (as ordinarily law-abiding persons) would be wholly incapable of controlling their behavior. Careful wording of the full defense, as developed at notes 304-15 & accompanying text *infra*, will make unlikely its frequent use.

harm in response to the provocation, then we are saying that the actor's moral blameworthiness is found not in his violent response, but in his *homicidal* violent response. He did not control himself as much as he *should* have, or as much as common experience tells us he *could* have, nor as much as the ordinarily law-abiding person *would* have. Thus, his choice-capabilities were partially undermined by severe and understandable, non-blameworthy anger, but he was not sufficiently in control of his actions so as to merit total acquittal. It is in this case that the traditional defense should apply.

C. DRAFTING THE DEFENSE

With this understanding of the defense in mind, a resolution of many of the earlier questions is possible.³⁰⁴ The heat of passion defense is an excuse, not a justification. The defense pertains to the actor, not the act. The legislative role should consequently be limited, because jurors, as ordinarily law-abiding persons can better judge the actor. Nonetheless, the defense is properly codified and not left solely to the discretion of the sentencing authority. Passion is a frequent cause of homicide.³⁰⁵ It is the most frequent distinguishing feature between forms of criminal homicide.³⁰⁶ It also represents a morally significant reason affecting guilt and punishment. If a rationale is needed before punishment based upon degrees of blameworthiness is ever to be rigidly codified, then it is found in the case of provocation as it pertains to homicide.

Once codified, however, legislatures should generally accede to the institution most qualified to decide whether provocation is sufficiently serious to merit partial or total exculpation. Killings in non-marital love triangles, for example, should not be excluded by legislative action. Nor should "misdirected retaliation"³⁰⁷ or "indirect provocation"³⁰⁸ automatically fall outside the defense. On the other hand, "provoked provocation"³⁰⁹ can be properly excluded as a matter of law, because in such cases Actor is to blame for creating his own anger.

It is now possible to draft a defense consistent with the earlier excusing analysis.³¹⁰ The careful doctrinal analysis conducted in this arti-

³⁰⁴ See *supra* section III(E).

³⁰⁵ See *supra* notes 4-7 and accompanying text.

³⁰⁶ See *supra* notes 52-53 and accompanying text.

³⁰⁷ See *supra* notes 78 and 205 and accompanying texts.

³⁰⁸ See *supra* notes 206-08 and accompanying text.

³⁰⁹ See *supra* notes 209-10 and accompanying text.

³¹⁰ Not explicit in my proposed statute are answers to other matters raised in the justification-analysis distinction. Accessories to provoked killings should have their guilt predicated upon their own degree of anger, independent of the anger of others in the killing. Similarly, as long as the provocation defense is an excuse, not a justification, it is not necessarily incon-

cle demonstrates that the correct approach to homicides caused by anger is one in which the law makes some fine distinctions between murder, manslaughter and excusable homicide. If a legislature wishes to articulate the unique moral underpinnings of the heat of passion defense then the legislature must be specific in its articulation of the defense's elements, even at the risk of asking juries to draw difficult lines.

The defense might be drafted to read as follows:

Manslaughter. Homicide which would otherwise constitute murder is manslaughter, if at the moment of killing of the victim:

(a) The actor suffered from extreme emotional upset which caused him to wholly or partially lose his self-control; and

(b) Such upset was caused by a real or reasonably apparent [unlawful] situation, for which he is not to blame for its creation, which would render the ordinarily reasonable and law-abiding person in the same situation liable to become so emotionally upset that he would attempt to inflict non-lethal force upon the person whom the actor attempted to kill.

Excusable Homicide. A homicide is excused if at the moment of killing:

(a) The actor suffered from extreme emotional upset which caused him to wholly lose his self-control; and

(b) Such upset was caused by a real or reasonably apparent [unlawful] situation, which he is not to blame for its creation, which would render the ordinarily reasonable and law-abiding person in the same situation liable to become so emotionally upset that he would be wholly incapable of controlling his conduct.

Although facially cumbersome, it expresses fully why an actor should be partially or wholly excused for killing a person who does not deserve to be killed. First, it focuses on the applicability of the defense at the time of the killing, not at the time of the provocation, thereby incorporating into the doctrine the common law concept that the killing must occur before there is reasonable time to cool off.³¹¹ An actor's degree of self-control at the moment of provocation is not pertinent, but it is relevant at the time of the homicidal response.

Second, both the partial and full defense require that the actor suffer from "extreme emotional upset," a broader and more relevant description than "anger."³¹² Third, the proposed statute explicitly states the degree to which the actor must lose self-control. It makes ex-

sistent for a jurisdiction to treat cases of incomplete self-defense differently than it does provocation. *See supra* notes 229-34 and accompanying text. If provocation is a justification, however, *see supra* notes 259-66 and accompanying text it should be treated differently than self-defense. For the relationship of duress to heat of passion, *see supra* notes 293-99 and 303 and accompanying text.

³¹¹ *See supra* notes 62-64 and accompanying text.

³¹² In this broader fashion, duress can prove to be a valid defense in cases of homicide if the law becomes convinced that fear undermines choice-capabilities, not merely choice-opportunities. *See supra* note 287.

plicit, thereby, that the defense is excuse-based, and is predicated on a loss of choice-capabilities, not choice-opportunities.

Fourth, the defense measures the defendant's conduct by the objective standard of an "ordinarily reasonable and law-abiding" person. This is a high standard that presupposes, as the law should, that people may ordinarily be expected to be reasonable and to abide by legal norms. On the other hand, the question ought to be whether the provocation renders this objective person "liable" to act in the way described, not whether provocation will always result in certain consequences. No provocation can always result in the same human response.

Fifth, as the defense is a form of excuse, the provocative "situation" need not in fact exist, as long as the actor is not blameworthy in believing it to be present. Thus, the defense applies to "reasonably apparent situation[s]". The term "situation" is also broad enough to avoid rigid pigeon-holes. It is debatable whether the "situation" must be an unlawful one. On its face this gives the defense a justification flavor. On the other hand, it is at least arguable that a person who becomes sufficiently enraged by a lawful act to act violently is, as a matter of law, blameworthy in his response. Reasonable and law-abiding people do not ordinarily become enraged by lawful situations. Sixth, the situation must be one for which the actor is not morally responsible for its creation. Thus, as already developed, the defense ought not apply in cases of provoked provocation.³¹³

Seventh, in the case of the partial defense, the test ought to focus on the actor's response to the person "whom the actor attempted to kill," not the actual victim. Thus, it is relevant, but not necessarily determinative, that the defendant directed his anger at the "wrong" person.³¹⁴

Finally, the law should require the jury to draw the thin and difficult line between an ordinarily law-abiding person who would be wholly out of control, and one who would be able to control himself enough not to kill. In essence, the jury must express an intuitive judgment about how angry a person would get in a given situation, and how well that person would control himself. Would he merely throw the victim up against a wall, or would he kill the victim? In essence, the English proportionality doctrine³¹⁵ has its place as long as it applies to the relationship of the provocation to the degree of loss of self-control rather than the specific means used to cause the death.

³¹³ See *supra* notes 206-07 and accompanying text.

³¹⁴ The nature of the victim is immaterial with the full defense because the total loss of control involved therein makes the identity of the victim in such cases entirely coincidental.

³¹⁵ See *supra* notes 79-83 and accompanying text.

V. CONCLUSION

Heat of passion is a defense that has been too little analyzed or clarified. Although initially created to avoid the death penalty, it was never sufficiently clear why the provoked killer should not be executed. Various rationales, often contradictory, have been suggested for the defense. Although more modern statutes often treat the defense as a form of excuse, the reasons why it is an excuse, and only a partial one, have remained largely uncertain. Also, the law often still combines common law rules of justification with what might otherwise be an excusing defense. Careful analysis of the defense, therefore, serves to clarify the law, and make the rules relating to this and other defenses more consistent.

Such an analysis demonstrates that heat of passion is not a form of justification, but of excuse. Still more careful analysis demonstrates that it should be either a partial or a full excuse, depending upon the degree of capability for self-control which the actor, and the ordinary person, possesses. Legislation should, and can, carefully codify this understanding.