

THE PROVOCATION DEFENSE AND THE NATURE OF JUSTIFICATION

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I.

It is an honor to be part of this Symposium. I am grateful to Professor Fontaine for inviting me to take part, particularly when he knows that I am among those who are not convinced that the provocation defense is “definitively one of excuse.”¹

In this Essay, I evaluate the evidence of “adequate non-provocation” that Fontaine puts forward to show that the heat of passion defense is decidedly an excuse (more precisely, a partial excuse).² I will be focusing my remarks on the traditional heat of passion defense. As I see it, the traditional heat of passion defense is mostly an excuse, but has a justificatory component.³ But the same is not true of the Model Penal Code (hereafter, MPC) version of the defense, the extreme mental or emotional disturbance defense (EMED). As Fontaine notes, the MPC version of the defense was carefully crafted to leave no doubt about its status, and although one might nonetheless claim that the drafters failed to

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1. Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 *U. MICH. J.L. REFORM* 1, 6 (2009).

2. For ease of expression, I, like Fontaine, will often simply say “excuse” rather than “partial excuse,” knowing that our readers understand that provocation is only a partial defense.

3. I also think that efforts to reform the defense should not take the form of cleaning it of justificatory components. My idea of salutary reform is thus not in the direction suggested by the MPC. Far more promising are the proposals of the UK Law Commission, though I am not sure it is necessary to transform the defense so that it is only a defense to first degree murder (mitigating to second degree murder). See *LAW COMMISSION, REPORT NO. 304, MURDER, MANSLAUGHTER AND INFANTICIDE* (2006) [hereinafter *UK LAW COMMISSION REPORT*]. See also Jeremy Horder, *Reshaping the Subjective Element in the Provocation Defence*, 25 *OXFORD J. LEGAL STUD.* 123 (2005).

render it purely an excuse, that is not something I wish to claim. So I want to be clear that I am referring only to the traditional heat of passion defense, not the EMED, when I say that the heat of passion defense is not definitively an excuse.

It is not my aim here to defend the position that the heat of passion defense should be understood as having a justificatory component, however. My primary aim is the more limited one of arguing that the cases that Fontaine puts forward to show that the heat of passion defense (again, excluding the MPC version) has to be purely an excuse do not in fact show that. They fail for different reasons, and I am especially interested in one particular reason why some of them fail: they rely on questionable assumptions about the nature of justification (assumptions that enter in at other points of his article, as well).

The assumption that factors in most prominently is that justification is tied to truth (to what is in fact the case), rather than to reasonable belief. A quotation from Fontaine's article will bring out what this means, and at the same time substantiate my attribution of the assumption to him. Consider the following claim:

Essential to the conceptualization of heat of passion as a partial justification is that the killer must have been seriously wronged—there presumably must be adequate, *real* provocation in order to even attempt an argument that a reactive killing is at all justifiable. Of important note, though, is that whereas provocation typically needs to be adequate (meaning that it must meet the reasonable person standard) it does *not* have to be real.⁴

According to Fontaine, heat of passion cannot be a justification unless it requires that the defendant actually *was* seriously wronged. But why could it not be a justification if she believed she was, and believed it on reasonable grounds (perhaps thinking that what was in fact an accident had been done deliberately, out of malice towards her)? Is it generally the case that justification requires that x actually be the case, rather than that D reasonably believes it to be the case?⁵

4. Fontaine, *supra* note 1, at 10–11.

5. There is more than one rival view here, though for the purposes of this Essay, the varieties do not matter, the key issue being whether justification requires that x actually be the case. One rival view is as stated: justification requires that x actually be the case, rather than that D reasonably believes it to be the case. Another is that justification requires that x actually be the case and that D reasonably believes it to be the case; yet another is that justification requires that x actually be the case and that D believes it to be the case (whether

Fontaine writes as if the answer to the second question is “Yes.” I find this puzzling, since he no doubt is aware that within the criminal law, the answer is generally understood to be “No.” Consider Joshua Dressler’s answer to the question of whether a defendant is “entitled to be acquitted if she was mistaken regarding the facts that would justify her conduct” and if so, whether the law should “describe her conduct as justified or excused.”⁶ Emphasizing that although he couches his points in terms of self-defense, “*the principles here have application to the other justification defenses, as well,*”⁷ Dressler answers the question as follows:

The law is clear-cut A defendant *is* entitled to be acquitted on the basis of self-defense if her mistake of fact regarding the threat was reasonable. . . . More specifically, the rule is that a defendant is justified—and not merely excused—in using deadly force if, at the time of the homicide, she had reasonable grounds for believing, and did believe, that she was in imminent danger of death or grievous bodily injury, and that deadly force was necessary to repel the threat, *although it turned out later that these appearances were false.*⁸

Thus, a justification defense is compatible with a mistake of fact, provided that the mistake is reasonable. And that entails (unless there is something special about provocation, requiring that if it is a justification, it is a justification of a different sort)⁹ that classifying the provocation defense as a justification would not require that adequate provocation be limited to “real” provocation. So classifying it would not entail that the heat of passion defense would be unavailable to a defendant who killed in the heat of

reasonably or not). For further discussion, see Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387 (2005).

6. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.04[A] (4th ed. 2006).

7. *Id.* To guard against misunderstanding, I should note that Dressler holds that provocation is an excuse. See Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 971–75 (2002). Dressler does allow that the provocation defense may “have a justification-like component,” *id.* at 971, but he means by this only that we may believe D’s anger to have been justifiable. *Id.* at 972. Dressler stresses that under “no circumstances is the provoked killing justifiable *in the slightest.*” *Id.* at 974. He puts forward the same view in *Provocation: Explaining and Justifying the Defense in Partial Excuse, Loss of Self-Control Terms*, in CRIMINAL LAW CONVERSATIONS 319 (Paul H. Robinson, Stephen P. Garvey, & Kimberly K. Ferzan eds., 2009). I am appealing to him here in support of my claim that in the law, justification defenses are compatible with mistake of fact, provided that the mistake is reasonable. I do not mean to suggest that he thinks that provocation is even partly a justification.

8. DRESSLER, *supra* note 6, § 17.04[A].

9. I mention this not because I have ever heard anyone suggest it, but just to indicate that that would be a way to block the inference.

passion over x (where, were x the case, it would constitute adequate provocation) but was mistaken in his belief that x was the case. Assuming that his belief that x was the case was reasonable, the provocation defense would be no less available to him than self-defense is to a defendant who mistakenly but reasonably believed that he was about to be killed unless he killed his “attacker.”

This is not to deny that some legal scholars think (a) that the law is in error in treating self-defense as a justification, and, more fundamentally, (b) that the rule that, in Dressler’s words, “a person is justified in acting on the basis of reasonable, albeit inaccurate, appearances”¹⁰ should be jettisoned. Nor do I mean to imply that their claims should be ignored or dismissed. But the position that justification requires truth (or reality, or actuality) is certainly controversial, and insofar as Fontaine’s arguments to the conclusion that provocation is purely an excuse rely on it, they are not going to settle the question that he hopes to settle. They do not pave the way to “mov[ing] past this fundamental issue”¹¹ of whether to classify provocation as purely an excuse.

II.

Fontaine draws our attention to “multiple [types of] cases in which, although no actual provocation by the victim is present, the court has recognized the applicability (or at least invokability) of the heat of passion defense.”¹² Referring to them as “adequate non-provocation” cases because “the adequate provocation standard is met but real provocation by the victim is absent,” he divides these cases into two categories, each of which he then divides into two subtypes.¹³

The first category encompasses cases where the killer mistakenly believed that the victim did x, where x was a serious wrong, but in fact there was no such wrong done. These cases divide into (1A) those where the mistake was reasonable, and (1B) those where it was unreasonable. The second category covers cases where a serious wrong was done, but not by the victim (or at least, not by all of D’s victims). These in turn bifurcate into two subtypes. The first (2A) comprises cases in which D intended to kill the provoker, but accidentally killed someone else, either in addition to killing the

10. DRESSLER, *supra* note 6, at 231.

11. Fontaine, *supra* note 1, at 7.

12. *Id.* at 13.

13. *Id.* at 14.

provoker, as when D's bullets hit both the provoker and someone else, or because D's bullet missed the provoker and hit someone else. The second (2B) comprises cases in which the killing of the non-provoker is not due to an accident or a mistake regarding the identity of the person at whom he took aim. The 2B cases are instances where D knowingly, and perhaps even intentionally, killed someone D knew to be a non-provoker. (In the case Fontaine cites, D kills both the provoker and the provoker's young child.)¹⁴

Fontaine claims that none of the cases in any of the categories he describes makes sense unless the provocation defense is understood to be an excuse.¹⁵ I will challenge this claim.

III.

Before assessing the evidence presented by those four types of cases, it may be helpful to spell out how the question of whether to classify provocation as a partial justification or a partial excuse (or as a hybrid) bears on what especially interests Fontaine, viz., the "social cognitive argument."¹⁶ This argument, which I'll briefly discuss in the final section of my Essay, asserts that in a case in which "the cognitively-biased heat of passion killer (a) did not cause his cognitive bias, and (b) could not have reasonably foreseen how said bias would contribute to his reactive killing, it is unclear how he is any more culpable than the heat of passion defendant who killed in response to a provocative situation that does meet the reasonable person standard."¹⁷ Fontaine suggests that the heat of passion defense should therefore be expanded to cover such cases, cases that now would not qualify for the defense because the requirement of "adequate provocation" is not met.

According to Fontaine, the social cognitive argument would be moot if heat of passion were a partial justification, because "[e]ssential to the conceptualization of heat of passion as a partial justification is that the killer must have been seriously wronged—there presumably must be adequate, *real* provocation in order to even attempt an argument that a reactive killing is at all justifiable."¹⁸ I disagree with the claim within the quotation, as it rests on a view of justification that I reject. Nonetheless, I agree with him that his argument would be moot if provocation were a partial

14. See *infra* note 39.

15. Fontaine, *supra* note 1, at 28.

16. *Id.* at 7–10.

17. *Id.* at 10.

18. *Id.* at 10–11.

justification, because (on my view of justification but not on his) its being a partial justification would entail that the killer, to be eligible for the defense, must have believed on reasonable grounds that he was seriously wronged, and Fontaine is interested in cases where the killer did *not* have reasonable grounds for his belief. (Here I assume that someone whose view of the situation is due to an “interpretational bias” of the sort Fontaine is interested in could not be said to have believed reasonably that he was seriously wronged. One might argue that we could relativize “reasonable” so that we mean “reasonable for someone with an interpretational bias,” but I think that would be misguided, and I believe that Fontaine shares that view.)

IV.

I now return to Fontaine’s claim that none of the cases he describes makes sense unless the provocation defense is understood to be an excuse. I begin with cases 1A, where D reasonably believed that V did x and that V’s doing x seriously wronged D, when in fact V did not do x and indeed, no such wrongdoing took place at all. My discussion builds on my remarks above concerning justification.

Barring further argument,¹⁹ that these cases can qualify for the heat of passion defense no more shows that the heat of passion defense is unequivocally one of excuse than does the fact that some cases of mistaken self-defense can qualify for self-defense show that self-defense is unequivocally an excuse. To see this, consider that (a) self-defense is standardly classified (in, among other places, casebooks, criminal law treatises, and criminal codes) as a justification and (b) what is required for self-defense is, *inter alia*, reasonable belief that one needs to use force to thwart an imminent threat, rather than that it actually be the case that there is an imminent threat and that one needs to use force to thwart it.²⁰

19. The only line of argument I can think of that could be helpful here would be as follows (as briefly noted *supra* in the text accompanying note 9). It might be claimed that there is something unique about the provocation defense such that if it were a justification, it would have to be a justification in the sense of “justification” favored by Fontaine, according to which the provocation would have to be real. In other words, one might try to argue that although in general, justification requires reasonable belief, and not truth, if provocation were a justification, it would have to be a justification in a different sense of “justification” according to which p’s truth, not just S’s reasonable belief that p, is required. I will not try to develop such an argument or address it in this Essay.

20. There are rare exceptions. Dressler notes that in *State v. Bradley*, 10 P.3d 358 (Wash. 2000), “notwithstanding the general rule, and despite a sharp dissent, the court holds that a jail inmate who uses force against a correctional officer may not successfully claim self-

Given (a) and (b), there is no reason to think that the fact that the heat of passion defense does not require actual provocation shows that the heat of passion defense cannot be a justification. As noted above, I do not in fact believe that the heat of passion defense is a justification. (I view it as a kind of hybrid: mostly an excuse, but with a justificatory component.) I am only pointing out here that cases of type 1A do not do the work that Fontaine claims they do.

One might reply that self-defense, despite generally being so classified, should not be regarded as a justification, since it does not require that the need to use what otherwise would be illegal force was real. Or one might argue that only the use of force in self-defense that is not predicated on a mistake of fact should be seen as justified and that self-defense that does involve such a mistake should be treated as excused, provided that the mistake is reasonable.²¹ Yet another possibility is a proposal by Professor Fontaine, viz., that these problematic cases should not be considered self-defense at all, and should be classified under a different (and new) defense: “mistaken self-defense.”²² This is not the place to enter the debate on whether self-defense should be reclassified or reconfigured in one of the ways mentioned. Suffice it to say that (1) there are legal scholars who think it should be; and (2) unless we are willing to classify self-defense as an excuse, or to separate self-defense that involves a pivotal mistake of fact from “true” self-defense, 1A type cases do not provide evidence that the heat of passion defense is an excuse.

That said, I do not mean to rest my argument that the 1A cases do not provide evidence that the heat of passion defense is purely an excuse solely on the fact that self-defense is standardly classified as a justification, together with the fact that it is widely understood to require reasonable belief (or sometimes simply honest belief) and not to require truth. I do not, that is, mean to rest my argument on custom. For I think that there are very good reasons for understanding justification in this way. In the next two sections I

defense unless he is in actual imminent danger of serious injury; a reasonable but mistaken belief is insufficient.” DRESSLER, *supra* note 6, § 18.01 n.11.

21. Or perhaps even if the mistake is not reasonable. Some do not think that a reasonable belief should be required for acquittal.

22. He argues that “because (a) self-defense is a full justification defense, and (b) ‘self-defense’ cases that are based in part or in whole on the defendant’s reasonable mistake of fact cannot be justified, a new, separate defense, which I call *mistaken self-defense* (and *mistaken defense of others*), need[s to] be recognized in order to *excuse* (and not justify) the defendant’s understandable but erroneously motivated violent act.” Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. (forthcoming 2010). See also Claire Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621 (1996); Hibi Pendleton, *A Critique of the Rational Excuse Defense: A Reply to Finkelstein*, 57 U. PITT. L. REV. 651 (1996).

will explain those reasons, and then in Section VII I will explain why there is also a pull in the opposite direction, towards applying the concept of justification only to cases where the relevant belief was true.²³

V.

I begin this section by explaining more fully my understanding of justification and how justifications and excuses differ.²⁴

Here is a view I endorse but also think does not tell the whole story: To say that an action is justified is to say that although it is of a type that is usually wrong, under these circumstances it was right. To say that an action is excused is to say that it was wrong, but that the agent who committed the action is not blameworthy.²⁵ Disagreements arise among those who otherwise agree with this statement in part because of some unclarities in what is meant by “right.” “Right” is ambiguous in at least two ways: first, it can mean merely “permissible,” but can also mean “obligatory” or something in between permissible and obligatory. (Whether one is consequentialist or not also enters in, affecting how one cashes out the terms, and affecting the distance between permissibility and obligatoriness.) In addition, and more crucial to my discussion,²⁶ “right” can mean either “formally right” or “materially right,” where formal rightness does not require a match between the agent’s view and reality, but only that the agent conducted herself as she should (relative to what she believed, and to what it was reasonable for her to believe). Thus, according to this distinction, someone who attempted to save her child’s life by giving him what she thought was medicine but unwittingly caused his death because, unbeknownst to her, the bottle contained poison would (assuming, at least, that she had no reason to suspect the bottle contained poison) have acted formally rightly, but not materially rightly. By contrast, the conduct of someone who aimed to poison her child but inadver-

23. See also Baron, *supra* note 5, §§ 5–8.

24. Since “excuse” is sometimes used casually to encompass both justifications and excuses, I should note that I here use “excuse” only in the narrower sense, according to which a justification is not an excuse.

25. One possible source of controversy is that I have spoken here of an action being excused, whereas some hold that only actors, not actions, are excused, and that only actions are justified. I firmly disagree. I’ll say a little more about this below, but for further discussion, see Baron, *supra* note 5, §§ 3–7.

26. The first ambiguity is by no means irrelevant, however; those who favor the stronger reading of “right” for purposes of understanding justification are more likely to believe that reasonable belief does not suffice for justification.

tently (due to a mistake about the contents of a bottle) prevented the child from becoming sicker and put him on the path to recovery would be materially right²⁷ but formally wrong.

Those who, perhaps without realizing it, think of “right” as meaning “materially right” will understand the italicized position to mean that justification does require “getting things right”; those who understand it as meaning “formally right” are less likely to do so. I say “less likely” rather than claiming that they will not do so because there is another complication—and another source of disagreement—that enters in. I framed the position in terms of *an action being justified*, but we also speak of *an agent being justified in doing x*. (This is why I said that that account of justification does not tell the whole story.) My claim is that when we speak of an agent being justified in doing x, we—even those of us who understand “S’s action was justified” to require that the action was materially right (whether or not we hold it also must have been formally right)—require first and foremost formal rightness. Do we also require material rightness? I think not. I hold that “S was justified in doing x” requires that S’s conduct was formally right, but does not require that it was materially right. By contrast, I hear a claim that an action is justified as ambiguous. More on this below.

Now, the fact that in many contexts we use “S was justified in doing x” in a way that entails that S acted formally rightly but does not entail that S acted materially rightly, is not yet to say that in the law, as well, we should understand “S was justified in shooting T in self-defense” to entail that S believed on reasonable grounds that she needed to shoot T to prevent him from killing or seriously injuring her, and not to entail that it really was necessary to do so. However, since in evaluating S’s conduct within the context of criminal law, we are looking not merely at the action in isolation from the defendant, but at how S conducted herself, it does seem to me very plausible to say exactly that.

VI.

Consider the following example, borrowed with slight modification from R.A. Duff:

Diane goes by arrangement to call on Bill, an elderly relative who is visiting a friend nearby. The doorbell is not answered;

27. On one version of the distinction, anyway. Some hold that one cannot act materially rightly without also acting formally rightly, but I am assuming that material rightness does not require formal rightness.

when she looks through the window, she sees Bill lying face down on the floor; banging on the window does not attract his attention. Knowing Bill's history of heart problems, she thinks that he [probably] . . . had a heart attack—but how can she help? The house is isolated; she has no mobile telephone; it would take too long to run to the nearest house for help (she came on foot). So she decides that she must break into the house in order to telephone for help and to give Bill emergency aid (as she is trained to do). She therefore reluctantly, but decisively, breaks in, knowing that she is causing expensive damage to the carefully restored window The story then develops in one of two ways—

(1) Bill has had a heart attack, and would have died had Diane not administered such timely first aid; she saves his life.

(2) Bill has fallen asleep, with his hearing aid turned off, whilst practicing a new relaxation technique, and needed no medical attention.²⁸

Everyone will agree that if the story develops in the first way, Diane is justified. Suppose that it develops in the second way. Diane of course has reason to regret having broken into the house, since it turns out to have been unnecessary. What should be the stance of others? Should Bill, or the owner of the home, say, when Diane apologizes for having needlessly broken the carefully restored window, “Don't worry; your mistake is perfectly understandable, and we completely excuse you?” Or if not say to Diane, say to each other, or at least think to themselves? Surely this would give Diane too little credit. She believed something that turned out not to be the case, but the evidence suggested that it was the case, and importantly, she acted rightly in erring on the side of caution here. The cost of an error in the opposite direction would be vastly higher than the cost of an error on the side of caution.²⁹

Notice that it is not the case (focusing still on scenario (2)) that there is something that Diane should have noticed, known, remembered, or thought about. As Duff emphasizes, Diane “acted just as she should have: her practical reasoning was impeccable

28. R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 271 (2007).

29. Portions of this paragraph overlap with my discussion of this topic in another paper. See Marcia Baron, *(Putative) Justification*, 13 JAHRBUCH FÜR RECHT UND ETHIK (ANN. REV. L. & ETHICS) 377, 386 (2005).

...”³⁰ He elaborates: “Had she asked for advice about what to do from others in the same epistemic position as her, they should have advised her to act just as she did; if someone asks us what he should do if he found himself in a situation like hers, we should advise him to act just as she did.”³¹

Insofar as we agree that in scenario 2, Diane was justified in breaking the window, this bears out the following: justification is tied to how well one conducted oneself, not to whether what one did turned out to be for the good. Further evidence of this can be seen by imagining a slightly different history to 2: Diane turns out to have had (on her keychain, on her person) a key to the house that Bill gave her a few days earlier. She simply forgot about the key. Here we begin to be less sure that we want to say that she was justified in breaking the window, not because it now turns out that she did not need to break it after all—that we already knew, since Bill turned out to be fine. But the fact that had she only remembered she had the key, she would not have needed to break the window, or that had she thought for a minute about her options, she might have remembered she had the key, factors into our thinking. This too suggests that our willingness to say she was justified is shaped by our judgment of how well she conducted herself.

Thus we speak of a person as justified to indicate that she acted as she should, despite the outcome;³² it would give her too little credit to say we excuse her. We excuse people when their conduct was not all that it should be, but where we recognize that it is too harsh to blame them for failing to conduct themselves as they should have. It is too harsh either because of some feature of the agent for which she is not culpable that rendered it very difficult for her to act as she should, or because the circumstances were such that it would have been very difficult for most people to act as they should.³³

It is worth noting that our use of “justified” in connection with beliefs and expectations conforms by and large to the picture I have sketched, and is sharply at odds with the view of justification according to which justification requires truth. Clearly, a belief may be justified without being true. When we say that a belief is

30. *Id.* at 274.

31. *Id.* at 274–75. It seems to me far more apt to say that she was justified than that she was excused. Duff agrees that “justified” is more apt than “excused,” but thinks neither is on the mark, and that we need a richer classification for exculpatory defenses than we now have. *See id.* at 265, 270. *See also* E-mail from R.A. Duff to Marcia Baron (Dec. 24, 2004, 07:41 EST) (on file with the University of Michigan Journal of Law Reform).

32. I will complicate the story in the next section.

33. For a more detailed and nuanced account, see Marcia Baron, *Excuses, Excuses*, 1 CRIM. L. & PHIL. 21 (2007).

justified, we mean that there are good grounds for it, and we generally mean that the agent believed it on (some of) those grounds. Indeed, in epistemology it is uncontroversial that S's being justified in believing p, and for that matter, p's being a justified belief, do not require that p be true.³⁴

VII.

As noted, this does not entail that we should continue to use "justified" in the context of criminal law as we do in other contexts. Nor does it tell the whole story of how we use "justified" outside of that context. Duff points out that there is some resistance to saying that Diane, in scenario 2 (as presented at the start of Section VI) was justified in breaking the window.³⁵ Although it rolls off my tongue naturally enough, I do recognize that it is less obvious in scenario 2 than in scenario 1 that she was justified in acting as she did. Why should that be? In this section I will offer an answer to that question, as well as to this one: Why is there any temptation in the context of criminal law to use "justified" in a way that requires truth? The answer to the first question is part of the answer to the second, and draws upon what I explained above, in Section V. An unclarity in what we mean by "right conduct" or "acted rightly," and some tension in our thinking about right conduct that that unclarity reflects, form the heart of my answer to the first question, and also contribute to the answer to the second. But also entering into the second is a need in law for another concept for which the word "justification" is routinely used. This dual use of the word "justification" in criminal law, intertwined with the tension in our thinking about right conduct, provides a good explanation of why justification in criminal law might be viewed as requiring truth.

As I suggested above, we peg justification to "right" (in the sense of "not wrong");³⁶ but an unclarity in precisely what it is that we are affirming (or denying) to be "right" leads to a division. We say (a) "You were right to do that," but also (b) "What you did was right" or (c) "That action was right." Though all three are ambiguous, the first is likely to be a positive evaluation of *the way the agent*

34. Thanks to Frederick Schmitt for discussing this with me at length, and brainstorming to try to think of any epistemologists who hold that either S's being justified in believing p, or p's being a justified belief, requires that p be true.

35. DUFF, *supra* note 28, at 271.

36. Here too an ambiguity lurks, and with it another disagreement (as noted above, in Section V): "right" can mean simply not wrong (or permissible), but can also mean something stronger than that. For reasons I explain in Baron, *supra* note 5, I favor a weaker reading. See also DUFF, *supra* note 28, at 266.

conducted herself, and to be consistent with the speaker's acknowledging that the action turned out (as in scenario 2) to be regrettable. The third is more likely to be an assessment of the action itself, separate from the reasons the agent had, and separate from the agent's motives, and perhaps the same is true of (b), though I think that is a hard call. But I am not concerned to figure out exactly which locutions suggest which appraisal; my aim here is to draw attention to an unclarity in the use of "right" that reflects a difference between an evaluation that is consistent with viewing the action as regrettable and an evaluation that is not, where the first evaluation is focused on the action itself, and the second on how the agent conducted herself.

Locutions with "justified" also are ambiguous, but I think this much is clear: "S was justified in doing x" is a comment on S, not on x; it makes little sense to say that S was justified in doing x if S did x for entirely the wrong reasons and had no idea that x would bring about the good consequences that it did bring about (or that it was an instance of, say, treating others with respect, whereas the alternatives open to S were not). By contrast, "The action S performed was justified" is less clear. Is the claim that S was justified, or only that the action was, even though S did not do it for that reason? It can be either; the latter is perhaps more likely.

Now, in the criminal law, there is a particular need to say "This type of action is generally illegal, but in circumstances C, it is permitted" and this is then framed in terms of justification. Thus, we say that self-defense is justified, meaning that actions of a certain type are justified.³⁷ That we employ the same word—"justified"—to single out actions that are permitted, in particular circumstances, despite being of a type that is generally prohibited, *and* to indicate a person's being justified in acting as she did, no doubt is a source of confusion. No wonder "justified" seems on the one hand to entail truth, and on the other hand, not to. My suggestion is that when we use "justified" to claim of a particular person that she was justified in doing x—and when we are asking whether she was justified, or should merely be excused—what matters is how she conducted herself. Thus, in circumstances (such as self-defense) where belief is critical,³⁸ what matters is whether

37. It is important to bear in mind, however, that we decide whether they are justified by reference not primarily to whether the features in virtue of which it seems important to make an exception to the general prohibition of intentional killing actually do obtain, but to whether they would appear to a reasonable person in those circumstances to obtain.

38. I put it this way to leave open the possibility that for some defenses, it is not belief but an emotional response that needs to be reasonable.

the belief on the basis of which she acted was held on reasonable grounds, not whether the relevant belief is true.

To sum up: I have tried to show why in the context of evaluating someone's conduct, it makes very good sense to peg justification to how she conducted herself and thus to reasonable belief that p, rather than to p's being true. I have also tried to explain why there is some pull towards the view that justification requires truth.

VIII.

The last three sections were in the service of evaluating Fontaine's claim that 1A cases are incompatible with viewing provocation as a justification. I turn now to the 1B cases, and then proceed in turn to the 2A cases and the 2B cases.

The 1B cases are those in which *the killer's belief that he has been provoked is unreasonable*.³⁹ I agree with Fontaine that cases of this type are incompatible with viewing provocation as a justification. But I do not agree that the case he cites, *State v. Mauricio*,⁴⁰ is of type 1B, and have doubts about 1B cases being at all common⁴¹ (though I would not be altogether surprised to hear of some in jurisdictions that follow the MPC approach on heat of passion).⁴² Rather than investigating what cases there may be, I limit my discussion to the case he presents.

39. At some points Fontaine seems to be saying that 1B cases include those in which either the defendant's belief that he was provoked is unreasonable, *or* his belief that he was provoked by the victim was unreasonable. I have corresponded with him to verify that I accurately presented his classification in Section II, *supra*, and he assures me that I have. "The first category does *not* have to do with the perceived source of the provocation, only whether real provocation was demonstrated. It is the second category that has to do with the source of the provocation (i.e., where the provocation came from a non-victim; the victim clearly did not provoke the killer)." E-mail from Reid Fontaine to Marcia Baron (Dec. 15, 2008, 09:34 EST) (on file with the University of Michigan Journal of Law Reform).

40. 568 A.2d 879 (N.J. 1990).

41. I should add that even if the cases are not frequent, if they are cases of a sort that we think should qualify as heat of passion killings, he would be helping his case by drawing our attention to them. I doubt, however, that anyone not already convinced that provocation is purely an excuse would think that cases of type 1B should qualify as heat of passion cases, and indeed wonder if many people who *are* convinced that it is purely an excuse would think that they should so qualify.

42. As noted above, I am not arguing that his arguments do not show the EMED has to be understood as purely an excuse, but only that they do not show that the traditional heat of passion defense has to be so understood. So I am speaking here only of cases in jurisdictions that do not follow the MPC approach. Moreover, cases where, although the statute reflects the traditional heat of passion approach, the MPC was relied on to support the ruling likewise do not concern me, since I do not deny that the MPC approach strongly encourages rejecting any requirement or even presumption that has a justificatory ring to it.

What reason is there for viewing *Mauricio* as a case in which the defendant's belief that he was provoked was unreasonable (and was so viewed by the Court)? It is true, as Fontaine says, that *Mauricio* involves intoxication, and it is certainly a good possibility that the intoxication is part of the explanation of Mauricio's mistaking the victim for the provoker.⁴³ But Fontaine cites it as a case in which it is the defendant's belief that he was provoked, not his belief that he was provoked by the victim, that was unreasonable. Why think that the defendant's belief that he was provoked was unreasonable, or that the Court held or assumed that it was? The Supreme Court of New Jersey's ruling makes it clear that in reversing, it holds that there is sufficient evidence for a jury "rationally to conclude that a reasonable person might, under the circumstances, have reasonably been provoked to the point of loss of control."⁴⁴ *It does not mention intoxication at all in explaining the reversal*, and makes it very clear that it is relying on a traditional reasonable person requirement:

We are satisfied that the evidence was susceptible of different interpretations and that defendant's view of the case would have permitted a jury rationally to conclude that a reasonable person might, under the circumstances, have reasonably been provoked to the point of loss of control.⁴⁵

Two physical altercations with a bouncer, in a short span of time, the Court notes, could constitute adequate provocation, as standardly understood. The Court offers similar remarks concerning the requirement that the defendant not have cooled off (at the same time acknowledging evidence that suggested that the subjective test might not have been met, but judging that this was for the jury to decide). So this case is in keeping with the traditional view of adequacy of provocation, rather than one in which the defendant's belief that he was provoked was unreasonable. The Court, at any rate, so views it, and I think it is absolutely correct in doing so.

What reason might there be for thinking otherwise? Fontaine is relying on the mention of intoxication. But intoxication is mentioned only in a different context: in the Court's explanation *not* of

43. Even so, that would not entail that his mistaking the victim for the provoker was unreasonable; no information is given as to whether the victim looked much like the provoker, so we cannot tell. (It is a little awkward to speak of mistaking one person for another as either reasonable or unreasonable; but insofar as it does make sense, the reasonableness of the mistake would presumably hinge largely on whether there was a strong resemblance between the persons in question.)

44. *Mauricio*, 568 A.2d at 885.

45. *Id.*

its reversal regarding the heat of passion defense, but rather of its agreement with the appellate court that the trial court did not err in refusing to provide an intoxication instruction. The Court stated, “We agree with the court below that the evidence was entirely insufficient to create a jury question on defendant’s intoxication.”⁴⁶ Now, I do not mean to suggest here that the Court, in taking that position, held that in fact he was not intoxicated; it is consistent with the Court’s reasoning that it thought that the evidence, looked at in its totality, indicated some level of intoxication, but a level of intoxication too low for an intoxication instruction to be warranted. The Court notes that there was, in addition to testimony that Mauricio seemed intoxicated, evidence presented by the prosecution that the defendant had not suffered a “prostration of faculties” (e.g., evidence that he could get up quickly after being knocked down).⁴⁷ The evidence was such that it was clear that insofar as he was intoxicated, he was not intoxicated enough to be thereby prevented from forming the necessary intent.

Let us assume, for purposes of trying to understand why Fontaine sees this case as involving an unreasonable belief on the killer’s part that he was provoked, that Mauricio was intoxicated and that the Court was aware that he was. How does intoxication factor in? Fontaine says that “a mistake, by definition, cannot be presumed reasonable if made when the maker is intoxicated”⁴⁸ and notes that “some courts have asserted that a non-sober judgment of provocation is necessarily inconsistent with reasonableness.”⁴⁹ In support of his claim, he cites *Howell v. State*: “[T]he existence of serious provocation must be determined through the eyes of a reasonable (and sober) person standing in the defendant’s shoes.”⁵⁰ Fontaine concludes: “The Supreme Court’s reversal in *Mauricio*, then, effectively recognized that a presumably unreasonable (due to intoxication) mistake as to provocation by the victim may be

46. *Id.* at 887.

47. *Id.*

48. Fontaine, *supra* note 1, at 19. I agree that a mistake cannot be presumed reasonable if made when the maker is intoxicated (though I’m not clear that that is true *by definition*). But in any case, there is no mistake here other than his mistaking the victim for the provoker. Since 1B cases concern only mistakes about the provocation, not about the source, that mistake cannot be what Fontaine has in mind. Substituting “judgment” for “mistake,” I again agree that a judgment cannot be presumed reasonable if made when the maker is intoxicated, but neither, I would submit, should it be presumed unreasonable. It might be, but it need not be. If one wished to claim that it should be presumed unreasonable, it at least needs to be acknowledged that this would be a rebuttable presumption.

49. *Id.* at 20 n.35.

50. 917 P.2d 1202, 1207 (Alaska Ct. App. 1996).

considered when determining adequate provocation in heat of passion.”⁵¹

Let’s examine his inference from the quotation from *Howell* to the conclusion that in recognizing that Mauricio was intoxicated when he killed, yet ruling that he should have received a heat of passion instruction, the Supreme Court in effect held that provocation can be judged adequate even though the defendant’s belief in the existence of serious provocation was unreasonable. Does it follow from the fact that the existence of serious provocation must be determined through the eyes of a reasonable and sober person standing in the defendant’s shoes, together with the fact that Mauricio, the defendant, was (as we are assuming) intoxicated at the time that he killed, that Mauricio’s judgment that there was serious provocation was unreasonable? No. That the existence of x must be determined through the eyes of a reasonable and sober person standing in the defendant’s shoes does *not* entail that if D was not sober at the time, the requirement is not met. In case this is not evident, imagine another scenario with a relevantly similar structure. Suppose that another somewhat intoxicated person—like Mauricio, not so intoxicated that she suffers “prostration of faculties”—is at a bar with her best friend, and while dancing, loses sight of her friend. Looking for her outside, she hears sounds of a scuffle and of acute distress, and discovers to her horror that her friend is being raped. Upon hearing D approach, the rapist tries to flee the scene, but D, enraged at what she has seen, shoots and kills him.⁵² The fact that this defendant was drunk is largely irrelevant to the question of whether a reasonable person in D’s situation would (or might) be similarly provoked. The question is a counterfactual question, a question about how a reasonable person would or might have reacted. It is not a question about whether the defendant was a reasonable person, or was in full possession of her faculties at the time. The reasonable person standard for provocation thus should not require that the defendant be sober at the time she killed. Unless her intoxication is a necessary part of the explanation of why she was provoked (explaining an overreaction), the objective test can be met despite the fact that she is intoxicated. In sum, Fontaine is wrong to infer from the position he quotes from *Howell* that if Mauricio was intoxicated at the time that he killed, his belief that he was (objectively) provoked was unreasonable.

51. Fontaine, *supra* note 1, at 20.

52. This example is loosely based on a pivotal scene from a famous (albeit not particularly good) film, *Thelma and Louise*. THELMA AND LOUISE (Metro-Goldwyn-Mayer 1991).

If Mauricio's drunkenness is not a necessary part of the explanation of his sense that he was provoked, it is immaterial. This seems to be the way the Supreme Court of New Jersey viewed the case. Had they thought it was material, presumably they would have offered some remarks in defense of their claim that there was sufficient evidence of adequacy of provocation for a jury instruction on heat of passion to be warranted.

To conclude the discussion of *Mauricio*: we have not been provided with a Category 1 case in which the killer's belief that he has been provoked is unreasonable, but where heat of passion is deemed by a court to be legally an option. One might nonetheless argue that it would be wise to expand the heat of passion defense to encompass such cases, but I think such an expansion would be unwise, for many of the same reasons that the less dramatic shift in that direction proposed by the MPC has proven problematic.⁵³

IX.

I turn now to Category 2 cases. The first type (2A) comprises cases in which D intended to kill the provoker, but accidentally killed someone else. Fontaine has in mind cases where D killed both the provoker and another person, as well as cases where D failed in his attempt to kill the provoker, but accidentally killed someone else. The second type (2B) comprises cases in which D knowingly, and perhaps intentionally, killed a non-provoker. The question for us to consider is whether these cases show that the heat of passion defense must be purely an excuse.

In the case Fontaine provides as an instance of type 2A, Paredes shot into the car occupied by the provoker and others, and killed both the provoker and (accidentally, it seems) a passenger in the car. Convicted of two counts of voluntary manslaughter, he appealed the second count, arguing that the instruction on transferred intent given to the jury was in error because transferred intent applies only to murder, not to manslaughter. The court ruled that he was wrong on this point of law. While the doctrine of transferred intent "is most often applied in the context of a murder charge, nothing in California decisional or statutory law limits it to murder or prevents it from being applied to a voluntary manslaughter charge."⁵⁴ The court observed that the rationale is

53. For discussion of the problems, see Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

54. *People v. Paredes*, No. B182323, 2007 WL 3015696, at *2 (Cal. Ct. App. Oct. 17, 2007).

the same, whether applied to a murder or to a manslaughter charge:

In either event, the doctrine reflects “the blameworthiness of someone who, acting with the intent to kill . . . actually has killed another individual” and allows the perpetrator to be “punished for a crime of the same seriousness as the one he tried to commit against his intended victim.”⁵⁵

One might question whether this rationale makes sense in an instance in which the perpetrator killed both the person he intended to kill and another. What is quoted seems to be formulated for cases in which the killer kills only one person (or at most, no more than the total number he intended to kill), and indeed, *Shabazz*, the case from which the rationale is drawn, involved precisely that. *Shabazz* intended to kill one person, but the intended victim ducked, and the bullet fatally wounded someone else.⁵⁶ And one might well question the doctrine of transferred intent itself. But these are not our concerns. For our purposes, what matters is the court’s response to *Paredes*’ claim that the doctrine does not apply to manslaughter—not only what the court does say, but also what it does not say. To that in a moment.

Is *Paredes* a case that we cannot make sense of if we suppose provocation to be a justification? Fontaine thinks it is because, he reasons, the defendant cannot possibly be justified in killing a non-provoker. He states, “[h]ere, mitigation must be seen as an excuse as it cannot be that the killing of the non-provoking victim was even slightly justifiable.”⁵⁷ I see why Fontaine says that it was not even slightly justifiable: it is true. But that does not mean that we can make sense of *Paredes* only if we suppose provocation to be an excuse, or that the Court’s reasoning relied on provocation being so classified. The reasoning behind the ruling does not draw at all upon the nature of the heat of passion defense. It relies solely on the doctrine of transferred intent and on the fact that “nothing in California decisional or statutory law limits it to murder or prevents it from being applied to a voluntary manslaughter charge.”⁵⁸ Fontaine claims that in *Paredes*, “transfer of intent is interpreted to mean that, because the defendant’s fury undermined his control and ability to form malice aforethought, his wrongful killing of the

55. *Id.* (quoting *People v. Shabazz*, 38 Cal. 4th 55, 64 (2006)).

56. *Shabazz*, 28 Cal. 4th at 62.

57. Fontaine, *supra* note 1, at 22.

58. *Paredes*, 2007 WL 3015696, at *2.

non-provoking victim . . . is non-murderous.”⁵⁹ The Court could have taken that position, and perhaps its members would endorse it if asked. However, there is nothing in the opinion that points to such a view. The Court simply does not speak to it.

One might claim that although the Court did not speak to it, it must have been assuming that provocation was a partial excuse, for how could the doctrine apply otherwise? I see no special difficulty in applying the doctrine if provocation is understood as a partial justification. The idea would be (a) that D was slightly justified in his killing of the provoker,⁶⁰ and (b) that if the doctrine of transferred intent is accepted, culpability for the death of the intended victim transfers over to the second death. Again, one might question the doctrine and its application to cases where the killer killed both the person he intended to kill and another, but if both are accepted—and if the doctrine is accepted, as the Court says, as a matter of “policy”—one need not tell a story according to which D’s killing of the non-provoker is partially justified on its own merits. The doctrine (at least as understood by *Paredes*) holds that whatever mitigates the killer’s culpability for the killing of the first victim, also mitigates the killer’s culpability for the killing of the second victim (barring any specific exclusion). It is noteworthy that *Paredes* does not discuss what it is that mitigates culpability in this particular case, though it notes that mitigation from murder to manslaughter can be due to imperfect self-defense as well as to provocation. The Court does not need to attend to what it was that mitigated culpability, because the doctrine dictates the answer to the question, “To what extent is the defendant culpable for the death of the victim he did not intend to kill?” The answer is that whatever culpability he had for the first victim—or whatever culpability he would have had had he succeeded in killing the person he attempted but failed to kill—he also has for the second.

Since self-defense is a justification, it is helpful, in thinking about how the doctrine could apply if provocation were a justification, to see how analogous cases—cases where one accidentally killed someone other than the aggressor—are handled when the defense in question is not provocation, but self-defense. Dressler explains (noting that courts have not addressed a large number of such cases) that courts generally “apply a transferred-justification doctrine, similar to the transferred-intent rule,” though in instances where D “fires a weapon ‘wildly or carelessly,’ thereby

59. Fontaine, *supra* note 1, at 22.

60. Note that this is not equivalent to saying that the action itself was slightly justifiable.

jeopardizing the safety of known bystanders,” some courts may find D guilty of manslaughter of a bystander.⁶¹ The underlying principle is easy to discern: if the defendant acted justifiably in using force in self-defense, then at least if he did not exhibit culpable disregard for the welfare of others, he is considered to have acted justifiably even if in defending himself, he accidentally caused the death of a bystander. A similar principle would apply in cases of an accidental killing of a non-provoker were we to view provocation as a justification: if D were partially justified in killing V, a provoker, then unless D showed a disregard for the welfare of bystanders, D would still be considered partially justified in his conduct even though he inadvertently caused the death of a bystander while attacking, or taking aim at, V. Whatever one thinks of the doctrine of transferred intent, the fact that it is applied in some provocation cases in no way shows that provocation has to be understood as an excuse to make sense. That self-defense, though considered a justification, utilizes the principle I have articulated in cases where D inadvertently kills an innocent bystander, is evidence that *Paredes* does not pose any problem for the view that provocation is a justification. Again, I want to clarify that I do not myself regard it as a justification; I am arguing only that *Paredes*, and 2A cases in general, do not pose a problem for those who wish to so classify them.

I turn now to 2B cases, those in which the defendant knowingly, and perhaps even intentionally, kills a non-provoker. In the case Fontaine cites, *State v. Stewart*, the defendant stabbed his ex-girlfriend and their young son to death.⁶² Convicted of the murder of his son, along with heat of passion manslaughter for the killing of his ex-girlfriend,⁶³ he appealed the murder conviction. Although it upheld the conviction, the Supreme Court of Minnesota noted that its reason for doing so was not that because the toddler was clearly a non-provoker, there was no basis for a heat of passion defense, but rather that Stewart’s admissions demonstrated that he killed his son not in the heat of passion, but to avoid detection for the crime he had just committed. The Court agreed with the appellant that “the trial court erred in ruling that there is no transference of heat of passion from the provocateur to a third-party victim who

61. DRESSLER, *supra* note 6, at 266.

62. 624 N.W.2d 585 (Minn. 2001).

63. He was also convicted, thanks to the doctrine of transferred intent, of manslaughter for the killing of her fetus (or, as the Court put it, “unborn baby”). *Id.* at 587.

is not a provocateur . . . ”⁶⁴ and the case is of interest to Fontaine precisely for that reason.⁶⁵

I agree with Fontaine that this ruling is incompatible with classifying the heat of passion defense as a partial justification rather than a partial excuse. There is no way in which the intentional killing of someone D knew to be a non-provoker could be partially justified on grounds of provocation. My reason for thinking this is not the same as Fontaine’s, however. My reason is that one cannot know someone to be a non-provoker yet believe, let alone on reasonable grounds, that the person seriously wronged him. Fontaine’s reason is that to be even partially justified, the killing must be a response to an *actual* serious, wrongful harm.⁶⁶

Of the rulings Fontaine cites (in all four categories), this is the only one that I agree is incompatible with classifying heat of passion as a justification. However, there is an important feature of the case that reduces its value for Fontaine’s purposes: as he notes, the Court relies on the MPC to support its claim that “the victim and the provocateur need not be the same person”⁶⁷ Since the MPC version of the heat of passion defense was carefully crafted to be an excuse,⁶⁸ it is not surprising that a ruling that relied on the MPC approach—specifically on the MPC position just quoted—makes sense only if the defense is viewed as an excuse. That said, if the case he presents happens to be indicative of a trend for courts in jurisdictions that have not adopted the MPC approach to draw upon the MPC and reject the traditional requirement that the victim be the (or a) provoker, that is indeed significant. That requirement is strong (though by no means the only) evidence of a justificatory component in the heat of passion defense, so if in fact

64. *Id.* at 591.

65. To forestall confusion, I should mention that the doctrine of transferred intent was not in play here.

66. Fontaine imposes a further restriction: “If the reactive killing *does not prevent* further unjust harm, then in no way could it be argued that heat of passion is a partial justification.” Fontaine, *supra* note 1, at 30. I disagree, but will not take this up here.

67. *Id.* at 24 (quoting *Stewart*, 624 N.W.2d at 589–90).

68. Not that no one views the EMED as a justification; Vera Bergelson seems to in her *Provocation: Not Just a Partial Excuse*, in *CRIMINAL LAW CONVERSATIONS* 328 (Paul H. Robinson, Stephen P. Garvey, & Kimberly K. Ferzan eds., 2009). She claims that the fact that the law requires a “reasonable explanation or excuse” (clearly a reference to the MPC), thus asking “not only how badly the actor was distressed, but also *why* he was so badly distressed, implies that only a person who was *justifiably* outraged may be entitled to the defense of provocation.” *Id.* at 328–29. I disagree. First, it is true that requiring a “reasonable explanation or excuse” entails that the defense has an objective component, but a defense can have an objective component (as does duress) while nonetheless being an excuse. Second, the requirement does not entail that the person had to be *justifiably* outraged (though it is unclear exactly what is intended by “reasonable explanation or excuse” and the MPC Comments offer little help on this).

that requirement is disappearing, even in non-MPC jurisdictions, that lends some support to Fontaine's claim that the heat of passion defense is definitely one of excuse. I am not aware, however, of any such trend.

X.

Before concluding, I want to return to an argument of Fontaine's that I sketched in Section III. The argument concerned "cognitively-biased" killers who kill in a heat of passion (hereafter CBK's) but cannot qualify for the defense because a reasonable person in the same situation would not think that she had been seriously wronged. Fontaine claims that the heat of passion defense should be available to some such killers. Specifically, he claims that in cases in which "the cognitively-biased heat of passion killer (a) did not cause his cognitive bias, and (b) could not have reasonably foreseen how said bias would contribute to his reactive killing,"⁶⁹ the killer is no more culpable than the defendant who meets the requirements for "adequate provocation" (as well as the other requirements for the defense).

I focus my attention on (b), though I want to note that even if we agree that the CBK who meets (a)⁷⁰ and (b) is no more culpable than the defendant who meets the requirements for adequate provocation, we need not accept the conclusion that the heat of passion defense should be available to some CBK's. We may, instead, hold that a different partial defense—perhaps a (possibly modified) diminished capacity defense—is more appropriate. So the argument is incomplete. Fontaine has of course been arguing that the examples he adduces of "adequate non-provocation" support the extension of the heat of passion defense in this direction, but if I am right, only one of the cases he presented supports it, and it is, as noted, one that relies on the MPC.

My concern is not so much to challenge (b) as to seek clarification, and then prompt some reflection on the degree of responsibility to which we should hold ourselves and others for recognizing our respective biases and other foibles, and moderating our behavior accordingly. First, the request for clarification: Is the idea that a CBK could not have reasonably foreseen specifically that his bias might lead him to kill someone, at some time? Or is it that he could not have foreseen that his bias might lead him to kill

69. Fontaine, *supra* note 1, at 8.

70. I am not sure that (a) should be a requirement, but I will not take that up here.

in this situation? Or is it that he could not be expected to admit that he has a cognitive bias at all? Or something a little different? With the qualification that I might take a slightly different view if I had a more complete picture of what this bias entails and how disabling it is, I want to urge that in general, we should hold ourselves responsible for being aware of our biases, our tendencies to misread situations and fly off the handle too easily, and any other tendencies that render us dangerous to others (and, for that matter, to ourselves). We are responsible for attending to these unfortunate tendencies, and for trying to understand what situations trigger the problem. If we cannot correct the problem directly, we should at least strive to keep it in check, both by steering clear of the situations in which we are likely to fly off the handle (etc.), and developing strategies for exiting (or perhaps asking others to keep us in check as needed) if, despite our efforts, we land ourselves in such a situation. The same is true concerning biases that are not conjoined with a readiness to act violently, though of course the problem is more serious insofar as the bias or other foible renders us a danger to others. We should work to correct the foibles, if possible, but even if we cannot, we should moderate our behavior to reduce the risks of harm that they create. If we cannot do so, then, depending on the risks involved, and the costs of restricting us, it may be appropriate for others to impose restrictions (e.g., barring us from possessing a firearm, or from operating a motor vehicle).

A couple of examples may help here (and I purposely pick foibles for which it seems unlikely that the agent would be culpable). If I panic when I find myself in a traffic jam, or when an unexpected detour prevents me from taking the only route I know, and thanks to my panic, become a very unsafe driver (or perhaps simply stop where I am and turn off the ignition, again creating a danger for others), this is a problem I need to address. If I cannot remedy the problem, I should try to avoid driving altogether, and at least limit my driving to times and places where such a situation is unlikely (at the same time devising techniques to calm myself down when anxious). To take a different example: If I cannot stand the sound of crying and become angry and violent when I hear it, I need to stay away from playgrounds (and hopefully have already realized that I should not become a parent or work in a school or a daycare center), and should be careful about visiting relatives or friends with young children.

With the qualification noted above, two paragraphs back, I venture to guess that someone who knows he has the cognitive bias in

question should realize that he overreacts. If so, he should take suitable steps accordingly. These would include consulting with friends to get a second “reading” of the situation before reacting, not permitting himself to own a firearm, and developing strategies for exiting disturbing situations before they become too much for him to handle. He should, in short, be held responsible for self-government. Someone who is not aware of the cognitive bias would be a more plausible candidate for an excuse, should he kill in a heat of passion (i.e., a heat that passes the subjective requirement, but not the reasonable person test), though even here we might ask if he *should* have been aware of his tendency to misread situations and respond violently.

I suggest that the affliction to which Fontaine draws attention be treated roughly the way unusual irascibility is: it should not allow someone who kills in what subjectively counts as a heat of passion to circumvent a reasonable person requirement. Perhaps, unlike unusual irascibility, it should exculpate, but if so, I think it should do so under a defense other than heat of passion.⁷¹

XI.

I hope to have shown that apart from cases relying on the MPC—and, as noted, the MPC went to some lengths to replace the heat of passion defense with a clearly excusatory defense of extreme mental or emotional disturbance—the cases that Fontaine has presented are in fact compatible with viewing the heat of passion defense as a partial justification. My aim, however, has not been to show that the heat of passion defense is a justification. I do not think it is, in part because I agree, without accepting the loss of self-control requirement,⁷² that intense emotion is at the heart of the defense. As I wrote in an earlier paper on heat of passion,⁷³ I see it as largely an excuse, although I think it has a justificatory component. But my deeper disagreement with Fontaine concerns

71. See Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003), for a proposal of “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 new defense would replace the heat of passion defense (including the MPC version, the EMED) and would resemble the EMED in that there is no requirement of provocation, but would make a much more complete break with the traditional heat of passion defense both in dropping altogether any suggestion that provocation of some sort was involved, and in allowing the defense to be applicable to all crimes.

72. Here I side with the UK Law Commission report. See UK LAW COMMISSION REPORT, *supra* note 3.

73. Marcia Baron, *Killing in the Heat of Passion*, in *SETTING THE MORAL COMPASS: ESSAYS BY WOMEN PHILOSOPHERS* 353–78 (Cheshire Calhoun ed., 2004).

the nature of justification, and I hope both to have presented reasons for taking seriously a view of justification that is tied to reasonable belief, rather than truth, and to have provided a sketch of what underlies the disagreement.