

# OF ORDINARINESS AND EXCUSE: HEAT-OF-PASSION AND THE SEVEN DEADLY SINS

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## INTRODUCTION

This Article examines the underlying rationale of the heat-of-passion partial defense and the circumstances in which it should operate. Part I briefly addresses the justification-or-excuse debate and resolves the matter in favor of heat-of-passion as a partial excuse. Part II explores the partial defense as a “concession to human frailty” by utilizing the Seven Deadly Sins as exemplars of common human frailties to determine that the heat-of-passion partial defense should be available regardless of whether the passion is justified or excused. Part III discards the “concession to human frailty” as inappropriate in an aspirational criminal law system, narrowing the application of the partial defense to partial losses of control for which the actor is blameless (regardless of the ordinariness of the passion).

### I. HEAT-OF-PASSION AS A PARTIAL EXCUSE

In addressing the heat-of-passion partial defense, it is first necessary to attend to a preliminary issue: whether the partial defense is a partial excuse or a partial justification. While arguments are voiced on both sides of the issue,<sup>1</sup> this Article will address heat-of-passion as a partial excuse.

While not the focus of this Article, it is valuable at the outset to briefly relate my reasons for this viewpoint in order to provide a framework of my understanding of the partial defense. Justification defenses, like self-defense, focus on the act and conclude that the conduct is not wrongful.<sup>2</sup> Excuse defenses, such as insanity, focus on the actor and conclude that although the actor’s conduct is wrongful, the actor is not blameworthy.

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<sup>1</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.07(C)(1)–(2) (4th ed. 2006).

<sup>2</sup> Some commentators opine that justified conduct must be “right” conduct, but I would reason that it includes all “non-wrongful” conduct. For a critique of the view that justified conduct is always right conduct, see Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984).

For heat-of-passion to qualify as a partial justification, the slaying must be deemed non-wrongful. Four theories are used to justify actions: (1) moral forfeiture; (2) moral rights; (3) lesser harm/superior interest; and (4) public benefit.<sup>3</sup> For moral forfeiture to partially justify the slaying, the deceased must have (partially) forfeited her right to life. It would be troubling to say that provoking parties (partially) forfeit their rights to life based on their (often legal) actions.<sup>4</sup> Provoked persons have no moral right to slay. The lesser harm theory is inapplicable, as the harm of slaying the provoker is greater than permitting the provoker to live. Lastly, the public benefit theory provides no justification, as the primary motive of the slayer is not action for the public good.

Excuse theory, on the other hand, does encompass the heat-of-passion partial defense. Professor Joshua Dressler has laid out two categories of excuses: (1) incapacity-oriented excuses and (2) no fair opportunity excuses.<sup>5</sup> Actors with some sort of incapacity, such as infancy or insanity, do not deserve punishment because of their internal deficiency. Actors who are not given a fair opportunity to follow the law, such as those acting under duress, are blameless because of the external constraints placed on their ability to act lawfully.<sup>6</sup>

The common law partial defense of heat-of-passion<sup>7</sup> contains four elements:

- (1) the actor must have acted in a heat of passion;
- (2) the passion must have been the result of adequate provocation;

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<sup>3</sup> See DRESSLER, *supra* note 1, § 17.02.

<sup>4</sup> See Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 477–78 (1988) [hereinafter *Provocation: Partial Justification or Partial Excuse?*].

<sup>5</sup> See Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 701–02 (1988).

<sup>6</sup> See *Provocation: Partial Justification or Partial Excuse?*, *supra* note 4, at 471.

<sup>7</sup> This Article concerns itself only with the common law, rather than specific codifications of the heat-of-passion partial defense, such as the English Homicide Act of 1957 or the American Law Institute's Model Penal Code. As this Article is concerned with rationalizing the partial defense as a whole, inquiry into the common law is more useful than into particular embodiments. A useful overview of codified heat-of-passion law in Canada, Australia, New Zealand, and South Africa can be found in GEORGE MOUSOURAKIS, *CRIMINAL RESPONSIBILITY AND PARTIAL EXCUSES* 74–75 n.51 (1998).

- (3) the actor must not have had a reasonable opportunity to cool off; and
- (4) there must be a causal link between the provocation, the passion, and the homicide.<sup>8</sup>

The “internal” element—the heat of passion—is the first element, and the “external” element—the provocation—is the second.

Of the two categories, the heat-of-passion partial defense better fits with the incapacity defenses. Although heat-of-passion does require an external element (the provocation), the hallmark of a no fair opportunity excuse, the actor is not (partially) deprived of the *opportunity* to follow the law. The actor is (partially) *incapable* of following the law. The outside element triggers an internal incapacity, much like the incapacity defense of intoxication (although an outside element, such as drugs or alcohol, operates upon the actor, it is the intoxication, the incapacity to control one’s own actions, which is the basis for the defense).

## II. FRAILTY, THY NAME IS HUMAN

### A. *A Unique Concession Indeed*

The heat-of-passion defense most likely was born of the desire to mitigate some less-culpable defendants’ convictions from murder to manslaughter in medieval England, where all murderers were subjected to the death penalty.<sup>9</sup> As penalties have become more flexible and all murderers no longer face death sentences, the need to loose some convicts from the chains of a murder conviction into the more comfortable shackles of a manslaughter conviction no longer explains the heat-of-passion partial defense.

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<sup>8</sup> See DRESSLER, *supra* note 1, § 31.07(B).

<sup>9</sup> See MOUSOURAKIS, *supra* note 7, at 61; Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 423–24 (1982) [hereinafter *Rethinking Heat of Passion*]; Finbarr McAuley, *Anticipating the Past: The Defence of Provocation in Irish Law*, 50 MOD. L. REV. 133, 135 (1987). For offenses other than murder, the heat-of-passion partial defense is unavailable, and provocations are usually accounted for as mitigating factors at sentencing. See MOUSOURAKIS, *supra* note 7, at 61. In the thirteenth century, the term murder (“murdrum”) described the fine imposed on Norman citizens by the government when a Norman who had killed another Norman could not be found. The fine was abolished in the next century and “murder” began to connote the most reprehensible killings, especially those done in secret. *Id.* at 62 & n.5. The heat-of-passion partial defense was applied to some attempted murders in nineteenth century England, but currently is not recognized as a partial defense in such situations. *Id.* at 69–70.

In modern times, many commentators recognize the heat-of-passion partial defense as a concession to human frailty<sup>10</sup>—recognition that the human courier is accompanied by the luggage of imperfection. The defense is somewhat explainable on this level. Take, for instance, the prototypical heat-of-passion scenario: Joe Cuckold returns home early to find his wife, Jane, in a “passionate embrace” with another man. Joe becomes instantly enraged, and immediately smashes a lamp over the man’s head, killing him.<sup>11</sup>

Joe’s actions are “ordinary” and understandable, albeit wrongful.<sup>12</sup> While it is easy to understand the partial excuse at this level, it does not square with other defenses in the criminal law, nor common morality—neither of which generally permit a reduction in culpability based on the fact that the wrongful action is “ordinary” or what others would do in the same circumstances.<sup>13</sup> The catacombs of human passion must be mined for another reason.

#### *B. Heat-of-Passion and the Seven Deadly Sins*

The frailties of human nature have most famously been illustrated by the seven deadly sins.<sup>14</sup> As evolved from earlier incarnations of the

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<sup>10</sup> See *Rethinking Heat of Passion*, *supra* note 9, at 442; McAuley, *supra* note 9, at 136.

<sup>11</sup> If Joe had instead killed Jane, some incarnations of the heat-of-passion defense would not grant him a partial defense. See, e.g., Melvin D. Glass, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1031 (1958) (describing heat-of-passion law in Texas until 1936, where the partial defense was available to a husband killing his wife’s paramour, but not his adulterous wife). Little rational explanation can be had for such a rule (and certainly not one grounded in excuse theory)—other than perhaps the outdated view of “wives as property” justifying the use of violence against the lothario (who has damaged the husband’s “property”) but not against the “property” itself.

<sup>12</sup> If Joe’s actions were not wrongful, he would be entitled to a justification. See Part I, *supra*.

<sup>13</sup> “Possibly one of the most remarkable features of modern criminal law has been its resistance to notions of excuse based on individual characteristics or circumstances.” Celia Wells, *Provocation: The Case for Abolition*, in *RETHINKING ENGLISH HOMICIDE LAW* 104 (Andrew Ashworth et al. eds., 2000). While somewhat of an overstatement (for instance, the criminal law takes note of a person’s insanity or circumstances of duress), it is true that the criminal law generally does not offer excuses based on the fact that an “ordinary” person would react similarly in the circumstances surrounding the crime (for instance, no excuse permits the poor to steal—although true necessity may create a justification).

<sup>14</sup> The seven “deadly sins” is actually a misnomer. “Sins” are specific acts of commission or omission. The seven deadly “sins” are actually seven vices (negative  
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“capital sins,”<sup>15</sup> Pope Gregory the Great enumerated the Seven Deadly Sins in the sixth century<sup>16</sup>: pride, envy,<sup>17</sup> wrath,<sup>18</sup> sloth, avarice,<sup>19</sup> gluttony, and lust.<sup>20</sup> For the early monastic communities, gluttony and lust were the

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character traits) that lead to sin. See SOLOMON SCHIMMEL, *THE SEVEN DEADLY SINS: JEWISH, CHRISTIAN, AND CLASSICAL REFLECTIONS ON HUMAN NATURE* 14 (1992). Furthermore, Catholicism distinguishes between “mortal” and “venial” sins. Mortal sins are thought to be so serious as to deprive the soul of grace and cause automatic damnation if left unpardoned at the time of death (although some maintain that mortal sins are unpardonable). Venial sins (from the Latin for “pardonable”) are minor sins or sins committed without deliberate intent and do not result in a loss of grace. Since each of the seven vices lead to both mortal (deadly) and venial (non-deadly) sins, they are more appropriately classified as the seven “cardinal, capital, or chief” sins/vices. See *id.* at 22. Since they were thought to be the source of all sin, the Seven Deadly Sins were originally referred to as the “Capital Sins.” See ALBAN MCCOY, *AN INTELLIGENT PERSON’S GUIDE TO CATHOLICISM* 89 (2001). In keeping with the popular vernacular, however, this Article will eschew the author’s predilections for the seven “capital vices” and refer instead to the Seven “Deadly Sins.”

<sup>15</sup> The listing of certain capital sins began in early Christian monastic communities in Egypt. Evagrius of Pontus, in the fourth century, listed eight such sins: gluttony, lust, avarice, sadness, anger, spiritual lethargy, vain glory, and pride. The specific order of the sins was important, as it was believed that each sin led to the next (gluttony leads to lust, which leads to avarice, and so on). Sadness and spiritual lethargy were then condensed into sloth, vain glory combined with pride, and envy added to the list. See SCHIMMEL, *supra* note 14, at 24–25.

<sup>16</sup> See *id.* at 25. Pope Gregory the Great’s Seven Deadly Sins interpreted Evagrius’s eight capital sins, which applied more specifically to monastic communities, note 15, *supra*, for general application to the normal perils of the soul outside of monastic life. See HENRY FAIRLIE, *THE SEVEN DEADLY SINS TODAY* 12 (1978). Both Dante Alighieri and Geoffrey Chaucer followed Pope Gregory the Great’s ordering of the Seven Deadly Sins, but modern theologians tend to advance lust to a higher place in the list. *Id.* at 33–34.

<sup>17</sup> Alternatively known as “jealousy.”

<sup>18</sup> Alternatively known as “anger.”

<sup>19</sup> Alternatively known as “greed” or “covetousness.”

<sup>20</sup> Dorothy Sayers further divided the Seven Deadly Sins into three disreputable but warm-hearted sins (lust, wrath, and gluttony) and four respectable but cold-hearted sins (avarice, envy, sloth, and pride). MCCOY, *supra* note 14, at 90. The cold-hearted sins are sins of the spirit and more likely to be graver than the warm-hearted sins of the flesh. *Id.* The “respectable” sins are able to masquerade as virtues, while the “disreputable” sins cannot mask their negative character. *Id.* Sloth’s pretense is the virtue of tolerance, but slothful “over-tolerance” can destroy belief in an objective truth and acknowledgment of moral right and wrong. *Id.* at 91–92. Envy, by wishing all to be equally unhappy and rendering worthless other’s accomplishments, can hide under the pretext of the public virtue

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greatest tormenters, while Pope Gregory the Great and St. Thomas Aquinas instead labeled pride the root of all sin.<sup>21</sup>

*1. The Inequitable Treatment of Non-Wrathful Slayings*

Although not mentioned specifically in the Bible,<sup>22</sup> the Deadly Sins are illustrated in its stories. The three stories below illustrate how certain Deadly Sins (other than wrath) can lead to homicide.

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of establishing equal rights. *Id.* at 95. The virtues of thrift (when employed as an end unto itself rather than as a necessity) or enterprise can disguise the vice of avarice. *Id.* at 97–98.

The table below lists several associations with the Seven Deadly Sins.

<b>Deadly Sin</b>	<b>Latin Name</b>	<b>Corresponding Virtue</b>	<b>Associated Demon</b>	<b><i>Gilligan's Island</i> Castaway</b>
<b>Pride</b>	Superbia	Humility	Lucifer	The Professor
<b>Envy</b>	Invidia	Kindness	Leviathan	Mary Ann
<b>Wrath</b>	Ira	Forgiveness	Satan	The Skipper
<b>Sloth</b>	Acedia	Diligence	Belphegor	Gilligan
<b>Avarice</b>	Avaritia	Charity	Mammon	Thurston Howell III
<b>Gluttony</b>	Gula	Temperance	Beelzebub	Mrs. Howell
<b>Lust</b>	Luxuria	Chastity	Asmodeus	Ginger

Catholicism maintains the Seven Holy Virtues, which correspond to the Seven Deadly Sins. Each sin is also thought to have a corresponding demon, which tempts humans with the vice. See PETER BINSFELD, BINSFELD'S CLASSIFICATION OF DEMONS. On a more indulgent note, each castaway on the popular television show *Gilligan's Island* was meant to reflect a deadly sin. See Robert M. Jarvis, *Legal Tales from Gilligan's Island*, 39 SANTA CLARA L. REV. 185, 187–88 n.15 (1998).

<sup>21</sup> Environmental factors most likely caused these varying perspectives. See SCHIMMEL, *supra* note 14, at 25. St. Thomas Aquinas believed pride to be the “deadliest” of the Deadly Sins as it is a sin of idolatry—attempting to elevate oneself and displace God. Pride is also perhaps more “dangerous” as it is a sin of the strong, rather than afflicting the weak. See MCCOY, *supra* note 14, at 90.

<sup>22</sup> While not even a close approximation of the Seven Deadly Sins, the following passage from the Book of Proverbs is often referenced in connection with the Seven Deadly Sins:

Six things the Lord hates,  
 Seven things are detestable to him:  
 A proud eye, a false tongue,  
 Hands that shed innocent blood,

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*a. Avarice: King David and Bathsheba: 2 Samuel 11:1–27*

King David saw a beautiful woman one day. He found out she was Bathsheba, the wife of Uriah, one of his subjects who was off at war. King David sent for Bathsheba and made love to her. Later she sent a message that he had impregnated her.

King David then sent a message to the commander of his army to place Uriah in the front line and then to quickly retreat, allowing Uriah to be killed by the enemy. The order was followed, and Uriah was slain in battle. After a mourning period, King David brought Bathsheba to the palace and took her for a wife.

*b. Envy: Joseph and his Brothers: Genesis 37:1–20*

Jacob had twelve sons, but loved his son Joseph the best because he had been born when Jacob was very old. Joseph's brothers were very envious of the favor their father showed to their youngest brother. One day when Joseph went to visit his brothers out in the fields, they saw him coming from a long distance and plotted to kill him by throwing him down a well and telling their father that wild animals had killed him.

*c. Lust: Lot, the Angels, and the Sodomites: Genesis 19:1–9*

Two angels came to the city of Sodom one evening. Lot, thinking they were human travelers, invited them to his house to rest for the night. After dinner the men of Sodom surrounded Lot's house and demanded he turn over his two visitors so they could have sex with them. Lot stood defiantly outside his house, and the men threatened bodily harm if he did not turn his visitors over to them.

Outside intervention precluded homicides from actually occurring in the latter two stories,<sup>23</sup> but it is clear that killings were planned<sup>24</sup> or within

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A heart that forges thoughts of mischief,  
 And feet that run swiftly to do evil,  
 A false witness telling a pack of lies,  
 And one who stirs up quarrels between brothers.

*Proverbs 6:16–19. See SCHIMMEL, supra note 14, at 23.*

<sup>23</sup> Joseph's brothers cast him down the dry well, but then sold him to some Ishmaelites who happened upon them instead of leaving him there to perish. They then told their father that wild animals had torn Joseph to pieces. *Genesis 37:23–35*. In the last story, the angels  
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the realm of possibility,<sup>25</sup> and a homicidal intent is sufficiently illustrative for present purposes. Each story fits within the basic heat-of-passion rubric: a provoking event<sup>26</sup> that stimulates a passion<sup>27</sup> that leads to a killing (or near killing) in the heat of that passion.

The element that is absent from the each story is the temporal element—that the actor slays before a reasonable opportunity to cool off has passed. In two ways this temporal requirement contradicts the reasoning that the heat-of-passion partial defense exists to recognize the frail nature of humans.

First, regardless of whether the actor was still wrapped up in the heat of passion, the partial defense is unavailable to those who had sufficient time to rethink their wicked impulse. A true concession to human nature would not require persons stirred with passion to bottle their passions within a “reasonable” period of time.<sup>28</sup> The law concedes that, upon provocation, people who become infused with passion sometime (unfortunately) kill in the heat of those passions. A temporal limitation is an aspirational limitation, focusing on how humans *should* act (by taking control of our passions) rather than how humans *do* act (often letting our passions get the better of us for an extended period of time), and, resultantly cuts many actions committed in true heats of passion out of the partial defense. Such an aspirational limitation does not fit within the framework of a “concession to human frailty.”

The second way in which the temporal requirement contradicts the concession to human frailty reasoning is by effectively removing entire “passions” from protection. Slayings committed under the influence of most of the Deadly Sins will rarely qualify for the heat-of-passion partial

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pulled Lot back into the house and struck the men of Sodom with blindness, rendering their attack ineffective. *Genesis* 19:10–11.

<sup>24</sup> In the story of Joseph and his brothers.

<sup>25</sup> In the story of Lot, the angels, and the Sodomites.

<sup>26</sup> The provoking events are: (1) seeing a beautiful woman bathing, (2) the favor Jacob showed to Joseph, and (3) the arrival of two strangers in town.

<sup>27</sup> The passions are: (1) avarice (covetousness), (2) envy, and (3) lust.

<sup>28</sup> It is also argued that the temporal requirement unfairly favors granting the partial defense to the physically stronger party (most often males), because lack of physical strength often leads to delay in physical attack—a weaker provoked party will wait to a more opportune time to attack their provoker. See Dennis Klimchuk, *Outrage, Self-Control, and Culpability*, 44 U. TORONTO L.J. 441, 464 (1994), citing Susan Lorraine Bandalli, *Women, Spousal Homicide and the Doctrine of Provocation in English Criminal Law* 47–48 (1993) (Master of Law thesis, Osgoode Hall Law School).

defense. Common human experience informs us that all of the Deadly Sins save wrath usually manifest themselves over a longer period of time.

Take avarice for example: Shakespeare referred to greed as “the green sickness”<sup>29</sup>—a slow burning infection of the soul. Avarice rarely spawns spur of the moment action. The story of King David’s covetousness,<sup>30</sup> is an unexceptional<sup>31</sup> illustration of death caused by avarice. King David wanted to make Bathsheba his wife, even though she was the wife of another. He had her husband killed and took her for himself. When ordering the killing, King David acted in the heat of his greedy passion. However, a time period sufficient for a “reasonable opportunity” to cool off had occurred, removing his actions from eligibility for the heat-of-passion partial defense.

The other Deadly Sins (lust, envy, pride, gluttony, and sloth) work more similarly to avarice than to wrath. While these passions can no doubt lead to spur of the moment slayings (particularly lust and envy), the bulk of killings fueled by the six Deadly Sins other than wrath will not meet the temporal requirement of the heat-of-passion partial defense. However, these killings are still caused by common human frailties, which a true “concession to human weakness” would recognize.

Heat-of-passion is an odd type of “concession to human frailty”—one that makes only a very narrow concession. It allows murder to be mitigated to manslaughter, but only (1) if a provoking event occurs which (2) causes the killer to slay (3) in a heat of passion (4) before she had a reasonable opportunity to cool off. Surely killings that lack one (or more) of these four requirements can still be regarded as within the range of actions that might ordinarily be expected of humans.

## 2. *Explicating the Unfair Treatment: Justified Anger, Excused Slayings*

Accepting that the temporal requirement favors partially excusing wrath-slayings rather than slayings induced by the six other Deadly Sins leads to investigation into why wrath-slayings are more deserving of the partial excuse.<sup>32</sup> Two more Biblical tales are illustrative.

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<sup>29</sup> WILLIAM SHAKESPEARE, ANTHONY AND CLEOPATRA act. 3, sc. 2 (The Oxford Shakespeare ed. 1994).

<sup>30</sup> See Part II.B.1.a, *supra*.

<sup>31</sup> “Unexceptional” refers to King David’s internal progression from “provocation” to homicide, not the means employed.

<sup>32</sup> Although not in conjunction with an inspection of the temporal requirement, it has been noted that “passion” in the heat-of-passion context usually means “anger.” See Donna (continued)

a. *Cain and Abel: Genesis 4:1–16*

Cain and Abel were brothers and labored as a farmer and a shepherd, respectively. Abel offered the best parts of one of his first-born lambs to God, while Cain offered some of his harvest. God was pleased with Abel's offering, but rejected Cain's offering. The rejection of his offering angered Cain a great deal.<sup>33</sup> Cain slew Abel, and east of Eden he was cast.

b. *Moses and the Golden Bull-Calf: Exodus 32:1–35*

While Moses was up on Mt. Sinai receiving the Ten Commandments, the Israelites whom he had led out of Egypt grew restless and constructed a golden bull-calf to worship. Upon his return, Moses became furious at what he saw. Moses melted the bull-calf into powder, mixed it into the drinking water, and forced those who had worshipped the golden idol to drink it. Moses then commanded those who were true to God to kill those who were not, resulting in the death of about three thousand men. Those who took part in the killings received a blessing from God for their willingness to defend God, even by slaying their own kinsmen. God then sent a disease on the Israelites as further punishment.

Both of these stories demonstrate wrath-slayings, but exemplify very different moral implications. Cain's slaying of Abel was clearly wrongful conduct (evidenced by the punishment meted out upon Cain). The killing of the unfaithful Israelites is presented as "right" or "proper" action (evidenced by the blessing bestowed upon those who smote their kinsmen). In criminal law terms, the killing of Abel is presented as unjustified, while the killing of the unfaithful Israelites is presented as justified. Of course, modern American law would not justify even the killing of the Israelites, as the law prefers punishment to be doled out by government actors and disfavors mortal penalties imposed by groups such as Moses' band of vigilantes.

The difference between wrath and the other Deadly Sins is not that *actions* induced by wrath are more correct than those induced by the other

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K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 79 (1992). However, anger is not the only emotion that courts have accepted as an eligible "passion." See *Rethinking Heat of Passion*, *supra* note 9, 427 n.62; DRESSLER, *supra* note 1, § 31.07(B)(1).

<sup>33</sup> It is arguable that Cain labored under jealousy rather than anger (or a combination of the two). See *Rethinking Heat of Passion*, *supra* note 9, 421 n.4. For present purposes, assume that Cain's sole vice was anger (which is consistent with the *Good News Bible's* English translation).

Deadly Sins; rather, it is that sometimes wrath is not a sin at all—wrathful passion can be proper. The anger that Cain felt upon the rejection of his offering was wrongful—his offering was denied because he did not give his best, and he who gives God his second best gives God nothing.<sup>34</sup> Since it was Cain who was in the wrong, it was morally improper for Cain to feel anger. Moses, on the other hand, displayed “righteous indignation” or “justified anger”—the Israelites were acting wrongfully, which rightfully upset him.

Other actors in the Bible who are exemplars of virtue become angry, including God<sup>35</sup> and Jesus.<sup>36</sup> This confirms that becoming angry is not always or inherently wrongful.<sup>37</sup> St. Paul does not condemn anger *per se* in his writings, but instead cautions the people to not let their anger lead them into sin—anger in and of itself is not always inherently sinful or wrongful, but can lead to sinful and wrongful conduct.<sup>38</sup> Aristotle, a secular philosopher, speaks of the “right” amount of anger felt against the “right” person for the “right” motive as characterizing goodness.<sup>39</sup>

In modern criminal law terms, anger can be “justified” or it can be wrongful. For purposes of clarity, for the remainder of this Article “justified anger” will be referred to as such and wrongful anger will be referred to as “wrath.” Here is where the Seven “Deadly Sins” as a misnomer can cause confusion. Since justified anger is not included in the

<sup>34</sup> See Vincent P. Miceli, *THE ROOTS OF VIOLENCE* 78 (1989).

<sup>35</sup> See, e.g., *Numbers* 22:22, in which God becomes angry with Balaam for disregarding his command. St. Paul, in his letters to the Romans, instructs the people not to take revenge when they are wronged, but instead to let “God’s anger do it.” See *Romans* 12:19.

<sup>36</sup> Jesus became angry with the moneychangers and merchants defiling the holiness of the Temple, and drove them out. See *Matthew* 21:12–13; *Mark* 11:15–17; *Luke* 19:45–46; *John* 2:13–22. Furthermore, Jesus teaches that whoever without cause is angry will be brought to trial, implying that it is not always wrongful to be angry. See *Matthew* 5:22.

<sup>37</sup> Indeed, St. Thomas Aquinas commented, “It is the mark of the virtuous man to be angry at injustice.” MCCOY, *supra* note 14, at 104. Important to remember, though, is that even justified anger does not itself create justice—it is only fuel for positive actions. *Id.*

<sup>38</sup> See *Ephesians* 4:26. But see *Ephesians* 4:31 (“Get rid of all bitterness, passion, and anger.”)

<sup>39</sup> See Aristotle, *ETHICS*, Book Two, Chap. VI, at 51 (J. A. K. Thomson trans., George Allen & Unwin Ltd. 1953). Aristotle states that feelings such as anger, fear, desire, pity, and boldness can be felt either too much or too little, and actions, similarly, can be performed deficiently or to excess. *Id.* However, some feelings such as malice, shamelessness, and envy, and actions such as adultery, theft, and murder are “evil in themselves” and can never be felt or practiced to a right amount, but are always wrongful. *Id.* at 52–53.

Seven Deadly Sins, it seemingly leads to the conclusion that actions motivated by justified anger are not sinful or wrongful. However, the “Seven Deadly Sins” are more appropriately categorized as the “Seven Capital Vices.”<sup>40</sup> Each of the seven vices is wrongful, but not necessarily sinful. The act of sinning is separate from the emotion. Just as the Seven Capital Vices can be wrongful emotions without necessarily causing sinful acts, non-wrongful emotions (such as justified anger) can cause sinful and wrongful acts.

This distinction is important in criminal law. When a non-wrongful emotion (such as justified anger) causes a wrongful act (such as a homicide), the passion can be justified and the action wrongful. An excuse (such as heat-of-passion) may be available to reduce the actor’s culpability for the wrongful action.

*C. The Excuses of the Father are the (Partial) Excuses of the Son*

The next inquiry is whether the same result occurs when the actor’s passion is wrongful (as opposed to justified). May one who kills under the influence of one of the Seven Deadly Sins claim the heat-of-passion defense? In such a case, both the actor’s emotion (for instance, wrath, envy, or greed) and the actor’s conduct (the slaying) are wrongful. Professor Dressler posits that if the passion is excused, the slaying is eligible for the partial excuse of heat-of-passion—to him excusing rather than justifying the passion creates no legal distinction.<sup>41</sup>

A useful analogy for determining whether excused passions may be the basis of a heat-of-passion partial excuse is to slayings committed while in a state of temporary insanity as a result of involuntarily intoxication. A killing committed while in a state of temporary insanity induced by involuntary intoxication is generally “wrongful.”<sup>42</sup> Since the killing is wrongful, the defense is excusatory in nature. Revisiting our earlier classifications,<sup>43</sup> the defense is “incapacity-oriented,” even though an *external* stimulus (the drug ingested) causes the *internal* lack of capacity for following the law. A homicide committed in a state of temporary insanity induced by involuntary intoxication is a three-step process: (1) an

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<sup>40</sup> See note 14, *supra*.

<sup>41</sup> See Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 972–74 (2002) [hereinafter *Why Keep the Provocation Defense?*].

<sup>42</sup> Of course, a justified killing by an intoxicated actor (such as a killing in self-defense) would not be “wrongful.”

<sup>43</sup> See Part I, *supra*.

external stimulus (the involuntary intoxication); (2) produces a lack of capacity (the temporary insanity); and (3) a crime (for our purposes, a killing) is committed while in that state of incapacity.

As stated above, the final step, the killing, is wrongful. The second step, the temporary insanity, is also “wrongful.”<sup>44</sup> However, depending on whether the intoxication was voluntary or involuntary, the temporary insanity is excused. When an actor voluntarily becomes intoxicated, the resulting temporary insanity and any bad acts committed in that state are not excused—the actor, by voluntarily becoming intoxicated, willingly put herself in the position to become temporarily insane and potentially harmful.<sup>45</sup> However, when the actor becomes intoxicated involuntarily, any resulting temporary insanity and bad acts committed in that state are excused because the actor is not blameworthy for the (“wrongful”) temporary insanity and (wrongful) bad acts.<sup>46</sup>

The next inquiry is into the first step—the intoxication—which is generally held to be “wrongful.”<sup>47</sup> Intoxication is “involuntary” when the actor is not to blame for becoming intoxicated.<sup>48</sup> Four circumstances arise in which intoxication is deemed involuntary: (1) when the actor is coerced into becoming intoxicated; (2) intoxication by mistake (and the actor is not at fault for the mistake); (3) the actor becomes unexpectedly intoxicated from proper use of prescription medication; and (4) “pathological intoxication” (a temporary psychotic reaction triggered by alcohol) when the actor had no reason to know such a reaction would occur.<sup>49</sup>

The first situation comprising “involuntary” intoxication is coerced intoxication. Ironically, coerced intoxication is not “involuntary” in the sense the actor did not choose to become intoxicated. Instead, the “involuntariness” reflects that the actor had “no fair opportunity” to refuse her coercer—it is an embodiment of the duress excuse. Since the actor had no feasible choice except to become intoxicated, the actor is not blameworthy and is excused (even though the act of becoming intoxicated is wrongful).

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<sup>44</sup> Here, “wrongful” is used to connote society’s judgment that temporary insanity is a state of being that is undesirable.

<sup>45</sup> See *Provocation: Partial Justification or Partial Excuse?*, *supra* note 4, at 475.

<sup>46</sup> See DRESSLER, *supra* note 1, § 24.06(B).

<sup>47</sup> Society (as reflected by its criminal laws) has judged a state of intoxication to be generally undesirable.

<sup>48</sup> See DRESSLER, *supra* note 1, § 24.06(A).

<sup>49</sup> *Id.*

The second circumstance occurs when a mistake of fact induces the intoxication. The actor believes (and is not at fault for believing) that the substance she is ingesting is non-intoxicating. The actor lacks the *mens rea* (the wrongful intent) to become intoxicated. The same reasoning explains why the actor is not blamed in the third or fourth scenarios as well—without intending to do so, the actor mistakenly becomes intoxicated.

When lack of *mens rea*, because of mistake of fact, is applied to a crime, it results in the lack of proof of an element of the crime, rather than operating as an *excuse* for the crime. For instance, when X mistakenly picks up Y's briefcase (instead of her own) and takes it home, X is not guilty of stealing because she lacked the criminal intent to do so. For present purposes, however, applying lack of *mens rea* to a non-criminal wrongful action—becoming intoxicated—operates differently. Since becoming intoxicated is not (generally) criminal, it does not have “elements” and therefore a lack of *mens rea* does not negate an element of the wrongful action. Lack of *mens rea* in this context is more appropriately regarded as a “no fair opportunity” excuse—the actor did not know the factual situation (e.g.: that the pill was a hallucinogenic drug rather than an aspirin) and therefore lacked a fair opportunity to act non-wrongfully.

The successful use of a temporary insanity because of an involuntary intoxication defense to a murder charge is a triple-excuse: the intoxication is excused because it is involuntary (regardless which of the four circumstances of involuntary intoxication is involved), the temporary insanity is excused because it is caused by an intoxication for which the actor was not to blame, and the murder is excused because it was committed in a bout of temporary insanity for which the actor was not to blame.

Therefore, excuses can be bases for other excuses—as long as the actor is not to blame for the wrongful state of being or loss of capacity that leads to the wrongful act, the act is still eligible to be excused. Applying this logic to the heat-of-passion partial defense permits an excused wrongful passion to be the basis of a heat-of-passion partial excuse. Just because one acts in the heat of a wrongful passion—a Deadly Sin, for example—does not mean the actor is ineligible for the heat-of-passion partial excuse. In the case of a killing in the heat of a *wrongful* passion, the first inquiry must be whether the passion is excused.<sup>50</sup>

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<sup>50</sup> Wrongful passions cannot be justified, as explored in Part II.B.2, *supra*.

### III. A LESSON FROM THE LEMMINGS: PUNISHING ORDINARY WRONGFULNESS

The conclusion that the passion may be either excused or justified is consistent with that of Professor Dressler.<sup>51</sup> At this point, however, our views diverge. Dressler appears unconvinced that people have meaningful control over their emotions, and, therefore, seems uneasy with the idea of “excusing” people for feeling certain emotions, as that suggests that merely feeling those emotions is morally blameworthy.<sup>52</sup> Instead, Dressler permits an excusal of the passion where such passion is “within the range of expected human responses to the provocative situation”—if the provocation might cause an ordinary person to feel such passion, that passion is excusable.<sup>53</sup>

Such an excuse—that other ordinary persons *might* feel the same way—should not be recognized by the criminal law. While excuse theory is usually applied to wrongful (read: criminal) acts, rather than emotions, other aspects of human life—whether it be emotions or states of being—may be excused under the same theories. Professor Dressler’s assertion that excuses usually apply to blameless people, rather than emotions<sup>54</sup> improperly refocuses the issue. While legitimate excuses are *dependent* on blameless people, it is the wrongful act that is excused, not the person. The same logic applies to emotions—if a person is blameless for feeling a wrongful emotion, an excuse for that emotion is appropriate.

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<sup>51</sup> See *Why Keep the Provocation Defense?*, *supra* note 41, at 972–74.

<sup>52</sup> See *id.* at 972 n.64. Evagrius of Pontus held the opinion that humans are “powerless” over whether any of the eight “provoking thoughts,” see *supra* note 15, enter into the mind, but can control whether those thoughts linger and become passions. See ROBIN AMIS, *A DIFFERENT CHRISTIANITY: EARLY CHRISTIAN ESOTERICISM AND MODERN THOUGHT* 318 (1995). I. M. Kontzevitch described six stages of “provocation” (“provocation” in the sense of catalysts for sin, not the heat-of-passion partial defense), the initial phase of which, the “suggestion,” was involuntary. Later stages, in which the person determines their attitude to the stimulus and further entertains the provoked thoughts are controllable. *Id.* at 320–25. If the first inclination of provoking thoughts is beyond human control, it does not necessarily follow that a provoked killer’s “passion” entitled to excuse. While the seed of the emotion may be planted involuntarily (which would receive an “incapacity excuse”)—the first twinge of envy, for instance—it is still within the capacity of humans to deny this feeling from growing into a passion that overtakes them. Therefore, the actor’s *passion* is not excused.

<sup>53</sup> See *Why Keep the Provocation Defense?*, *supra* note 41, at 973.

<sup>54</sup> See *id.* at 972 n.64.

From Dressler's viewpoint, where humans lack meaningful control over their emotions, it makes sense that passions that lead to killings are offered broad excuse.<sup>55</sup> Only those passions that fall outside of the range of expected human responses are unexcused—indicating that those who cannot keep their emotions within such a “normal” range are blameworthy for their emotions. Such blame indicates that humans do maintain at least some control over their emotions.

Dressler's framework is not incompatible with the idea that some emotions are just plain wrongful. However, Dressler excuses those wrongful emotions if an “ordinary” person might feel them under the same circumstances.<sup>56</sup> Under this reasoning, while some emotions are wrongful, usually those who feel them are not blameworthy. It is not apparent why wrongful emotions should be so easily excused—instead, such emotions should only be excused where either the actor is incapable of avoiding the emotion or lacks a fair opportunity to do so.

At first blush the incapacity-oriented defenses (infancy, insanity, et cetera) may appear to offer little shelter—not because these excuses are inapplicable, but because actors suffering from these deficiencies would often be afforded a full defense. However, these internal deficiencies may bestow an excuse for the actor's wrongful emotion, even where an excuse for the crime is not always appropriate. It is entirely conceivable to imagine a person who grasps the wrongfulness of killing without understanding the wrongfulness of their emotions or passions (wrath or envy, for instance). Or perhaps some people suffer from disorders (“rageaholics”) that render them unable to control feeling wrath, even if they acknowledge such responses are wrongful. Such persons would be entitled to an incapacity excuse for the emotion, although not for the action.

Excuses based on lack of a fair opportunity are relatively inapplicable to wrongful passions. Quite simply, wrongful emotions are the result of internal deficiencies; external stimuli (the basis of no fair opportunity excuses) cannot coerce emotions. When *D* has a gun held to her head, she can be coerced to rob a bank, and she is excused because she is acting under duress. However, when *D* has a gun held to her head, she cannot be coerced into feeling wrath, envy, or lust.

The argument may be made that any stimulus that might cause an ordinary person to feel a wrongful passion deprives the actor of a fair opportunity to avoid feeling the wrongful passion. For instance, when a

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<sup>55</sup> See *id.* at 972–73.

<sup>56</sup> See *id.* at 973–74.

neighbor drives home a shiny new luxury automobile, an ordinary person might feel envious. Such a response would be within the range expected responses to such a “provocation.” However, the fact that “normal people” might also feel pangs of jealousy does not mean that the actor is denied a *fair opportunity* to avoid feeling envious—it merely means that an ordinary person might feel the same wrongful emotion.

#### CONCLUSION

The heat-of-passion partial defense should be applied only to situations in which the actor’s passion is either justified or excused and the slaying committed in the heat of that passion is partially excused (because of the heat of the passion). Passions should be justified only when the passionate emotion is non-wrongful, which includes righteous anger and fear. Wrongful passions should be excused where the actor is incapable of avoiding feeling the passion. Whether an actor is caught up in the heat of a wrongful or non-wrongful passion should not usually be factually difficult to establish. Where the actor is reacting to the wrong of another, the actor’s emotion will usually be justified.<sup>57</sup>

It may seem unjust to impose greater punishment where actions spawn from emotions that are common to all humans. Feelings of envy, wrath, lust, and avarice are common frailties—indeed, if such was not the case they would not be included in the Seven Deadly Sins. Remembering that the Seven Deadly Sins are in actuality the Seven Capital Vices and are not sinful in and of themselves, but only stimulate sinful action helps to explain the result. Refusing the heat-of-passion partial defense to those who kill in a wrongful passion does not punish people for *feeling* the wrongful emotion. It punishes people for failing to control the emotion and acting under the influence of the wrongful passion.<sup>58</sup> Indeed, the

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<sup>57</sup> Research indicates that geography plays a factor to how one reacts in certain circumstances. Individuals from the Southern region of the United States take offense more easily than do those from other parts of the country, and more frequently respond violently to “insults to honor.” Southerners actually underwent different physiological changes than Northerners in laboratory testing on responses to insults. See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 36 (2003). Such differences should have no effect on excusing the emotion—as feelings of anger in response to an insult are non-wrongful—even though a wrongful violent response may be more “ordinary” in the American South than other parts of the country.

<sup>58</sup> According to Jeremy Horder:

the state has no duty to condescend to motivations for so harming others  
that have no moral value, like greed, envy, or spite. It only has reason

*(continued)*

universality of these emotions weighs in favor of denying the partial excuse—all humans deal with these emotions, and the overwhelming majority of people are able to do so in a way that stops short of slaying another. Instead of (uniquely and incompletely)<sup>59</sup> conceding to human frailty, the heat-of-passion partial defense should partially excuse only slayings committed in a state of justified or excused passion.<sup>60</sup>

Wrongful slayings committed in the heat of a wrongful passion/partial loss of control should be punished as murder—since the actor is to blame for the passion and partial loss of control, full culpability remains for any actions committed in the heat of that passion.

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to condescend, by way of excuse, to motivations for harming others which do have moral value, which normally form part of a morally worthwhile life, such as anger, fear, or compassion.

JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 158–59 (1992).

<sup>59</sup> See Part II.A–B, *supra*.

<sup>60</sup> The “ordinariness” of the frailty should not form the basis for an excuse.