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Heating Up and Cooling Down: Modifying the Provocation Defense by Expanding Cooling Time

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HEATING UP AND COOLING DOWN: MODIFYING THE PROVOCATION DEFENSE BY EXPANDING COOLING TIME

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This Note argues for expanding the provocation defense for criminal defendants by broadening the applicability and recognition of both cooling time and rekindling. This expansion can be accomplished by transforming cooling time and rekindling into subjective standards that focus on the unique internal and external qualities of the defendant. Doing so would not only be consistent with the underlying purpose of the defense but also appropriate considering our modern understanding of the psychological effects of trauma and reactivity to provoking stimuli. Accordingly, courts should practice leniency with respect to cooling time and rekindling. The best approach to provocation is one that considers the concept of cooling time as a means of evaluating the facts and circumstances of the defendant's situation rather than a tool to bar the defense. This Note concludes that because the provocation defense results only in mitigation and not acquittal, courts should abandon the categorical approach to provocation and the objective standard of cooling time altogether to allow for flexibility across individual and cultural contexts.

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I. INTRODUCTION

Over-incarceration has become an increasing concern in modern American society.[1] In its 2018 report, the Bureau of Justice Statistics reported that "nearly 2.2 million adults were held in America's prisons and jails at the end of 2016."[2] Some commentators feel that the issue of mass incarceration undermines some of our most basic principles of justice and reveals deeper, more systemic problems in our legal system.[3] Beyond prison reform, one proposed method of mitigating the effects of mass incarceration is to look inward toward specific statutes and common law traditions that can be interpreted in a way that results in fewer (or alternatively, shorter) convictions.[4] Changing the standards for specific criminal acts, though intrinsically limited in influencing the larger institutional and societal forces at play, can nonetheless serve as a useful means of reducing some of the ill-effects of over-incarceration in individual cases.[5]

Practicing leniency by recognizing both broader defenses and potential mitigations in criminal trials is one way that judges can

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[1] Though mass incarceration is widely prevalent and poses a collective problem, data indicates that mass incarceration disproportionality affects minorities. *See* Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019), https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html (reporting that although African-Americans "comprise only about 12% of the total US population, they represent 33 percent of the federal and state prison population").

[2] *Id.* ("That means for every 100,000 people residing in the United States, approximately 655 of them were behind bars.").

[3] *See, e.g.*, David Feige & Robin Steinberg, *Replacing One Bad Bail System with Another*, N.Y. TIMES (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/opinion/california-bail-law.html ("We have locked up too many people for too long, stacking the deck against those least able to defend themselves and undermining, in the name of safety, foundational principles designed to make our nation a bulwark against tyranny and oppression.").

[4] *See, e.g.*, Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/ (explaining how the prison lobby fears lower prison demand as a result of "leniency in conviction . . . standards").

[5] "Mass incarceration is, ultimately, a problem of troublesome entanglements." Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/ (arguing that no single method exists for combating mass incarceration and instead that it is "not possible to truly reform our justice system without reforming the institutional structures, the communities, and the politics that surround it").

use their discretion to help mitigate charges.[6] The doctrine of provocation is one area of law where judges can potentially widen the availability of mitigation and partial defenses in cases involving defendants who are arguably less culpable. A wider conception of provocation, therefore, can serve as a "basis for mitigation and mercy to marginalized defendants in a regime of overly punitive policies and mass incarceration."[7]

The substance and availability of the provocation defense are highly dependent on the jurisdiction.[8] Moreover, "[t]he very nature of the doctrine has remained unresolved—judges, lawmakers, and academics alike have struggled to properly gauge the doctrine's spirit, as well as the boundaries of its application."[9] There are three general approaches to provocation: (1) some jurisdictions use a common law, categorical analysis (a far less common phenomenon now than in the past); (2) other common law jurisdictions take a more modern, case-by-case approach; and (3) a minority of jurisdictions have adopted the Model Penal Code's (MPC) approach, which abandons the provocation defense altogether for a defense rooted in emotional disturbance or distress.[10]

Provocation doctrine, which is sometimes referred to as the "heat of passion defense," can be traced back to seventeenth century English common law, making it "one of the most ancient doctrines of criminal law."[11] Today, the partial defense is nearly universally recognized in some form across every U.S. jurisdiction and even in other countries.[12]

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[6] This Note does not argue that altering the provocation defense will defeat the larger, institutional problems of mass incarceration—rather, it is meant to explore methods of alleviating mass incarceration's effects in individual cases by reducing charges (and thereby sentences) typically associated with crimes for which the provocation defense can be used.

[7] Michal Buchhandler-Raphael, *Fear-Based Provocation*, 67 AM. U. L. REV. 1719, 1738 (2018).

[8] *See* Reid G. Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J. L. REFORM 27, 33 (2009) ("[C]ommon law jurisdictions have varied considerably in their determinations as to what does and does not count as adequate provocation . . . .").

[9] *Id.* at 28.

[10] *See id.* (describing various jurisdictional approaches to provocation); *see also* Girouard v. State, 583 A.2d 718, 723 (Md. 1991); Maher v. People, 10 Mich. 212, 219 (1862); MODEL PENAL CODE § 210.3(1)(b) (1985).

[11] Michal Gilad, *Provocation and Multiculturalism*, 46 CRIM. L. BULL. 1097, 1101–02 (2010).

[12] *See id.* at 1102 (explaining that today at least some form of the provocation defense "exists in the common law and criminal statutes of most national legal systems" in the world).

"The provocation doctrine was historically designed to recognize that there are aspects of our cultural background and history that may cause reasonable people to behave in ways that are offensive to the criminal legal system."[13] In other words, society designates as generally less culpable people who were driven to commit acts of murder due to an inflamed state of passion.[14] Courts, however, often practice restraint in recognizing the defense and instructing the jury accordingly; this restraint might be attributable to the relatively demanding standard that some jurisdictions require of defendants asserting the provocation defense.[15] Some commentators argue that "[t]he prevalent hostility towards provocation often results in the defense proving too narrow for many defendants, precluding mitigation where it might be warranted."[16]

One element that restricts both the availability and feasibility of the provocation defense is the notion of "cooling time," which refers to the time elapsed between the initial provoking event and the defendant's act of killing.[17] Cooling time is typically measured by an objective standard—the question (often directed at the jury) being whether there was a "reasonable cooling time" following the

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[13] *Id.*; *see also id.* at 1103 ("[For example, t]he provocation defense makes allowances for the ways in which reasonable people are influenced and compelled by dominant cultural conceptions of natural honor." (citing James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1868–69 (1999))).

[14] *Id.* at 1106 ("Some claim that a 'person who is provoked to kill does so without the malice aforethought required for the crime of murder and is, therefore, less culpable,' and thus less worthy of condemnation." (first quoting A. DUNDES RENTELN, THE CULTURAL DEFENSE 31 (2004); then citing Douglas J. Brown, *Disentangling Concessions to Human Frailty: Making Sense of Anglo-American Provocation Doctrine Through Comparative Study*, 39 N.Y.U. J. INT'L L. & POL. 675, 722 (2007))).

[15] *See, e.g.*, *Girouard*, 583 A.2d at 723 (holding that the standard for provocation was not met because the defendant's situation relied on words alone and did not fit into the historically recognized categories of adequate provocation); State v. Pittman, 647 S.E.2d 144, 168 (S.C. 2007) (finding no error in the trial court not instructing the jury on the provocation defense because the defendant failed to establish adequate provocation); People v. Casassa, 404 N.E.2d 1310, 1317 (N.Y. 1980) (denying a defendant the MPC's Extreme Emotional Disturbance (EED) defense because he failed to establish that his development of EED was reasonable); *see also* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 476–93 (10th ed. 2017) (defining and contextualizing the concept of "cooling time").

[16] Buchhandler-Raphael, *supra* note 7, at 1737.

[17] Commonwealth v. LeClair, 708 N.E.2d 107, 111 (Mass. 1999) (stating that for provocation to be adequate the accused must "lose his self-control in the heat of passion" and the killing must have "followed the provocation before sufficient time had elapsed for the accused's temper to cool" (quoting Commonwealth v. Schnopps, 417 N.E.2d 1213, 1215 (Mass. 1981))).

provocation.[18] Related to cooling time in establishing sufficient provocation is the concept of "rekindling," which refers to a situation where a later provoking event occurs that, under normal circumstances, would itself be insufficient to constitute provocation. This event, however, is said to be "sparked" by an earlier provoking event that would have been considered adequate provocation had sufficient time not passed.[19]

This Note will argue that courts should practice leniency with respect to cooling time and rekindling in light of our modern understanding of how individuals deal with psychological and physical trauma. The best approach to provocation is one in which cooling time—instead of barring the defense—is considered in the context of the situation in jurisdictions using either the categorical approach to provocation or the case-by-case approach. Part II explains how the provocation defense functions in our current system along with competing conceptions of what constitutes "adequate provocation." Part III then introduces the legal and psychological explanations and objectives of the provocation defense. Next, Part IV advocates for replacing the objective standard of cooling time with a subjective one—essentially arguing that cooling time should be broadened as far as circumstances permit upon a showing by the defendant that he or she had not subjectively "cooled." Finally, Part V will conclude that because the provocation defense results only in mitigation and not acquittal[20] courts should abandon the categorical approach to provocation and the objective standard of cooling time altogether to allow for flexibility across individual and cultural contexts.

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[18] *See* State v. Gounagias, 153 P. 9, 12 (Wash. 1915) (holding that cooling time is based on a reasonableness standard measured by the conduct of the average person); *see also LeClair*, 708 N.E.2d at 111 (stating that a manslaughter charge is permissible when the killing occurs before sufficient time has passed to cool the defendant's temper); Maher v. People, 10 Mich. 212, 219 (1862) (holding that manslaughter is appropriate where the killing occurs before "a reasonable time has elapsed for the blood to cool and reason to resume its habitual control").

[19] *See* KADISH ET AL., *supra* note 15, at 476 ("The cooling-time limitation can sometimes be surmounted by arguing that an event immediately preceding the homicide rekindled an earlier provocation. But many courts refuse to take note of 'rekindling.'").

[20] *See* Buchhandler-Raphael, *supra* note 7, at 1723 (demonstrating that to be acquitted of homicide a defendant must claim self-defense—and that provocation merely allows for mitigation, not acquittal).

II. THE MODERN PROVOCATION DEFENSE

The provocation defense is a defense that may be available to defendants charged with criminal homicide. Criminal homicide is typically divided into two main offenses: murder and manslaughter.[21] What ordinarily distinguishes murder from manslaughter is the presence of malice aforethought.[22] Typically, a showing of malice requires a killing to be committed "willfully, deliberately, and with premeditation."[23] Provocation serves as the intermediary between murder and manslaughter—defendants who are sufficiently provoked are said not to have acted with malice.[24] Consider this nineteenth century formulation from the Michigan case of *Maher v. People*:

> But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition; then the law, out of indulgence to the frailty of human nature, or rather,

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[21] *See* People v. Beltran, 301 P.3d 1120, 1125 (Cal. 2013), *as modified on denial of reh'g* ("Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder." (quoting People v. Knoller, 158 P.3d 731, 738 (Cal. 2007))). Jurisdictions often categorize these offenses into varying degrees or levels of murder and manslaughter (e.g., "first-degree murder" or "Murder 1"). *See, e.g.*, *Beltran*, 301 P.3d at 1125 (explaining the requirements of first degree murder, second degree murder, and manslaughter in California); *LeClair*, 708 N.E.2d at 109 (noting the existence of first degree murder and manslaughter in Massachusetts); *see generally* People v. Gonzalez, 278 P.3d 1242 (Cal. 2012) (highlighting general differences between first and second degree murder).

[22] *See Beltran*, 301 P.3d at 1125 (explaining and defining the differences between murder, manslaughter, and malice).

[23] *Id.* Other articulations of malice include "prompted by, or . . . sprung from, a wicked, depraved or malignant mind—a mind which, even in its habitual condition, and when excited by no provocation . . . is cruel, wanton or malignant, reckless of human life, or regardless of social duty." Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 314 (1996) (quoting *Maher*, 10 Mich. at 218).

[24] *See Beltran*, 301 P.3d at 1125 ("Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter.").

> in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter.[25]

The "less heinous character" of a homicide committed in the absence of malice and in the heat of passion is believed to render the defendant less culpable because he acted out of "temporary excitement rather than of wickedness of heart or innate recklessness of disposition."[26] Though the precise contours of a sufficient provocation defense vary by jurisdiction, there are generally four requirements: (1) a showing of adequate provocation; (2) a killing committed in the "heat of passion"; (3) a "sudden heat of passion—that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool"; and (4) a "causal connection between the provocation, the passion, and the fatal act."[27] Though provocation can encompass "words, gestures, expressions and physical acts," some jurisdictions are hesitant to consider words alone as sufficient provocation.[28] Accordingly, legally provocative words often must be "accompanied by conduct indicating a present intention and ability to cause the defendant bodily harm."[29] Otherwise, some argue, the bar to establish a provocation defense would be unjustifiably low and could encompass ordinary arguments as adequate provocation.[30]

With respect to the substantive component of classic provocation doctrine, some commentators argue that the defense includes both a "descriptive and evaluative prong: a subjective inquiry into the defendant's state of mind to determine if he or she were actually in a heat of passion, and an objective inquiry into whether the

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[25] *Maher*, 10 Mich. at 219.

[26] State v. Gounagias, 153 P. 9, 12 (Wash. 1915).

[27] Girouard v. State, 583 A.2d 718, 721 (Md. 1991).

[28] Gilad, *supra* note 11, at 1100; *see also Girouard*, 583 A.2d at 721 (agreeing with the State's argument that "[w]ords spoken by the victim, no matter how abusive or taunting, fall into a category society should not accept as adequate provocation"); Sims v. State, 573 A.2d 1317, 1322–23 (Md. 1990) (holding that racial slurs and derogatory comments, standing alone, do not rise to the level of sufficient provocation).

[29] *See Girouard*, 583 A.2d at 722.

[30] *See id.* at 721 ("[I]f abusive words alone could mitigate murder to manslaughter, nearly every domestic argument ending in the death of one party could be mitigated to manslaughter.").

defendant was reasonably provoked to react violently."[31] The subjective line of inquiry rests on whether the defendant was provoked *in fact*, or alternatively, is feigning provocation to try to reduce his or her murder charge.[32] There is, however, little risk of a defendant walking free in these types of cases because provocation is only considered a "partial defense"—as such, it can only mitigate a charge of murder to manslaughter and, in some jurisdictions, first-degree murder to second-degree murder.[33] Procedurally, in some jurisdictions, "[t]he burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof."[34] After the defendant "injects" the issue into the case as a partial defense and the judge agrees to instruct the jury accordingly, the jury typically decides the reasonableness of both the provocation itself as well as that of the cooling time period.[35] For example, in a provocation case involving the mutual combat category, the court noted that "[w]hether mutual combat is serious enough to rise to this level is, generally, a matter for the jury."[36]

A. CATEGORICAL APPROACH TO PROVOCATION

The common law historically conducted a categorical analysis of provocation, under which only five predetermined categories relating to the victim's wrongdoing constituted legally adequate provocation, those being: "(1) an aggravated assault or battery; (2)

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[31] Buchhandler-Raphael, *supra* note 7, at 1730; *see also id.* ("The reasonableness inquiry focuses on whether a reasonable person in the defendant's situation would have similarly been provoked into a heat of passion . . . and would not have cooled off in the interval of time between the provocation and the delivery of the fatal blow.").

[32] *See id.* at 1732 (describing the requirements under the subjective prong of the extreme emotional disturbance defense).

[33] *See* Gilad, *supra* note 11, at 1102 (describing how the provocation defense serves as a mitigation rather than a means of complete exculpation); *see also* Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 98 (2014) ("Alternatively, the jury may mitigate in favor of the defendant by rejecting a charge of first-degree murder, finding the defendant guilty of only second-degree murder.").

[34] Riggs v. State, 138 So. 3d 1014, 1023 (Ala. Crim. App. 2013).

[35] *See* State v. Gounagias, 153 P. 9, 12, 14 (Wash. 1915) (explaining that "the question of adequate or reasonable *cause*" is a question of fact for the jury whereas "the question of such reasonable *tendency*" is a question for the court related to the admission of testimony). The *Gounagias* court, however, noted in its opinion that not all courts follow this procedure. *See id.* (discussing questions for the jury and questions for the court).

[36] People v. Garcia, 651 N.E.2d 100, 110 (Ill. 1995).

mutual combat; (3) commission of a serious crime against a close relative of the defendant; (4) illegal arrest; and (5) observation of spousal adultery."[37] Some states, such as Alabama in *Riggs v. State*, still generally confine provocation cases to these narrow, traditional categories.[38] Historically, courts were disinclined to instruct the jury on a defendant's provocation defense if the circumstances of the case fell outside these categories.[39] For example, in a Maryland case, the court expressly stated that it would "leave to another day the possibility of expansion of the categories of adequate provocation to mitigate murder to manslaughter."[40]

Criticism of the categorical approach tends to focus on its rigidity and failure to account for situations in which the passions of even a reasonable person would be provoked.[41] For example, some commentators described the rigidity of the categorical approach as follows: "A defendant could not claim the provocation mitigation unless he fell strictly within one of the categories of legally adequate provocation. The early common law approach was woefully insensitive to context." [42] Further, the distinction between adequate and inadequate provocation is often arbitrary at best—for example, one commentator noted that a "blow to the face" is sufficient (as mutual combat) whereas "a boxing of the ears" would not be, and discovery of a spouse's adultery would be sufficient whereas that of a fiancée would not.[43]

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[37] Buchhandler-Raphael, *supra* note 7, at 1729 (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 531 (7th ed. 2016)); *see also Riggs*, 138 So. 3d at 1024 (stating that only certain, defined situations constitute adequate provocation); *Garcia*, 651 N.E.2d at 110 ("The only categories of provocation recognized by this court are substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse."); JUDY E. ZELIN, 12 MARYLAND LAW ENCYCLOPEDIA § 25 (2018) (listing the traditional categories of provocation that Maryland courts recognize along with "anything the natural tendency of which is to produce passion in ordinary men and women" (quoting Christian v. State, 951 A.2d 832, 842 (Md. 2008))).

[38] *See Riggs*, 138 So. 3d at 1024 (recognizing sufficient provocation only in cases involving adultery, assault or physical confrontation against the defendant, and attacks that the defendant witnesses by someone against his or her own family member).

[39] *See, e.g.*, *id.* (discussing historical categories of the provocation defense); *see also* Girouard v. State, 583 A.2d 718, 723 (Md. 1991) (holding that any provoking act must fall within the legally proscribed classes of provocation).

[40] *Girouard*, 583 A.2d at 723.

[41] *See* Kahan & Nussbaum, *supra* note 23, at 308 (describing the arbitrary nature of the traditional categories).

[42] *See* Lee & Kwan, *supra* note 33, at 98.

[43] Kahan & Nussbaum, *supra* note 23, at 308.

Further, some criticize the categories for being antiquated regarding gender norms—for example, by rewarding male aggression[44] and by mitigating punishments in situations of "spousal adultery" and "protection" of (typically female) relatives.[45] Beyond the outdated nature of the categories, the categorical approach is criticized for the fact that words alone are often not considered adequate provocation, and when they are, the words usually have to come from the victim him- or herself, and the words must directly relate to one of the circumscribed categories.[46]

B. CASE-BY-CASE APPROACH TO PROVOCATION

Most modern U.S. jurisdictions reject the categorical approach and instead adopt a flexible, case-by-case standard.[47] In these cases, rather than limiting the inquiry to the traditional provocation categories, courts broaden the scope of potentially provocative events to "anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it."[48] This formulation of sufficient provocation in no way implies that reasonable "provocation must be of a kind that would *cause* an ordinary person of average disposition to *kill*."[49] The proper standard instead focuses on "whether [a]

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[44] *See, e.g.*, Buchhandler-Raphael, *supra* note 7, at 1729 ("The unifying feature to all categories rested on the notion of a male defendant's anger, which was perceived as justified given the violation of his honor, as undergirded by prevailing notions of masculinity.").

[45] *See* State v. Gounagias, 153 P. 9, 15 (Wash. 1915) ("[The *Willis* case] rests largely upon a statute of Texas relating to killing as the result of insults toward female relatives." (citing Willis v. State, 75 S.W. 790, 796 (Tex. Crim. App. 1903))). *But see* Wood v. State, 81 A.3d 427, 438 (Md. 2013) (denying the defense in a case where "the victim made a derogatory comment about [the defendant's] mother").

[46] *See Gounagias*, 153 P. at 14 ("At least one court has asserted that provocative words or acts, to have a reasonable tendency to produce a mitigating degree of anger and excitement in the ordinary man, must be the words or acts of the victim at the time and place of the killing." (citing State v. Lewis, 14 Mo. App. 191, 196 (Mo. Ct. App. 1883))).

[47] *See* Maher v. People, 10 Mich. 212, 222 (1862) ("[T]he question of the reasonableness or adequacy of the provocation must depend upon the facts of each particular case."); Kahan & Nussbaum, *supra* note 23, at 309 ("Modern authorities have tended to abandon categorical definitions of adequate provocation . . . ."); *see also* Buchhandler-Raphael, *supra* note 7, at 1729 ("Courts gradually abandoned this narrow position after they acknowledged that the rigid categories were too constraining. In their place, courts began leaving the jury to decide what constituted adequate provocation and instructing them that the question should be measured against the reasonable man standard." (footnotes omitted)).

[48] *Maher*, 10 Mich. at 221.

[49] People v. Beltran, 301 P.3d 1120, 1123 (Cal. 2013), *as modified on denial of reh'g*.

person of average disposition would be *induced to react* from passion and not from judgment."[50]

Because jurisdictions that follow this approach do not limit the scope of provocation to the traditional categories, the provocation defense can be expanded to a wide range of situations and contexts. For example, in one California case, "[t]he sole defense theory was that the defendant killed in the heat of passion. When the victim said she had aborted her pregnancy, the news was so disturbing that defendant acted not from reflection but in reaction to the provocation."[51] In another case, a Pennsylvania court allowed provocation to mitigate a murder charge to voluntary manslaughter where the provocation was "brought about by prolonged stress, anger[,] and hostility caused by marital problems."[52]

As mentioned earlier, the case-by-case approach to provocation has both subjective and objective elements.[53] The objective aspect "measures the defendant's reaction against that of an ordinary person, with normal temperament and capacity for self-control."[54] Despite the fact that the standard invokes the reasonable person and therefore appears to be wholly objective, the "objective inquiry is inherently subjectivized to incorporate some of the defendant's personal characteristics, such as physical traits like weight, height, and age."[55] Finally, there is an inquiry into whether or not the defendant was *in fact* subjectively provoked by the event—even if the situation would constitute adequate provocation on its own, if the defendant was not actually provoked, there can be no mitigation.[56] As with several other legal standards involving the "reasonable person," the law considers jurors to be better equipped than judges to determine what this standard requires in individual situations.[57] The rationale for allowing the jury to determine the

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[50] *Id.* (emphasis added).

[51] *Id.* at 1125.

[52] *See* Girouard v. State, 583 A.2d 718, 722 (Md. 1991) (citing Commonwealth v. Nelson, 523 A.2d 728, 733–34 (Pa. 1987)) ("The Pennsylvania court left the determination of the weight and credibility of the testimony regarding the marital stress and arguments to the trier of fact.").

[53] *See supra* note 31 and accompanying text.

[54] Buchhandler-Raphael, *supra* note 7, at 1730.

[55] *Id.*

[56] *See, e.g.*, Gilad, *supra* note 11, at 1102.

[57] *See, e.g.*, Maher v. People, 10 Mich. 212, 222 (1862) (finding that, in contrast with jurors, a judge's "habits and course of life give him much less experience of the workings of passion in the actual conflicts of life").

"sufficiency and tendency of a given provocation" is that jurors are conceptualized as coming from a wide variety of backgrounds and having diverse life experiences.[58] As a result, the legal system assumes a juror is able to better understand what the reasonable person standard entails and, in provocation cases specifically, the concept of the "frailty of human nature."[59]

C. MPC APPROACH: EXTREME EMOTIONAL DISTURBANCE

The MPC abandons both the categorical and case-by-case approaches to provocation; in fact, its guidelines do not refer to the partial defense of provocation at all.[60] Instead, the MPC focuses on emotion through its EED defense.[61] Still, a vast majority of U.S. jurisdictions, including those that adopt the MPC's guidelines for other offenses, stick to the common law provocation doctrine; one scholar found that only twelve jurisdictions currently recognize the MPC's EED defense.[62] Other commentators noted that of the few jurisdictions that did enact the MPC's EED test several quickly reverted back to the common law approach to provocation.[63]

The MPC's test "provides that a person who would otherwise be guilty of murder might be convicted of the lesser offense of manslaughter if that person killed the deceased while suffering from an 'extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.'"[64] This formulation of the

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[58] *Id.*

[59] *Id.* at 219.

[60] *See* Fontaine, *supra* note 8, at 40 (noting that the MPC eliminated the provocation requirement).

[61] *Id.* at 41.

[62] *See* Buchhandler-Raphael, *supra* note 7, at 1728 ("However, broadly speaking, most jurisdictions adhere to the core elements of common law provocation—the heat of passion defense—whereas only twelve jurisdictions adopted some version of the Model Penal Code's . . . alternative defense . . . ."); *see also* Paul H. Robinson, *Murder Mitigation in the Fifty-Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis*, 47 TEX. TECH L. REV. 19, 24 (2014) ("[A] large majority of jurisdictions—forty of the fifty-two—reject the Model Penal Code's attempt to broaden the common-law provocation defense, which typically mitigates murder to manslaughter.").

[63] Kahan & Nussbaum, *supra* note 23, at 323 (noting that relatively few states enacted the MPC version of voluntary manslaughter and that "a substantial number of the ones that did reverted to the common law formulation after only a short time").

[64] Buchhandler-Raphael, *supra* note 7, at 1732 (quoting MODEL PENAL CODE § 210.3(1)(b) (1985)). *But see id.* ("However, most jurisdictions that amended their statutes after the MPC's defense adopted only the EED prong, thus rejecting the mental disturbance prong on the theory that defenses pertaining to defendants' mental abnormalities ought to be separately treated under the insanity defense framework.").

defense, unlike the common law approach to provocation, focuses more on the defendant's state of mind than the actual events precipitating the offense or the victim's actions. The emphasis on the defendant's state of mind comes from the drafters intention for "the cause and intensity of the actor's emotion" to result in a successful defense even in cases where the defendant "strikes out in a blinding rage and kills an innocent bystander."[65] Courts have interpreted the MPC's EED standard as involving a "degree of volitional impairment just short of insanity."[66] However, insanity is distinguished from EED insofar that an insanity defense requires an almost complete loss of self-control whereas EED contemplates more of a "diminished" capacity than a total lack thereof.[67]

The MPC's focus on extreme emotional disturbance rather than a specific provoking event obviates the requirements of "suddenness" and cooling time found in the common law[68] because an emotional disturbance "does not hinge on some specific wrongdoing" committed against the defendant, causing him to react from passion or rage.[69] By contrast, a defendant can develop EED as a result of any number of emotions, including depression, anxiety, grief, distress, paranoia, agitation, or shock.[70] Additionally, as the New York Court of Appeals noted in *People v. Casassa*, the EED (affirmative) defense "may be based upon a *series of events*, rather than a *single precipitating cause*."[71]

There are, however, limitations to the EED defense, namely that the defendant must be able to show that his or her reaction, or

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[65] Kahan & Nussbaum, *supra* note 23, at 321 (quoting MODEL PENAL CODE § 210.3 cmt. 5(a) at 61 (1985)).

[66] *Id.* at 322.

[67] *Id.*

[68] *See* Buchhandler-Raphael, *supra* note 7, at 1732 (explaining that the MPC's EED defense is able to circumvent some of the typical obstacles to provocation mitigation).

[69] *Id.* at 1733 ("Moreover, the EED defense rejects provocation's cooling off period requirement, allowing for defendants to claim that they acted under EED even if there was a significant time lapse between the events that caused the emotional disturbance and the reactive aggression.").

[70] *See, e.g.*, Kahan & Nussbaum, *supra* note 23, at 322 ("[A]ny affective experience sufficient to disable a person's 'usual intellectual controls' or 'scramble normal rational' thinking counts as 'extreme emotional disturbance.'" (quoting State v. Elliott, 411 A.2d 3, 8 (Conn. 1979))).

[71] 404 N.E.2d 1310, 1313 (N.Y. 1980) (emphasis added) (noting that in determining whether the defendant's emotional reaction was reasonable the totality of the circumstances is relevant to "how a person might have his reason overcome").

development of EED in the first place, was reasonable.[72] This requirement is not unrelated to the concept of cooling time—for example, it is less likely that a jury would find it objectively reasonable for a defendant to have developed EED if the precipitating event (or events) was minimal in impact and occurred far in the past. However, unlike in common law provocation cases, even this type of situation would be highly dependent on context; the defense would not be denied simply because too much time had passed.

Similar to the common law doctrines, the MPC's formulation of EED also mixes subjective and objective factors. The MPC standard, however, is arguably more subjective in that it "directs the jury to consider the 'reasonableness' of the defendant's conduct 'from the viewpoint of a person in the actor's situation.'"[73] In creating the standard, the MPC sought to incorporate a "larger element of subjectivity" into the EED defense.[74] One particular area of confusion is the potentially ambiguous meaning of "situation."[75] Is a "situation" a mere reflection of the reasonable person standard (like that used in the common law), or does it seek to personalize the standard and include more of the defendant's unique characteristics? Comments to the MPC suggest the defendant's situation likely does not exclude an "exceptionally punctilious sense of personal honor," an "abnormally fearful temperament," or "other personal characteristics that 'differentiate [the defendant] from the hypothetical reasonable man' of the common law."[76] The comments indicate, however, that the doctrine nonetheless "places far more emphasis than does the common law on the actor's subjective mental state."[77]

In *Casassa*, the New York Court of Appeals found that the defendant met the subjective standard of suffering from an extreme emotional disturbance but that he failed to show[78] there was a

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[72] *E.g.*, Buchhandler-Raphael, *supra* note 7, at 1732.

[73] Kahan & Nussbaum, *supra* note 23, at 321 (quoting MODEL PENAL CODE § 210.3(1)(b) (1985)); *see also Elliott*, 411 A.2d at 7 (noting that the MPC's EED doctrine "sets forth a standard that is objective in its overview, but subjective as to the defendant's belief").

[74] Kahan & Nussbaum, *supra* note 23, at 321 (quoting MODEL PENAL CODE § 210.3(1)(b) cmt. 3 at 49 (1985)).

[75] *Id.* at 321–22.

[76] *Id.* (citing MODEL PENAL CODE § 210.3(1)(b) cmt. 5(a) at 62 (1985)).

[77] *Id.* at 321 n.225 (citing MODEL PENAL CODE § 210.3(1)(b) cmt. 5 at 54 (1985)).

[78] People v. Casassa, 404 N.E.2d 1310, 1317 (N.Y. 1980). Importantly, some MPC jurisdictions, such as New York, treat EED as an affirmative defense with the defendant

reasonable explanation or excuse for having developed EED in the first place.[79] The Supreme Court of Connecticut, however, ordered a new trial in a case where a defendant, suffering from "a combination of child custody problems, the inability to maintain a recently purchased home and an overwhelming fear of his brother," was convicted for killing his brother abruptly with no provocation or altercation.[80] Illustrative of the wide range of situations falling within the EED defense, "any affective experience sufficient to disable a person's 'usual intellectual controls' or scramble 'normal rational thinking' counts as an 'extreme emotional disturbance.'"[81] The MPC thus broadens the scope of potential situations where the partial defense might be granted and the charge mitigated from murder to manslaughter.[82]

D. COOLING TIME AND REKINDLING

Cooling time, though not particularly relevant in MPC jurisdictions that adopt the EED defense, remains an essential element of common law provocation doctrine.[83] Cooling time refers to the time between an initial provoking event and the eventual act of killing.[84] Typically, "the time necessary for cooling is a reasonable time. The question of reasonable time is . . . a conclusion to be drawn from all of the facts and circumstances of the particular case."[85] Courts historically take a psychological approach, rooted in

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bearing the burden to prove the presence of EED. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 197 (1977) (upholding as constitutional New York's designation of EED as an affirmative defense). In contrast, the common law often permits the defendant to "inject" the issue into the case but does not shift the burden of proof. *See* Riggs v. State, 138 So. 3d 1014, 1023 (Ala. Crim. App. 2013) (quoting ALA. CODE § 13A-6-2(b)) ("[T]he burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof.").

79 *See Casassa,* 404 N.E.2d at 1312–14 (finding no reasonable excuse for having developed EED when a woman with whom the defendant was enamored simply told him she was not falling in love with him).

80 State v. Elliott, 411 A.2d 3, 5 (Conn. 1979). The *Elliot* court entertained the defendant's argument that his brother's past of bullying him "compounded by many other extenuating circumstances resulted in the defendant's overwhelming fear of his brother." *Id.*

81 *See* Kahan & Nussbaum, *supra* note 23, at 322 (emphasis omitted) (quoting *Elliot*, 411 A.2d at 8) ("To get to the jury, the defendant need show only that his feelings were sufficiently 'intense,' not that they were in any sense appropriate to his situation.").

82 *See Elliot*, 411 A.2d at 7 ("[T]he defense of extreme emotional disturbance does not serve to negate intent, but rather is raised to establish circumstances that mitigate culpability.").

83 *See supra* notes 17–18 and accompanying text.

84 *See supra* note 17 and accompanying text.

85 State v. Gounagias, 153 P. 9, 13 (Wash. 1915).

fundamental human nature, to articulating a standard for cooling time.[86] For example, the *Maher* court stated, "[a] reasonable cooling time . . . is that for which a good reason can be given, and in which the sudden transport of passion might naturally and rationally, according to the laws of the human mind, pass away."[87]

Although the cooling time inquiry tends to be fact-dependent, courts typically hold a day constitutes sufficient cooling time.[88] For example, in an old Washington case, the court noted, "[n]o court would be warranted in saying that such callous conduct, while the original wrong was but a day old, would have no reasonable tendency to produce immediate, uncontrollable anger, destroying the capacity for cool reflection in the average man."[89] In some cases, even a few minutes may be enough to constitute sufficient cooling time, thereby barring the provocation defense.[90] Most courts, however, note the absence of a bright-line rule with respect to cooling time and are hesitant to impose one.[91]

To most defendants, the requirements of cooling time and suddenness of the provocation present "significant hurdles" that limit the availability of the defense in situations that would otherwise meet the requirements for sufficient provocation.[92] A minority of jurisdictions consider cooling time a question of law for the court, whereas most jurisdictions consider cooling time a

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[86] *See, e.g.*, People v. Logan, 164 P. 1121, 1122 (Cal. 1917); *Gounagias*, 153 P. at 13; Maher v. People, 10 Mich. 212, 214 (1862).

[87] *Maher*, 10 Mich. at 214 (emphasis omitted); *see also Logan*, 164 P. at 1122 (describing cooling time as "the interval of time . . . sufficient for the defendant's passion to cool and the voice of reason and humanity within him to be heard").

[88] *See infra* notes 89–91. Also, note the terminology here—"sufficient cooling time" acts as a *barrier* to mitigation whereas "sufficient provocation" acts to *grant* the mitigation. *See supra* note 27 and *infra* notes 94–96 and accompanying text.

[89] *Gounagias*, 153 P. at 13.

[90] *See* State v. Cole, 525 S.E.2d 511, 513 (S.C. 2000) (finding sufficient cooling time when only three to five minutes had passed between the altercation with the victim and the killing, during which the defendant went to his mother's apartment and retrieved his gun); *see also* State v. Pittman, 647 S.E.2d 144, 169 (S.C. 2007) (denying the defense to a twelve-year-old accused of killing his grandparents after they had paddled him and more than ten minutes had elapsed between the paddling and the killing, at which point the grandparents had already gone to bed); *but see* Kahan & Nussbaum, *supra* note 23, at 317 ("[The *Ashland*] court concluded, as a matter of law, that seventeen hours was sufficient 'cooling time' for a man's rage to be brought under control following discovery of adultery." (citing People v. Ashland, 128 P. 798, 802 (Cal. Ct. App. 1912))).

[91] *See, e.g.*, *Maher*, 10 Mich. at 223 (noting with respect to cooling time no "precise time . . . *in hours or minutes* can be laid down by the court, as a rule of law").

[92] Buchhandler-Raphael, *supra* note 7, at 1725.

question for the jury to determine along with the presence or absence of sufficient provocation.[93] One outlier jurisdiction considered cooling time in the reverse, meaning the cooling time exacerbated, rather than mitigated, the defendant's passion:

> The . . . defendant waited for his victim in her apartment for 20 hours before killing her. The court held that the defendant was nevertheless entitled to a manslaughter instruction, because the jury could find that the defendant's heat of passion resulted from a long-smoldering prior course of provocative conduct by the victim, the passage of time serving to aggravate rather than cool [the] defendant's agitation.[94]

Normally, such a long period of time suggests to the jury (or alternatively, the judge) that the defendant had more than sufficient time for reflection.[95] Thus, a long period of time, perhaps combined with a "methodical" approach to the actual act of killing, typically results in the judge refusing to recognize (or to instruct the jury on) the defense.[96] Alternatively, some courts consider a long-standing grudge to be a "telltale characteristic of premeditation" rather than one of impulse, which, instead of mitigating second-degree murder to manslaughter, would actually raise the charge to first-degree murder with malice aforethought.[97]

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[93] *Compare Pittman*, 647 S.E.2d at 169 (explaining that whether there is an absence of sudden heat of passion between the provocation and the killing is a question of law for the court), *with Gounagias*, 153 P. at 12 (holding whether the alleged provocation would result in heat of passion in the ordinary man is a question of fact for the jury).

[94] *See* KADISH ET AL., *supra* note 15, at 477 (citing People v. Berry, 556 P.2d 777, 781 (Cal. 1976)).

[95] *See id.* at 476 ("The common-law view is that a significant lapse of time between the provocation and the act of killing renders the provocation inadequate . . . .").

[96] *See Pittman*, 647 S.E.2d at 169 ("The methodical execution of the shootings, combined with the lapse of time between the beating and shootings, clearly indicates that Appellant did not kill his grandparents in a sudden heat of passion."); *see also Gounagias*, 153 P. at 14 ("The offered evidence makes it clear that the appellant knew and appreciated for days before the killing the full meaning of the words, signs, and vulgar gestures of his countrymen, which, as the offer shows, he had encountered from day to day for about three weeks . . . .").

[97] *See* Girouard v. State, 583 A.2d 718, 722–23 (Md. 1991) (quoting Tripp v. State, 374 A.2d 384 (Md. Ct. Spec. App. 1977)) (explaining how a long-standing grudge or cumulative rage, although "psychologically just as compelling a force as the sudden impulse," is not an appropriate circumstance for the provocation defense).

Related to the concept of cooling time is the idea of rekindling.[98] Rekindling refers to an event that, while itself would not constitute adequate provocation (either due to the insufficiency of provocation or an extended cooling period), sparks a memory from an earlier event that *would be* considered sufficient provocation had time not passed.[99] Notably, rekindling can serve as a useful consideration in the earlier described "grudge" or "long-smoldering emotion" cases where the factfinder must determine the factual question of whether sufficient cooling time has passed.[100] For example, a California court recognized that provocation might be adequate in a case where a "long course of provocatory conduct, which had resulted in intermittent outbreaks of rage under specific provocation in the past, reached its final culmination in the apartment when [the victim] began screaming."[101]

Historically, courts have not recognized rekindling as a separate element of the provocation doctrine with the ability to supersede cooling time requirements.[102] But an archetypal example of a successful rekindling claim is found in *People v. Barberi*, a New York case from the late nineteenth century (notably before New York adopted and implemented the MPC) where a female defendant "killed the man who had betrayed her by fraudulent means under a promise of marriage, and who, after repetitions of the promise and failures to fulfill it, finally flatly refused with insulting words."[103] However, in modern common law jurisdictions, rekindling is the exception, not the rule. For example, in a later Massachusetts case, the state's highest court refused to mitigate a claim where a defendant, who had suspected his wife of infidelity for several

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[98] *See* KADISH ET AL., *supra* note 15, at 476–77 (noting the effect that rekindling can have on the cooling-time limitation).

[99] *See id.* at 476 ("The cooling-time limitation can sometimes be surmounted by arguing that an event immediately preceding the homicide rekindled an earlier provocation.").

[100] *See id.* (citing People v. Berry, 556 P.2d 777, 780–81 (Cal. 1976)) (noting that most courts refuse to take note of rekindling or recognize it in situations where sufficient cooling time has passed).

[101] *Berry,* 556 P.2d at 781 (noting that the "passion of jealousy, pain[,] and sexual rage" could cause the ordinary man of average disposition "to act rashly from this passion").

[102] *See* KADISH ET AL., *supra* note 15, at 476 ("[M]any courts refuse to take note of 'rekindling.'")

[103] State v. Gounagias, 153 P. 9, 14 (Wash. 1915) (citing People v. Barberi, 43 N.E. 635, 638 (N.Y. 1896)); *see also Barberi*, 43 N.E. at 638 ("If, at that moment, in consequence of what he said to her and the final culmination of the alleged wrongs of which she conceived herself to have been the victim, she became incapable of reasoning or of deliberating, the act, we think, would not constitute murder in the first degree.").

weeks, eventually strangled her in a rage "upon suddenly confirming his suspicions."[104] Many courts find the provocation defense to be fundamentally inconsistent with the concept of rekindling insofar that rekindling cases inevitability accompany a period of time that exceeds an acceptable cooling period:

> In the nature of the thing *sudden* anger cannot be cumulative. A provocation which does not cause instant resentment, but which is only resented after being thought upon and brooded over, is not a provocation sufficient in law to reduce intentional killing from murder to manslaughter, or under our statute to second degree murder, which includes every inexcusable, unjustifiable, unpremeditated, intentional killing.[105]

It is therefore predictable that many common law jurisdictions will not be particularly receptive to the idea of rekindling because it not only bypasses the requirements of cooling time, but it also further blurs the lines between premeditated murder, murder without premeditation, and manslaughter.

III. EXPLANATIONS AND JUSTIFICATIONS OF THE PROVOCATION DEFENSE

The provocation (or EED) defense can perhaps be best understood in the context of its historical and legal justifications. Understanding how the partial defense operates as either a justification or excuse is critical for proposing proper alternatives to the modern provocation doctrine. Moreover, analyzing the psychological rationale behind provocation is critical to determining whether the policy objectives underlying it can be best achieved by implementing a more flexible, subjective standard for some of its core elements.

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[104] *See* KADISH ET AL., *supra* note 15, at 477 ("The court held that his prior suspicions provided adequate cooling time, and therefore no manslaughter instructions were required." (citing Commonwealth v. LeClair, 708 N.E.2d 107 (Mass. 1999))).

[105] *Gounagias*, 153 P. at 14.

A. IS PROVOCATION A JUSTIFICATION OR AN EXCUSE?

Typically, criminal defenses and mitigations are grouped into two main categories: justifications and excuses.[106] Justifications are rooted in the idea that the action taken by the defendant is socially desirable (e.g., self-defense, necessity, defense of property),[107] whereas excuses focus more on the diminished capacity of the defendant at the time the crime occurred (e.g., insanity or duress).[108] There is some disagreement among courts and scholars as to whether the provocation defense is a breed of justification or excuse—specifically, whether we should understand the defendant's behavior as socially acceptable or desirable given the circumstances or if it reflects something unique to the individual defendant that, though rendering him less culpable, is not behavior we would encourage others to follow.[109]

Those who argue that provocation is a justification might view the doctrine of provocation as "less [of] a question regarding the capacity of the defendant to conform his conduct to the law and more [of] a question of whether the defendant has lived up to normative expectations."[110] Commentators reason that because the defendant will often claim that the victim did something to provoke the killing and thus was "at least partially at fault" for his or her own demise, provocation mirrors self-defense as a justification because the success of either "turns on the extent to which the fact finder agrees with the defendant that the victim was partially responsible."[111] In

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[106] *See* Kahan & Nussbaum, *supra* note 23, at 318–21 (defining and comparing justifications and excuses).

[107] *See id.* at 318–19 ("Justifications are said to identify acts that produce morally preferred states of affairs."). Justifications, unlike subjective excuses, are considered "universal" and "objective" and thus "indifferent to the identity of the actor or her motive for doing the act." *Id.* at 319.

[108] *See id.* at 319 ("Excuses . . . are said to identify circumstances in which an act is wrongful but the actor blameless."). Excuses are thus distinct from justifications insofar as they are "concerned with how the defendant's particular circumstances affected her capacity or opportunity to obey the law." *Id.*

[109] *See* Fontaine, *supra* note 8, at 28 ("Among the many convoluted issues surrounding heat of passion, the debate as to whether the defense is one of partial justification or excuse has been persistent.").

[110] Lee & Kwan, *supra* note 33, at 99.

[111] *Id.* at 100; *see also* Fontaine, *supra* note 8, at 32 ("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.").

this sense, the defendant is believed to have "done the right thing" and is therefore viewed as "less guilty than an unprovoked killer."[112]

In contrast, if the doctrine of provocation is understood as an excuse, then the actor's subjective motivation would be relevant only in determining whether his or her acts are "freely chosen."[113] Further, "because emotions are unwilled, this theory of assessment furnishes no ground for distinguishing among actors based on the quality of their passions."[114] As a result, the specific provoking incident(s) are of less importance than in the justification context—what matters to partially excuse the defendant is only whether he or she was subjectively, adequately provoked.[115] The reactor is partially excused because the reactive violence is understandable, albeit wrongful. The understanding lies in the acknowledgment that, given the circumstances, a similarly placed individual would likely experience emotional disturbance similar to that of the defendant's and that such an emotionally aroused state can undermine one's rationality and limit one's self-control.[116]

The MPC's formulation of EED is clearly intended to operate as a partial excuse focusing on the defendant's internal emotional state and subjective aspects of his or her situation at the time of the killing.[117] In conceptualizing provocation as a theory of partial excuse, the MPC is able to abandon barriers such as cooling time and rekindling and mitigate charges for arguably less culpable defendants who committed their killings while in a distressed emotional state.[118]

B. PSYCHOLOGICAL AND HISTORICAL EXPLANATIONS

There are several competing explanations for the provocation defense, many of which are rooted in the "frailty of human nature"[119]

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[112] *See* Lee & Kwan, *supra* note 33, at 100 (noting, however, that the provocation doctrine is best viewed as mixing elements of both justification and excuse).

[113] *See* Kahan & Nussbaum, *supra* note 23, at 320 (explaining provocation doctrine under a theory of excuse).

[114] *Id.* at 320–21.

[115] *Id.*

[116] *Id.* at 322.

[117] *See* Fontaine, *supra* note 8, at 28 ("In the United States, the [MPC] has taken an obvious stand with its 'extreme mental or emotional disturbance' language, largely read to clearly frame heat of passion as an excuse.").

[118] This is true regardless of whether the ordinary person would have subjectively cooled.

[119] Buchhandler-Raphael, *supra* note 7, at 1728. Historically, the provocation doctrine was understood in the religious context of man's basic shortcomings in relation to God. *See* State

or "infirmities"[120] of the human condition that operate to undermine one's "exercise of control or mastery over one's passion."[121] Recognition of this frailty demands "compassion towards defendants who killed while experiencing intense passionate emotions as a result of the deceased's wrongdoing."[122] Killing in the context of provocation is therefore "less heinous precisely because the quality of a person's emotions affects the moral assessment of her acts."[123] Under this line of reasoning, "after a relatively short period of time the 'forces' and 'drives' of anger no longer operate in the person's psyche; reason necessarily reasserts its control by suppressing a drive or force that is by its very nature not a thinking or reasoning force, in effect ordering it to subside."[124] Sufficient cooling time thus naturally bars a provocation defense under the assumption that the ability to act rationally has already returned to the defendant before the killing even occurred.[125]

However, this rationale is inconsistent with the fact that courts often find sufficient cooling time to have passed "even when it is conceded that the defendant remained in a state of intense agitation."[126] Cooling time constrains the availability of the defense in these cases because the court assumes that holding onto anger or intense emotion for an extended period of time, under most circumstances, can never be reasonable.[127] However, "[p]sychological research suggests that fear significantly interferes with individuals' thought processes by disturbing rational judgment and diminishing reasoning mechanisms,"[128] supporting the conclusion that a reasonable cooling period either does not exist or is so dependent on the individual as to be inherently irreconcilable with a reasonable person standard.[129] Finally, an alternative

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v. Gounagias, 153 P. 9, 12 (Wash. 1915) ("[W]e may deem it in a general way to be that the law accepts human nature as God has made it, or as it manifests itself in the ordinary man, and every sort of conduct in others which commonly does in fact so excite the passions of the mass of men . . . ." (citing 2 BISHOP'S CRIMINAL LAW § 701 (8th ed. 1892))).

120 *Gounagias*, 153 P. at 13 (quoting State v. Yarborough, 18 P. 474, 479 (Kan. 1888)).

121 *Id.* (quoting *Yarborough*, 18 P. at 479).

122 Buchhandler-Raphael, *supra* note 7, at 1728.

123 Kahan & Nussbaum, *supra* note 23, at 314.

124 *Id.* at 317.

125 *E.g.*, *id.* at 316.

126 *Id.* at 317.

127 *Id.*

128 Buchhandler-Raphael, *supra* note 7, at 1726.

129 This is particularly true if we view the provocation mitigation as just short of an insanity defense (like the partial excuse of EED).

method of viewing these cases is through the lenses of cognition, emotion, and behavior. As one commentator has noted, "[h]eat of passion reflects a mediated path by which there is an interpretation of provocation (cognition) that causes overwhelming anger (emotion), which, in turn, leads to a reactive killing (behavior)."[130]

IV. BEST APPROACHES TO PROVOCATION AND COOLING TIME

In the absence of a uniform approach to provocation and in light of its psychological and legal justifications, there are alternatives to the modern provocation doctrine that courts (and perhaps even legislatures) in common law jurisdictions should entertain. The categorical approach, which has already declined in prevalence across the United States, should be abandoned along with its rigid and outmoded understanding of "heat of passion" that ignores the psychological nuances that the defense is intended to capture.[131] As explained in Part II, this wholly objective, circumscribed approach has already largely been replaced in favor of a case-by-case standard that focuses on the reasonableness of the defendant's provocation in light of the surrounding circumstances.[132] However, both the categorical and case-by-case approaches imply an objective standard with respect to cooling time. By contrast, rekindling, which also has an objective component, is only possible in the *Maher* approach because it does not fit squarely within any of the traditional categories.[133]

Expanding the applicability and recognition of cooling time and rekindling by transforming both into subjective standards[134] that focus on the unique qualities of the defendant is consistent with the underlying purpose of the provocation defense. It is also appropriate considering our modern understanding of the psychological effects

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[130] Fontaine, *supra* note 8, at 48.

[131] *See, e.g.*, Kahan & Nussbaum, *supra* note 23, at 323 (noting that the common law was traditionally hostile to psychological and psychiatric experts testifying regarding the adequacy of provocation).

[132] *See supra* Part II (discussing common critiques of the traditional, categorical approach and noting the general shift by many U.S. jurisdictions toward a case-by-case, *Maher* approach).

[133] *See supra* Part II.

[134] As opposed to an objective standard of reasonableness "determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be." Fontaine, *supra* note 8, at 40 (citing MODEL PENAL CODE § 210.3(b) (1985)).

of trauma and reactivity to provoking stimuli.[135] The reasonableness or adequacy of provocation should remain an objective question for the jury (or if decided as a matter of law, the judge) to decide on a flexible, case-by-case basis in line with the *Maher* approach. However, questions of whether enough time had passed to internally "cool" the defendant's passions or whether the cumulative effects of prior instances of trauma had "sparked" an additional provocation should be determined from a subjective standard and considered by the factfinder in appropriate cases.

The rationale for expanding these doctrines is rooted in the basic policy served by mitigation. On a fundamental human level, the provocation defense is premised on the idea that "individuals who kill in heat of passion upon adequate provocation are both less deterrable and less dangerous than those who kill without provocation or with only minor provocation."[136] The doctrine derives its authority from the concept of diminished culpability, which is present when the internal effects of intense emotion are influenced or perhaps even generated by external forces beyond the defendant's direct control. As one law review article put it:

> A person whose "psychological control mechanisms" are overwhelmed by fear or rage cannot justly "be held accountable" for criminal acts . . . . [E]motions enter into such an account only as forces that either do or do not limit an offender's choices; the strength of a person's emotions is thus of far more interest than any valuations internal to them.[137]

Unlike the common law tradition, the MPC has already acknowledged there need not be "sudden passion and heat of blood" in order to grant a mitigation.[138] The MPC's approach supports the argument that there are several important emotions in archetypal manslaughter cases that have the ability to control or direct a

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[135] *See supra* Part III.

[136] Kahan & Nussbaum, *supra* note 23, at 306.

[137] *Id.* at 302.

[138] *Compare* State v. Gounagias, 153 P. 9, 14–15 (Wash. 1915) ("If, at that moment, in consequence of what [the victim] said to [the defendant], and the final culmination of the alleged wrongs . . . [the defendant] became incapable of reasoning or of deliberating, the act, we think, would not constitute murder in the first degree."), *with* MODEL PENAL CODE § 210.3(1)(b) (1985).

defendant's actions beyond just "fleeting rage"—these include dominant and powerful emotions such as fear, anxiety, and dread that can result from an accumulation of trauma and abuse over time.[139] Accordingly, the MPC recognizes instances where a "significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore."[140] In other words, the EED approach, unlike that of common law jurisdictions, does not treat cooling time and rekindling as obstacles to granting the defense when merited—far from it, it enables these elements to open the door to a successful mitigation where the defendant is operating under a diminished emotional state.[141] Common law jurisdictions should model their provocation doctrine on EED by understanding cooling time not as a restriction on the defense that requires all provoked killings to be "spontaneously undertaken," [142] but instead as a means of expanding its availability in cases involving (1) emotions other than anger where the act may not immediately follow the provocation (i.e., sufficient cooling time) or (2) events not provocative in and of themselves but that have been sparked by an earlier, sufficient provocation (i.e., rekindling).

Even under a proposed subjective standard, sufficient cooling time can still be inferred in situations where it appears that the defendant could not have remained internally provoked for such a period of time (or, is no longer suffering from EED in MPC jurisdictions). In other cases, the factfinder might find it subjectively reasonable for the purposes of mitigation if a battered woman killed her abuser not in self-defense but out of extreme fear or rage in the days following her abuser's latest attack.[143] By contrast, if she had suffered from only a mere insulting remark yet continued to be "obsessively angry for days, weeks, months, or even years, then [the factfinder] will regard [her] view of what's

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[139] *See* Kahan & Nussbaum, *supra* note 23, at 306.

[140] People v. Patterson, 347 N.E.2d 898, 908 (N.Y. 1976).

[141] This is not to be conflated with a diminished *mental* state that might call for an insanity (or partial) insanity plea. Accordingly, the defendant in this scenario is seeking only mitigation from murder to manslaughter and not full acquittal.

[142] *See* People v. Casassa, 404 N.E.2d 1310, 1314 (N.Y. 1980) (quoting *Patterson*, 347 N.E.2d at 908) (underscoring the MPC's abandonment of sufficient cooling time as a barrier to the partial defense).

[143] This is assuming a time period that, under current provocation doctrine, would constitute sufficient cooling time.

important in life as skewed."[144] The factfinder's ability to base its assessment of the initial provoking event in objective reasonableness (i.e., whether the event was sufficiently provocative) and then draw subjective inferences from the defendant's subsequent behavior helps dispel concerns that someone with "a cruel, vindictive, and aggressive disposition . . . will seize upon the slightest provocation to satisfy his uncontrolled passions by forming a design to kill."[145]

Further, jurisdictions are free to adopt rules and exemptions that render certain situations as never sufficiently provocative under the law.[146] For example, a jurisdiction could adopt a rule that prohibits any mitigation in cases that involve the so-called "gay panic defense," a defense historically asserted when a straight man kills a homosexual man solely due to the latter's sexual or social advances.[147] Legal historians roughly estimate that the gay panic defense was employed by defendants seeking mitigation in at least 200 cases between 1996 and 2006.[148] Following vast social change in American society and increasingly tolerant attitudes toward sexual orientation, several states today decline to recognize "gay panic" as adequate provocation. For example, "Florida does not recognize a nonviolent homosexual advance as sufficient provocation to incite an individual to lose self-control and commit acts in the heat of passion."[149] Moreover, in 2013, the American Bar Association "unanimously passed a resolution aimed at combating the discriminatory effects of gay and trans panic defenses," considerably decreasing the likelihood that expanding provocation

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[144] Kahan & Nussbaum, *supra* note 23, at 318 ("[A]s time passes after a wrongful provocation, it becomes increasingly difficult to determine whether the defendant's action was a genuine impassioned response to the provocation or a killing carried out for some other reason.").

[145] *Id.* at 307 (quoting Rivers v. State, 78 So. 343, 345 (Fla. 1918)).

[146] *See e.g.*, Lee & Kwan, *supra* note 33, at 79–80 ("'Gay panic' and 'trans panic' are not officially recognized criminal law defenses . . . .").

[147] *Id.* at 100 ("In the late 1960s, male defendants charged with murdering gay men began using gay panic defense strategies.").

[148] *Id.* at 101.

[149] Patrick v. State, 104 So. 3d 1046, 1056–57 (Fla. 2012); Davis v. State, 928 So. 2d 1089, 1120 (Fla. 2005) (holding that the defendant's claim "with regard to the [homosexual] advance theory is unpersuasive"); Commonwealth v. Pierce, 642 N.E.2d 579, 582 (Mass. 1994) (finding that a homosexual advance could not "produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint" (quoting Commonwealth v. Walden, 405 N.E.2d 939, 944 (Mass. 1980))).

doctrine will result in a myriad of successful "gay panic" defenses.[150] This local flexibility to alter provocation doctrine and its exemptions to conform with desirable social policy objectives greatly undercuts the argument that an expanded provocation defense would be "more humane to the perpetrator than wise in its effects on society."[151]

Finally, it is important to reiterate that provocation and EED are merely partial defenses—they serve only to mitigate a charge from murder to manslaughter rather than to fully acquit the defendant in a given case.[152] Instead of fully excusing or justifying the defendant's action, even a subjective approach to provocation and cooling time would, at most, serve to lessen a sentence and thereby more accurately capture a defendant's culpability given the circumstances surrounding the killing and the defendant's unique characteristics. Doing so would keep mitigation on the table in cases where abused defendants kill their attacker after suffering repeated, long-term abuse.[153] As one commentator observed, "[d]efendants who suffered from intimate partner battering are especially likely to face significant obstacles in meeting provocation's elements mostly due to the cooling off requirement, which precludes the defense from a defendant who had ample opportunity to regain control following the deceased's last act of violence."[154]

Additionally, relaxing cooling time requirements and abandoning the traditional approach would expand the defense in various cultural contexts where social norms and expectations differ—in fact, "many jurisdictions have [already] modified the provocation doctrine in response to cultural diversification."[155] A

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[150] *See* Lee & Kwan, *supra* note 33, at 79.

[151] Maher v. People, 10 Mich. 212, 228 (1862) (Manning, J., dissenting).

[152] It is also important to note that "[l]ike the vast majority of criminal trials, many of these cases resolve in plea agreements." Buchhandler-Raphael, *supra* note 7, at 1739.

[153] *See id.* at 1740 (noting categories of cases involving domestically abused defendants as well as defendants who were subjected to physical abuse by stalking, harassment, and bullying). *But see* State v. Pittman, 647 S.E.2d 144, 168 (S.C. 2007) ("[W]e decline to hold that a child has sufficient legal provocation to use deadly force against a guardian who disciplines through corporal punishment.").

[154] Buchhandler-Raphael, *supra* note 7, at 1744; *see also* State v. Goff, No. 11CA20, 2013 WL 139545 (Ohio Ct. App. Jan. 7, 2013) (declining to grant a provocation mitigation where a domestically-abused defendant had killed her husband out of fear of physical harm but had not satisfied the legal elements of self-defense).

[155] *See* Gilad, *supra* note 11, at 1097; *see also* A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 300 (1976) ("The proper distinction . . . is that individual peculiarities

more flexible provocation standard is thus likely to recognize that what might be considered sufficiently provocative in one culture could greatly differ across geographical, ethnic, and religious settings.

V. CONCLUSION

Common law jurisdictions should follow the example of the MPC in "emphasiz[ing] the need to examine the role that psychological dysfunction plays" in modern provocation doctrine.[156] Expanding the availability of the defense by abandoning the categorical approach altogether and moving toward a subjective standard of measuring cooling time could help eliminate the "provocation interpretational bias" often present in ambiguously provocative situations.[157] Under the current common law system, the judge or jury is regularly constrained to find sufficient cooling time as either a matter of law or fact even when a defendant's "smoldering or brooding anger seems morally appropriate or understandable."[158]

Failure to grant the mitigation in these situations is fundamentally inconsistent with the purpose and objectives of the provocation defense, whether conceptualized as a breed of legal excuse or of justification.[159] Further, employing the concepts of rekindling and cooling time as concrete barriers rather than navigable entryways ignores the "cumulative effect of a series of [sufficiently provocative] incidents that slowly accumulated, culminating in the homicide."[160] Not only would these proposed changes help alleviate some of the ill-effects of over-incarceration in individual cases, but they would also guide the system of justice ever closer to its ultimate aim—approximating the true culpability of criminal defendants.

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which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused's level of self-control should not.").

156 Fontaine, *supra* note 8, at 40.

157 *Id.* at 30–31. Doing so would offer leniency with respect to the level of charges and sentencing that reactive defendants who mistakenly interpret a provoking event "as one that is seriously wrongful or otherwise offensive" commonly receive. *Id.* at 31.

158 Kahan & Nussbaum, *supra* note 23, at 318.

159 *See* Buchhandler-Raphael, *supra* note 7, at 1726 ("Such mitigation [would] acknowledge[] that the criminal culpability and moral blameworthiness of defendants who acted out of fear [or other emotion] is diminished compared to defendants who coldly calculated a killing.").

160 *Id.* at 1733.