

The Wrongfulness of Wrongly Interpreting Wrongfulness:
Provocation Interpretational Bias and Heat of Passion Homicide*

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Abstract:

In United States criminal law, a defendant charged with murder can invoke the *heat of passion* defense, an affirmative, partial-excuse defense so that he may be instead found guilty of the lesser crime of manslaughter. This defense requires the defendant to demonstrate that he was significantly provoked and, as a direct result of the provocation, became extremely emotionally disturbed and committed the killing while in this uncontrolled emotional state. In this way, the law makes a partial allowance for *emotional* dysfunction—the wrongfulness of the homicide is mitigated when the emotionally charged reactivity restricts the actor’s capacity for rational thought and reasoned behavior. However, the defense makes no such allowance for *cognitive* dysfunction, despite the widely replicated finding in psychology that violent reactivity is associated with distorted cognitive processing. In particular, reactive violence is often attributed, in part, to provocation interpretational bias—a set of cognitive difficulties by which certain ambiguous-provocation situations are interpreted as intentional, hostile, and wrongful by the reacting aggressor. The present paper discusses how affording a partial excuse for emotional—but not cognitive—dysfunction poses both a logical inconsistency and a moral dilemma for American provocation law. Recommendations for reframing the heat of passion doctrine and resolving these issues are made.

Key words: SOCIAL INFORMATION PROCESSING, HEAT OF PASSION,
PROVOCATION, REACTIVE VIOLENCE, HOSTILE ATTRIBUTIONAL BIAS,
COGNITIVE DYSFUNCTION

The Wrongfulness of Wrongly Interpreting Wrongfulness:

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*Provocation law is all about emotions, most notably anger.*¹

The well-recognized distinction in criminal law between homicides that are committed in the heat of passion (i.e., manslaughter) versus with malice aforethought (i.e., murder) remains a subject of lively debate. In an attempt to be found guilty of only the lesser crime of manslaughter, a defendant charged with murder may invoke the heat of passion defense and attempt to show that he² was significantly provoked and, as a direct result, became emotionally charged, and killed his victim while in this uncontrolled³ state. Historically, there have been numerous attacks against the heat of passion doctrine, including arguments that it partially excuses reactive killings that are relatively more dangerousness, cruel, and ferocious than those that are premeditated,⁴ is based on unclear conditions,⁵ has a discriminatory impact based on

¹ Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 *Minn. L. Rev.* 959, 959 n.5 (2002).

² Solely for the purposes of flow and consistency, I use only the masculine pronouns *he*, *him*, *himself*, and *his*, when referring to hypothetical characters (such as provocateurs and killers), throughout this paper. No gender or sex bias is intended whatsoever.

³ The terms *uncontrolled* and *uncontrollable* are used interchangeably herein to describe states that are either uncontrolled or uncontrollable. In any case, a trier of fact may determine that a state of being (such as an emotional state) or an act (such as violence) was uncontrolled; of course, a determination that the state or act was uncontrollable is necessarily far more difficult to conclude.

⁴ James Stephen, *A History of the Criminal Law in England* (Vol. 3, 1883).

gender,⁶ and leads to unreasonably light sentences.⁷ However, little to none of the debate as to the merits of the doctrine has drawn from empirical research in psychology, despite its obvious relevance to identifying and understanding real differences in *mens rea* (i.e., guilty mind), and thus criminal culpability and responsibility.⁸ This paper examines how research on distorted cognitive processing (e.g., being biased toward misattributing provocation in situations in which the realness of provocation is unclear) may inform legal scholars' understanding about the culpability of certain reactive killings. That is, the present discussion focuses on how cognitive—

⁵ Brad J. Bushman & Craig A. Anderson, Is It Time to Pull the Plug on the Hostile Versus Instrumental Aggression Dichotomy?, 108 *Psychol. Rev.* 273, 273-279 (2001).

⁶ See, e.g., Marcia Baron, Killing in the Heat of Passion, in *Setting the Moral Compass: Essays by Women Philosophers* 353-378 (Cheshire Calhoun ed., 2004); Deborah E. Milgate, The Flame Flickers, But Burns On: Modern Judicial Application of the Ancient Heat of Passion Defense, 51 *Rutgers L. Rev.* 193, 193-228 (1998); Victoria Nourse, Passion's Progress: Modern Law Reform and the Provocation Defense, 106 *Yale L.J.* 1331, 1331-1448 (1997); Laurie J. Taylor, Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense, 33 *UCLA L. Rev.* 1679, 1679-1735 (1986).

⁷ See, e.g., Marcia Baron, Killing in the Heat of Passion, in *Setting the Moral Compass: Essays by Women Philosophers* 353-378 (Cheshire Calhoun ed., 2004).

⁸ For a rare exception, see Richard Holton & Stephen Shute, Self-Control in the Modern Provocation Defence, 27 *Oxford J. Legal Studies*, 49, 49-73.

and not just emotional—dysfunction⁹ has considerable moral relevance to discerning levels of criminal culpability in qualitatively different cases of reactive homicide.

In this paper, I argue that it is logically inconsistent and morally unjust to make a partial allowance for emotional, but not cognitive, mental dysfunction with respect to provocation law and demonstrate that, assuming all other requirements of the heat of passion defense to be satisfied, the individual whose rationality is diminished by cognitive impairment may be no less deserving of being partially excused for his homicidal act. It should be recognized at the outset that my argument herein is founded on an understanding of heat of passion such that the provocation defense, if successful, partially excuses the killer, in part, because the extreme emotional disturbance that the killer experienced in response to the perceived provocation compromised his mental faculties and thus his ability to act with normal rationality. This characterization of heat of passion is one such that the uncontrollable and unforeseeable diminishing of the killer's rationality means that the killer did not act with the mens rea that is typically requisite of murder (premeditation or malice aforethought). Because the killer's capacity was diminished when he committed the homicide, and did not act with premeditation, he is thus viewed as less criminally guilty than one who commits a premeditated killing. His diminished rationality translates into diminished responsibility¹⁰ and he is thus partially excused and found guilty of manslaughter rather than the harsher sentence of murder. Whereas this

⁹ By the term *cognitive dysfunction*, I am referring to serious cognitive disturbances, biases, distortions, and the like. I am not referring to intellectual deficits or deficiencies such as mental retardation.

¹⁰ See Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 Ohio St. J. of Crim. L. 289, 289-308 (2003).

understanding of heat of passion is consistent with United States common law, as well as the Model Penal Code,¹¹ it is not undisputed and alternative characterizations are more accepted in some other Anglo-American jurisdictions.¹²

The following discussion is arranged in three sections. First, the heat of passion doctrine is briefly reviewed and certain intrinsic problems with the doctrine are identified. A discussion of cognitive versus emotional disturbance is introduced. Second, a succinct overview of the empirical psychological literature on biased cognitive processing—particularly social-information processing biases by which there is a tendency to interpret ambiguous provocation situations as decidedly provocative—and violent reactivity in humans is presented. This review is provided to demonstrate the role that *cognitive* distortion can play in heat of passion homicide. Third, having pointed to implications of research on cognitive disturbance for provocation law, issues of social and legal policy are examined and avenues by which the heat of passion doctrine may be reframed are offered.

Heat of Passion

¹¹ Model Penal Code § 210.3(1)(b) (1962); see Markus D. Dubber, *Criminal Law: Model Penal Code 265-271* (2002) (characterizing provocation as a partial excuse in his commentary on the Model Penal Code); see also Kyron Huigens, *Liberalism, Normative Expectations, and the Mechanics of Fault*, 69 *Mod. L. Rev.* 462, 472 (2006). In his commentary on the Model Penal Code's framing of provocation, he stated "American criminal law theorists use the word 'excuse' to refer to denials of responsibility such as insanity and minority. This means that they read [provocation] as resting at least in part on a denial of responsibility." See *id.* at 472.

¹² The Law Commission, No. 304, *Murder, Manslaughter and Infanticide* 76-110 (2006); see generally Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (2000).

A homicide committed in the heat of passion may be reduced from murder to manslaughter. The heat of passion doctrine, which continues to be recognized in the United States (including, in some form, the majority of States, as well as the Model Penal Code (MPC)),¹³ varies in its language and requirements by jurisdiction. Although the requirements differ in how they are framed, the defense is typically conditioned upon: (a) a provocation occurred by which a reasonable person, if exposed to said provocation, would have lost his control, (b) the defendant was indeed provoked and, as a direct result, experienced uncontrollable rage or other extreme emotional disturbance, (c) the time that elapsed between the provocation and the homicide was not enough for a reasonable person to have cooled off, and (d) the defendant had not, in fact, cooled off prior to killing his victim.¹⁴ Whereas only a minority of jurisdictions recognize the heat of passion defense as defined by the MPC, and American statutory law remains largely guided by common law,¹⁵ the MPC does offer a broader, significantly more subjective version of the defense.¹⁶ Section 210.3(1)(b) of the MPC states that the crime of manslaughter may be met by satisfying the following heat of passion terms:

a homicide which would otherwise be murder is committed under the influence of

¹³ Model Penal Code § 210.3(1)(b) (1962).

¹⁴ Cf. J. R. Averill, *Anger and Aggression: An Essay on Emotion* (Springer-Verlag 1982); Marcia Baron, *Killing in the Heat of Passion*, in *Setting the Moral Compass: Essays by Women Philosophers* 353-378 (Cheshire Calhoun ed., 2004); Wayne R. LaFare & Austin W. Scott, *Criminal Law* (2d ed., 1986).

¹⁵ Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 *J. of Crim. L. and Criminology* 421, 421-470 (1982).

¹⁶ Model Penal Code § 210.3(1)(b) (1962).

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.¹⁷

The heat of passion doctrine emerged out of retributive philosophy of moral behavior and criminal justice, and, more specifically, the principle of penal proportionality. The doctrine of penal proportionality states that a person should be punished to the exact degree of—that is, no more and no less than—the culpability of his crime. In essence, the heat of passion doctrine was created to govern crimes in which the actor had been provoked and, as a result, had killed his victim out of uncontrollable rage and emotional influence. In these cases, the killer's emotional response to the provocation may be viewed to be so extreme that it diminishes his ability to think rationally and, literally, prevents him from acting with malice aforethought and cold-blooded premeditation.

A key element of the heat of passion doctrine is that the provocation need be deemed sufficiently substantial that a reasonable person would have lost control (hereafter called the “reasonable person requirement”). Restated, this condition is satisfied if a reasonable person would have become *unreasonable* if faced with the provocation in question.¹⁸ This requirement

¹⁷ Model Penal Code § 210.3(1)(b) (1962). It is unclear as to whether the word “mental” is intended to capture disturbances of the mind that are of a nonemotional nature or, alternatively, to clarify the meaning of the word “emotional.” This question is not adequately addressed in the MPC Commentaries. Model Penal Code (1985) (Commentaries).

¹⁸ Certainly, it may be said that one whose functioning is out of control is, by definition,

begs both logical and moral questions. The first question asks how reasonable a person is if he would lose control when presented with a provocation that does not cause an uncontrollable response in all (or anywhere close to all) people. Let's consider a possible heat of passion scenario: A father returns home to find that his neighbor has sexually and physically abused his daughter. The father experiences this scenario as a substantial provocation and, as a direct result, is overcome with fury. While enraged, he retrieves his gun and kills his neighbor. The father, on trial, invokes the heat of passion defense and, having satisfied all requirements of the doctrine, is successful in compelling the court to find that he is guilty of only manslaughter, and not murder. As such, the killer in this scenario is discerned to be less blameworthy for his actions than is the killer who plans and commits a murder in an unprovoked, cold-blooded manner. For the heat of passion defense to be successful in this case, though, it must be determined that a reasonable person would have lost control if presented with this provocation. While it is impossible to know the precise statistic, it is likely only a minority of cases in which such a discovery leads to an emotional response that is so overwhelming that the disturbed parent becomes violent to the point of committing homicide. That is, whereas a minority of individuals reacts to a substantial provocation by becoming overwhelmingly enraged and homicidally violent, most people simply do not. Assuming that the meaning and egregiousness of the provocation is interpreted similarly, the latter of these groups may, at the very least, be deemed to be a relatively more reasonable group of persons; that is, they do not respond to considerable provocation by acting unreasonably (or at least not so unreasonably that they kill). In fact, it is fair to say that, in this instance, the former group of persons is unreasonable, whereas the latter is reasonable.

If a truly (or reliably) reasonable person, then, would not lose control in response to the

unreasonable.

subject provocation, it may be inferred that the meaning of the reasonable person requirement is not that a reasonable person would lose self-control. Rather, the reasonable person requirement may be interpreted to mean that it is at least somewhat understandable (and thus excusable) for a person to lose control and act unreasonably when presented with a substantial provocation.

Having clarified the meaning of the reasonable person requirement in the context of the heat of passion doctrine, it may be concluded that the doctrine makes a partial allowance for behaving unreasonably.¹⁹

This partial allowance is made by the law not because the law intends to encourage or even approves of unreasonable behavior, but because the unreasonableness with which the heat of passion killer acts is considered to be (a) unforeseeable, (b) outside of his control, and (c) responsible, at least in part, for preventing the killer from making a more mindful behavioral decision. That is, the unreasonableness that the heat of passion killer experiences in response to the provocation is equated to diminished rationality. Because a heat of passion killing is necessarily committed with diminished rationality, as compared to murder, the defendant's

¹⁹ A small minority of courts (or jurisdictions) use an "ordinary" as opposed to "reasonable" person standard. Whereas a *reasonable person* standard may be thought of as a normative concept, an *ordinary person* standard may be considered to be more of an empirical concept. However, if the two terms are truly equal and interchangeable, though I suppose that they are not, the term ordinary person may be a less problematic one to use with respect to heat of passion killings because this defense partially excuses homicides that are, by their nature, at least partly unreasonable. Still, because it is empirically uncertain how often substantially provoked individuals react by committing homicide, it may be difficult to persuasively argue that heat of passion killing is *ordinary*, just the same.

responsibility is diminished, as well. This conclusion meets the spirit of penal proportionality in that the crime and punishment that are ascribed to the heat of passion killer are reduced from murder, in accordance with the defendant's lesser mens rea and corresponding criminal culpability.

The heat of passion doctrine recognizes unreasonableness (or diminished rationality) when it is believed to have been caused by extreme emotional reactivity. That is, the provoked killer's crime may only be reduced to manslaughter, by heat of passion terms, if the killing was committed in the context of extreme emotional dysfunction. The emotion that the killer experiences while committing the homicide has to be substantial enough that it prevents rational thought and reasoned behavior. In other words, the actor's rationality is diminished as a direct result of his emotional dysfunction. The emotion is necessarily dysfunctional because it so significantly impairs the actor's rationality that he becomes able to wrongfully kill, and indeed wrongfully kills, another human being.

A question remains, though, as to whether the heat of passion doctrine should protect only killers who have been truly provoked (in accordance with the reasonable person requirement) versus killers who have experienced a provocation, whether real or not, and have acted homicidally without malice aforethought or premeditation.²⁰ Based on retributive

²⁰ This question is related to the debate as to whether the heat of passion defense is one of partial excuse or partial justification. In the case of a heat of passion killing, a finding that the criminal culpability of the actor is mitigated because he lacked the necessary mens rea for murder is consistent with treating the defense as a partial excuse. See Markus D. Dubber, *Criminal Law: Model Penal Code 265-271* (2002). However, if the principal rationale is that the actor's retaliation was enacted in response to a real, harsh, and wrongful provocation, the doctrine may

underpinnings of the heat of passion doctrine, including principles of “just deserts” and penal proportionality, the answer is the latter. Assuming all other factors to be equal, the reactive killer who experiences a provocation, even in the case in which no real provocation exists, acts with no greater mens rea than the heat of passion killer who acts in response to a real provocation.

According to the heat of passion doctrine, though, the reactive killing is only partially excusable

be viewed as one of partial justification. Because proper analysis of this issue is provided elsewhere, and because it would require substantial discussion that is outside the scope of this paper, readers are directed to the following scholarly works: Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 *Minn. L. Rev.* 959, 959 n.5 (2002); Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 *Mod. L. Rev.* 467, 467-480 (1988); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 *J. of Crim. L. and Criminology* 421, 421-470 (1982); John Gardner, *The Gist of Excuses*, 1 *Buff. Crim. L. Rev.* 575, 575 (1998); John Gardner, *Justifications and Reasons, in Harm and Culpability* 103 (1996); John Gardner and Timothy Macklem, *No Provocation without Responsibility: A Reply to Mackay and Mitchell* [2004] *Criminal Law Review* 213; Peter Westen, *An Attitudinal Theory of Excuse*, 25 *L. & Phil.* 289 (2006); Alan Norrie, *Punishment, Responsibility and Justice* (2000). Furthermore, I have argued elsewhere that heat of passion is an affirmative partial excuse (or mitigating) defense and in no way should heat of passion killings be viewed as even partially justifiable. See Reid Griffith Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 *Psychol., Public Policy, and Law* 143, 143-165 (2007). This understanding of heat of passion is consistent with that of the MPC. See Model Penal Code § 210.3(1)(b) (1962); Markus D. Dubber, *Criminal Law: Model Penal Code* 265-271 (2002).

in the case that the jury or “fact finder” determines that a provocation existed by which a reasonable person would have lost control.

A moral dilemma remains, though, in that, whereas the heat of passion defense partially excuses killers who are deemed less reprehensible due to emotional dysfunction, no such allowance is made for killers who act, in part, out of *cognitive* disturbance.²¹ In effect, provocation law requires a person to control his cognitive functioning more than his emotional functioning, although it provides no rationale as to why diminished rationality that is caused by emotional disturbance is any more excusable than if it were founded upon biased cognitive functioning. Whereas the law partially excuses the killer who accurately interprets a substantial provocation and, in a state of disturbed emotional reactivity, kills another, it does not partially excuse the killer who, although he may be strictly unable to interpret the situation otherwise, *inaccurately* interprets (and thus experiences) a substantial provocation and responds by furiously killing *perceived* provocateur.²² Although in both cases the killer’s rationality is diminished due to psychological dysfunction, only the killer in the former case is partially excused. In this way, provocation law makes an allowance for uncontrolled emotional disturbance, but not that which is naturally cognitive.

Could it be that this distinction is justified because the existence of a *real* provocation is

²¹ For the purposes of this paper, cognition is referred to, according to traditional human information-processing perspectives, as nonemotional mental functions and operations such as perception, attribution and interpretation, comprehension, inference, decision making, planning, and learning.

²² That is, even when one’s perception of provocation is the result of cognitive dysfunction, the reasonable person requirement limits what qualifies as sufficient provocation.

necessary for there to be mitigated criminal culpability? The answer must be negative because, even in the less subjective, statutory law version of heat of passion, the fact finder must make a determination of the reasonableness of the claimed provocation. That is, the provocation need not be, in fact, real, but rather the event in question need only *appear* sufficiently provocative that a reasonable person would have responded with overwhelming, uncontrolled emotion.²³ Stated differently, the event in question need appear sufficiently provocative that a reasonable person would have become unreasonable.

Cognitive dysfunction, though, should be distinguished from cognitive carelessness. The killer who is otherwise cognitively capable but makes a mistake as to the provocative nature of the situation at hand may be said to have had a duty to more thoughtfully and carefully interpret the situation. The killer whose cognitive abilities are limited or restricted, though, may not be said to have the same responsibility because it would be unjust and, for that matter, wholly absurd to require one to be responsible for cognitive functioning of which he is incapable. Let us elaborate upon the earlier heat of passion hypothetical. A father, who was seriously abused as a child, returns home to find his neighbor interacting intimately with his daughter. The daughter is clearly disheveled, distraught, and in great discomfort. Perhaps the neighbor is, in fact, helping the daughter after the daughter was involved in an accident while playing outside. The father, though, interprets an abuse scenario due to biased interpretive processing that developed as a result of his own early abuse. In response to his interpretation that the neighbor is sexually molesting and physically harming his daughter, the man becomes enraged and kills the neighbor.

²³ Theoretically, the event in question may even be characterized by nonprovocative intent, as in the case of an elaborate practical joke, just so long as it appears sufficiently provocative to satisfy the reasonable person requirement.

It is likely that a truly reasonable person in this situation would first ask his daughter and neighbor what exactly has happened and is continuing to take place. However, in the case of the person who experiences this interaction as a substantial provocation, he may become so emotionally enraged that he is unable (or at least less able) to further follow a course of inquiry, only to kill the neighbor in retaliation. The interpretation of provocation, though, may result from cognitive carelessness or cognitive dysfunction. In the former case, the killer is able to consider an alternative explanation for the situation, but fails to do so. In the latter case, context-specific features may trigger a type of cognitive bias or disturbance by which an interpretation of provocation becomes the pervasive and driving understanding.

Cognitive dysfunction should also be distinguished from “mistake of fact.” According to the MPC Commentaries, a criminal defendant’s demonstration that he committed the act in question based on a mistake of fact may excuse the charged crime if the mistake (regardless of how reasonable the mistake is) negates or “negatives” the mental state that is required to establish an element of the crime.²⁴ Although mistake of fact has been invoked in defense of a wide variety of criminal acts (e.g., larceny, kidnapping, income tax, and criminal conspiracy), it may not be sufficient to reduce murder to manslaughter in heat of passion cases.²⁵ In the case of one deer hunter mistaking another for a deer and therefore shooting and killing the latter, the killer’s mistake of fact (even if the killer’s mistake of fact was clearly unreasonable, such as would be the case if the victimized hunter looked nothing like a deer) may be deemed to have

²⁴Model Penal Code § 2.04 cmt. (1985).

²⁵ It should be noted that there is nothing that inherently precludes a court from allowing or applying both mistake of fact and heat of passion doctrines together. However, the provocation in question would still need to satisfy the reasonable person requirement.

negated the necessary mens rea for murder, thus resulting in a reduced charge/conviction of involuntary manslaughter. Note, however, that in the case of heat of passion homicide, an unreasonable mistake of fact with respect to provocation would not suffice to reduce murder to manslaughter. This is because the provocation must be deemed to be sufficient according to the reasonable person standard.

Social Information Processing and Reactive Violence

Behavioral scientists have drawn a parallel between murder and manslaughter in criminal law and instrumental and reactive violence in psychology.²⁶ Whereas instrumental (or proactive or predatory) violence is typically premeditated, goal-driven, and committed in cold blood, reactive (or hostile or affective) violence is characterized as hot-blooded, emotional, and enacted in retaliation to social stimuli that are perceived to be provocative and wrongful. This dichotomy is similar to the murder/manslaughter distinction in criminal law in that murder is committed with malice aforethought and in the pursuit of an identified goal (or set of goals) and manslaughter is found in homicide cases in which the killer has acted in response to a provocation and in the heat of passion. In this way, murder represents instrumental homicide and manslaughter reflects killing that is reactive.

Empirical evidence that has distinguished reactive from instrumental forms of violence

²⁶ Reid Griffith Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 *Psychol., Public Policy, and Law* 143, 143-165 (2007); see also Brad J. Bushman & Craig A. Anderson, *Is It Time to Pull the Plug on the Hostile Versus Instrumental Aggression Dichotomy?*, 108 *Psychol. Rev.* 273, 273-279 (2001); Kenneth A. Dodge, *Emotion and Social Information Processing, The Development of Emotion Regulation and Dysregulation* 159-181 (Judy Garber & Kenneth A. Dodge eds., 1991).

has stemmed from several areas of behavioral science, including social cognition, psychophysiology, neurobiology, clinical psychology, and psychiatry. Research on the development of social cognitive processing and aggressive behavior has been particularly useful in understanding structural, phenomenological, and functional differences between violent subtypes. Multiple differences in how instrumental versus reactive aggressors process social information have been identified and used to understand alternative developmental courses, behavioral patterns, and individual commissions of violent conduct.

The majority of programs of social cognitive research that have identified and replicated empirical differences between violent subtypes have been guided by a social-information processing approach. Social-information processing theory (SIP)²⁷ explains aggressive behavior as the behavioral result of multiple series of mental operations that are potentially active in

²⁷ Nicki R. Crick & Kenneth A. Dodge, Review and Reformulation of Social Information-Processing Mechanisms in Children's Social Adjustment, 115 *Psychol. Bull.* 74, 74-101 (1994); Kenneth A. Dodge, A Social Information Processing Model of Social Competence in Children, in *The Minnesota Symposia on Child Psychology: Vol. 18, Cognitive Perspectives on Children's Social and Behavioral Development* 77-125 (M. Perlmutter ed., 1986); Reid Griffith Fontaine, Applying Systems Principles to Models of Social Information Processing and Aggressive Behavior in Youth, 11 *Aggression and Violent Behav.* 64, 64-76 (2006); L. Rowell Huesmann, An Information Processing Model for the Development of Aggression, 14 *Aggressive Behav.* 13, 13-24 (1988); L. Rowell Huesmann, The Role of Social Information Processing and Cognitive Schema in the Acquisition and Maintenance of Habitual Aggressive Behavior, in *Human Aggression: Theories, Research, and Implications for Social Policy* 73-109 (Russell G. Geen & Edward Donnerstein eds., 1998).

response to social stimuli. According to Crick and Dodge's reformulated model of SIP, an individual engages in a series of cognitive processes upon being presented with a social cue or stimulus.²⁸

Of critical importance to the present discussion of cognitive dysfunction and reactive homicide are early (or immediate) SIP functions—encoding and interpretation of cues—in that they entail perceptual and attributional processes by which the meaning of social stimuli and situations are assessed. Individuals perceive and evaluate social information in light of past experiences that are stored in and accessed from memory; in this way, individuals may form mental representations of the social situations as they emerge and develop. These representations may be subsequently cued or triggered by aspects of specific situations that arise. For example, the individual who was victimized in his youth, may develop a tendency to react with hostility to situations that involve ambiguously negative treatment of a child.

Numerous developmental studies in psychology have found associations between SIP tendencies, biases, distortions, and deficits and aggressive behavior.²⁹ Dodge and his colleagues have observed several biases in how aggressive youths encode social cues. For example, compared to their nonaggressive peers, aggressive youths have been found to be more likely to (a) base their evaluations about ambiguous provocation situations on schemata as opposed to

²⁸ Id.

²⁹ Nicki R. Crick & Kenneth A. Dodge, Review and Reformulation of Social Information-Processing Mechanisms in Children's Social Adjustment, 115 *Psychol. Bull.* 74, 74-101 (1994); Reid Griffith Fontaine & Kenneth A. Dodge, Real-time Decision Making and Aggressive Behavior in Youth: A Heuristic Model of Response Evaluation and Decision (RED), 32 *Aggressive Behav.* 604, 604-624 (2006).

actual information about the social stimuli that were presented to them,³⁰ (b) be subject to recency effects in their interpretation of cues (i.e., they are more influenced by information that becomes available at the conclusion of interpersonal exchanges),³¹ (c) focus on aggressive social cues more than nonaggressive ones,³² and (d) use less information about various types of social cues when interpreting social contexts.³³

Additional processing problems with respect to judgment and interpretation of social stimuli have been found to be prevalent among aggressive youths.³⁴ Most notably, aggressive youths tend to attribute harmful intent, hostility, and moral wrongfulness to stimulus actors in ambiguous provocation situations. Perhaps most notably, one study found that aggressive children tend to interpret benign cues as hostile even when the majority of cues that are presented to them for their evaluation favor attributions of benign intent.³⁵ It has been hypothesized that

³⁰ Kenneth A. Dodge & A. M. Tomlin, Utilization of Self-Schemas As a Mechanism of Interpretational Bias in Aggressive Children, 5 *Soc. Cognition* 280, 280-300 (1987).

³¹ Kenneth A. Dodge & A. M. Tomlin, Utilization of Self-Schemas As a Mechanism of Interpretational Bias in Aggressive Children, 5 *Soc. Cognition* 280, 280-300 (1987).

³² Karen R. Gouze, Attention and Social Problem Solving As Correlates of Aggression in Preschool Males, 15 *J. of Abnormal Child Psychol.* 181, 181-197 (1987).

³³ Kenneth A. Dodge & Joseph P. Newman, Biased Decision-Making Processes in Aggressive Boys, 90 *J. of Abnormal Psychol.* 375, 375-379 (1981).

³⁴ Nicki R. Crick & Kenneth A. Dodge, Review and Reformulation of Social Information-Processing Mechanisms in Children's Social Adjustment, 115 *Psychol. Bull.* 74, 74-101 (1994).

³⁵ Kenneth A. Dodge & Joseph P. Newman, Biased Decision-Making Processes in Aggressive Boys, 90 *J. of Abnormal Psychol.* 375, 375-379 (1981).

reacting aggressively toward ambiguous provocateurs may directly result, at least in part, from attributions that the stimulus actor is intentionally and unjustly attempting to cause harm to the responding individual. In this way, aggressive behavior may function as a means of defending oneself or retaliating against a person who is perceived and interpreted to be provocative and hurtful. Originally termed “hostile attributional bias” by Nasby, Hayden, and DePaulo (1979), this set of information processing difficulties is more comprehensively captured by the term *provocation interpretational bias* (PIB) as it is clear that multiple cognitive operations that contribute to the ultimate interpretation of a provocation are critical to the relation between social cognition and retaliatory violence.^{36,37} This is entirely consistent with early seminal work that demonstrated that a youth’s interpretation that a peer’s cue is provocative is uniquely predictive of the former’s aggressive retaliation.³⁸

³⁶ Kenneth A. Dodge & John D. Coie, Social-Information-Processing Factors in Reactive and Proactive Aggression in Children's Peer Groups, 53 *J. of Personality and Soc. Psychol.* 1146, 1146-1158 (1987); Nicki R. Crick & Kenneth A. Dodge, Social Information-Processing Mechanisms in Reactive and Proactive Aggression, 67 *Child Dev.* 993, 993-1002 (1996).

³⁷ Note that it is more accurate to characterize provocation interpretational bias as exactly that—a bias. As opposed to a cognitive *deficit* (by which there may be the actual absence of a mechanism or ability), PIB should be understood to be a cognitive *distortion*, or mental disturbance that is triggered by aspects of a social stimulus. Cf. Joseph P. Newman, Psychopathic Behavior: An Information Processing Perspective, in *Psychopathy: Theory, Research and Implications for Society* 81-104 (D. J. Cooke, R. D. Hare, & A. Forth eds. 1998) (discussing the cognitive deficits in the information processing of psychopaths).

³⁸ Leonard Berkowitz, Situational and Personal Conditions Governing Reactions to Aggressive

In addition, multiple studies have uniquely linked PIB with *reactive* aggressive behavior in youth. One of the first studies to examine this relation, found that, as compared to their proactive aggressive and nonaggressive peers, reactive aggressive boys were more likely to (a) have difficulty accurately processing and interpreting benign intentions in situations in which actors had accidentally caused harmful outcomes, and (b) attribute hostile intent to ambiguous provocateurs.³⁹ A subsequent study by Crick and Dodge (1996) produced similar findings and demonstrated that the unique relation between hostile attributional bias and reactive aggressive behavior held in an examination that included girls as well as boys.⁴⁰ Similarly, in their study of juvenile offenders incarcerated in a maximum security prison, Dodge, Price, Bachorowski, and Newman (1990) found that aspects of PIB were uniquely related to undersocialized (but not socialized) conduct disorder, a pattern of aggressive behavior that is typified by chronic fighting, being easily angered, and other characteristics that are associated with reactive violence.⁴¹

Cues, in *Personality at the Crossroads: Current Issues in Interactional Psychology* 165-171 (David Magnusson & Norman S. Endler eds., 1977); Kenneth A. Dodge & John D. Coie, Social-Information-Processing Factors in Reactive and Proactive Aggression in Children's Peer Groups, 53 *J. of Personality and Soc. Psychol.* 1146, 1146-1158 (1987).

³⁹ Kenneth A. Dodge & John D. Coie, Social-Information-Processing Factors in Reactive and Proactive Aggression in Children's Peer Groups, 53 *J. of Personality and Soc. Psychol.* 1146, 1146-1158 (1987).

⁴⁰ Nicki R. Crick & Kenneth A. Dodge, Social Information-Processing Mechanisms in Reactive and Proactive Aggression, 67 *Child Dev.* 993, 993-1002 (1996).

⁴¹ Kenneth A. Dodge, Joseph M. Price, Jo-Anne Bachorowski & Joseph P. Newman, Hostile Attributional Biases in Severely Aggressive Adolescents, 99 *J. of Abnormal Psychol.* 385, 385-

The etiology of PIB has also been a topic of considerable scientific interest. The overarching hypothesis that has guided this research states that being exposed to, and experiencing, harsh environmental events and conditions contributes to children's learning that the world is a hostile, unsafe place. Although the degree to which qualitatively discernible etiological factors may be related to the tendency to interpret ambiguous social cues as provocative varies, PIB-related problems may develop as a result of a variety of hardships,⁴² including (a) growing up in communities that have high prevalence rates of violent crime,⁴³ (b) being exposed to domestic violence at home,⁴⁴ (c) being abused as a child,⁴⁵ (d) harsh physical discipline,⁴⁶ (e) chronic social rejection,⁴⁷ and (f) being subject to repeated incidents of prejudice

392 (1990).

⁴² Catherine P. Bradshaw & James Garbarino, *Social Cognition As a Mediator of the Influence of Family and Community Violence on Adolescent Development: Implications for Intervention*, 1036 *Annals of the N.Y. Acad. of Sci.* 85, 85-105 (2004).

⁴³ Janis B. Kupersmidt, Ariana Shahinfar & Mary Ellen Voegler-Lee, *Children's Exposure to Community Violence*, in *Helping Children Cope with Disasters and Terrorism* 381-401 (Annette M. La Greca et al. eds., 2002).

⁴⁴ Gregory S. Pettit, Kenneth A. Dodge & M. M. Brown, *Early Family Experience, Social Problem Solving Patterns, and Children's Social Competence*, 59 *Child Dev.* 107, 107-120 (1988).

⁴⁵ Kenneth A. Dodge, Gregory S. Pettit, John E. Bates & Ernest Valente, *Social Information-Processing Patterns Partially Mediate the Effect of Early Physical Abuse on Later Conduct Problems*, 104 *J. of Abnormal Psychol.* 632, 632-643 (1995).

⁴⁶ Bahr Weiss, Kenneth A. Dodge, John E. Bates & Gregory S. Pettit, *Some Consequences of*

or hate (e.g., racism).⁴⁸

Whereas the majority of research on PIB and aggressive behavior has historically focused on youths, the last 12 years have seen an increase in scientific attention paid to links between hostile processing biases and aggression in adults. Epps and Kendall (1995) were among the first to examine hostile attributional bias in an adult population, showing that aggressive college students were more likely to interpret ambiguous provocateurs as acting intentionally and with hostility.⁴⁹ These findings were later extended to other adult contexts, such as interpretations of

Early Harsh Discipline: Child Aggression and a Maladaptive Social Information Processing Style, 63 *Child Dev.* 1321, 1321-1335 (1992).

⁴⁷ John D. Coie & Kenneth A. Dodge, Multiple Sources of Data on Social Behavior and Social Status in the School: A Cross-Age Comparison, 59 *Child Dev.* 815, 815-829 (1988); John D. Coie, Kenneth A. Dodge & Janis B. Kupersmidt, Peer Group Behavior and Social Status, in *Peer Rejection in Childhood 17-59* (John. D. Asher & John D. Coie eds., 1988); Nicki R. Crick & Gary W. Ladd, Children's Perceptions of Their Peer Experiences: Attributions, Loneliness, Social Anxiety, and Social Avoidance, 29 *Developmental Psychol.* 244, 244-254 (1993); Zvi Strassberg & Kenneth A. Dodge, Focus of Social Attention Among Children Varying in Peer Status (paper presented at the annual meeting of the Association for the Advancement of Behavior Therapy, November 1987).

⁴⁸ Dennis R. Combs et al., Perceived Racism As a Predictor of Paranoia Among African Americans, 32 *J. of Black Psychol.* 87, 87-104 (2006).

⁴⁹ James Epps & Phillip C. Kendall, Hostile Attributional Bias in Adults, 19 *Cognitive Therapy and Res.* 159, 159-178 (1995).

risky and aggressive driving⁵⁰ and frustrating workplace situations in which the motivation underlying a supervisor's actions was ambiguous.⁵¹ Findings have consistently linked higher levels of aggression with a greater likelihood to interpret ambiguous provocation situations as actual provocations.

In sum, PIB may significantly increase the likelihood that a person may experience a particular social situation as a provocation when the content of the situation is not in fact provocative. It is this experience of the situation at hand that is linked to one's emotional response to the stimulus—that is, the interpretation of the situation is conceived to mediate the relation between the presented social cue and respondent's emotional arousal.⁵² In fact, the individual who is faced with an unambiguously horrific provocation but does not interpret it as such (perhaps because of processing biases of another sort) may be far less likely to respond with heightened emotional arousal than is the person who wrongly interprets a nonprovocative

⁵⁰ B. Alex Matthews & Fran H. Norris, When Is Believing "Seeing"? Hostile Attribution Bias As a Function of Self-Reported Aggression, 32 *J. of Applied Social Psychol.* 1, 1-32 (2002).

⁵¹ Robert J. Homant & Daniel B. Kennedy, Hostile Attribution in Perceived Justification of Workplace Aggression, 92 *Psychol. Rep.* 185, 185-194 (2003).

⁵² Kenneth A. Dodge, The Structure and Function of Reactive and Proactive Aggression, in *The Development and Treatment of Childhood Aggression* 201-218 (D. Pepler & K. Rubin eds., 1991); Elizabeth A. Lemerise & Kenneth A. Dodge, The Development of Anger and Hostile Interactions, in *Handbook of Emotions* 537-546 (Michael Lewis & Jeannette M. Haviland-Jones eds., 1993); see also Richard S. Lazarus & Susan Folkman, *Stress, Appraisal, and Coping* (Springer-Verlag 1984); Richard S. Lazarus & Craig A. Smith, Knowledge and Appraisal in the Cognition-Emotion Relationship, 2 *Cognition and Emotion* 281, 281-300 (1988).

situation as that which is significantly provocative.

PIB and Heat of Passion Homicide: Does Provocation Law Need Reframing?

Among the many possible responses to the position I herein take, there are two that seem most practical, though only one (i.e., reframing of the defense) adequately addresses and resolves the logical and moral issues. Opponents of the heat of passion doctrine,⁵³ however, may cite the problems with the doctrine raised herein as additional reasons to abandon the heat of passion defense altogether. Certainly, abolition of the defense would resolve the logical inconsistency of making a partial allowance for emotional, but not cognitive, mental dysfunction; that is, a defense cannot be inherently inconsistent in its logical structure if it does not exist. However, pulling the plug on the defense would not resolve the moral problem; in fact, it increases the breadth and severity of the moral problem in that, without heat of passion, a greater number of individuals who kill *without* the requisite mens rea of murder would necessarily be found guilty of, and punished for, a disproportionately harsh verdict of murder. Still, heat of passion abolitionists would likely be willing, if not perfectly content, to live with this outcome.

Although heat of passion has been under attack in recent years (particularly by feminist legal scholars),⁵⁴ some recent and prominent formulations of the doctrine have expanded its scope with respect to defendants to which it may apply. For example, although only a minority of

⁵³ Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 Minn. L. Rev. 959, 959-1002 (2002) (providing a recent discussion).

⁵⁴ See, e.g., Deborah E. Milgate, *The Flame Flickers, But Burns On: Modern Judicial Application of the Ancient Heat of Passion Defense*, 51 Rutgers L. Rev. 193, 193-228 (1998); Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 Emory L.J. 665, 665-685 (2001).

States have adopted it, the MPC introduced the language “extreme mental or emotional disturbance,” suggesting that the fact finder may determine sufficient disturbance of mind that is other than emotional (or, at least, not primarily emotional by its nature).⁵⁵ Nearly a quarter century later, the Court in *People v. Gjidoda*⁵⁶ adopted a similar standard and elucidated its position by quoting the decision in *Maher v. People*:

In determining whether provocation [is] adequate and reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard—unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind or infirmity of temper not arising from wickedness of heart or cruelty of disposition.⁵⁷

The language “peculiar weakness of mind or infirmity of temper” would seemingly allow for cognitive, in addition to emotional, dysfunction to be considered in discerning mitigation of criminal culpability of reactive killers. However, the more liberal language that is used in the MPC, as well as in the cases of *Maher v. People* and *People v. Gjidoda*, does not explicitly state that cognitive dysfunction (or disturbance) should, or even may, be considered, leaving the issue wide open to a court’s interpretation and discretion.

A proper framing of the heat of passion doctrine should clearly articulate what degree and type of mental disturbance are sufficient. In the case of PIB, it has been scientifically established that multiple aspects of early stages of SIP are associated with aggressive and violent behavior—

⁵⁵ Model Penal Code (1962).

⁵⁶ *People v. Gjidoda*, 364 N.W.2d 698 (Mich. Ct. App.1985).

⁵⁷ *Maher v. People*, 10 Mich. 212 (1862).

more specifically, reactive aggression and violence. Just as clear is that PIB differs widely in degree across aggressive individuals: from a complete absence of processing difficulties at the one end of the continuum to an extreme bias at the other. To prevent its abuse, the doctrine should be reframed so that it clearly articulates what mental dysfunction is covered by terms such as “extreme mental or emotional disturbance,” “peculiar weakness of mind,” or the like. Certainly, this articulation should account for nonculpable cognitive, and not just emotional, dysfunction. Abuse of the doctrine may be further curbed by clearly stating that the cognitive, emotional, or otherwise mental dysfunction claimed by the defendant be scientifically substantiated, such as PIB is, in the doctrine’s reframing.

Reframing the doctrine in this manner does broaden the scope of the heat of passion defense to include those who are severely biased in their provocation interpretations but may have not been significantly provoked (and thus not had a “reasonable explanation or excuse”). However, this reformulation also demands more from the defendant, in terms of evidence. After the prosecution has made its prima facie case and the burden has shifted, the defendant would have to demonstrate, in addition to evidence as to why he interpreted the event in question as a significant provocation, the following: (a) the defendant’s claimed cognitive dysfunction falls within the descriptive language of the heat of passion doctrine; that is, the defendant’s claimed dysfunction is serious, nonculpable, and mental by its nature; (b) there is sufficient scientific support that substantiates the valid existence of the claimed cognitive dysfunction; (c) the defendant did indeed experience, or was subject to, the cognitive dysfunction that he claims to have had at the time of the killing. This criterion may be met both by the testimony of the defendant and those who have firsthand knowledge of the defendant as well as psychological assessment and evaluation; and (d) all other elements of the heat of passion defense are met

(including that the killing was committed while the defendant was experiencing an extreme emotional disturbance as a direct result of the perceived provocation).

Specifically, I recommend that in cases in which PIB, due to factors that are unforeseeable by and out of the control of the defendant, substantially biases the defendant's cognitive abilities in such a way that he perceives the stimulus situation as egregiously provocative, such a cognitive disturbance be legally recognized. In such cases, if a cognitive bias of this nature is expertly substantiated, the egregiousness of the stimulus situation, as it is so evaluated by the defendant, may be appraised by the fact finder. For example, in the case that the defendant has sufficiently demonstrated a PIB, the interpreted provocation may be determined to be egregious in the case that a father believes that his child has been abused, but not if he merely perceives that his property has been stolen.

With respect to testimony of the defendant and those who have firsthand knowledge of the defendant, it may be determined if there is evidence that the defendant has a history of difficulties with respect to mindful, valid understandings of social events that are open to interpretations of provocation. Testimonial evidence may support or oppose conclusions drawn by forensic experts based on psychological assessments and evaluation of the defendant, regarding whether there existed a persistent pattern or bias with respect to how the defendant interprets (or has interpreted) ambiguous social events. In reference to forensic evaluation, there are, in fact, multiple psychological assessments that have been scientifically established to be valid and reliable that are designed, in part, to measure mental functioning related to hostile attributions and PIB.⁵⁸ Reliable and valid measures of hostility should be used in the

⁵⁸ See, e.g., M. K. Pope, Timothy W. Smith & Frederick Rhodewalt, Cognitive, Behavioral, and Affective Correlates of the Cook and Medley Hostility Scale, 54 *J. of Personality Assessment*

determination of the degree to which the defendant is biased in his interpretations of provocation. Testimonial evidence, results of psychological assessments, and conclusions drawn from forensic interviews of the defendant may be used collectively to ascertain a conclusion as to the defendant's claim of PIB.

This proposed reframing of heat of passion is consistent with Morse's (2003) mitigating defense of "guilty but partially responsible" (GPR).⁵⁹ What Morse has suggested, though, is far more encompassing:

This Commentary proposes that the criminal law should include a generic, doctrinal mitigating excuse of partial responsibility that would apply to all crimes, and that would be determined by the trier of fact. This partial excuse would apply in cases in which a defendant's behavior satisfied the elements of the crime charged, but the defendant's rationality was non-culpably compromised and thus

501, 501-514 (1990); Thomas Schill, Nerella V. Ramanaiah & S. R. Conn, Development of Covert and Overt Hostility Scales from the Buss-Durkee Inventory, 67 *Psychol. Rep.* 671, 671-674 (1990); Tim W. Smith, Jill D. Sanders & James F. Alexander, What Does the Cook and Medley Hostility Scale Measure? Affect, Behavior, and Attributions in the Marital Context, 58 *J. of Personality and Social Psychol.* 699, 699-708 (1990); M. V. Ujjwalarani & Y. V. Ramavani, Measurement of Human Aggressiveness: Restandardization of Buss-Durkee Inventory, 33 *Psychol. Studies* 137, 137-40 (1988); Wayne F. Velicer, Joseph Michael Govia, Nancy P. Cherico & Donald P. Corriveau, Item Format and the Structure of the Buss-Durkee Hostility Inventory, 11 *Aggressive Behav.* 65, 65-82 (1985).

⁵⁹ See Stephen J. Morse, Diminished Rationality, Diminished Responsibility, 1 *Ohio St. J. of Crim. L.* 289, 289-308 (2003).

the defendant was not fully responsible for the crime charged.⁶⁰

GPR would require that it be demonstrated that the defendant's rationality was nonculpably diminished at the time of the crime, such that he did not have the requisite mens rea to properly be found guilty of the crime charged. In PIB terms, a defendant may demonstrate that his processing was, due to nonculpable factors (e.g., having been subjected to abuse as a child), biased in such a way that stimulus situation was definitively interpreted as egregiously provocative. As such, the defendant's rationality was diminished at the time of the killing, not only due to emotional dysfunction, but also cognitive distortion.

In Morse's (2003) proposal, he articulated that, at the time of the crime, the defendant must have had "serious difficulty in thinking 'straight' about [his] behavior."⁶¹ This language is likely to be interpreted as more liberal than the reframing of heat of passion that is herein suggested, though. For example, a person who is very tired or is in a bad mood may have serious difficulty thinking straight about his behavior. In contrast, this paper's proposal to reframe heat

⁶⁰ Id. at 289. Note that Morse's proposed mitigating excuse applies to all crimes, not just intentional homicide. Morse cannot understand why mitigation of criminal culpability via "extreme mental or emotional disturbance," to use the MPC's heat of passion language as an example, should only apply to intentional homicide. Admittedly, I share in Morse's confusion with respect to this issue; it seems that, in terms of retributive justice, one should be punished no more than he is guilty, regardless of whether the crime is intentional homicide, assault, theft, or any other crime. Historically, though, United States law has persistently treated crimes of intentional homicide differently with respect to mitigation of criminal culpability.

⁶¹ Id.

of passion is based on scientific substantiation of PIB as a real phenomenon of cognitive dysfunction, the established empirical relation between PIB and reactive violence, and the detectability and measurability of PIB via reliable and valid psychological assessments. This is not inconsistent with Morse's articulation, yet it is more conservative—both in its evidentiary requirements and in its limitation to heat of passion killings—and perhaps less likely to allow for legal abuses.⁶²

Another consideration with respect to retributive justice and punishment regards the continuum upon which PIB lies. As discussed, PIB varies widely across individuals. One possible reframing of the heat of passion doctrine articulates criminal culpability according to the exact degree to which the criminal's actions are mentally culpable (or compromised) at the time of the crime. This approach differs significantly from the murder/manslaughter distinction that is currently defined by the heat of passion doctrine and more accurately represents retributive principles of penal proportionality and "just deserts."⁶³ However, it may be most sensible for courts to distinguish between smaller increments of criminal culpability and appropriate

⁶² Id. at 304-07 (providing Morse's responses to anticipated objections to the GPR proposal).

⁶³ The argument for mitigating criminal culpability according to a continuum of diminished capacity is not new. As a recent example, in their argument against the juvenile death penalty, Steinberg and Scott (2003) distinguished between mitigation and excuse in their proposal to account for developmental differences in psychosocial maturity between adolescents and adults. See Lawrence Steinberg & E. S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1009-1018 (2003).

punishments during the sentencing stage.⁶⁴ That is, defendants who successfully invoke the heat of passion defense and are found guilty of the lesser crime of manslaughter may be differentially punished according to their varying degrees of criminal culpability, as presented and discerned by the trier of fact during sentencing. In this way, the heat of passion doctrine may stay largely in tact, but the interests of retributive justice and social policy—that is, that criminal defendants be punished in full accordance with, but no more than, their respective degrees of guilt—may be more fully satisfied.

Opponents of my proposal may argue that such a revision will result in a class of heat of passion defendants that, overall, is more likely to kill again in the future. It seems reasonable to conclude that, on average, a person with PIB is, by his nature, more likely to interpret certain kinds of stimuli as provocative and respond with anger and retaliation. Whereas this is a legitimate social policy concern—as it goes directly to the issue of public safety—it is not an issue of retributive justice. Nonetheless, it is an issue that most lawmaking bodies consider in their decision making. I am not inclined to believe that the reactive killer with PIB is significantly more likely to be recidivistic than the emotionally volatile killer who is already excused, in part, under the current framing of the heat of passion doctrine. First, there is no scientific evidence that supports this notion. Considerable empirical investigation of reactive killers with alternative patterns and styles of mental (both cognitive and emotional) disturbance is needed before a scientific conclusion of any kind may be drawn with respect to this issue. Second, it may not be presumed that a reactive killer with PIB would repeatedly encounter situations that are ambiguous as to egregious provocation. Furthermore, it seems equally baseless

⁶⁴ See Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 *Ohio St. J. of Crim. L.* 289, 289-308 (2003).

to presume that a recurrent pattern of this sort would be more likely than that of a reactive killer *without* PIB who repeatedly encounters situations that present truly, and *unambiguously*, egregious provocations.

In order to meet these competing values—the retributive justice principle of penal proportionality and the social policy concern of repeat offending and future dangerousness—it may be of considerable importance to tailor the structuring of rehabilitation programs to the offender-specific mental attributes or disturbances (e.g., PIB, chronic hostility, impulsivity) of all types of killers (e.g., committers of malice aforethought murder, heat of passion manslaughter, reactive killing due in part to PIB). Because PIB is a type of cognitive problem, a strong cognitive focus is critical in formulating rehabilitation for criminal offenders with this type of mental disturbance. Among the more prominent cognitive-behavioral interventions for offenders for which scientific support has been found is cognitive restructuring of identified mental distortions.⁶⁵ Cognitive restructuring is used to help individuals become more aware of potential processing problems, including perception, attribution, interpretation, evaluation, and beliefs. For example, Dodge proposed that, for the reactive aggressive individual who is biased toward attributing intentionality and hostility to ambiguous provocateurs, an appropriate cognitive method may focus on social role-taking (or perspective taking) so that aggressor may better understand others' thoughts and feelings.⁶⁶ In addition, cognitive restructuring may be combined

⁶⁵ David B. Wilson, Leana A. Bouffard & Doris L. Mackenzie, A Quantitative Review of Structured, Group-Oriented, Cognitive-Behavioral Programs for Offenders, 32 *Crim. Just. and Behav.* 172, 172-204 (2005) (providing a recent quantitative review).

⁶⁶ Kenneth A. Dodge, The Structure and Function of Reactive and Proactive Aggression, in *The Development and Treatment of Childhood Aggression* 201-218 (D. Pepler & K. Rubin eds.,

with other approaches that are primarily oriented toward behavior modification, anger management, and the development and maintenance of adaptive social relationships.

Conclusion

The heat of passion doctrine provides that a defendant charged with murder may be partially excused if the homicide in question was committed in response to a significant provocation and while the defendant was experiencing significant emotional disturbance as a direct result of said provocation. The underlying rationale is based on the retributive principle of penal proportionality and acknowledges that the person who kills under these circumstances does not meet the requisite mens rea for murder and thus should not be convicted of, and punished for, murder. Rather, the heat of passion killer's rationality is recognized as having been diminished at the time of the homicide due to extreme fury or other emotional disturbance. In this way, the heat of passion doctrine partially excuses this class of killers based on their emotional dysfunction.

The current framing of the heat of passion defense, though, is logically inconsistent and morally problematic in that, whereas the heat of passion killer may be partially excused for emotional impairment, the same allowance is not made for cognitive difficulties. The dilemma posed by mitigating criminal culpability based on one type of mental dysfunction (emotional) and not another (cognitive) is that the killer who is cognitively and emotionally dysfunctional may be no more guilty of mind than the killer who is only emotionally compromised. That is, the mens rea of the former may be no more culpable than the mens rea of the latter.

Why cognitive dysfunction has been largely neglected with respect to the heat of passion doctrine is unclear. American provocation law recognizes that a mental impairment in emotional functioning can partially excuse criminal culpability associated with homicide, yet it does not

recognize the scientifically-established cognitive impairment of perceptual and interpretational distortion. In the current paper, I discuss a set of social-cognitive processing problems called provocation interpretational bias (PIB). PIB is an umbrella term intended to capture the various scientifically-supported processing problems that have been linked with aggressive—particularly reactive aggressive—individuals. A social-information processing approach is taken to demonstrate the role of PIB in the social-cognitive and moral-cognitive processing and behavioral reactivity of violent offenders. It is argued that the heat of passion doctrine should be reframed to account for the implications of PIB in emotionally reactive homicide.