STATE OF MICHIGAN
IN THE SUPREME COURT

MENAYETTA YEAGER,

Defendant-Appellant,

v.

STATE OF MICHIGAN,

Plaintiff-Appellee.

Case No. 164055

Wayne County Circuit Court
Case No. 17-8290-01-FC

Index of Appendices

APPENDIX 1

12-21-21 Court of Appeals opinion with concurrence

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee-Cross Appellant,

v

MENAYETTA MICHELL YEAGER,

Defendant-Appellant-Cross Appellee.

UNPUBLISHED
December 21, 2021

No. 346074
Wayne Circuit Court
LC No. 17-008290-01-FC

Before: O'BRIEN, P.J., and BECKERING and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Before plenary review, this Court remanded this case to the trial court for that court to conduct a *Ginther*[1] hearing "limited to the issue of whether defendant's trial counsel rendered ineffective assistance of counsel by failing to request an instruction on voluntary manslaughter as a lesser included offense to murder."[2] Following the *Ginther* hearing, the trial court granted defendant a new trial. The prosecution filed a cross-appeal to contest this ruling.

Addressing the issues raised in defendant's original appeal, we find no error. In the prosecution's cross-appeal, we agree with the prosecution that the trial court erred by concluding that defendant received ineffective assistance of counsel at trial, and therefore reverse the trial court's ruling granting defendant a new trial.

I. FACTUAL BACKGROUND

This action arises from the murder of defendant's boyfriend. According to defendant, on the day of the murder, she and the victim were returning to defendant's house from a local

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1993).

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restaurant in a minivan that belonged to defendant's mother. While defendant was driving home, she told the victim she did not want to be in a relationship with him anymore. The victim responded by striking defendant in the face while she was still driving and hitting her repeatedly until she stopped the van in the middle of the street. The victim then got out of the van, pulled defendant out by her hair, and continued to hit her. Defendant managed to get away from the victim and ran down the street, but the victim got in the van and attempted to hit defendant with the vehicle. Defendant called the police, but the victim drove away before police arrived.

Labarren Borom testified that he saw the victim attempt to hit defendant with a vehicle outside of Borom's house. Borom recognized defendant as the daughter of a coworker, who lived in the area. Borom saw the victim drive the van onto Borom's front lawn and a neighbor's front lawn, and believed the victim was trying to hit defendant. Defendant appeared disheveled and looked as if someone recently punched or hit her. After Borom saw the victim drive the van down the street, Borom got in his truck and drove toward defendant to make sure she was safe. Defendant was crying and yelling on the side of the road, and when Borom spoke to her, she asked him to drive her to get the van. Borom agreed, and defendant got in his truck.

Defendant spoke to the victim on her cellphone, and the victim told her he would leave the van at the intersection of Warren Avenue and Van Dyke Street. However, the victim had not brought the minivan to that location by the time Borom and defendant arrived. Defendant continued speaking to the victim on her cellphone, demanding he give her the van. Defendant then told Borom that the victim would meet them at the intersection of Mack Avenue and Van Dyke Street, where defendant could pick up the minivan. Defendant and Borom drove to a Sunoco gas station near Mack Avenue and Van Dyke Street.

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Defendant appealed issues related to her trial, and the prosecution cross-appealed the trial court's ruling following the *Ginther* hearing.

II. DEFENDANT'S APPEAL

A. EVIDENCE OF OTHER ACTS

Defendant argues the trial court erred by declining to allow her to introduce evidence of the victim's past acts of domestic violence under MCL 768.27b and MRE 404(b). We disagree.

"The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion." *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010). Underlying questions of law are reviewed de novo. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

Initially, we note that the trial court allowed defendant to present evidence showing that the victim was physically and verbally abusive to defendant and had a character for aggression, see MRE 404(a)(2),[3] and defendant's contention on appeal is that the trial court should have allowed her to present evidence of specific instances where the victim abused her. Yet defendant

[3] MRE 404(a)(2) states:

> (a) ***Character evidence generally.*** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> (2) ***Character of alleged victim of homicide.*** When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused[.]

does not identify any specific acts of domestic violence committed by the victim that the trial court should have allowed into evidence. She instead asserts without specificity that the victim's "prior acts of domestic violence" should have been admitted. By failing to specify what evidence was erroneously excluded, defendant has failed to adequately present this issue for our review. Despite this failure, we briefly address defendant's arguments and conclude that they have no merit.

Defendant first argues that the victim's acts of domestic violence towards defendant should have been admitted under MCL 768.27b(1), which states:

> Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE] 403.

Fatal to defendant's argument is the simple fact that, by its terms, MCL 768.27b(1) is only applicable to "evidence of the defendant's commission of other acts of domestic violence"; the statute says nothing about the admission of a victim's other acts of domestic violence. Because MCL 768.27b(1) does not allow for the admission of a victim's commission of other acts of domestic violence, the trial court did not err by not admitting evidence of the victim's past acts of domestic violence under this statute.

Defendant alternatively argues that the trial court erred by not admitting evidence of the victim's past acts of domestic violence under the res gestae exception to MRE 404(b). MRE 404(b) allows for the admission of other-acts evidence for non-propensity purposes such as to prove motive, opportunity, or intent. Our Supreme Court has plainly stated, however, that "there is no 'res gestae exception' to MRE 404(b)," *People v Jackson*, 498 Mich 246, 274; 869 NW2d 253 (2015), so defendant's contention that the victims past acts of domestic violence should have been admitted "under the *res gestae* exception to MRE 404(b)" is without merit.

In the same argument, defendant more generally asserts that she should have been permitted to introduce evidence of the victim's past acts of domestic violence to provide context for why she feared for her life when she shot the victim "five minutes" after he attacked her. Yet the trial court allowed defendant to present evidence showing that the victim was physically and verbally abusive to defendant and had a character for aggression. Defendant does not explain why, in light of this evidence, it was necessary for the trial court to admit evidence of specific instances where the victim abused defendant.

Lastly, defendant contends that the trial court's exclusion of evidence of the victim's past acts of domestic violence deprived defendant of evidence necessary to prove "battered woman syndrome." "The 'battered woman syndrome' generally refers to common characteristics appearing in women who are physically and psychologically abused by their mates." *People v Wilson*, 194 Mich App 599, 603; 487 NW2d 822 (1992) (quotation marks and citation omitted).

Defendant claims that battered woman syndrome is an affirmative defense, but that is incorrect.[4] Evidence of battered woman syndrome is typically offered to support a claim of self-defense. *People v Christel*, 449 Mich 578, 589; 537 NW2d 194 (1995). As our Supreme Court explained:

> [E]xpert scientific evidence concerning "battered-woman's syndrome" does not aid a jury in determining whether a defendant had or had not behaved in a given manner on a particular occasion; rather, the evidence enables the jury to overcome common myths or misconceptions that a woman who had been the victim of battering would have surely left the batterer. Thus, the evidence helps the jury to understand the battered woman's state of mind. [*Id*. (quotation marks and citation omitted).]

Put simply, evidence that a defendant suffered from battered woman syndrome could help a jury evaluate a self-defense claim—such as aiding the jury in assessing whether the defendant reasonably believed her life was in danger—but battered woman syndrome is not, itself, a defense.

With this understanding of battered woman syndrome in mind, it is clear that defendant's argument is without merit. Battered woman syndrome is established through expert testimony, not through the admission of specific instances of domestic violence. Thus, the trial court's decision to exclude evidence of the victim's past acts of domestic violence did not deprive defendant of the opportunity to present evidence of battered woman syndrome to aid her claim of self-defense.[5]

B. JURY INSTRUCTIONS

Defendant argues the trial court erred by failing to instruct the jury regarding the crimes of voluntary manslaughter, involuntary manslaughter, and reckless discharge of a firearm. We disagree.

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[4] Defendant attributes her assertion that battered woman syndrome is an affirmative defense to *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002)—a case dealing with a defense of others theory. *Kurr* makes no mention of battered woman syndrome.

[5] Defendant also argues that defense counsel at trial provided ineffective assistance by not calling an expert to testify about battered woman syndrome. It is well established that the defendant has the burden of establishing the factual predicate for her claim of ineffective assistance of counsel. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008). Defendant never presented any affidavits or other proof in either the trial court or on appeal suggesting what an expert witness on battered woman syndrome would have testified to at trial. Our Supreme Court has recognized that not all women in abusive relationships necessarily suffer from battered woman syndrome, see *Christel*, 449 Mich at 588, and defendant has not presented proof that she suffered from the syndrome other than the fact that the victim was abusive. Thus, defendant failed to establish the factual predicate of her ineffective assistance claim, and that claim does not warrant appellate relief.

Defendant did not request jury instructions for voluntary and involuntary manslaughter or reckless discharge of a firearm. In fact, defendant expressed satisfaction with the jury instructions as given after they were read to the jury. It is well settled that "an affirmative statement that there are no objections to the jury instructions constitutes express approval of the instructions, thereby waiving review of any error on appeal.' *People v Kowalski*, 489 Mich 488, 505 n 28; 803 NW2d 200 (2011). Accordingly, defendant has waived any claim of error, and this Court need not further analyze this issue on appeal.[6]

C. STANDARD 4

In a Standard 4 brief, defendant raises several claims of ineffective assistance.

To prevail on an ineffective assistance claim, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008).

Defendant first argues that her trial counsel was ineffective because he did not communicate with her enough and failed to adequately prepare her to testify. Assuming that this allegation is true[7] and that her trial counsel's performance was objectively unreasonable, defendant does not explain how the outcome of her trial would have been different but for this performance. For instance, defendant does not explain how her trial testimony would have differed had her counsel better prepared her to testify. Because defendant has not alleged that anything about her trial would have been different but for her trial counsel's performance, she has necessarily failed to establish a claim of ineffective assistance warranting appellate relief. See *Trakhtenberg*, 493 Mich at 51.

Next, defendant argues that her trial counsel failed to adequately investigate her case and, consequently, failed to secure witnesses and evidence that would have been favorable to her defense. Defendant contends that had her trial counsel investigated her medical records and obtained reports from various police departments, he would have discovered evidence showing that the victim had abused defendant in the past. Defendant also contends that had her trial counsel investigated her case more thoroughly, he could have located an unidentified witness that would have testified about the victim's past abuse of defendant. Initially, we note that (1) evidence that the victim was aggressive to the victim and physically abused her was already before the jury, and (2) defendant has failed to explain how specific instances of the victim's past abuse were

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[6] In a supplemental brief, defendant argued that her trial counsel was ineffective for failing to request instructions for voluntary manslaughter. This was the issue that this Court remanded to the trial court for a *Ginther* hearing, and is discussed in Section III.

[7] At the *Ginther* hearing unrelated to this issue, the trial court found that defendant's trial counsel communication with defendant was "very poor."

admissible, as explained in Section II.A. Regardless, defendant has not presented any of the medical records or police reports that she claims would have established that the victim abused her, nor has she identified the witness that could have testified about the victim's abuse of defendant or what that witness would have said. Thus, defendant has failed to establish the factual predicate of her ineffective assistance claim. *Dendel*, 481 Mich at 125.

Defendant lastly argues that she was prejudiced by the cumulative effect of her trial counsel's errors. However, having identified no errors, defendant's cumulative-error claim fails. See *People v Dobek*, 274 Mich App 58, 107; 732 NW2d 546 (2007).

III. PROSECUTION'S CROSS-APPEAL

In its cross-appeal, the prosecution argues that the trial court erred by ruling that defendant's trial counsel rendered ineffective assistance of counsel by failing to request a voluntary manslaughter instruction. We agree.

Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). Factual findings are reviewed for clear error, while legal conclusions are reviewed de novo. *Id*. As previously stated, to prevail on an ineffective assistance claim, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. Counsel is presumed effective, and defendant carries a heavy burden to overcome this presumption. *Head*, 323 Mich App at 539.

"[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Voluntary manslaughter is a mitigation defense and "requires a showing that (1) defendant killed in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009).

In finding that defendant's trial counsel was ineffective for not requesting a voluntary-manslaughter instruction, the trial court first walked through the evidence presented at the *Ginther* hearing as it related to the incident that led to the charges against defendant, made factual findings related to that evidence, and concluded that a voluntary-manslaughter instruction was supported by those factual findings. The court then addressed defendant's trial counsel's performance and determined that her counsel failed to request a voluntary-manslaughter instruction "based on his serious misunderstanding of the law," which led to defendant's trial counsel failing to inform defendant that voluntary manslaughter was a possible mitigation defense. This, the court determined, amounted to "deficient representation." Turning to the prejudice prong, the trial court ruled that this deficient performance prejudiced defendant because "the record establishes that any reasonable juror could find, based upon the evidence, that, uhm, [defendant] was guilty of voluntary manslaughter, and not first degree murder."

We agree with the trial court that defendant has established that her trial counsel's performance fell below an objective standard of reasonableness. On appeal, the prosecution argues

that it was trial strategy for defendant's trial counsel to not request a voluntary manslaughter instruction. It is true that defendant's trial counsel testified that he did not request a voluntary-manslaughter instruction because that "would have been inconsistent" and "totally against . . . what we were saying. . . . That was not in our defense."[8] It is also true that "[f]ailing to request a particular jury instruction can be a matter of trial strategy," *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013), and "counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). However, any strategy used by counsel must, in fact, be sound, and "a court cannot insulate the review of counsel's performance by calling it trial strategy." *People v Douglas*, 496 Mich 557, 585; 852 NW2d 587 (2014) (quotation marks and citation omitted).

Defendant's trial counsel's strategy here was not, in fact, sound. At the *Ginther* hearing, defendant's trial counsel repeatedly explained that he did not believe that a voluntary-manslaughter instruction was appropriate in this case because he did not believe that defendant intended to kill or seriously harm the victim. Defendant's trial counsel's understanding of the law in this sense was arguably correct; for a defendant to be guilty of voluntary manslaughter, the killing must be intentional. See *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991) (explaining that murder and voluntary manslaughter "are both homicides and share the element of being intentional killings," but "the element of provocation which characterizes the offense of manslaughter separates it from murder"). Yet defendant's trial strategy was that she acted in self-defense, and our Supreme Court has repeatedly explained that " '[a] finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions.' " *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010), quoting *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990). That is to say, the jury needed to find that defendant acted intentionally for the strategy used by defendant's trial counsel to be successful. Defendant's trial counsel's decision to not request a voluntary-manslaughter instruction because voluntary manslaughter requires that the killing be intentional, while pursuing a defense that "necessarily requires a finding that the defendant acted intentionally," *id*., was not sound trial strategy, and was otherwise objectively unreasonable.

We agree with the prosecution, however, that the trial court erred when it concluded that defendant's trial counsel's deficient performance prejudiced defendant. As stated previously, the trial court reasoned that trial counsel's deficient performance prejudiced defendant because "the record establishes that any reasonable juror could find, based upon the evidence, that, uhm, [defendant] was guilty of voluntary manslaughter, and not first degree murder." Yet the mere fact that a juror *could* find defendant guilty of voluntary manslaughter, not first-degree murder, is not determinative. The question is whether "but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at

[8] The prosecution contends on appeal that defendant's trial counsel was "seeking an all or nothing verdict," but that contention is not borne out by the record. Defendant's trial counsel never testified that he did not request a voluntary-manslaughter instruction because defendant's strategy was "all or nothing." Rather, as will be explained, he repeatedly testified that he did not seek a voluntary-manslaughter instruction because he did not believe that the killing in this case was intentional.

51. The outcome here was that the jury found defendant guilty of first-degree murder, and in so doing rejected the lesser charge of second-degree murder. As pointed out by the prosecution, this is identical to the situation in *People v Raper*, 222 Mich App 475, 483-484; 563 NW2d 709 (1997), wherein this Court explained why counsel's failure to request a voluntary-manslaughter instruction in this situation did not amount to ineffective assistance of counsel:

> Lastly, defendant argues that he was denied effective assistance of counsel because his trial attorney failed to submit jury instructions regarding the lesser included offenses of voluntary and involuntary manslaughter. We find no merit in this argument. In this case, defendant was charged with first-degree murder. The jury was instructed on first-degree murder and second-degree murder, and found defendant guilty of first-degree murder. The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser included offense such as manslaughter. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Thus, even if defendant's trial counsel had requested a manslaughter instruction and the trial court had failed to give such an instruction, such error would have been harmless. For the same reason, defendant cannot show that his counsel's failure to request a manslaughter instruction caused him prejudice. Accordingly, defendant cannot sustain his claim of ineffective assistance of counsel. *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996).

As a published decision, we are bound by the reasoning in *Raper* under the rule of stare decisis. MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.").[9] We therefore reverse the trial court insofar as it held that defendant established a claim of ineffective assistance of counsel and awarded her a new trial.

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[9] Defendant urges us to convene a conflict panel with *Raper* under MCR 7.215(J), but we decline to do so because we are not convinced that *Raper* was wrongly decided. Defendant was convicted of first-degree murder. "The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and *deliberation*," *People v Bass*, 317 Mich App 241, 265-266; 893 NW2d 140 (2016) (quotation marks and citation omitted; emphasis added); see also MCL 750.316(1)(a) (defining first-degree murder as "any willful, deliberate, and premediated killing"), whereas "[a] defendant properly convicted of voluntary manslaughter is a person who has acted out of a temporary excitement induced by an adequate provocation and *not from the deliberation* and reflection that marks the crime of murder," *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974) (emphasis added). See also *People v Younger*, 380 Mich 678, 681-682; 158 NW2d 493 (1968) ("If there be actions manifesting deliberation, it cannot be said, legally, that the homicide was the product of provocation which unseated reason and allowed passion free reign."). That is, a finding of deliberation would seem to necessarily preclude a finding that the defendant killed in of the heat of passion, i.e., committed voluntary manslaughter. Here, when instructing the jury on the elements of first-degree murder, the trial court stated that in order to convict defendant of first-degree murder, it had to find "that the killing was deliberate, which means that the defendant considered the pros and cons of the killing, and thought about, and chose her actions before she did it." The jury's conviction of first-degree murder demonstrates that it found that

IV. CONCLUSION

In defendant's appeal, we affirm. In the prosecution's cross-appeal, we reverse the trial court's order awarding defendant a new trial.

/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron

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defendant "considered the pros and cons of the killing, and thought about, and chose her actions before she did it," which would seem to necessarily preclude a finding that defendant killed in the heat of passion in this case.

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>
> (2) ***Character of alleged victim of homicide.*** When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused[.]

does not identify any specific acts of domestic violence committed by the victim that the trial court should have allowed into evidence. She instead asserts without specificity that the victim's "prior acts of domestic violence" should have been admitted. By failing to specify what evidence was erroneously excluded, defendant has failed to adequately present this issue for our review. Despite this failure, we briefly address defendant's arguments and conclude that they have no merit.

Defendant first argues that the victim's acts of domestic violence towards defendant should have been admitted under MCL 768.27b(1), which states:

> Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE] 403.

Fatal to defendant's argument is the simple fact that, by its terms, MCL 768.27b(1) is only applicable to "evidence of the defendant's commission of other acts of domestic violence"; the statute says nothing about the admission of a victim's other acts of domestic violence. Because MCL 768.27b(1) does not allow for the admission of a victim's commission of other acts of domestic violence, the trial court did not err by not admitting evidence of the victim's past acts of domestic violence under this statute.

Defendant alternatively argues that the trial court erred by not admitting evidence of the victim's past acts of domestic violence under the res gestae exception to MRE 404(b). MRE 404(b) allows for the admission of other-acts evidence for non-propensity purposes such as to prove motive, opportunity, or intent. Our Supreme Court has plainly stated, however, that "there is no 'res gestae exception' to MRE 404(b)," *People v Jackson*, 498 Mich 246, 274; 869 NW2d 253 (2015), so defendant's contention that the victims past acts of domestic violence should have been admitted "under the *res gestae* exception to MRE 404(b)" is without merit.

In the same argument, defendant more generally asserts that she should have been permitted to introduce evidence of the victim's past acts of domestic violence to provide context for why she feared for her life when she shot the victim "five minutes" after he attacked her. Yet the trial court allowed defendant to present evidence showing that the victim was physically and verbally abusive to defendant and had a character for aggression. Defendant does not explain why, in light of this evidence, it was necessary for the trial court to admit evidence of specific instances where the victim abused defendant.

Lastly, defendant contends that the trial court's exclusion of evidence of the victim's past acts of domestic violence deprived defendant of evidence necessary to prove "battered woman syndrome." "The 'battered woman syndrome' generally refers to common characteristics appearing in women who are physically and psychologically abused by their mates." *People v Wilson*, 194 Mich App 599, 603; 487 NW2d 822 (1992) (quotation marks and citation omitted).

Defendant claims that battered woman syndrome is an affirmative defense, but that is incorrect.[4] Evidence of battered woman syndrome is typically offered to support a claim of self-defense. *People v Christel*, 449 Mich 578, 589; 537 NW2d 194 (1995). As our Supreme Court explained:

> [E]xpert scientific evidence concerning "battered-woman's syndrome" does not aid a jury in determining whether a defendant had or had not behaved in a given manner on a particular occasion; rather, the evidence enables the jury to overcome common myths or misconceptions that a woman who had been the victim of battering would have surely left the batterer. Thus, the evidence helps the jury to understand the battered woman's state of mind. [*Id*. (quotation marks and citation omitted).]

Put simply, evidence that a defendant suffered from battered woman syndrome could help a jury evaluate a self-defense claim—such as aiding the jury in assessing whether the defendant reasonably believed her life was in danger—but battered woman syndrome is not, itself, a defense.

With this understanding of battered woman syndrome in mind, it is clear that defendant's argument is without merit. Battered woman syndrome is established through expert testimony, not through the admission of specific instances of domestic violence. Thus, the trial court's decision to exclude evidence of the victim's past acts of domestic violence did not deprive defendant of the opportunity to present evidence of battered woman syndrome to aid her claim of self-defense.[5]

B. JURY INSTRUCTIONS

Defendant argues the trial court erred by failing to instruct the jury regarding the crimes of voluntary manslaughter, involuntary manslaughter, and reckless discharge of a firearm. We disagree.

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[4] Defendant attributes her assertion that battered woman syndrome is an affirmative defense to *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002)—a case dealing with a defense of others theory. *Kurr* makes no mention of battered woman syndrome.

[5] Defendant also argues that defense counsel at trial provided ineffective assistance by not calling an expert to testify about battered woman syndrome. It is well established that the defendant has the burden of establishing the factual predicate for her claim of ineffective assistance of counsel. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008). Defendant never presented any affidavits or other proof in either the trial court or on appeal suggesting what an expert witness on battered woman syndrome would have testified to at trial. Our Supreme Court has recognized that not all women in abusive relationships necessarily suffer from battered woman syndrome, see *Christel*, 449 Mich at 588, and defendant has not presented proof that she suffered from the syndrome other than the fact that the victim was abusive. Thus, defendant failed to establish the factual predicate of her ineffective assistance claim, and that claim does not warrant appellate relief.

Defendant did not request jury instructions for voluntary and involuntary manslaughter or reckless discharge of a firearm. In fact, defendant expressed satisfaction with the jury instructions as given after they were read to the jury. It is well settled that "an affirmative statement that there are no objections to the jury instructions constitutes express approval of the instructions, thereby waiving review of any error on appeal.' *People v Kowalski*, 489 Mich 488, 505 n 28; 803 NW2d 200 (2011). Accordingly, defendant has waived any claim of error, and this Court need not further analyze this issue on appeal.[6]

C. STANDARD 4

In a Standard 4 brief, defendant raises several claims of ineffective assistance.

To prevail on an ineffective assistance claim, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008).

Defendant first argues that her trial counsel was ineffective because he did not communicate with her enough and failed to adequately prepare her to testify. Assuming that this allegation is true[7] and that her trial counsel's performance was objectively unreasonable, defendant does not explain how the outcome of her trial would have been different but for this performance. For instance, defendant does not explain how her trial testimony would have differed had her counsel better prepared her to testify. Because defendant has not alleged that anything about her trial would have been different but for her trial counsel's performance, she has necessarily failed to establish a claim of ineffective assistance warranting appellate relief. See *Trakhtenberg*, 493 Mich at 51.

Next, defendant argues that her trial counsel failed to adequately investigate her case and, consequently, failed to secure witnesses and evidence that would have been favorable to her defense. Defendant contends that had her trial counsel investigated her medical records and obtained reports from various police departments, he would have discovered evidence showing that the victim had abused defendant in the past. Defendant also contends that had her trial counsel investigated her case more thoroughly, he could have located an unidentified witness that would have testified about the victim's past abuse of defendant. Initially, we note that (1) evidence that the victim was aggressive to the victim and physically abused her was already before the jury, and (2) defendant has failed to explain how specific instances of the victim's past abuse were

[6] In a supplemental brief, defendant argued that her trial counsel was ineffective for failing to request instructions for voluntary manslaughter. This was the issue that this Court remanded to the trial court for a *Ginther* hearing, and is discussed in Section III.

[7] At the *Ginther* hearing unrelated to this issue, the trial court found that defendant's trial counsel communication with defendant was "very poor."

admissible, as explained in Section II.A. Regardless, defendant has not presented any of the medical records or police reports that she claims would have established that the victim abused her, nor has she identified the witness that could have testified about the victim's abuse of defendant or what that witness would have said. Thus, defendant has failed to establish the factual predicate of her ineffective assistance claim. *Dendel*, 481 Mich at 125.

Defendant lastly argues that she was prejudiced by the cumulative effect of her trial counsel's errors. However, having identified no errors, defendant's cumulative-error claim fails. See *People v Dobek*, 274 Mich App 58, 107; 732 NW2d 546 (2007).

III. PROSECUTION'S CROSS-APPEAL

In its cross-appeal, the prosecution argues that the trial court erred by ruling that defendant's trial counsel rendered ineffective assistance of counsel by failing to request a voluntary manslaughter instruction. We agree.

Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). Factual findings are reviewed for clear error, while legal conclusions are reviewed de novo. *Id*. As previously stated, to prevail on an ineffective assistance claim, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. Counsel is presumed effective, and defendant carries a heavy burden to overcome this presumption. *Head*, 323 Mich App at 539.

"[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Voluntary manslaughter is a mitigation defense and "requires a showing that (1) defendant killed in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009).

In finding that defendant's trial counsel was ineffective for not requesting a voluntary-manslaughter instruction, the trial court first walked through the evidence presented at the *Ginther* hearing as it related to the incident that led to the charges against defendant, made factual findings related to that evidence, and concluded that a voluntary-manslaughter instruction was supported by those factual findings. The court then addressed defendant's trial counsel's performance and determined that her counsel failed to request a voluntary-manslaughter instruction "based on his serious misunderstanding of the law," which led to defendant's trial counsel failing to inform defendant that voluntary manslaughter was a possible mitigation defense. This, the court determined, amounted to "deficient representation." Turning to the prejudice prong, the trial court ruled that this deficient performance prejudiced defendant because "the record establishes that any reasonable juror could find, based upon the evidence, that, uhm, [defendant] was guilty of voluntary manslaughter, and not first degree murder."

We agree with the trial court that defendant has established that her trial counsel's performance fell below an objective standard of reasonableness. On appeal, the prosecution argues

that it was trial strategy for defendant's trial counsel to not request a voluntary manslaughter instruction. It is true that defendant's trial counsel testified that he did not request a voluntary-manslaughter instruction because that "would have been inconsistent" and "totally against . . . what we were saying. . . . That was not in our defense."[8] It is also true that "[f]ailing to request a particular jury instruction can be a matter of trial strategy," *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013), and "counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). However, any strategy used by counsel must, in fact, be sound, and "a court cannot insulate the review of counsel's performance by calling it trial strategy." *People v Douglas*, 496 Mich 557, 585; 852 NW2d 587 (2014) (quotation marks and citation omitted).

Defendant's trial counsel's strategy here was not, in fact, sound. At the *Ginther* hearing, defendant's trial counsel repeatedly explained that he did not believe that a voluntary-manslaughter instruction was appropriate in this case because he did not believe that defendant intended to kill or seriously harm the victim. Defendant's trial counsel's understanding of the law in this sense was arguably correct; for a defendant to be guilty of voluntary manslaughter, the killing must be intentional. See *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991) (explaining that murder and voluntary manslaughter "are both homicides and share the element of being intentional killings," but "the element of provocation which characterizes the offense of manslaughter separates it from murder"). Yet defendant's trial strategy was that she acted in self-defense, and our Supreme Court has repeatedly explained that " '[a] finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions.' " *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010), quoting *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990). That is to say, the jury needed to find that defendant acted intentionally for the strategy used by defendant's trial counsel to be successful. Defendant's trial counsel's decision to not request a voluntary-manslaughter instruction because voluntary manslaughter requires that the killing be intentional, while pursuing a defense that "necessarily requires a finding that the defendant acted intentionally," *id*., was not sound trial strategy, and was otherwise objectively unreasonable.

We agree with the prosecution, however, that the trial court erred when it concluded that defendant's trial counsel's deficient performance prejudiced defendant. As stated previously, the trial court reasoned that trial counsel's deficient performance prejudiced defendant because "the record establishes that any reasonable juror could find, based upon the evidence, that, uhm, [defendant] was guilty of voluntary manslaughter, and not first degree murder." Yet the mere fact that a juror *could* find defendant guilty of voluntary manslaughter, not first-degree murder, is not determinative. The question is whether "but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at

[8] The prosecution contends on appeal that defendant's trial counsel was "seeking an all or nothing verdict," but that contention is not borne out by the record. Defendant's trial counsel never testified that he did not request a voluntary-manslaughter instruction because defendant's strategy was "all or nothing." Rather, as will be explained, he repeatedly testified that he did not seek a voluntary-manslaughter instruction because he did not believe that the killing in this case was intentional.

51. The outcome here was that the jury found defendant guilty of first-degree murder, and in so doing rejected the lesser charge of second-degree murder. As pointed out by the prosecution, this is identical to the situation in *People v Raper*, 222 Mich App 475, 483-484; 563 NW2d 709 (1997), wherein this Court explained why counsel's failure to request a voluntary-manslaughter instruction in this situation did not amount to ineffective assistance of counsel:

> Lastly, defendant argues that he was denied effective assistance of counsel because his trial attorney failed to submit jury instructions regarding the lesser included offenses of voluntary and involuntary manslaughter. We find no merit in this argument. In this case, defendant was charged with first-degree murder. The jury was instructed on first-degree murder and second-degree murder, and found defendant guilty of first-degree murder. The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser included offense such as manslaughter. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Thus, even if defendant's trial counsel had requested a manslaughter instruction and the trial court had failed to give such an instruction, such error would have been harmless. For the same reason, defendant cannot show that his counsel's failure to request a manslaughter instruction caused him prejudice. Accordingly, defendant cannot sustain his claim of ineffective assistance of counsel. *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996).

As a published decision, we are bound by the reasoning in *Raper* under the rule of stare decisis. MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.").[9] We therefore reverse the trial court insofar as it held that defendant established a claim of ineffective assistance of counsel and awarded her a new trial.

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[9] Defendant urges us to convene a conflict panel with *Raper* under MCR 7.215(J), but we decline to do so because we are not convinced that *Raper* was wrongly decided. Defendant was convicted of first-degree murder. "The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and *deliberation*," *People v Bass*, 317 Mich App 241, 265-266; 893 NW2d 140 (2016) (quotation marks and citation omitted; emphasis added); see also MCL 750.316(1)(a) (defining first-degree murder as "any willful, deliberate, and premediated killing"), whereas "[a] defendant properly convicted of voluntary manslaughter is a person who has acted out of a temporary excitement induced by an adequate provocation and *not from the deliberation* and reflection that marks the crime of murder," *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974) (emphasis added). See also *People v Younger*, 380 Mich 678, 681-682; 158 NW2d 493 (1968) ("If there be actions manifesting deliberation, it cannot be said, legally, that the homicide was the product of provocation which unseated reason and allowed passion free reign."). That is, a finding of deliberation would seem to necessarily preclude a finding that the defendant killed in of the heat of passion, i.e., committed voluntary manslaughter. Here, when instructing the jury on the elements of first-degree murder, the trial court stated that in order to convict defendant of first-degree murder, it had to find "that the killing was deliberate, which means that the defendant considered the pros and cons of the killing, and thought about, and chose her actions before she did it." The jury's conviction of first-degree murder demonstrates that it found that

IV. CONCLUSION

In defendant's appeal, we affirm. In the prosecution's cross-appeal, we reverse the trial court's order awarding defendant a new trial.

/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron

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defendant "considered the pros and cons of the killing, and thought about, and chose her actions before she did it," which would seem to necessarily preclude a finding that defendant killed in the heat of passion in this case.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee-Cross Appellant,

v

MENAYETTA MICHELL YEAGER,

Defendant-Appellant-Cross Appellee.

UNPUBLISHED
December 21, 2021

No. 346074
Wayne Circuit Court
LC No. 17-008290-01-FC

Before: O'BRIEN, P.J., and BECKERING and CAMERON, JJ.

BECKERING, J. (*concurring*).

In this case, which has recently been returned to this Court following a *Ginther*[1] hearing, I agree with the trial court's and the majority's conclusion that defendant Menayetta Yeager was deprived of effective assistance when her trial counsel chose not to ask for a voluntary manslaughter jury instruction, among other very poor advocacy strategies. If ever there were a heat of passion case, this is it. Defendant shot and killed her boyfriend in the throes of an episode where he beat her up, yanked her out of her car by the hair, carjacked her, drove over people's lawns in an attempt mow her down, and taunted and threatened to kill her when she tried to get her car back.[2] Defendant's counsel decided to argue only self-defense. But as the trial court correctly concluded, it was substandard not to also ask for a voluntary manslaughter instruction in light of the presenting record evidence and defendant deserves a new trial. To deprive her of that opportunity would be a serious deprivation of justice. But in its cross appeal after remand, the prosecution cited for the very first time *People v Raper*, 222 Mich App 475; 563 NW2d 709 (1997), proclaiming correctly that we are bound by it on the issue of prejudice. I agree with defendant's appellate counsel that *Raper* was wrongly decided, and I would convene a conflict panel under MCR 7.215(J) because I believe defendant was prejudiced by her counsel's unacceptably bad representation. Before she spends the rest of her life in prison, she deserves a new trial.

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[2] Defendant testified that it was her mother's car.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant's convictions arose out of the shooting death of Jonte Brooks. According to defendant's trial testimony, she was driving her mother's van with Brooks as a passenger. She told Brooks that she no longer wanted to be in a relationship and he became angry. He punched defendant. Defendant stopped the van and Brooks pulled her out of the van by her hair. He then beat defendant on the side of the road. Brooks got back into the van and attempted to run over defendant. Defendant called the police while evading Brooks. Witness Labarren Borom stopped his truck beside defendant and told her to get in before Brooks returned. She got into the truck. During these events, defendant was speaking to Brooks on the phone in an attempt to get him to stay in the area so that he could be apprehended by the police. Brooks told defendant he would leave the van at a nearby gas station. However, when Borom and defendant arrived at that gas station, Brooks was not there. Brooks evidently saw defendant in the truck with Borom. He threatened to kill them both. Borom pulled out of the gas station and continued driving down the road while defendant and Brooks argued over the phone. Brooks screamed at Borom to pull into a nearby gas station. Borom complied. Brooks also pulled into the gas station. Defendant claimed that she exited Borom's car in order to run away, but Borom handed her a gun, and she shot at Brooks because she was scared. Video surveillance at the gas station captured the incident and showed defendant shooting at the van as Brooks drove away in it. Brooks later lost control of the van and crashed into a brick wall. He was pronounced dead upon arrival at the hospital. An autopsy showed that he was killed by a bullet that entered through the back of his shoulder and pierced his lung. Toxicology testing showed that Brooks's blood alcohol concentration was .135, which is slightly less than twice the legal intoxication limit. There was also marijuana in his system.

Defendant claimed she shot at Brooks two or three times, while the on-duty gas station clerk testified that he heard 10 shots. Evidence technicians discovered 17 shell casings in the gas station's parking lot.

During closing arguments, the prosecution emphasized defendant's frustration and anger illustrated by her 911 call and statements to Borom. According to Borom, defendant expressed her frustration with Brooks and indicated that she was tired of him playing games with her. After Brooks pulled the van into the gas station, he taunted defendant. She then exited the truck and shot at the van. Moreover, Borom stated that after defendant shot at Brooks, she got back into his truck and demanded that he "follow that bitch."

Defense counsel decided to pursue only a claim of self-defense and chose not to ask for a voluntary manslaughter jury instruction based on his understanding that self-defense is mutually exclusive of voluntary manslaughter. The prosecution asked the trial court to add a lesser included instruction for second-degree murder. The jury deliberated for multiple hours over the course of two days, requesting multiple exhibits including video footage of the shooting and 911 calls, before eventually finding defendant guilty of first-degree murder and possession of a firearm during the commission of a felony.

The trial court sentenced defendant to the mandatory sentence of life imprisonment without the possibility of parole. Defendant appealed her convictions and sentence to this Court. After

oral argument, this Court remanded the case to the trial court to conduct a *Ginther* hearing to address whether defendant was denied the effective assistance of counsel as the result of defense counsel's failure to request a voluntary manslaughter jury instruction. After hearing testimony and considering the parties' arguments, the trial court granted defendant's motion for a new trial, finding that defense counsel provided ineffective assistance on this basis. The prosecution filed a cross-appeal, arguing that the trial court erred by granting defendant's request for a new trial because this Court's holding in *Raper* requires us to conclude that trial counsel's ineffectiveness was harmless.

II. ANALYSIS

Defendant asserted, and the trial court agreed, that she was denied the effective assistance of counsel at trial. I agree. I believe that this Court's holding in *Raper* inappropriately precludes relief to defendants for the failure to provide a voluntary manslaughter instruction in cases in which the jury chooses first-degree murder instead of second-degree murder.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, Mich 575, 579; 640 NW2d 246 (2002). "The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

To prevail on a claim of ineffective assistance of counsel, a defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

"Manslaughter is an inferior offense of murder because manslaughter is a necessarily included lesser offense of murder." *People v Mendoza*, 468 Mich 527, 533; 662 NW2d 685 (2003). "[A]n inferior-offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *Id*. (footnote omitted). "To prove voluntary manslaughter, the prosecution must prove that: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). However, "provocation is not an element of voluntary manslaughter . . . [r]ather, provocation is the circumstance that negates the presence of malice." *Mendoza*, 468 Mich at 536 (citation omitted). In a case in which "a defendant is charged with murder, instructions for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Tierney*, 266 Mich App at 714. "The degree of provocation required to mitigate a killing from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *Id*. at 714-715 (quotation marks and citation omitted). "The determination of what is reasonable provocation is a question of fact for the fact-finder." *Id*. at 715 (quotation marks and citation omitted).

In this case, a rational view of the evidence supports an instruction on voluntary manslaughter. Testimony at trial showed that Brooks physically assaulted defendant by punching, kicking, and pulling her hair. He forcibly removed defendant from the driver's seat of her mother's van and attempted to hit her with the van several times. He then taunted and threatened defendant over the phone as she attempted to retrieve the van. According to testimony elicited by the prosecution, defendant was angry and frustrated with Brooks. She indicated that she was tired of him. After Brooks pulled into the gas station, he continued to taunt defendant. She then exited the truck and shot at the van 17 times as Brooks drove away. When she returned to the truck, she told Borom to follow Brooks. A reasonable jury could accept the evidence that indicated that defendant was stoked into a heat of passion and shot defendant before there was a lapse of time during which a reasonable person could control her passions and apply reason to the situation. Although defendant's taunts over the phone could not serve as adequate provocation, Brooks also physically assaulted defendant and attempted to run her over multiple times, including driving over people's lawns in an attempt to hit her, followed by carjacking and threats to kill her which kept her passions inflamed. See *People v Mitchell*, 301 Mich App 282, 288; 835 NW2d 615 (2013) (concluding that the trial court erred by failing to provide voluntary manslaughter instruction because the defendant killed the victim after the victim struck the defendant with a baseball bat and hit him several times in the face). Therefore, defendant was entitled to a voluntary manslaughter instruction, and defense counsel was deficient for failing to request such an instruction.[3] See *Tierney*, 266 Mich App at 714. See also *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010) ("A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.") (Quotation marks and citation omitted).

However, defendant must also show that she was prejudiced by defense counsel's error. In other words, she is required to establish that if defense counsel had asked for a voluntary manslaughter jury instruction, there exists a reasonable probability of a different outcome. See *Sabin (On Second Remand)*, 242 Mich App at 659. In *Raper*, 222 Mich App at 483, the defendant, who was charged with first-degree murder, argued that he was denied the effective assistance of counsel because his attorney failed to request that the jury be instructed on the lesser included offenses of voluntary and involuntary manslaughter. This Court disagreed, observing that the jury was instructed in regard to first-degree murder and second-degree murder, and the jury found the defendant guilty of first-degree murder. *Id*. This Court concluded that "[t]he jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser included offense such as manslaughter." *Id*. Thus, any error was ultimately harmless, and

[3] As explained in the majority opinion, defense counsel made an error of law because self-defense and voluntary manslaughter are not mutually exclusive mitigating circumstances, and self-defense also requires that the defendant act with deliberation. Similarly, although not raised by defendant in this appeal, defense counsel may have also provided ineffective assistance during the plea negotiation phase of the proceedings. During his *Ginther* hearing testimony, defense counsel explained that if he requested a voluntary manslaughter instruction, defendant might as well have taken the plea deal offered by the prosecution because defendant would then have to admit that she exited the truck with the intent to shoot and kill Brooks.

therefore, the defendant could not establish that he was prejudiced by defense counsel's failure to request an instruction on manslaughter. *Id*. at 483-484.

The opinion in *Raper*, 222 Mich App at 483, cites this Court's earlier opinion in *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990), for the proposition that failure to instruct the jury on manslaughter constitutes harmless error if the jury was instructed on both first- and second-degree murder, and finds the defendant guilty of first-degree murder. In the *Zak* case, two codefendants went to trial for murder; defendant John Zak was convicted of second-degree murder and defendant Harry Anderson was convicted of first-degree murder. *Zak*, 184 Mich App at 1. On appeal, Anderson argued that the trial court erred by refusing to instruct the jury in regard to manslaughter. *Id*. However, this Court concluded that

> Where the trial court instructs on a lesser included offense which is intermediate between the greater offense and a second lesser included offense, for which instructions were requested by the defendant and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless if the jury's verdict reflects an unwillingness to have convicted on the offense for which instructions were not given. [*Id*., citing *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988), superseded by statute as stated in *People v Smith-Anthony*, 494 Mich 669, 687 n 53;837 NW2d 415 (2013)[4].]

Because "the jury was instructed on both first- and second-degree murder and convicted defendant Anderson of first-degree murder[,]" this Court determined "that their rejection of second-degree murder reflects an unwillingness by the jury to convict on manslaughter and, therefore, the failure to so instruct constitutes harmless error." *Zak*, 184 Mich App at 16.

In *Beach*, 429 Mich at 490, a Michigan Supreme Court case that preceded *Raper* and *Zak*, our Supreme Court held that the failure to instruct the jury in regard to conspiracy to commit larceny in a building constituted error; however, because the jury rejected the lesser included offense of conspiracy to commit unarmed robbery and convicted the defendant of the greater offense of conspiracy to commit armed robbery, the error was ultimately harmless. In regard to the harmless error analysis, the Court explained that "[t]he existence of an intermediate charge that was rejected by the jury does not, of course, automatically result in an application of the [harmless error] analysis." *Id*. at 491. Rather, "the intermediate charge rejected by the jury would necessarily have to indicate a lack of likelihood that the jury would have adopted the lesser requested charge." *Id*. The Court further explained that implicit in the jury's verdict in that case was a finding concerning the use of a weapon. *Id*. at 492. The Court observed that "if [the jury] concluded that the defendant was not planning to use force, it could have and undoubtedly would have, found her guilty of the instructed lesser included offense of conspiracy to commit unarmed robbery." *Id*. at 490. As a result, the Court believed that the jury's verdict showed that the failure to provide an

[4] The Court notes that after Michigan's robbery statute was amended in 2004, larceny from a person was no longer a necessarily included lesser offense of robbery. *Smith-Anthony*, 494 Mich 687 n 53.

instruction concerning the conspiracy to commit larceny in a building was not prejudicial to the defendant because the jury had no reasonable doubt concerning the intended use of force. *Id*.

I conclude that *Raper* impermissibly limits relief in cases involving instructional error, especially considering the reasoning and analysis employed by the Supreme Court in *Beach*. I believe that this case exemplifies the situation described in *Beach*, 429 Mich 491, in which an instructional error is not harmless because the jury's rejection of second-degree murder does not necessarily "indicate a lack of likelihood that the jury would have adopted" a verdict of voluntary manslaughter.

In this case, defendant was charged with first-degree murder. "The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bass*, 317 Mich App 241, 256-266; 893 NW2d 140 (2016) (quotation marks and citation omitted). The jury was also instructed in regard to second-degree murder. The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (quotation marks and citation omitted). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. (quotation marks and citation omitted). "Murder and manslaughter are both homicides and share the element of being intentional killings. However, the element of provocation which characterizes the offense of manslaughter separates it from murder." *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). As noted earlier in this opinion, the provocation required for a manslaughter charge "is that which causes the defendant to act out of passion rather than reason." *Tierney*, 266 Mich App at 714.

As a result, considering the elements of the aforementioned offenses, I do not believe that the jury's decision to convict defendant of first-degree murder instead of second-degree murder automatically proves that the jury would not have been inclined to convict defendant of voluntary manslaughter if given the opportunity. A reasonable jury could have accepted the prosecution's theory of the case that defendant deliberately shot and killed Brooks, but concluded that she did so out of uncontrollable anger as a result of the events that occurred in the moments before the shooting. There is a reasonable probability that even though the jury would not find self-defense, if given the option it would have found defendant guilty of voluntary manslaughter rather than first-degree murder. See *Sabin (On Second Remand)*, 242 Mich App at 659. See also *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Moreover, claims of ineffective assistance of counsel are reviewed on the basis of the facts in each individual case. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004) ("The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." On the other hand, this Court's holding in *Raper* acts as an absolute bar to relief in circumstances such as those present in this case. I believe such a strict, bright line rule contradicts the proper analysis necessary to address a claim that a criminal defendant was denied the effective assistance of counsel. As such, if it were not for this Court's binding opinion in *Raper*, I would affirm the trial court's order granting

defendant a new trial on the basis that defense counsel's performance fell below an objective standard of reasonableness and defendant was prejudiced by it. In light of *Raper*, I would declare a conflicts panel under MCR 7.215(J) so this Court can revisit the ruling in that case. Barring that, I hope the Michigan Supreme Court takes this case and examines the legal integrity of the bright line rule in *Raper*.

/s/ Jane M. Beckering

APPENDIX 2

P v Lee unpublished opinion from the Court of Appeals

2016 WL 1533554
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Gregory Terrance LEE, Defendant–Appellant.

Docket No. 325039.
|
April 14, 2016.

Wayne Circuit Court; LC No. 14–002138–FC.

Before: GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ.

Opinion

PER CURIAM.

***1** Defendant appeals as of right his jury trial convictions of two counts of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 50 to 75 years' imprisonment for each second-degree murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises from defendant's murder of cousins Lorne Jones and Eric Jones. Defendant met with the two in order to purchase marijuana. However, a verbal altercation ensued after words were exchanged regarding the murder of "Brad"—a close friend of defendant, whom defendant believed was murdered by Lorne and Eric. Defendant shot both men approximately 22 times, killing them. After defendant was arrested, he told police officers that he killed the two for "[w]hat they did to Brad." At trial, defendant testified that he saw Lorne reaching for his waistband and that he saw a gun. Defendant immediately pulled out his gun and started shooting. After trial, defendant was convicted, and now appeals.

Defendant first argues that the trial court violated his constitutional rights to a fair trial and a properly instructed jury, in addition to the right to present a defense, by failing to give a requested voluntary manslaughter instruction to the jury. We disagree.

Generally, "[f]or an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v. Metamora Water Serv, Inc,* 276 Mich.App 376, 382; 741 NW2d 61 (2007). In the trial court, defendant requested a voluntary manslaughter instruction not once, but twice. Thus, this issue was preserved. [1] However, defendant did not object on the basis of the purported constitutional violations, leaving that issue unpreserved.

A claim of instructional error involving a question of law is reviewed de novo, but the trial court's conclusion that an instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v. Dupree,* 486 Mich. 693, 702; 788 NW2d 399 (2010). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v. Buie,* 491 Mich. 294, 320; 817 NW2d 33 (2012). Appellate review of unpreserved errors is limited to plain error affecting substantial rights. *People v. Carines,* 460 Mich. 750, 763–764; 597 NW2d 130 (1999)

"When a defendant is charged with murder, the trial court must give an instruction on voluntary manslaughter if the instruction is supported by a rational view of the evidence." *People v. Mitchell,* 301 Mich.App 282, 286; 835 NW2d 615 (2013) (citation and quotation marks omitted). "To prove that a defendant committed voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id.* (citation and quotation marks omitted). "[F]or the provocation to be adequate it must be that which would cause a reasonable person to lose control." *Id.* at 287 (citation and quotation marks omitted). Generally, sufficient evidence to support a voluntary manslaughter instruction exists when there is evidence that the defendant was spurred by at least some physical provocation. See, e.g., *id.* at 287–288 (holding that the defendant was adequately provoked, and a voluntary manslaughter instruction warranted, when the "victim started using profanity and then swung a baseball bat and struck

defendant."). However, mere words and insults will generally not be considered insufficient provocation. See, e.g., *People v. Pouncey,* 437 Mich. 382, 391–392; 471 NW2d 346 (1991) (holding that insulting words are generally not adequate provocation, and that a mere "verbal fracas" between the victim and the defendant was not adequate provocation).

***2** Initially, we note that the trial court incorrectly concluded that manslaughter was not a lesser included offense of first-degree murder. The law clearly holds that voluntary manslaughter is a lesser included offense of first-degree murder. *People v. Mendoza,* 468 Mich. 527, 541; 664 NW2d 685 (2003) ("[B]oth forms of manslaughter are necessarily included lesser offenses of murder."). However, despite this error, the trial court reached the right outcome in denying the instruction. [2] A rational view of the evidence presented at trial does not support a voluntary manslaughter instruction on the basis of provocation. The evidence showed that Lorne and Eric had at least taunted defendant and insulted him. Additionally, defendant testified at trial that Lorne told Eric to get out and beat defendant. Defendant also stated that he saw Lorne reaching for his waistband and that he saw a gun. However, these facts do not support the conclusion that defendant was provoked to the extent that a reasonable person would lose control and act in the heat of passion. See *Mitchell,* 301 Mich.App at 286. Defendant was, at best, goaded by words, and faced an ephemeral possibility of some potential physical contact. However, there was no actual physical altercation between the three men. Moreover, while defendant testified that he saw Lorne with a gun, the jury was instructed on self-defense, and rejected that theory. Accordingly, the voluntary manslaughter instruction was properly denied, and there was no plain error affecting defendant's substantial rights.

Defendant next argues that the trial court violated his constitutional and statutory right to be present during a critical proceeding by reading a corrected jury instruction in his absence. We disagree. "This Court reviews constitutional questions de novo ." *People v. Powell,* 303 Mich.App 271, 274; 842 NW2d 538 (2013). Questions of statutory interpretation are also reviewed de novo. *People v. Krueger,* 466 Mich. 50, 53; 643 NW2d 223 (2002).

A criminal defendant has both a constitutional and statutory right to be present during his or her trial. *People v. Kammeraad,* 307 Mich.App 98, 116–117; 858 NW2d 490 (2014). Namely, the confrontation clauses and the due process clauses of both the federal and Michigan constitutions impliedly guarantee this right. US Const, Am VI; Const 1963, art 1, § 20; US Const, Am XIV; Const 1963, art 1, § 17; *Kammeraad,* 307 Mich.App at 116–117. Furthermore, MCL 768.3 provides, "No person indicted for a felony shall be tried unless personally present during the trial...." Although "trial" encapsulates a broad spectrum of processes and procedures, the constitutional and statutory right to be present applies to the jury instruction phase as well. *Powell,* 303 Mich.App at 275. The test to determine whether "defendant's absence from a part of his trial requires reversal of his conviction is whether there was any reasonable possibility that defendant was prejudiced by his absence." *Buie,* 298 Mich.App at 59 (citation and quotation marks omitted).

***3** After reading the jury instructions, the trial court realized it had made an error. The trial court proceeded to correct the error, but defendant was absent from the courtroom at the time. In defendant's absence, the trial court stated the following to the jury:

> Okay. Here's the final instructions. And when I gave you that final instruction I said running away from the police. I should have said running away from the scene. Thank you? Okay.
>
> Alright, you can start with your deliberations. Only knock on the door with a note, if you need anything.

From the record, it was clear that the trial court was correcting a trivial error—replacing one word for another. Moreover, even defendant concedes that he does not know whether the jurors, who were in the jury room at the time the judge gave the corrected instruction, could see that defendant was absent from the courtroom. Thus, we do not agree that there was a reasonable probability that defendant was prejudiced by his absence. *Id.*

In his Standard 4 brief, defendant argues that the prosecution committed misconduct by failing to divulge crucial witness contact information and by making inflammatory statements during cross-examination. We disagree. Because defendant did not object to the prosecutor's conduct at trial, this issue is unpreserved and review is limited to plain error affecting substantial rights. *People v. Gaines,* 306 Mich.App 289, 308; 856 NW2d 222 (2014). Error requiring reversal will not be found when a curative instruction could have displaced any

prejudicial effect of the prosecutor's misconduct. *People v. Johnigan,* 265 Mich.App 463, 467; 696 NW2d 724 (2005).

We first address defendant's assertion that the trial court committed misconduct in its failure to provide discovery. Discovery in criminal cases is fairly limited, and is defined and governed solely by MCR 6.201. *People v. Greenfield,* 271 Mich.App 442, 447–448; 722 NW2d 254 (2006). MCR 6.201(A)(1) provides, in relevant part:

[A] party upon request must provide all other parties:

> (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial....

Additionally, MCR 6.201(F) provides: "Unless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of this rule within 21 days of a request under this rule and a defendant must comply with the requirements of this rule within 21 days of a request under this rule."

On November 6, 2014, defense counsel told the trial court the following:

> I checked my emails and all my mail. The prosecutor never did send me a witness list. I found out that one of the witnesses that can testify to exculpatory evidence on behalf of my client is not—although mentioned on the witness list not checked off as a witness they were going to call. I prepared a subpoena for that witness and I was given the address of that witness today because they block out or black out all the—....
>
> ***4** So I'm going to ask the Court's assistance in having the officer-in-charge, the Detroit Police, serve that witness who is on their witness list. His name is Nader Mohammed Sherrie, that's N-a-d-e-r Mohammed—....

Moreover, on November 10, 2014, defense counsel again mentioned on the record that he was missing contact information from the prosecution regarding Nader Mohammed Sherrie, Terrance Anthony Collins, Sharde Thomas, and Latasha Henderson. Again, defense counsel mentioned that the Detroit Police Department reports contained the names of these individuals and contact information, but that the contact information had been redacted. Defense counsel stated, "I emailed Counsel for the Prosecution to give me their specific addresses. And I was never given their specific addresses; they were blacked out, on the discovery." Assuming defense counsel spoke truthfully, it appears that the prosecution inappropriately failed to send defendant contact information in accordance with MCR 6.201(A), thus violating the court rule. [3]

However, the violation does not affect defendant's substantial rights. Defendant does not show how the presence of the witnesses would have affected the outcome of the trial. See *Carines,* 460 Mich. at 763. The record is sparse as to what the witnesses would have precisely testified. However, defense counsel's general contention was that these witnesses would have stated that Lorne and Eric admitted to being involved in Brad's murder, and that Lorne and Eric picked on defendant previously. However, defendant himself testified that he was afraid of Lorne and that he was acting in self-defense. The jury also heard that defendant told police that Lorne and Eric were involved in Brad's murder. Thus, we are not convinced that these witnesses would have changed the outcome of the trial, especially considering the substantial evidence admitted against defendant at trial, including defendant's prior inconsistent statement to police, where he stated that he shot and killed Lorne and Eric. In addition, there was an eye witness who saw defendant leaving the scene, and the evidence showed that the victims were shot 22 times. Accordingly, defendant's substantial rights were not affected by the violation.

Defendant also claims the prosecutor's comments during cross-examination constituted misconduct. "Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v. Dobek,* 274 Mich.App 58, 63; 732 NW2d 546 (2007). Questions of prosecutorial misconduct are decided on a case-by-case basis, and a prosecutor's remarks must be evaluated in context, including the defense arguments and the relationship to the evidence admitted at trial. *People*

v. Roscoe, 303 Mich.App 633, 648; 846 NW2d 402 (2014); *Dobek,* 274 Mich.App at 64.

The prosecutor, during cross-examination, asked defendant the following: "You used that weapon a few weeks prior, at the gas station on State Fair; didn't you, sir?" The prosecutor followed up with: "You've fired firearms at people before; correct?" The prosecutor finally asked, "You fired a firearm at someone at that gas station a couple of weeks prior; didn't you, sir?" Defendant denied all of questions posed by the prosecutor. Defendant claims on appeal that these questions were implicit allegations of defendant's prior bad acts contrary to MRE 404.[4] However, defendant denied all the questions, so there was no evidence in the record that defendant committed these acts. Further, the trial judge properly instructed the jury that the prosecutor's statements were not evidence. Thus, although defendant claims that the prosecutor's statements were allegations against his character, there was no circumstantial or direct record evidence that defendant committed these acts. Furthermore, even assuming the prosecutor's questions constituted misconduct, there was substantial evidence against defendant presented at trial, including his prior inconsistent statement to police where he admitted to killing Lorne and Eric. Given the brief nature of the prosecutor's questions in light of the significant evidence against defendant, defendant cannot show prejudice.

***5** Finally, defendant argues in his Standard 4 brief that his trial counsel was ineffective for failing to investigate and produce witnesses at trial.[5] We disagree. "[A] defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his or her counsel was ineffective." *People v. Lane,* 308 Mich.App 38, 68; 862 NW2d 446 (2014). Defendant did not move for a new trial or evidentiary hearing here. Accordingly, the issue is unpreserved for appellate review. "When the trial court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record." *Id.* at 68.

"To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v. Nix,* 301 Mich.App 195, 207; 836 NW2d 224 (2013), citing *People v. Armstrong,* 490 Mich. 281, 289–290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix,* 301 Mich.App at 207.

Defense counsel's efforts in ascertaining the missing witnesses did not fall below an objective standard of reasonableness. Indeed, the record reflects that defense counsel was trying to find the witnesses but did not have their addresses. However, even assuming defense counsel's performance was deficient, defendant's ineffective assistance claim still fails because he was not prejudiced by his counsel's failure. As discussed above, there was no probability that the outcome of the proceedings would not have been different, as the presence of the witnesses would likely not have altered the jury's verdict.

Affirmed.

GLEICHER, J. (concurring).

I concur with the result reached by the majority. I write separately to respectfully disagree with one aspect of the majority's reasoning.

I agree that the trial court erroneously declared that "[m]anslaughter is not an included offense of [m]urder in the [f]irst [d]egree." Nevertheless, the majority holds, evidence that one of the victims reached for a gun after being instructed to "beat" defendant's "ass" "do[es] not support the conclusion that defendant was provoked to the extent that a reasonable person would lose control and act in the heat of passion," as "[d]efendant was, at best, goaded by words, and faced with an ephemeral possibility of some potential physical contact." I respectfully disagree with this conclusion. I believe that the record contains adequate evidence of *provocation* to support a voluntary manslaughter instruction. But it lacks evidence of a second element of that offense: that the defendant killed in the heat of passion.

Citing *People v. Pouncey,* 437 Mich. 382, 391–392; 471 NW2d 346 (1996), the majority opines that "mere words and insults will generally be considered insufficient provocation." The majority misreads *Pouncey.* Words alone may constitute adequate provocation, depending on the words and the circumstances. As the Supreme Court emphasized in *Pouncey,* "[t]he determination of what is reasonable provocation is a question of fact for the factfinder" unless "no reasonable jury could find that the provocation was adequate[.]" *Id.* at 390. In *Pouncey,* the Court cited LaFave

& Scott, Criminal Law, § 76, pp 576–577, for the proposition that "words of an informative nature, rather than mere insults, have been considered adequate provocation." *Id.* at 391. The more current version of LaFave's treatise similarly observes that "words alone will sometimes do, at least if the words are informational (conveying information of a fact which constitutes a reasonable provocation when that fact is observed) rather than merely insulting or abusive words." LaFave, Substantive Criminal Law (2d ed), § 15.2(b), pp 499–500. And in *Pouncey,* the Court was careful to add, "we decline to issue a ruling that insulting words per se are never adequate provocation." *Pouncey,* 437 Mich. at 391.

***6** But regardless of whether words suffice as adequate provocation, in this case words were coupled with action. Defendant testified that one of the victims reached for his waistband. Defendant then stated: "I swear I seen a gun." Given this testimony, I simply cannot agree with the majority that "[d]efendant was, at best, goaded by words, and faced an ephemeral possibility of some potential physical contact." According to defendant's testimony, this was far more than a verbal fracas.

Nevertheless, I believe that the trial court need not have instructed the jury regarding voluntary manslaughter, as a rational view of the evidence did not support that defendant acted in the heat of passion. "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *Id.* at 389. That "passion" is otherwise characterized as "rage," "terror," or "wild desperation." LaFave, § 15.2(a), p 494 (quotation marks omitted). "A 'passion for revenge' ... will not do." *Id.* To qualify as manslaughter, a killing

> must have been committed in a moment of frenzy or of temporary excitement. Manslaughter is homicide devoid of actions which require unimpassioned calculation for their accomplishment. If there be actions manifesting deliberation, it cannot be said, legally, that the homicide was the product of provocation which unseated reason and allowed passion free rein.
>
> [*People v. Younger,* 380 Mich. 678, 681–682; 158 NW2d 493 (1968).]

Defendant's testimony supports that defendant shot the victims when threatened by their words and acts. But no evidence substantiates that defendant was motivated by a passionate rage, frenzy or terror. Rather, defendant's testimony reflects deliberation rather than loss of control:

> *Q.* Did you commit a first degree murder against an Eric Jones?
>
> *A.* No. They was both down [sic] in self-defense.
>
> * * *
>
> *Q* .... And when he went for a waistband—for a weapon—how did you feel; what was your reaction to that?
>
> *A.* At first it was act on instinct. Which is, because of the relationship, self-perseverance [sic], you know, I just wanted to protect myself and make sure I was all right.

Under certain circumstances, a defendant appropriately claims self-defense and requests in the alternative that the jury return a voluntary manslaughter verdict. See *People v. Heflin,* 434 Mich. 482; 456 NW2d 10 (1990). In other words, the two defenses are not mutually exclusive. Here, however, no evidence supports that defendant was enraged or overwhelmed by a passionate and uncontrollable urge to do violence. Rather, defendant testified that he judged the situation as one in which his life was in immediate danger, and acted accordingly. Based on his testimony, defendant was provoked. But no evidence suggests that he acted "out of passion rather than reason," *Pouncey,* 437 Mich. at 389, or that he ever lost his self-control. On this basis, I concur with the majority's conclusion that no instructional error requiring reversal occurred.

All Citations

Not Reported in N.W.2d, 2016 WL 1533554

Footnotes

1 The prosecution argues on appeal that defendant failed to preserve this issue because his counsel did not request the voluntary manslaughter instruction based on provocation grounds. Instead, defense counsel asked for the instructions on a self-defense theory. We disagree. Because defendant requested a jury instruction on manslaughter, defendant's claim of instructional error was preserved.

2 This Court will ordinarily not reverse a lower court if it reaches the right result for the wrong reason. *People v. Goold,* 241 Mich.App 333, 342 n 3; 615 NW2d 794 (2000).

3 We hold that the prosecution's failure to send witness contact information in this case was not a violation of *Brady v. Maryland,* 373 U.S. 83; 83 S Ct 1194; 10 L.Ed.2d 215 (1963). To establish a *Brady* violation, defendant must show: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *People v. Chenault,* 495 Mich. 142, 155; 845 NW2d 731 (2014). Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 150 (citation and quotation marks omitted). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 157 (citation and quotation marks omitted). Even assuming the prosecution suppressed the contact information, and that the information was somehow favorable and exculpatory for defendant, the information was not material, as defendant himself admitted to the murders and admitted to having killed the individuals partly because of their alleged involvement in Brad's earlier death, in addition to the fact that the jury rejected defendant's self-defense argument.

4 MRE 404(b)(1) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident...."

5 Defendant also argues that defense counsel was ineffective because he "failed to press for a firm ruling on the admissibility of information throughout the entire court proceedings...." Defendant does not elaborate. Accordingly, this argument is abandoned. See *People v. Portellos,* 298 Mich.App 431, 445; 827 NW2d 725 (2012) ("Parties may not merely announce their position and leave it to this Court to discover and rationalize the basis for their claims, and we may consider unsupported issues abandoned.").

APPENDIX 3

Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 SCAR LWS 71 (1992)

2 S. Cal. Rev. L. & Women's Stud. 71

Southern California Review of Law and Women's Studies
Fall, 1992

Women and Crime
Donna K. Coker [a1]

HEAT OF PASSION AND WIFE KILLING: MEN WHO BATTER/MEN WHO KILL

"[Adultery is the] archetypical illustration of adequate provocation." [1]

I. INTRODUCTION

Men who *beat* their wives or lovers [2] frequently allege that the woman's infidelity or her desire to be unfaithful provoked the beating. ***72** [3] Research regarding men who *kill* their wives suggests that they are similarly motivated by sexual jealousy. [4] Although jealousy is not the only motivation given by men who beat or kill their wives, claiming adultery as provocation may mean the difference between a voluntary manslaughter conviction and a murder conviction. The voluntary manslaughter law of practically every jurisdiction will recognize provocation induced by the sight of a wife's adultery as a motivation to kill. [5] In fact, English and American jurists and legal scholars repeatedly refer to adultery as *the* paradigm example of provocation adequate enough to mitigate what would otherwise be murder to a voluntary manslaughter conviction. [6]

***73** The elevation of adultery to the status of *the* paradigm example of provocation is notable for several reasons. Adultery is an anomaly in the common law doctrinal world of provoking events, and it is the only major traditional category of "adequate provocation" that does not involve an actual or threatened physical assault. [7] Even though adultery-related killings comprise the singular area of homicide law that has historically distinguished a wife-killing from all other killings, these killings are seldom recognized as belonging to the universe of "domestic violence" killings. Wife-killing is therefore excluded from the modern analysis afforded wife *abuse.* [8]

Recent years have seen an explosion of interest and research in both the social sciences and law with regard to the violence of men against their present or former wives or lovers. Legal scholarship has focused primarily on the challenges involved in the representation of battered women--in temporary restraining order hearings, [9] child custody fights, [10] ***74** and, most notably, in the area of criminal defense of women who kill their abusive partner. [11] Expert testimony regarding "battered woman's syndrome" is now admissible in most states when a woman is charged with the murder of her current or former abusive partner. [12] When abusive men are prosecuted for assault, many jurisdictions have special domestic violence units or programs that employ a range of strategies from diversionary programs to mandatory jail time. [13] The judicial system's heightened awareness of and response to wife abuse has led to a better understanding of the motivations of the abuser and the circumstances of the abused woman's existence. Perhaps the two most important insights that have arisen from this activity are the recognition that wife-abuse is purposeful--and not primarily expressive-- behavior, [14] and that battered women are neither masochists nor provocateurs. Men who are identified as abusers are therefore more likely to be held accountable for their violence today than they were twenty years ago.

***75** In light of the intense social science and legal activity in the area of domestic violence generally, it is remarkable that this information is frequently absent from the legal analysis when a man's beatings escalate to murder. [15] Nowhere is this lack

more apparent or ironic than in the area of homicide law that has historically distinguished a domestic violence killing from all others: the heat-of-passion killing provoked by discovery of a wife's adultery. [16]

In this article I will apply the growing body of social science data and feminist theory regarding domestic violence to reexamine heat-of-passion/adultery law. The article is organized around two central points. First, law implies a dubious distinction between men who premeditate the murder of wives and lovers, and "innocent" [17] men who catch their wives in bed with someone. This distinction does not accurately describe husband-to-wife homicides. Second, there is a remarkable similarity between the social understandings that underlie important elements of voluntary manslaughter's heat-of-passion doctrine and the excuses and justifications that abusive men give to explain their violence. The primary *excuse* abusive men give for their violence is that they were "out of control," a claim which is frequently linked with an explicit or implicit charge that it was the victim's provocation that made them lose control. The primary *justifications* for the violence are that she deserved it due to her improper conduct or, more subtlely, that the man was acting in (emotional) self-defense. Both of these excuses and justifications significantly mirror the understanding of violence that informs voluntary manslaughter/heat-of-passion law.

***76** This congruence between how abusive men perceive their violence and the legal doctrine of voluntary manslaughter perpetuates two major misconceptions about the nature of wife-killing. The first misconception follows from the belief that violence in response to a wife's provocation--in this context, the wife's adulterous conduct--is an uncontrollable response, which in turn reinforces the belief that intervention can have little deterrence or prevention impact. The second misconception follows from the congruence between the justifications given by abusive men and the quasi-justificatory elements of voluntary manslaughter doctrine: the wife-killer who kills in response to his wife's "provocative" conduct is seen as an unlikely recidivist and therefore less dangerous. [18] The basis for this belief is that the victim's behavior was *unusually* provocative and since the accused is unlikely to encounter such a provocative wife again, he is unlikely to kill again. [19] This claim underscores the view of battered women as provocateurs who "call[] this upon [themselves]." [20] A quasi-self-defense claim is also hidden within the batterer's justifications which reinforces the view that the dynamics of the relationship are to blame for the violence: he killed because he was married to *this* woman or because he was involved in *this* relationship, not because of his personal inclination to be violent with female intimate partners.

Scholars analyzing heat-of-passion doctrine have similarly accepted these same assumptions: one rationale for the doctrine holds that ***77** increased penalties will not deter heat-of-passion killings, [21] and a somewhat contradictory rationale suggests that these killers do not pose a serious future threat to society because they are unlikely recidivists. [22] Yet social science research on domestic violence demonstrates that these beliefs are inaccurate when applied to wife-abuse and wife-killing generally, and are therefore highly questionable when applied to the so-called "provoked" wife-killings. [23]

This article's assessment will include a close examination of a California case, *People v. Berry.* [24] The California Supreme Court in *Berry* overturned a first degree murder conviction by finding that the trial court's failure to give a voluntary manslaughter instruction was reversible error. Berry claimed to have killed in response to provocation caused by his wife's adulterous conduct and her sexual "taunts." The case demonstrates the deleterious effect of the resonance between the excuses and justifications given by abusive men and the cultural (mis)understandings that underlie modern heat-of-passion/adultery doctrine.

Before examining voluntary manslaughter doctrine, it is important to note what I am *not* saying. I am not saying that a large number of men who kill their wives or lovers "get off" with voluntary manslaughter convictions. In fact, we don't know how many of these defendants are convicted of voluntary manslaughter as opposed to first or second degree murder, [25] and appellate cases fail, for a number of reasons, to provide the answers. First, many, if not most, appellate cases involving voluntary ***78** manslaughter doctrine are appealed on the ground that the court failed to give a voluntary manslaughter instruction. This likely creates a particular bias because in many modern jurisdictions voluntary manslaughter instructions are given freely, thus ensuring that those cases where an instruction is refused involve particularly egregious facts. [26] Second, the great majority of homicide appellants lose, [27] and there is no reason to believe that cases where a male defendant killed his wife or lover are exceptions. Third, it is unlikely that a defendant who receives the lesser penalty of voluntary manslaughter will appeal his conviction. Therefore, while significant anecdotal evidence suggests that a voluntary manslaughter defense is successful for many wife-killers, [28] there is scarce empirical data or relevant appellate information on which to rely to discern the realities of trial court practice. Even without trial court data, however, the analysis of this Article is not undermined. The parallels between

the thinking of abusive men and voluntary manslaughter doctrine suggest, at the very least, likely outcomes at trial, and provide a keener understanding of the social context in which abusive men operate.

*79 A. VOLUNTARY MANSLAUGHTER DOCTRINE

Modern United States voluntary manslaughter doctrine is the successor, in large part, to sixteenth and seventeenth century English common law. [29] The commonplace practice of wearing weapons turned drunken brawls and the settlement of "breaches of honor" into deadly affairs. Difficulties of proof in the self-defense context, and the belief that capital punishment was an unfair result for those who killed in mutual combat, prompted jurists to mitigate the crime of murder to manslaughter where the defendant was shown to have acted in "the heat of passion." [30] The four necessary elements established by the common law still shape much of modern voluntary manslaughter doctrine: (1) a provocation that would arouse a reasonable man to the heat of passion; (2) the defendant actually was aroused to the heat of passion; (3) a reasonable man would not have cooled off; and (4) the defendant did not, in fact, cool off. [31]

Generally, the doctrine requires that the "passion" disturb the defendant's reason to such an extent that an "ordinary person[] of average disposition [[[would] likely . . . act rashly or without due deliberation and reflection, and from passion rather than judgment." [32] "Passion" has usually meant "anger," though some jurisdictions have consistently included fear and jurisdictions that follow the Model Penal Code include any "extreme mental or emotional disturbance." [33] Revenge, however, ***80** can never be an adequate motivation to mitigate murder to manslaughter, revenge being consistent with premeditation and wholly inconsistent with an act committed under the "sway" of passion. [34]

The common law measure of what would arouse a "reasonable man" to such a passion became a question of law, evolving into fixed categories of "adequate" provocation. The "nineteenth century four" [35] came to define "adequate provocation" in the courts of the United States: (1) a violent assault; (2) an unlawful arrest; (3) mutual combat; (4) the sight of the accused's wife in the act of adultery. [36]

1. *Adultery Category*

The "adultery category" was recognized in the earliest cases as the highest form of provocation. In fact, one of the earliest cases to delineate the various forms of "adequate provocation," notes that adultery is the "highest invasion of property" and thus represents the "highest" form of provocation. [37] Similarly, the seventeenth century *Manning's Case,* [38] one of the earliest examples of an adultery category voluntary manslaughter conviction, ordered that defendant Manning have the benefit of clergy and be burned in the hand, [39] directing the executioner to "burn him gently, because there could be no greater provocation than this." [40] The American experience was no different. Perhaps the first American case ***81** to develop the concept of the "reasonable man" in a homicide trial involved adultery-related attempted murder. [41]

Modern reformation of voluntary manslaughter doctrine has, if anything, tended to expand the circumstances under which the "adultery category" applies. While some jurisdictions have strict rules requiring that the act of adultery be actually witnessed by the defendant, or that the couple be *married* as opposed to unmarried lovers [42] --the modern trend away from strict categories to a "reasonableness" standard has allowed wife killers to include a wider range of circumstances. [43] Nevertheless, the doctrine is still generally tied to an "objective standard"--which ties it to some measure of community norms. [44] The Model Penal Code (MPC) provides the most dramatic departure from the common ***82** law's categories of "legally sufficient" provocation, but still maintains a variant of the objective/subjective test, requiring that the "extreme mental or emotional disturbance" have a "reasonable explanation or excuse". [45]

II. "INNOCENT" KILLERS V. "IN COLD BLOOD": MEN WHO BEAT AND MEN WHO KILL

> It is specious to draw a line between domestic violence assault and spousal homicide as if they were two quite distinct, separate species. They are not, instead they are often one and the same event, along a continuum of

> violence distinguished only by *inter alia* the force and number of blows, where the knife plunged or bullet embedded. [46]

In those areas in which there is a good "fit" between social understandings and legal doctrine, the doctrine remains largely unexamined, its assumptions unquestioned. [47] Such a "fit" is found between the social expectation that a man will be enraged at a wife or lover's sexual infidelity, on the one hand, and the legal doctrine of voluntary manslaughter/ ***83** heat-of-passion law as applied when the accused claims he was provoked by his wife's adultery. [48] The historical common law category of adultery as the paradigm example of provocation adequate to render a killing voluntary manslaughter reflects this social expectation, and together--the interaction of the social understanding with the legal doctrine--hides the degree to which "adultery killings" are really like other wife-killings.

The research relevant to the study of men who kill their wives is currently divided into two perspectives: first those researchers whose primary orientation is the study and treatment of battering men and who view murder as an extreme point on a continuum of abusive conduct; [49] second, those who focus on the study of inter-sexual homicides, this latter group being comprised mostly of criminologists, sociologists, and forensic psychiatrists. [50] Efforts to correlate the two bodies of data and analysis have been rare.

***84** In this section, I will discuss what we know about men who are identified as "abusers" and what we know about those men who kill their wives or lovers. Evidence strongly suggests that, at the very least, these two groups significantly overlap. This evidence includes the similarity of the explanations given by abusers and those given by wife-killers regarding their motivation to kill; data that suggests that in the majority of domestic violence killings, the male killer has a history of violence with the homicide victim; and studies that show that police have been called to the scene of a husband-wife homicide several times prior to the occurrence of the homicide.

There may exist a group of killers to whom this data does not apply. Heat-of-passion doctrine is predicated on just such a claim: a provoked killer, of "average disposition" and ordinary self-control [51] for whom violence is an *uncharacteristic* act. This article does not attempt to refute the general claim that such killers exist, but rather suggests that its applicability is strained when it is used to describe men who kill their female partners. I will show that similar claims of provocation have been made regarding wife beating generally and are demonstrably false. Additionally, the close association of wife-killing with heat-of-passion law has created a dynamic in which the general social construction of wife-killing as an "uncontrollable" response provoked by bad conduct reinforces and is also reinforced *by* the doctrine's view of adultery related wife-killings. This interaction suggests that if the general social construction of wife-killing is premised on misconceptions, then application of those same conceptions to *adultery* killings, are likely to be equally false.

A. MEN WHO BATTER

1. *The Issue is Control*

I will begin with what we know the most about: men who are identified as "batterers." First, a batterer's pattern of conduct is frequently repeated in his different romantic relationships with women. [52] Contrary to those views which stress the dynamics of a given relationship, it ***85** appears that an abuser is likely to bring the violence with him to each new romantic encounter. Second, much of current literature on battering notes that the violence, contrary to earlier psychoanalytic explanations, is *instrumental* rather than *expressive.* [53] In other words, the violence is not only an expression of rage, but serves a *purpose.* In general, that purpose is to *control* his wife or lover, to gain compliance with his demands. [54] I will discuss the purposeful nature of violence directed against wives more fully in Section III, but it is important here in identifying the *systemic* quality of the violence to note that it is neither random nor is it isolated conduct. It is part of a *system* of control and is frequently accompanied by threatening behavior, destruction of property, sexual, verbal, and economic abuse. [55]

The instrumental nature of the violence can be seen in the manner in which battering men describe their motivations for violence. Abusive men blame their violence on complaints about the woman: she's a bad housekeeper; she doesn't show the men the

proper deference; she's verbally aggressive; she's a poor mother. [56] Sexuality figures prominently in most of these complaints: she's not sexually responsive enough; she is--or desires to be--sexually unfaithful. [57] The women, in turn, describe abusive partners or ex-partners as extremely possessive, suspicious, and jealous; [58] and clinicians describe the men as "pathologically" jealous. [59] ***86** The control of the woman's sexuality also extends to sexual abuse--abuse that may become extreme such as rape, forced sex with animals or other men, and physical attacks on the woman's sex organs or breasts. [60]

The following story is typical of the accounts women give of the men's "pathological" jealousy:

> He figured out it took 30 minutes exactly for me to get from work back home. I could never go out for a drink with the other women in the office. I could barely chat on the way out to the parking lot. God help me if there was a traffic jam or if a train came across town and blocked the road. He'd be pacing in the driveway, tapping his watch, ready to accuse me of having an affair after work. [61]

To understand the full impact of this kind of extreme jealousy, it must be viewed in a context which includes many other control tactics. [62] The result of the *whole* is to limit the woman's social contacts, to isolate her. Friendships with other women are discouraged; activities that cannot be closely monitored are denied. [63]

Extreme jealousy is a powerful tool for control in two distinct ways. First, by calling on the social understanding available to the man who punishes a woman who has humiliated him by making him a "cuckold," the abusive man draws upon one of our most powerful cultural stereotypes; the blameworthiness of his violence is thus mitigated. Second, it serves to directly control his wife's daily behavior by monitoring who she sees, who she talks to, how she dresses, who her friends are, or whether or not she has any friends. [64]

***87** Extreme jealousy is but one tool of control utilized by the batterer. Battered women tell similar stories of having to account for every dime they spend, something they attribute to the man's fear that they are saving money in order to leave him. [65] This connection between the degree to which the man controls his lover's actions and the degree to which he fears losing her is also referred to in the literature on battering. [66] The more fearful he is of losing the woman, the more coercive and controlling his behavior becomes, creating an increasingly powerful incentive for the woman to leave him, resulting in an escalating circle of violence and control. [67] The controlling behavior may not pay off in the long run, but it is clearly reinforced in the short run: it insures compliance, it maintains dominance, it feels powerful, and it diminishes the woman's ability to leave. The idea that a struggle for control is at the heart of battering is further underscored by the fact that women are in the greatest danger when they leave a battering relationship: over half of those who are killed are separated at the time. [68]

2. *Obsessiveness and Centrality of the Woman*

Literature on battering has examined the murder of wives and lovers primarily from the standpoint of prevention, identifying characteristics that increase a particular man's lethality. For example, Barbara Hart identifies the following factors as important in measuring an individual man's likelihood of committing murder: his obsession with his partner, the centrality to his life of the relationship with the woman, drug and alcohol consumption, access to weapons, threats of homicide or suicide, fantasies of homicide or suicide, access to the woman, and pathological jealousy. [69]

***88** Obsessiveness and the centrality of the woman are two particularly important factors indicating "lethality." When a woman leaves, obsession with her may be manifested through "courting" kinds of behavior (e.g., frequent phone calls, flowers) or through persistent threats and "stalking" behavior. [70] This suggests that the killings committed by men who could have been identified as "batterers," had the assessment been applied prior to committing homicide, are not the result of impulsive behavior, but instead follow a long period of obsessive thinking marked by rehearsal--either in the form of homicidal fantasy or in the form of actual assaults similar in nature to the ultimate act of killing. "Deliberation," as defined by many first degree murder statutes, may fail to capture the nature of this obsessive thinking. [71] Our oppositional definitions of "premeditation" and "impassioned" killings fail to capture the nature of this phenomenon which is both premeditated in its obsessive quality *and* "impassioned" in

that the killer believes himself to be "out of control." The man "may have fantasized events that would 'trigger' him to commit homicide," rehearsing the killing, though not *planning* it in a straight-forward cognitive fashion. [72] He may describe feeling that his choice to kill is completely in the hands of fate or, perhaps more accurately, in the hands of the victim. [73] If she continues to do "x," or if she refuses to do "x," then he will "have no choice" but to kill. These men may be heard to say with some resignation, "one of us is going to end up dead." [74] The sense of no control is easily demonstrated to be false, of course. For like the man who blames his abusive behavior on drinking, yet continues to frequent places where drink is plentiful, these men take no responsibility for avoiding circumstances which they claim provokes ***89** them to uncontrolled rage. Instead, they "toy" with the idea of killing, becoming increasingly obsessive about the wrong done them by the victim and eventually convinced that "something must be done to make things right." This kind of quasi loss of control can be very attractive, for "[by] experiencing himself as an object controlled by transcendent forces, an individual can genuinely experience a new or different world." [75]

3. *Police and Criminology Studies: Battering Men and Killers*

Police and criminology studies are the works that best bring together the analysis of the battering literature with information regarding men who kill. Contrary to "[t]he popular image of the model citizen who one day goes berserk and kills a family member[,]" [76] police studies have consistently found that men who kill their female partners have a *history* of violent behavior. [77] Roughly 70% to 75% of domestic homicide offenders have been previously arrested and about 50% have been *convicted* for violent crimes. [78] The frequently cited Kansas City study of spousal homicides found that in 90% of the cases the police had been called to the home a median of 5 times in response to "domestic disturbance" calls. [79]

***90** Though the popular image of the man who kills his wife is someone who "suddenly cracked" [80] under the strain, this is clearly not the case when the accused fits the description of a battering man. This violence is purposeful conduct committed by a man who has a history of assaulting the victim. However, the conception of the man pushed beyond his limits is the thread that ties our cultural conceptions of domestic violence together with those reflected in voluntary manslaughter doctrine.

B. MEN WHO KILL

Research regarding men who kill wives or lovers is not extensive, and qualitative research which examines the *motivations* of the accused is even more limited. [81] Additionally, those studies which do examine motivations typically carry an inherent bias related both to the purpose of the research and to the manner in which the subjects are selected. These studies are generally carried out by psychiatrists to whom the subject has been referred either by the defense counsel or by the court. The court is more likely to refer those men whose sanity is an issue. Not surprisingly, the research of predominately defense-side forensic psychiatrists may carry a defense bias. [82] Even were this not the case, the process of selection for court referral necessitates judicial and defense counsel judgment calls regarding the various potential defenses available for the defendant--i.e., insanity, diminished capacity, heat of passion. Though the absence of comparative data makes certainty impossible, it is likely that the samples are thereby further skewed in the direction of referrals for defendants whose stories more nearly fit judicial and general social stereotypes of "heat-of-passion" killings. This "turn" to the sampling is further exaggerated by the dismissal from the study of those who are ***91** clearly insane, [83] thereby producing a sample of sane defendants whose chances of fitting some classic description of "heat-of-passion" has been greatly increased. While such a sample cannot purport to be a study which represents the *entire* group of men who kill their wives, lovers, or ex-wives and lovers, it does shed light on the subject. These studies provide an opportunity to examine the way in which the killers' explanations for their violence, as well as the explanations attributed to their violence by mental health professionals, are shaped by the intersection of the mental health profession and law. The result, then, is a research sample--distilled and bent--to more nearly reflect "classic" heat of passion stories. This provides an excellent opportunity to test the concepts of this paper, for if we are to find the classic heat of passion wife-killer--i.e., the man who "suddenly" kills under the "sway" of passion, for whom violence is an uncharacteristic act and therefore the result of circumstances rendering him "out of control"--we would expect to find him in these studies. In fact, what we find are wife-killers who look much like wife *batterers.*

Approximately 60% of men who kill their wives allege that she was sexually unfaithful and over 50% say that she deserted them. [84] One study concludes that the most common type of homicide committed by men who kill their wives is a "sex-role threat homicide" in which "[a] walkout, a demand, a threat of separation . . . represent [to the men] intolerable desertion,

rejection, and abandonment." [85] This study's description of the wife-killers sounds remarkably similar to battering literature's description of batterers: emotionally dependant on their partner; controlling of her movements and behavior; extremely jealous and possessive; experiencing her attempts to separate as intolerable desertion requiring a violent response; likewise responding with violence to a perceived rejection of their "rightful" dominance. [86]

***92** Another study by Showalter, however, more nearly matches the stereotype of the impassioned killer. [87] Showalter's study consists of eleven men referred by their defense attorneys for a psychiatric evaluation. The focus of the defense counsel's strategy was the state of mind of the defendant at the time of the offense. [88] Though Showalter's sample is small, he argues that the striking similarity between the 11 subjects suggests that they are "characteristic of a large proportion of spousal homicide cases." [89] Showalter describes a "spousal-homicide syndrome" leading to killings that are "classic illustrations of victim-precipitated homicides." [90] The subjects in Showalter's study are men who were relentlessly tormented by unforgiving wives or girlfriends who taunted them about their sexual inadequacies and flaunted their own affairs with other men. In summary, Showalter's description tracks closely the heat of passion stereotype of an "adultery category" voluntary manslaughter case. On closer examination however, despite Showalter's conclusion that these men are "clearly differentiat [[[ed] . . . from the stereotypical murderer," [91] his findings provide remarkable similarities to descriptions of battering men in the battering literature that tend to belie the "heat of passion" categorization. For example, with regard to prior acts of violence, all but one of the men admitted making prior threats of assault on their wives. [92] Further, the relationships are described as "a central feature in the life of the offender" [93] suggesting an obsessiveness with the woman and emotional dependency characteristic of abusive men. [94] In 72% of the cases the defendant and victim were separated at the time of the assault and the woman's threat of a final withdrawal from the relationship precipitated the attack in ten of the eleven cases. [95] In all eleven cases the man believed that his partner was having an affair. [96] These findings appear to mirror the control motivations and emphasis on sexual jealousy characteristic of men identified as batterers, and are consistent ***93** with battering literature's focus on the lethality of separation. Finally, Showalter states that only five of the eleven men reported having committed prior acts of violence against their partner. [97] If true, this finding would obviously mitigate against a "battering" assessment. However, the accuracy of this self-reporting is thrown into serious question by the researcher's insensitivity to clues of prior violence. For example, in one of two stories used by Showalter as demonstrative of his "spousal-homicide syndrome", the homicide follows closely after the man is served with divorce papers. [98] Showalter notes that the sheriff who delivered the papers had been instructed to stay at the residence until the man left, but failed to do so. [99] It is a common practice in divorce actions in which physical violence is alleged to serve a restraining order with the complaint requiring that the abusing party leave the home immediately. The requirement that the sheriff remain on the scene until this was accomplished strongly suggests that the victim feared her husband's likely physical retaliation. Additionally, Showalter fails to include in his assessment of "prior acts of violence" a man's destruction of his wife's car in an effort to prevent her from leaving. [100] Sensitivity to the literature on battering would have suggested that this was a violent act designed to frighten and control the woman by denying her a means of escape, [101] an image in sharp contrast to the "abused" and beleaguered men Showalter describes.

C. CONCLUSION

In conclusion, homicide law divides sane individuals who intentionally kill into two major categories: those who premeditate murder and those who act in the heat of passion. Social stereotypes of wife-killing that characterize the killer as a previously non-violent man who "snapped" under pressure, roughly parallel the understandings which underlie heat-of-passion doctrine. However, this social stereotype is grossly inaccurate when applied to men who are identified as "batterers" and when applied to the *general* category of husband-wife killings. Violence perpetrated by abusive men is purposeful, not spontaneous; the majority of men who kill their wives have a documented history of violent assaults. Furthermore, one would expect to find empirical evidence ***94** of wife-killers who fit the stereotype of the heat-of-passion killer in those reports of forensic psychiatrists whose job it is to aid defense counsel, yet these reports seem to confirm that men who kill and men who batter have remarkably similar personality traits and similar motivations. While further research is needed before we can determine whether or not the "impassioned" wife-killer exists, if he does exist, he is apparently part of a very small group of wife-killers.

III. HEAT-OF-PASSION/ADULTERY DOCTRINE, AND THE JUSTIFICATIONS AND EXCUSES OF BATTERING MEN

"[E]very act of human beings--even their crimes--*says* something." [102]

When men kill their present or former wives or lovers, they bring excuses and justifications to law that reflect societal understandings of male rage and female provocation. These justifications and excuses resonate with and find expression in the heat-of-passion doctrine. James Ptacek notes that battering men, like others who are "called to account" for socially disapproved behavior, seek to "neutralize" their violence by engaging in *excuses* and *justifications.* [103] *Excuses* are found in a man's denial of full responsibility for the violence; *justifications* in his accepting some responsibility for the violence, but "den[ying] or trivializ[ing] the *wrongness* of his violence." [104]

Four excuses and justifications made by abusive men particularly resonate with voluntary manslaughter doctrine: the claim of loss of control, the claim of provocation, the claim of emotional self defense, and the frequently intertwined charge that his partner has been, or desires to be, sexually unfaithful. This section will examine the congruence between these claims by batterers and certain aspects of voluntary manslaughter legal doctrine. Feminist literature and clinical research on battering have amply demonstrated that, when offered by abusive men, these claims are demonstrably false and rely on a belief system that validates male control of wives and lovers. This section will take this analysis one ***95** step further to show the mutually reinforcing connection between the socio-psychology of abusive men and the legal doctrine under which their violence is examined when they resort to homicide.

A. THE EXCUSE: LOSS OF CONTROL

1. *The Excuse Given by Battering Men*

Ptacek and others working with abusive men note that one of the most common excuses they give for their violence is that they were "out of control." [105] The validity of this excuse, however, is belied by at least three aspects of their behavior. First, the majority of abusive men are violent only with current or former wives or lovers or their children. [106] Though they admit having similar feelings of frustration and rage in other settings, they do not respond violently in those settings. This is likely the result of differentially perceived risks as well as social learning that justifies violence against female partners (e.g., "If I hit my boss, I would get fired and maybe arrested; but my *wife* is *supposed* to do what I say . . . ").

The statements made in the following narrative provide an example of this kind of risk-weighing behavior which contradicts the loss of control excuse.

> I found a note written by my wife . . . [that] said that she owed somebody $6 for babysitting for her for twelve hours. I thought to myself "Where in the living hell could she have been gone for twelve hours?" My mind then turned to her stepping out with someone behind my back, so I called her. When she came in the room, I said, . . . "Where in the hell where you for twelve hours? . . . . "
>
> Then she started giving me some story about going shopping and going to the hairdresser's. . . . I said, "Don't hand me that bullshit; you're fucking around with someone." She said, "No, no, I'm not." Then I yelled, "You no-good tramp, dirty whore, you better tell me where in the hell you have been." She said, "You are acting like nothing but a bum: I'm not going to tell you anything." I thought to myself, "I'm going to beat the damn truth out of that no-good, rotten bitch." I started thinking about tying her up and beating her until she talked, but then I thought that if I went that far, she might leave me, so I ***96** dropped it. I was scared that if I did do it, then I would end up losing her. [107]

Second, the statements made by abusive men directly contradict the loss of control excuse. For example, when asked why the violence wasn't more severe if they were "out of control," abusive men will frequently say that they did not want to hurt the woman seriously, [108] suggesting at the very least, a measure of control over the *degree* of violence. In fact, while describing their violence as "out of control," many men admit to *intending* to harm or frighten their partner. [109]

Third, the accounts given by men who abuse are *internally* inconsistent with a loss of control account. The following explanation serves as a good example:

> It's a condition of being out of control. She's going on and on . . . you gotta get up and do something, you know. That's the way I felt, the way to do it was go over and try to shut her up physically. I'd lose my head. [110]

This man begins by appealing to a loss of control, but his second sentence suggests purposeful behavior (i.e., he had to "do something" to "shut her up"), while his closing sentence again returns to the loss of control theme. The second sentence discloses his bid for domination. Whether an abusive man really believes in his story of being out of control or is instead spinning a calculated lie--willing to tell any story which might diminish whatever retribution endangers him--is a difficult question and may depend on the abuser "type", [111] the degree of self-awareness he possesses, and the degree to which an out-of-control story resonates with the family and community with which he identifies--including the degree to ***97** which they challenge or reinforce the story. [112] One thing seems certain: the belief in the abuser's "out-of-controlness" reinforces his violence, offering him no encouragement to take personal responsibility for his violent conduct and reinforcing his victim-blaming thinking. As I will discuss in the next section, this victim-blaming in the form of an out-of-control understanding of the battering receives much social support--creating a reinforcing loop between the man's private perception of the etiology of his violence and the public's understanding of its etiology.

2. *The Reason Battering Men Give for Their Loss of Control: Provocation and Victim-Blaming*

> On some occasions she was the provoker. It didn't call for physical abuse. I was wrong in that. But it did call for something . . . you know, you're married for that long, if somebody gets antagonistic, you want to defend yourself. [113]

Clinicians working with abusive men note the frequency with which they engage in blaming the woman for their abusive behavior. [114] This victim-blaming often takes the form of claiming that the woman provoked the attack. A woman's verbal aggression, for example, may be seen as the equivalent of a physical attack warranting physical retaliation. [115] In addition to verbal aggression, abusive men claim to be provoked by their perception of the woman's inadequacy as a home-maker/cook, by her "failure" to respond sexually or to behave in a deferential manner (e.g., "not knowing when to be quiet"), or because they believe her to be--or believe she *desires* to be--sexually unfaithful. [116] Excuses and justifications have some variation in form, but as is apparent in the ***98** following statements, they follow a standard pattern: they assume a norm for female/wifely behavior, assert that their partner has violated that norm, and thus blame her for provoking their violent behavior and/or assert that she deserved to be punished.

> My emotions just took over at that point. And I just went off at that point . . . I shot [her lover]. And then I shot my wife. [117]

> I was a good provider for my family and a hard worker. . . . I told her if she stopped with the divorce, and that I would promise to act better . . . but she wouldn't buy any of it. I got angrier and angrier. . . . I looked at her straight in the face and said, "Well, X, you better start thinking about those poor kids of ours." She said, "I don't care about them: I just want a divorce."

> My hate for her exploded then, and I said, "You dirty, no-good bitch," and started pounding her in the face with my fist. She put her arms up and covered her face, so I ran and got my rifle and pointed it at her. I said, "Bitch, you better change your mind fast or I'm going to kill you." She looked up and said in a smart-ass way, "Go ahead then, shoot me." I got so mad and felt so much hate for her, that I just started shooting her again and again. . . . [118]

Despite the obvious inconsistencies in the accounts given by abusive men, the description of battering as a result of "uncontrollable" rage has mental health adherents [119] and clearly resonates with cultural understandings of the man who has been "pushed too far." [120] These men are using "socially approved vocabularies" [121] to define their behavior in the most "understandable," and therefore sympathetic, light. The use of the familiar social constructs of female provocation and male victimization ***99** serve to make the batterer's quest for control over his partner invisible to those who are not looking for it.

When abusive men talk of their "loss of control," it cannot mean that they literally had *no* control--no volition. It is meant in the *vernacular* sense--a sense in which both justification and excuse are mingled: "This would make any reasonable man angry enough to choose to do violence." [122] The power of their stories is not in their logical consistency with the excuse of "loss of control," but rather in the way they resonate with a far more subtle and more culturally significant phenomenological definition of "out of control-ness."

3. *Voluntary Manslaughter Doctrine and "Loss of Control"*

> The fundamental inquiry in determining the sufficiency of the defendant's mental state to constitute a killing voluntary manslaughter is whether the defendant's reason was, at the time of his act, disturbed or obscured by some passion . . . to such an extent as would render ordinary persons of average disposition likely to act rashly or without due deliberation and reflection, and from passion rather than from judgment. [123]

The language used by many courts in describing a heat-of-passion killing suggests that the accused killed in an "uncontrollable rage," [124] that he acted out of "wild desperation." [125] Criminal law theorists have struggled with just what is meant by "out of control" in the voluntary manslaughter context or what it means to say that the accused killed "under the sway of passion." If the accused really had no volition in the killing, then is it fair to punish him at all? The task of definition is made even more difficult by the additional requirement that the provocation be such that a "reasonable" person would also have been swayed by passion. Assuming that reasonable people are never moved so entirely by provocation as to kill, what does the reasonableness standard mean?

***100** Joshua Dressler's approach to these questions is to suggest that voluntary manslaughter apply to those killings committed under provocation that would cause the "ordinarily law-abiding person . . . [to] lose self-control to the extent that *he could not help but act violently,* yet he would still have sufficient self-control . . . [to] avoid using force likely to cause death or great bodily harm." [126] If, however, the "ordinarily law-abiding person" could not have helped but to *kill,* then the defendant should be wholly excused. [127] Dressler's focus on the accused's *inability* to refrain from violence--though he retains the ability to choose less deadly violence--is a close fit for the doctrine's focus on the "uncontrollable" nature of the killing. Similar to what is suggested by Dressler's analysis, the courts' use of the term "uncontrollable" does not mean the accused had *no* volition, but rather that the accused's ability to make choices was significantly impaired-- though not rendered impossible.

Dressler's analysis shares with voluntary manslaughter/heat-of-passion doctrine three unexamined assumptions that underlie--and undercut--the understanding of these killings. First, "ordinary" people are provoked to violence. Second, this violence is an uncontrolled response, even if the degree of violence is not. Third, there is a certain inevitability to the leap from anger to violence: anger and violence seem to collapse, becoming the same thing.

Dressler's first assumption reflects the requirement under voluntary manslaughter doctrine that the defendant be provoked under circumstances that would similarly provoke a "reasonable" person. The premise of voluntary manslaughter doctrine's use of the reasonable person standard is that reasonable people are, under the right circumstances, provoked to violence; when a reasonable person's thinking is "disturbed by passion," violence is the response. Dressler's assumption ignores the manner in which social, cultural, and political definitions inform an individual's choice to resort to violence. The people with whom we are angry, the circumstances we define as anger-appropriate, and the way in which anger is expressed are socially constructed phenomena. [128] More ***101** importantly, Dressler's assumption completely misses the dimension that power and subordination play in defining the uses of violence. The extent to which one believes that one has options other than violence or, perhaps more to the point, the extent to which one believes that a violent response is morally justified in a given situation, necessarily reflects one's status vis-a-vis the provoker and one's expectations of what the provoker's "appropriate" behavior *should* have been. A decision to use violence necessarily reflects the balance of power between the two persons, as well as the actor's assessment as to whether his reference group would define the situation as calling for a violent response.

Dressler's and the doctrine's second assumption that under provoking circumstances, violence is an "uncontrolled" response--though the *degree* of violence may not be--provides a remarkable parallel for the *quasi*-out-of-control description abusive men give. Just as abusive men are not describing a complete lack of volition when they say they were "out of control," voluntary manslaughter doctrine does not really mean that the accused's behavior was "uncontrollable."

The quasi-lack-of-control phenomenon that emerges from voluntary manslaughter doctrine relies not only on the mental state of the accused--*i.e.,* excuse doctrine, but also on a finding of moral blame on the part of the victim--*i.e.* quasi-justification. [129] This is seen most clearly in the courts' rejection of claims that the behavior of a child or of a "resisting victim" can provide "adequate" provocation to render a killing voluntary manslaughter. [130] The rejection of these claims relies on the concept of an "innocent" victim, the opposite of a "provoking," or blame-worthy victim. The doctrine, therefore, represents precisely the same mixture of victim-blame and "out of control-ness" that figures so prominently in the explanations of violence given by abusive men. By focusing on the behavior of the victim (was she provocative? was the provocation "adequate?") and on the anger of the accused (was he *genuinely* provoked?) voluntary manslaughter doctrine's application to wife-killings obscures the struggle for control which is at the heart of battering, just as that struggle is hidden in the accounts that abusive men give of their violence.

***102** Finally, Dressler assumes that violence, though not homicide, is a common response to certain provocative events--that rage leads inevitably to violence. This conflation of anger with violence is so imbedded in voluntary manslaughter doctrine as to appear common sensical. It is, therefore, not surprising that Dressler offers no empirical evidence to support this claim. [131] It is, in fact, culture that mediates between anger and violence-- that either encourages or discourages the transformation of anger into violence. [132] Like provocation doctrine, Dressler does not ignore the social context that mediates between anger and violence: the need for the stimulus to be so significant that a "reasonable" person would have been provoked [133] ties the event to its social context. The "reasonableness" requirement is designed to measure the *legitimacy* of the anger: if the event *should* not have provoked rage, than it is immaterial that the accused was actually provoked. This places at issue the *legitimacy* of the accused's rage, yet fails to question the fundamental assumption that conflates rage with violence. The truth is, the transition from anger *to* violence is no less culturally constructed than is the definition of what it is appropriate to get angry about. The result of collapsing anger with violence is to focus on the *quality* of the anger (e.g., was he *passionately* angry?) and miss the crucial question: what *purpose* did his anger serve? This collapse makes invisible the fact that *"aggression is a strategy, not an instinct."* [134]

Voluntary manslaughter doctrine also treats anger as an inevitable result of provocative events and similarly conflates anger and violence. If adultery is the "paradigm" heat of passion event, anger is the paradigm heat of passion emotion. [135] Traditionally and modernly in many jurisdictions, anger is the *only* recognized "heat-of-passion" emotion. For women accused of murdering husband's or lovers, the result has often been to exclude killings resulting from fear from the reach of voluntary manslaughter doctrine. [136] However, the doctrine's anger model is equally as troubling when applied to *men* who kill their partners. The ***103** doctrine supports a belief in the inevitability of an angry response to provoking events and then conflates anger with violence, thus hiding the cultural leaps that take place when a man determines first, that his wife's behavior is worthy of his rage and second, when he translates that rage into violence. Both Dressler and the doctrine ignore this leap, providing another element of commonality between the social understanding abusive men carry regarding their violence and that of the legal doctrine. The combination supports an "out-of-control" understanding that serves to hide the power and control dynamics at the

heart of the abuser's violence and to reinforce the belief that spousal homicide resulting from "passion" cannot be deterred. [137] The research on deterrence, however, makes clear that many wife killers respond to criminal deterrence. [138]

B. THE JUSTIFICATION: RIGHTEOUS RAGE [139] AND MALE VICTIMHOOD

Abusive men not only excuse their violence (e.g., "I was out of control"; "she provoked me"), they also *justify* it. When a man hits a woman because she used the wrong tone of voice, because she wasn't interested in having sex--"[y] ou don't tell me when to touch you" [140] -- ***104** because of her poor housekeeping, [141] because she's not a "good mother," or because she's sleeping with someone else, he is not only excusing the violence because he was "provoked," he is also voicing two interrelated forms of justification. The first rationale is that "she deserved it." [142] This justification calls on a clear sense of moral "right"; the violence is motivated by retaliation. [143] The second kind of justification is one of emotional self defense: the man had to protect himself. The latter claim occupies a continuum from "I deserve better"--a claim very close to the more obviously retaliatory "she deserved it" justification--to the other extreme in which the man portrays himself as the *real* victim, forced to protect himself from his partner's (emotional) violence. The two forms are at times distinct, at other times completely indistinguishable, and frequently, both forms of justification fold into concepts of provocation. [144]

1. *Retribution and Retaliation: "The Bitch Deserved It Defense"* [145]

"I should just smack you for the lousy wife you've been." [146]

There is ample evidence that abusive men assault and sometimes kill their wives or lovers in what they consider to be *justifiable* retaliation. They are most likely to kill when she attempts to leave or in some other way defies their authority, and they are likely to grossly escalate their violence when she has the temerity to fight back. [147] What abusive men characterize as "justifiable" is obviously not any form of justifiable homicide recognized by law. Criminal law generally defines a revenge killing as first degree murder. A retaliatory killing is antithetical to the doctrinal understanding of voluntary manslaughter--the assumption being that revenge killings are marked by "cool" calculation evidencing premeditation, and therefore cannot be "hot blooded" killings. [148] The ***105** court's hostility to a straight forward retaliatory claim is no less so when the defendant is charged with killing his unfaithful wife or lover. [149]

However, a justification claim of sorts is built into the common law definition of provocation because "an individual is *to some extent* morally justified in making a punitive return against someone who intentionally causes him serious offense." [150] Though voluntary manslaughter's mix of both excuse and justification doctrine are *doctrinally* illogical, [151] Carol Tavris suggests that the doctrine makes *cultural* sense as an attempt to reconcile a conflict between "two equally powerful value systems": strong prohibitions against intentional individual acts of violence and "[a] great passion for revenge, retribution, and [the] defense of moral values." [152]

This mixture of partial justification and excuse is also apparent in the explanations that abusive men give for their violence. In 1988, police officer Clarence Ratcliff gunned down his estranged wife, Judge Carol Irons. [153] Ratcliff told the police officers who arrested him, "I just couldn't take the bitch anymore." Ratcliff was convicted of voluntary manslaughter, as well as attempted homicide for shooting at the two police officers who came to Irons' assistance. One juror explained the ***106** voluntary manslaughter verdict this way: "[e]verybody felt he was provoked by his wife to do this. First of all, she went out with other men. Then he was having trouble sexually and I imagine she rubbed that in to him. Then he went to his lawyer's office and found out she wouldn't agree to the settlement. All of that *provoked* him into doing it." [154] Both the juror's and Ratcliff's understanding of provocation include elements of justification as well as excuse: he lost control *and* she deserved it.

2. *Male Victims and Female Tormentors: The Quasi-Self Defense Claim*

Voluntary manslaughter has long been understood to draw upon both justification and excuse doctrine. In fact, as discussed previously in this Article, the two nearly conflate in a provocation claim. However, what is not so readily apparent is that when

men kill their wives or lovers, they frequently present a more deeply hidden quasi-self-defense claim. Even in situations of the most horrific violence, abusive men invoke self-defense language. [155] They characterize themselves as the *real* victims and view their partner's self-protection measures as attacks that must be defended against. [156] If the woman gets a restraining order, she's doing something *to him.* A woman's decision to separate is characterized as "abandonment"--a charged word implying she has treated her partner unjustly, maybe even abusively.

The result is that a woman who attempts to separate from an abusive man is entrapped in a web of the man's making, in which every ***107** action she takes to protect herself threatens to reinforce his view that she's attacking *him;* thus, actions taken to increase her safety also have the potential to increase her danger. For example, many women attempt to leave an abusive relationship when the violence becomes severe or takes a sudden jump in severity. They leave to protect themselves and their children from the escalating violence. However, we also know that women are in the greatest danger of being killed when they separate or attempt to separate. [157] Thus, a woman who attempts to leave is gambling: if she stays he may kill her, if not now, then later; if she leaves and he finds her, he may kill her *because* she left him.

The decision to take legal action is similarly fraught with danger. For example, getting a restraining order offers the potential benefit of sending a message that there are consequences to his violence which may result in diminished violence or none at all; a restraining order also makes it more likely that the police will intervene *early*--as opposed to too late. On the other hand, the abusive man may believe a restraining order to be an *escalating* move on the woman's part which serves to raise the stakes of the conflict. To the batterer, the restraining order is an attack which requires a counter-attack: "before I was just playing, but if you're going to do *this,* I'll get serious, too." The restraining order may also kill his hope of reconciliation which, in turn, increases his desperation and again raises the stakes in his mind--putting his very manhood on the line.

Jack Katz' description of the killer engaged in "righteous slaughter" [158] further demonstrates the conflation of justification and excuse in a provocation claim, as well as the way in which the two forms of justification-- "she deserved it" and a quasi-self-defense claim--are intertwined. Katz theorizes that a person engaged in "righteous slaughter" is first responding to an act of humiliation. By turning his humiliation into rage, the attacker is able to transcend his feelings of humiliation. He can then transform rage into violence by viewing himself as a defender of "the [[social] Good" (e.g., his role as husband, father, competent lover). Through the violent act, the attacker is able, at least for a moment, to recapture his social sense of self, a self that he believed to be threatened or annihilated by the humiliating event. [159]

***108** Whether the killing Katz describes would fit the legal doctrinal understanding of "heat of passion" would depend largely on the fortuities of the jurisdiction the killer found himself in, the nature of the humiliating event, and its proximity in time to the killing. [160] Regardless of these variables, however, a conception of provocation is clearly at the heart of Katz' description. Though the justificatory themes may be more apparent in Katz' description, the *excusing* image of a man pushed outside the boundaries of his self-control is also clearly present. The justificatory themes are evident in that the killer starts his trajectory from the point of a deep humiliation *caused* by the victim, hence the invocation of the *partial-justificatory* belief that the victim "deserved *something.*" Additionally, the killer believes that he is engaged in a "righteous" act in defense of "the Good." From the killer's perspective, though clearly not necessarily from the law's, his act of killing is thus justifiable in the traditional sense--it is better that he killed than had he not killed. However, the righteous killer attacks not only to retaliate against the one who has harmed him; he attacks in order to *undo* the harm done to him. The act of violence restores his sense of self, transcends his feelings of deep humiliation, and thus becomes an act of self-protection. [161]

***109** The story of male *emotional* victimization can be found wherever men *physically* abuse women. For example, Lynne Henderson demonstrates the way in which the cultural story of heterosexuality, which has informed society's and the law's treatment of rape, relies largely on a male innocence/female guilt paradigm: "an unexamined belief that men are not morally responsible for their heterosexual conduct, while females are morally responsible both for their conduct and for the conduct of males." [162] Henderson notes that in this version of the story of heterosexuality, "women are seductive and *have the power, like the Sirens, to drive men 'wild,' to lose control, and therefore not be responsible,*" [163] much like the story of male "out of control" rage and female provocation in the "battering" context. [164] When an abusive man describes his violence as a result of his partner's conduct which "drove him crazy" he is invoking the same meta-story of victimized male/female tormentor. The male innocence/female guilt story hidden within an adultery provocation claim is not only about the man pushed "out of control" by a woman; if a woman is "driving him wild," he must protect himself. The irony in an abuser's provocation claim

is that the woman's behavior that caused the man to "lose control" is the same behavior that provides the justification for his reassertion of control (of her).

Abusive men frequently equate a woman's verbal aggression with their own physical violence, [165] as though there is no real difference between words and fists. Defiant, angry, rejecting, belittling, abandoning or merely disagreeing words warrant a violent assault.

***110** Abusive men are not alone in equating (female) verbal aggression with (male) physical aggression. [166] The belief is underscored by the (mistaken) belief that women have superior verbal skills against which men cannot defend themselves. [167] Clinicians assume that men cannot verbally communicate their needs and feelings and that abusive men are even less able to do so. Clinical attention, therefore, has been directed at increasing the verbal skills of abusive men. [168] This focus has been sharply criticized both for its failure to recognize the power and control dynamics which underlie abusive behavior and for the inaccuracy of its fundamental tenet: the truth is that abusive men are frequently extremely adept at verbal expression. [169] Abusive men, nonetheless, benefit from this social conception of the hapless man who must defend against a nagging, shrewish woman who torments him with *words.*

The belief that men are emotionally victimized by female tormentors is evidenced by social beliefs that equate (female) verbal aggression with (male) physical retaliation. This belief in male victimhood is, in turn, reflected in the view that men who abuse do so in response to a woman's "provocative" behavior or to protect themselves from a woman's vicious verbal assaults.

When freed from the legal definition of justification, it becomes apparent that the explanations abusive men give to justify their violence resonate with portions of voluntary manslaughter doctrine. This is most apparent in the manner in which voluntary manslaughter doctrine draws upon justification doctrine: someone who engages in serious provocation must expect some form of retribution. However, when the defendant is accused of killing his wife or lover, the quasi-self defense claim plays a more critical role than it does in other "provocation" cases. Within adultery provocation doctrine, the "victimized male" perspective is expressed ***111** in two ways: the equation of adultery with a physical assault, and the adultery exception to common law "words alone" doctrine.

3. *Voluntary Manslaughter Doctrine and Justification: Adultery is an Assault and Words are Weapons*

As noted previously, adultery provides the only traditional category of adequate provocation that does not involve an assault or battery. [170] That this anomaly has so long been ignored demonstrates the power of the social construction of female adultery as an assault on the male partner. [171] Similarly, voluntary manslaughter doctrine provides a rough parallel for the abusive man's view that abandonment or defiance of his authority is as an assault requiring his self-defense or retaliation. This parallel between adultery provocation doctrine and the justifications abusive men offer can be seen in the common law doctrine of those jurisdictions which provide an adultery exception to the general "words alone" rule. While the traditional rule is that, "mere words or gestures, however insulting, abusive, opprobrious, or indecent" cannot constitute adequate provocation sufficient to mitigate what would otherwise be murder to the crime of voluntary manslaughter, [172] a number of common law jurisdictions recognize an exception in the context of a wife's confession of adultery. [173] Again, of those exceptions to the "words alone" rule, adultery is the only major category *not* to involve an assault or threat of assault. [174]

***112** 4. *Heat of Passion Killers and Domestic Killers Are "Unlikely Recidivists"*

Many legal scholars defend voluntary manslaughter's relatively light punishment by arguing that the heat of passion killer is unlikely to commit future acts of violence. [175] The argument is, presumably, that since the killer acted as a result of particularly egregious circumstances, and particularly egregious circumstance are, by their nature, infrequent occurrences, the killer poses little future threat to society. When a man kills his wife or lover, this general belief regarding "heat of passion" killers is sometimes reinforced by similar beliefs regarding wife-killings. For example, C. Robert Showalter argues that the men in his study are "clearly differentiate [[[d] . . . from the stereotypical murderer [because] *the person who kills a spouse is a most unlikely recidivist.*" [176] Though Showalter doesn't clearly explain this conclusion, it appears to rest on his assessment that the assaults were the result of "the psychological intensity of the provocation, the peculiar vulnerability of the offender, and the

distinct aberration of mental functioning which unleashes the murderous aggression." [177] Showalter's assumption that the wife-killer who kills under the stress of "intense provocation" is unlikely to kill again is rendered suspect by the degree to which Showalter's men appear to overlap with the population of "battering" men. As discussed previously in this article, men who are abusive in one relationship are likely to abuse again in the next relationship. [178] While likelihood of future abusive behavior is enough to make Showalter's non-recidivist assumption problematic, in ***113** fact, anecdotal evidence suggests that men who kill wives or lovers are not only likely to beat future partners, but may be more likely to kill again, as well. [179]

Despite the evidence to the contrary, Showalter's view of wife-killing predominates in much of criminal law practice and jurisprudence with disastrous results. The case of Garcia v. Superior Court, [180] brought by the children of murder victim, Grace Morales, provides an example. Grace, who had already suffered severe abuse at the hands of her exboyfriend, parolee Napoleon Johnson, was subsequently abducted and killed by him. Despite Johnson's numerous threats to kill Grace in the presence of his parole officer, the officer refused to move to revoke Johnson's parole and actually encouraged Grace to reconcile with Johnson, telling her that Johnson posed no threat to her or to her children. [181] While the parole officer failed to heed many warning signs, one warning sign is entirely ignored by the court, as well: *Johnson's parole was from a homicide conviction for killing his first wife.* [182] In fact, Johnson's status as one who had already killed an intimate partner should have alerted his parole officer to the possibility that he might kill a woman again. [183] Instead, the parole officer failed to tell Grace the nature of Johnson's prior conviction. [184]

***114** Psychological theories of violence against wives or lovers that ascribe some role in the causation or maintenance of the battering to the woman/victim may further underscore the belief in the exceptionality of the accused's violence. These theories suggest that the woman *caused* the violence through her provocative behavior; [185] or *maintained* the violence by "staying" when she should have left, thus "reinforcing" the man's abusive behavior; [186] or, put with more sophistication, *maintained* the violence through her role in an interactive "system" that operated, perhaps unconsciously, to sustain the man's violent behavior. [187] The influence in the courtroom and on popular culture of such "interactionist" or "systems" psychological theories cannot be overstated. [188] This rationale for voluntary manslaughter doctrine's lesser penalty parallels a social understanding of domestic violence: heat-of-passion killers act as a result of a *peculiar* set of circumstances and are therefore unlikely to kill again; battering results from the dynamics of a *particular* relationship or in ***115** response to a *particular* woman and therefore, batterers are unlikely to abuse in subsequent relationships. [189]

IV. *PEOPLE V. BERRY*

Appellate court opinions are likely to be particularly skewed in domestic heat-of-passion cases and there is little or no data regarding the sentencing disposition of men who kill wives and lovers. [190] Therefore, an analysis of *trial* court data is necessary in order to begin to determine the extent to which a "domestic violence discount" [191] operates to produce reduced sentences for men who kill wives or lovers. [192] Trial court proceedings can provide data regarding the real world effect of the congruence between the excuses and justifications of abusive men and their doctrinal counterparts in voluntary manslaughter doctrine. The remainder of this article will analyze an entire case--from the accused's police confession, to the trial transcript, to the final California Supreme Court opinion--in order to illustrate the central points of this Article's analysis.

***116** A. THE BACKGROUND IN *BERRY*

The case of *People v. Berry* [193] appears in many criminal law textbooks as well as legal treatises, generally for the proposition that the question of "cooling off" is a jury question. [194] The California Supreme Court in *Berry* overturned the defendant's first degree murder conviction for the killing of his wife, Rachel Pessah. At trial, Berry testified [195] that three days after their wedding, his wife Rachel left him to visit her home country of Israel. Upon her return, she informed him that she had a lover in Israel named Yacob and intended to divorce Berry in order to be with him. Over the course of the next several days, Rachel alternately expressed a desire to have sex with Berry and a contrary desire to "save herself" for Yacob. Berry choked Rachel at least two times prior to killing her--the second time strangling her severely enough to render her unconscious. Following this second assault, Berry called a cab to take Rachel to the hospital and he moved in with friends. Subsequently, Rachel filed a

warrant for Berry's arrest. On the same day that Berry learned of the warrant, he let himself into the empty apartment where Rachel was still living and waited 20 hours for her to return home. The opinion describes what happened next:

> Upon seeing [Berry] there, [Rachel] said, "I suppose you have come here to kill me." [Berry] responded, "yes," changed his response to "no," and then again to "yes," and finally stated "I have really come to talk to you." Rachel began screaming . . . [and] finally defendant strangled her with a telephone cord. [196]

At trial the court refused to give a jury instruction on voluntary manslaughter, ruling that as a matter of law the 20 hour wait in the apartment was a sufficient "cooling off" period to have allowed a reasonable man's passion to cool. [197] The California Supreme Court remanded the case, holding that Berry had adequately demonstrated provocation to warrant a jury instruction on voluntary manslaughter and that having demonstrated a "long course of provocatory conduct" which "reached ***117** its final culmination . . . when Rachel began screaming," [198] the question of "cooling off" should go to the jury. The *Berry* opinion places the decision in line with earlier California case law finding that a *series* of provocative behaviors may provide legally adequate provocation to mitigate murder to manslaughter. [199]

At his trial, Berry offered only two defense witnesses: himself and a psychiatrist, Dr. Martin Blinder. [200] Dr. Blinder testified that

> [Rachel] was a depressed, suicidally inclined girl [sic] and . . . this suicidal impulse led her to involve herself even more deeply in a dangerous situation with defendant. She did this by sexually arousing him and taunting him into jealous rages in an unconscious desire to provoke him into killing her and thus consummating her desire for suicide. [201]

The defense needed Blinder's testimony for two different, but equally critical, reasons. First, the fact that Berry had a prior conviction for stabbing and injuring his second wife had already been ruled admissible. [202] Blinder's testimony was required to neutralize this damaging fact, but, in fact, Blinder went one step better by explaining that Berry's past violence resulted from his repeated emotional victimization at the hands of women. [203] Second, Blinder's testimony was needed most obviously in order to cast the killing as a heat of passion killing and, in particular, to explain the 20-hour wait in Rachel's apartment as a result of *cumulative* passion and not premeditation and lying-in-wait. The result was psychiatric testimony that brilliantly--if tautologically--turned facts about Berry that suggested the antithesis to a "heat of passion killer"--i.e., a proclivity for violence, a history of serious prior assaults on the victim ***118** identical in kind to the fatal assault, Berry's stabbing of his ex-wife under remarkably similar circumstances, and a psychological profile fitting that of an abuser-- into evidence of Berry's increasing provocation as the result of Rachel's relentless "taunting."

B. *"INNOCENT" V. "IN COLD BLOOD"* TURNED ON ITS HEAD

1. *Berry's Defense: A Propensity to Batter Women*

In essence, Berry's defense was that he *was* the sort of man who abused women-- but the twist was Blinder's psychiatric explanation that Berry's violence was a result of his choosing women who enraged him and provoked him to violence. The fact that Berry had a prior conviction for assaulting his ex-wife with a butcher knife, that in past relationships with other women he had destroyed their property, forcing former girlfriends to "put him out of the house, locking the door," [204] indicated to Blinder the personality of the *women* with whom Berry involved himself, more than it demonstrated Berry's dangerous and abusive nature. Blinder testified that these women "offer[ed] him the promise of comfort but ultimately deliver[ed] . . . emotional pain." [205] Yet Blinder's testimony provides a classic portrait of an abuser. Berry was *most* dangerous when women threatened to leave him. [206] Berry was "emotionally dependent" on wives and girlfriends; he threatened physical violence in order to control women; [207] he destroyed women's property; [208] and he had a ***119** history of violent relationships with wives and lovers. [209] The Supreme Court's opinion read Dr. Blinder's testimony to focus narrowly on the effect of *Rachel's* "provocative" behavior

on Berry's mental state. [210] Dr. Blinder's testimony, however, refers to a cumulative rage resulting from the provocation of *all* the women in Berry's entire life: [211]

> Q: . . . How would you characterize [Berry's] state of mind . . . [at the time of the homicide]?
>
> A: . . . I would say that he was in a state of uncontrollable rage which was a product of having to contend with what seems to me an incredibly provacative [sic] situation, an incredibly provacative [sic] young woman, and *that this immediate situation was superimposed upon Mr. Berry having encountered the situation time and time again. So that we have a cumulative effect dating back to the way his mother dealt with him.*
>
> . . .
>
> Q: . . . [Y]ou say that the situation involving Rachel Berry and Albert Berry . . . was the product of . . . cumulative . . . provocations. Now, specifically, what would you base your opinion as to provocations on?
>
> . . .
>
> A: . . . We have two factors here. . . . The past history, that is, the history of this man well in advance of his meeting the deceased. And then the history of his relationship with her. And I think the two go together . . . . After 15 years [of marriage to his second wife] and five children, his wife leaves him for . . . another man. . . . They continued to live together, during which time his wife taunted him about her boyfriend.
>
> . . .
>
> One night while they were having sex, his wife [calls him by the name of her boyfriend.] Despondent and enraged at the same time, he went into the kitchen, obtained a knife, and stabbed his wife in the abdomen. ***120** And she was not serious. He only got to spend a year in jail for that. [212]
>
> . . .
>
> So we have this pattern of enormous dependency on these women and then rupture of the relationship with tremendous rage, almost uncontrollable. I think in one instance he put his foot through the stereo . . . he had purchased for one of these girls [sic] . . . .
>
> So we see a succession of women, beginning with his mother, who offer the promise of comfort but ultimately deliver indifference and emotional pain.

The irony of this defense testimony is found in its confirmation that Berry had a *propensity* to assault wives and lovers under circumstances in which he claimed the woman's infidelity provoked him. Rachel, then, became the recipient of Berry's cumulative rage against *all* the past women in his life. In a tautological way, Berry's past abuse of other women was used to strengthen his claim of *Rachel's* provocative nature: Berry had a pattern of involvement with emotionally abusive women; his violence was in response to their "abuse"--never the other way around. Rachel was involved with Berry; therefore, it is more than likely that Rachel emotionally abused Berry and that his violence was the result of provocation occasioned by her abuse. Dr. Blinder makes this leap of logic quite explicit in response to the District Attorney's attempt to probe his knowledge of Rachel's (supposed) subconscious suicidal motivation:

> Q: . . . [A]ssuming that [Rachel's suicidal] statement was made after the time of . . . her first husband's tragic accidental death. Would that have any effect [on your assessment] as to her [suicidal] state of mind?
>
> A: . . . Not much, Mr. Winkler. *Any woman who engaged in a relationship with [Berry] clearly has serious depressive and suicidal impulses.* [213]

Again, the District Attorney attempted to highlight Blinder's complete reliance on Berry for his clinical assessment of Rachel and Berry's former lovers:

> ***121** Q: . . . Really, everything that you have [about Rachel] basically is what Mr. Berry tells you about her?
>
> A: . . . Well, let's put it this way, Mr. Winkler. . . . We're looking at a man who's had a series of relationships which have been in the same pattern time after time and which have all ended in much the same way, not perhaps the violent outcome but at least psychologically the same kind of outcome. It would be very surprising if Mr. Berry did any better in this relationship than he did with all the others. [214]
>
> Q: . . . You are basing your opinion that [Berry] had these types of relationships primarily on what Mr. Berry tells you, is that correct . . . ?
>
> A: . . . Well, in part. I think I am basing it primarily on my ability to detect, identify familiar clinical patterns and some of the data that Mr. Berry gives me fits into this clinical pattern . . . . When you get a total longitudinal history of this man, *one can almost draw up the nature of his relationships with women* without his telling you a great deal about them. [215]

2. *Obsessive Thinking: Rehearsal for Murder*

Indicia of premeditation of the obsessive, brooding kind characteristic of batterers is clear in *Berry.* Berry himself said in his police statement, "I deliberately waited to kill her. No pretense, no bullshi[t], no nothing." [216] Berry's long wait for Rachel to return home provides further evidence. His two prior assaults on Rachel also suggest premeditation, but the court's failure to understand the escalating, obsessive nature of wife battering prevents its recognition. The opinion relies on Blinder's explanation that the two prior assaults were evidence of Berry's increasingly provoked state. [217] In fact, prior assaults just as easily support a "rehearsal" model or provide evidence of Berry's resort to increasingly dangerous tactics in order to control Rachel. Berry's ambivalence--his uncertainty about whether or not he intended to kill Rachel--and the fact that his two prior assaults of Rachel

were similar in kind though not in severity, strongly point to the kind of "locked-in"--"it all depends on what *she* does"--sense of causality that mark the most dangerous of abusive men.[218] Berry's confession evidences this kind of ambivalence. He requests to go back on the record to say, "I knew damn well when I was ***122** waiting there for her, I'd probably kill her"[219] but at trial testified that when Rachel asked if he'd come to kill her, he first said "yes" then "no" then "yes" again.[220] While Berry admits that he knew he would "*probably* kill her," he also states that his intent was to make her stop screaming: "She come in the door. She started screaming. I told her to shut up. All I wanted to do was talk. She kept screaming at me. I grabbed her and we wrestled . . . and I tried to shut her up. She wouldn't stop screaming. I wrapped the phone cord around her [neck]".[221]

3. *Rachel's Supposed Failure to Exit*[222] *and Berry's Defense*

The defense portrayed Rachel as a vindictive--albeit confused--woman who sexually used and abused Berry in order to gain her own death. The defense strategy was to play on an old theme which surfaces throughout the legal system's treatment of battered women: "If it was so bad, why did she stay?" The defense recognized that the motivations of a woman who is being abused by her partner are nearly universally seen as suspect--or at the least, extremely problematic.[223] As Martha Mahoney has described, this focus on the woman's perceived failure to leave makes her acts of resistance invisible-- resistance which may take the form of "staying" or "leaving" or some of both.[224] Mahoney notes that failure to exit a battering relationship is used *against* a woman: either "to dispute the truth of descriptions of physical violence (if it was so bad, why didn't she leave?)" or--as in Rachel's case-- "to question her functionality."[225] Rachel's attempts to resist Berry's violence--whether through physical self-defense,[226] contact with and threats to contact his probation ***123** officer,[227] separation from Berry, turning to her friends,[228] or the filing of criminal charges-- are made completely invisible by Dr. Blinder's testimony and are disregarded by the California Supreme Court as well. They are hidden by Blinder's assumption that Rachel "stayed"[229] with Berry in order to achieve her subconscious desire for her own death. If Rachel desired suicide--even if "subconsciously"-- why did she separate from Berry and why did she initiate criminal charges? One is left to wonder just how Rachel could have extricated herself from the situation in a manner that Blinder would have recognized as *not* complicit with Berry's intent to kill her.

C. "LOSS OF CONTROL": SHE MADE ME DO IT

The doctrine and the complementary views of battering as a phenomena of "loss of control" surface repeatedly in Blinder's testimony, in Berry's testimony and police statement, and in the opinion of the California Supreme Court. The legal doctrine always, of course, shapes the defense story. It is therefore hardly surprising that while Berry's original statement to the police suggested several possible motives for killing Rachel,[230] by the time of trial, "jealousy and sexual rage"[231] were the sole motivations forwarded by the defense. However, the "out of control" understanding permeates the entire case in far more subtle ways than can be explained by mere defense strategy. The California Supreme Court opinion repeatedly echoes the tenor of Blinder's words--using terms such as "the result" or "culmination"--terms that diffuse responsibility and make Berry's violence seem inevitable and uncontrollable. For example, the opinion notes that Rachel's provocative behavior *"resulted"* in Berry's attacks; her confession of her love affair with Yacob "*brought about* further argument and a brawl that evening [after she returned from ***124** Israel] in which defendant choked Rachel and she responded by scratching him deeply many times."[232] Rachel's "taunts and incitements" "*led* defendant to choke her on two occasions, until finally [[[Rachel] achieved her unconscious desire [for suicide] and was strangled."[233] And the court further notes that "[Rachel's] long course of provocatory conduct . . . *had resulted* in intermittent outbreaks of rage . . . [[[which] *reached its final culmination* in the apartment when Rachel began screaming."[234]

Time and again the court identifies Rachel as the actor and Berry as the one who is acted upon. The violence "results," a brawl is "brought about" by Rachel's behavior, and Berry is therefore "led" to choke her.[235] Where Berry's violence is not *directly* attributed to Rachel, it is described in terms that imply mutuality. For example, an assault in which Berry choked Rachel is described as a "brawl."[236] Berry's own words belie this "out of control" focus. He states that Rachel "held [the first assault] over his head."[237] He reports that when Rachel threatened to "sign that God damn report" and have his probation officer put him in jail, Berry's response was, "[I]f that's the case you want to put me in jail for something, I might as well do something. So I grabbed her by the throat and she passed out and I quit."[238]

D. BERRY'S JUSTIFICATION CLAIMS

1. *The "Bitch Deserved It" Defense*

Blinder's description of Rachel serves to recreate and reinforce the old sexist notions of "bad" women--women who deserve to be hit. To a great extent, the fight between the prosecution and the defense became whether or not Rachel was a "bitch." The prosecution presented testimony that Rachel was "sweet" to rebut Blinder's testimony that she was "a tease." This is most clearly seen in Blinder's testimony regarding Rachel's conversation with Berry's parole officer. Blinder implies that Rachel's threats to tell Berry's parole officer of the second assault, were attempts to manipulate Berry--to *abuse* him. [239] On cross-examination of Blinder the prosecution attempts to create a different image of Rachel, ***125** but one no less bound by the dichotomy of provocateur/bitch vs. "good"/helpless woman: [240]

> Q: And did she in fact not beg [the parole officer] to forgive Albert because she forgave him and she wanted him to give him another chance? . . . [[[Assuming this to be true] *would that not tend to mitigate against the kind of picture Mr. Berry attempted to draw to you of Rachel?*
>
> A: No. In fact, it just goes along with the classical picture of the very nature of her personality and his personality too. On the one hand, she is begging, "forgive my wonderful husband, I love him, I don't want the Court to find out about this." Yet, of course, she is the principal vehicle by which this information might be funneled to the Court. . . . [She says] 'I am only telling you about these things for his own good.' But in the process of pleading for him she potentially slits his throat.
>
> . . .
>
> Q: Who could a person, a wife turn to, assuming she doesn't have her own private psychiatrist, in a situation of this sort where she was choked into unconsciousness?
>
> A: That depends on whether or not she wants to see her husband be put behind bars.
>
> . . .
>
> Q: But it is always equally, reasonably probable, is it not, that she went up there to try to get help for this marital state?

The prosecution and defense have created bi-polar extreme definitions of Rachel: either she is the ultimate self-sacrificing woman, going to the probation officer only to get help with her marital state in complete disregard of her own safety, eager to protect Albert from any consequences of his assault on her or, alternatively, she is a manipulative tease whose only interest in talking with the probation officer was to ensure that she had some power over Berry--power she was determined to use to hurt him. It is likely that Rachel wanted some measure of protection and some control over Berry to the extent that he would be less likely to hurt her again, but she did not want to lose control of her relationship entirely to the power of the state. She may have hoped, as many women do, that, with the proper controls, she could safely continue to live with Berry. [241]

126 2. *Berry's Quasi Self-Defense Claim

In response to the Attorney General's argument that the twenty hours Berry spent waiting in the house for Rachel to return was, as a matter of law, an adequate cooling off period, the court notes: "the long cause of provocatory conduct . . . reached its final culmination in the apartment when Rachel began screaming."[242] The court, in essence, ruled that Rachel's *screaming* was the final act that, on the heels of the past provocatory conduct, moved Berry to kill her. The court's acceptance of Rachel's screaming as the final culminating event is completely contrary to an established principle of California voluntary manslaughter doctrine: that is, that the behavior of a resisting victim can *never* provide adequate provocation to mitigate murder to manslaughter.[243] No commentary has addressed this contradiction-- presumably because the fact that the case was a domestic violence case completely obscures the uncontroverted evidence that Berry entered Rachel's apartment with the supposition--if not the clear intent--that he would hurt her.

Berry, too, considered Rachel's screaming to be provocative. In his statement to the police he suggested that he killed Rachel just to shut her up.[244] This wasn't the first time Berry portrayed his violence against Rachel as self-defense in response to Rachel's verbal and psychological abuse. Berry testified that the second time he choked Rachel it was in response to a slur on his parenting:

> She said, 'I never want to see you again. I never want to talk to you again. I hate you. You don't even care for your own children. You never do anything for your own children, try to get in touch with them. How do you expect me to think that you care for me?'[245]

***127** Of course, Berry's *trial* testimony largely matched Blinder's testimony--both portraying Berry as a chronic victim of women: Berry's violence was merely in response to such tormenting behavior.[246] However, Berry's police statement--given before he'd talked to his attorney--may provide a more accurate assessment of how Berry actually saw Rachel. As noted earlier, the most significant difference between the statement and Berry's testimony--other than his retraction of statements indicating premeditation, claiming they were self-destructive lies[247]--was that the number of "reasons" Berry gave for the killing had narrowed dramatically to two: sexual jealousy and rage.[248] His statement is otherwise consistent--if not in specifics, certainly in emotional tone--to his subsequent testimony. Berry portrayed himself, and likely believed himself to be, the *real* victim. When asked by the police why he didn't just leave Rachel--"[w]hat made you want to take her life first?"[249]--Berry responded,

> I had so much planned in the future, everything. We were going to open up a restaurant when she came back [from Israel]. Had it all planned we were going to move, we were going to get out of that apartment because of bad memories . . . . I never denied her anything. She could have anything--as a matter of fact, when she was in Israel I sent her my last God damn hundred dollars.[250]

This testimony portrays a man who is feeling great disappointment and loss. It also portrays a man wholly captured by his own perspective of reality-- unable to imagine what was motivating Rachel. Berry's pain, no doubt, was genuine, but it was not his pain that killed Rachel. Berry was able to present himself--to himself--as the cuckold, the man wronged by a spendthrift, golddigger wife several years his junior.[251] ***128** These cultural stereotypes facilitated Berry's belief in himself as "victim."

Though Blinder's testimony focused on Rachel's "provocative" sexual behavior, the truth is that Berry didn't kill Rachel until it appeared that she might make good on her threat to leave him.[252] As discussed earlier in this article, Blinder's testimony completely ignores this fact. Not surprisingly, perhaps, Blinder's testimony is completely from Berry's perspective: the relationship dynamics continue, even though Rachel has rejected attempts at reconciliation and has filed a police report. Of course, a defense witness tells it from the perspective of the accused, but in this circumstance, the defendant's perspective is largely that of the Court and that of the Law, as well. That perspective, as identified in this article, suggests that a woman's "abandonment" of a husband is provocative--and that a woman's preference of another lover is provocation of the worst sort.

V. CONCLUSION

The understanding of heat of passion homicides currently overlaps with *traditional* understandings of wife killings. This overlap operates in two mutually reinforcing directions. First, to a large extent heat of passion killings are defined *as* domestic violence killings. This can be seen in the doctrinal status of adultery as *the* paradigm heat of passion case, in the popular as well as clinical descriptions of domestic violence as the result of "passion" and "provocation," and in criminal law's unusual emphasis on the mental life of the man who kills an intimate. [253] Second, are the significant ways in which the excuses and justifications given by abusive men match elements of and assumptions that underpin voluntary manslaughter doctrine. The central excuse of battering men--that their violence results from being out of control--resonates with and is reinforced by the legal doctrine. The *instrumental* nature of domestic violence is thus made invisible: the batterer's ongoing struggle for control of ***129** the *woman* is lost in the story of his inability to control *himself.* Further, this belief in the "uncontrollability" of the killer's violence suggests that the violence cannot be deterred. Both domestic violence and "heat of passion" killings are viewed-- independently-- to be crimes unlikely to respond to deterrence measures. The cultural overlap between the two categories of crime further reinforces this belief and prevents the recognition that studies showing that aggressive police intervention *decrease* spousal homicide rates, [254] presents a serious challenge to the "out of control" assumption. Similarly, when abusive men justify their violence in terms that portray themselves as emotional victims and their violence as necessary self-protection, their justification resonates with comparable underpinnings of voluntary manslaughter doctrine. The story of male victimhood may be couched in sophisticated psychological language utilizing a "systems" or "interactionist" approach, such as the psychiatric testimony of Blinder in *Berry,* or it may instead rest baldly on the assumption that a wife's sexual unfaithfulness or verbal assertiveness is the equivalent of a physical assault which demands a physical response.

The modern analysis of wife-beating belongs in today's legal analysis of wife-murder. It is somewhat ironic that while *traditional* social understandings of wife-killings overlap with those of heat of passion doctrine, the modern analysis of wife-battering is entirely missing in today's legal analysis of wife-killings. This analysis centers on the importance of the abuser's attempt to control the woman and the particularly dangerous manifestation of this control in response to her attempts to separate. The absence of this analysis to wife-killings evidences a *de facto* legal and cultural separation between wife-battering and wife-murder. If we eliminate that separation, we eliminate two dangerous myths: first, that men who kill their wives or girlfriends do so in the heat of "uncontrolled passion"; second, that men who kill are not likely to kill again. The first myth results in a failure to recognize that while wife-killings marked by brooding, obsessive behavior may not match a "predatory," [255] "rational" conception of premeditated murder, they are nevertheless *planned* killings. The second myth results in the failure to recognize the relevance of the insurmountable evidence that men who batter do so in relationship after relationship, negating the theory that recidivism in the wife-murder context is unlikely.

***130** To provide the protection for abused women that the criminal justice system and this society should provide, we must recognize the culturally reinforcing nature of the overlap between how abusive men think and how the legal doctrine works. We must eliminate the *de facto* legal and cultural separation between wife-beaters and wife-killers, placing the legal and cultural analysis of wife-*murder* squarely within that of wife-*battering.*

Footnotes

a1 Litigation Associate, Heller, Ehrman, White & McAuliffe. B.A. 1978, Harding University; M.S.W. 1982, University of Arkansas at Little Rock; J.D. 1991, Stanford Law School. Martha Mahoney provided invaluable insight and support for the development of this paper as did Robert Weisberg, Carol Sanger, Lynne Henderson, and Blanca Silvestrini. Thanks to Debbie Jackson and Juanita Briscoe for their able typing assistance and to the partners of Heller for their support of this project. This article is dedicated to my husband, Tom Dukowitz, who made this article possible by his willingness to pick up *my* share of the childcare and housework. I also owe a debt of gratitude to the women of Maluhia 'O Wahine whose courage, as Suzanne Pharr describes it, to "walk right into the unknown," has shaped my thinking about battering, and especially to my dear friend Kristine Woodall, whose common sense and fierce partisanship with women is ever a source of strength.

1 People v. Thompkins, 240 Cal. Rptr. 516, 518-19 (Ct. App. 1987) ("At least as early as Manning's Case (1793) 83 Eng. Rep. 112, an archetypical illustration of adequate provocation to invoke the common law heat-of-passion theory for voluntary manslaughter has been the defendant's discovery of his wife in bed with another man.").

2 For the sake of brevity, I will sometimes use the terms wives and lovers to also include *former* wives and lovers. The distinction, however, is an important one. More women are killed when they separate, or attempt to separate, from an abusive man than when they are "with" him. Norman J. Brisson, *Battering Husbands: A Survey of Abusive Men,* 6 Victimology 338 (1983) (finding that over half of male domestic homicide perpetrators studied were separated from the victim at the time of the homicide; only 9.1% of the *female* perpetrators were separated at the time of the killing). *See generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 MICH. L. REV. 1, 49-53 (1991) (suggesting that the term "separation assault" be used to identify those attacks which are in response to a woman's attempt to separate or are in retaliation for separation). Furthermore, the term "wife-killing," unless stated otherwise, is meant to include the homicide of female intimates, or former intimates, whether or not they were ever legally married to the killer. This article does not explore the differences, if indeed there are any, between murders of wives and murders of lovers who are not married to the offender. *See* Zimring et al., *Intimate Violence: A Study of Intersexual Homicide in Chicago,* 50 U. CHI. L. REV. 910, 918 (1983) (finding more frequent homicides involving "girlfriends" and "boyfriends" than between married couples). This article will focus on heterosexual battering. This is in no way meant to diminish the significance of battering in gay and lesbian relationships, however. *See generally* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986) (collection of essays and materials regarding battering in lesbian relationships); DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE (1991) (discussing battering in gay male relationships).

3 *See* Laura L. Crites, *Wife Abuse: The Judicial Record, in* WOMEN, THE COURTS, AND EQUALITY 38, 50 (Laura L. Crites & Winifred L. Hepperle eds., 1987) ("An unfaithful, promiscuous wife is perhaps the most frequently offered justification by the abusing husband for his violence . . . It should be noted that extreme irrational jealousy is one of the most common characteristics of abusing husbands."); R. Emerson Dobash & Russell P. Dobash, *The Nature and Antecedents of Violent Events,* 24 BRIT. J. CRIMINOLOGY 269, 274 (1984) ("[S] ources of conflict [in battering relationships studied] centered on three main issues--possessiveness and jealousy, demands concerning domestic labour and service, and money."); James Ptacek, *Why Do Men Batter Their Wives?, in* FEMINIST PERSPECTIVES ON WIFE ABUSE 133, 148 (Kersti Yllö & Michele Bograd eds., 1988) (batterer's charges of infidelity are marked by themes of self-righteousness). Maria Roy, *Probing a Cross-Section of Battered Women: A Current Survey of 150 Cases, in* BATTERED WOMEN: A PSYCHSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 41-42 (Maria Roy ed., 1977) (finding jealousy to be second only to arguments over money as precedents to violence).

4 Pathological jealousy is "a significant indicator of the potential for homicide." David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge,* RESPONSE TO VICTIMIZATION WOMEN & CHILDREN, 1990, at 13, 14. *See generally* Brisson, *supra* note 2, at 341 (from 41% to 66% of wife-killers studied said jealousy proceeded the violence). Anecdotal evidence also suggests that jealousy is frequently given as an explanation for domestic homicides committed by men. *See generally* Matt Lait & Davan Maharaj, *Terror in Lido Trailer Park,* L.A. TIMES, Feb. 6, 1990, at B1 (when describing a man's murder of his ex-wife, acquaintances noted that he was a "jealous husband": "He would always seem to think that she was fooling around with someone else and he wouldn't let her out of his sight. . . . ").

5 "It is the law practically everywhere that a husband who discovers his wife in the act of committing adultery is reasonably provoked, so that when, in his passion, he intentionally kills either his wife or her lover (or both), his crime is voluntary manslaughter rather than murder." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 656 (2d ed. 1986). Jurisdictions differ regarding the effect of mere *knowledge* of adultery as opposed to actually witnessing an adulterous act. *Id.* at 657. The "modern" rule no longer depends on discrete categories of provocation as a matter of law, but rather uses a reasonable person standard, leaving the question of adequacy to the jury. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 86-87 (3d ed. 1982).

6 *See, e.g.,* A. J. Ashworth, *The Doctrine of Provocation,* 35 CAMBRIDGE L.J. 292, 294 (1976) (describing the provocation of a man finding his wife committing adultery as provocation "of the highest degree"). *See also* People v.

Thompkins, 240 Cal. Rptr. at 518 (the "archetypical illustration of adequate provocation" is a wife's adultery). At least one author notes that of all the traditional categories of adequate provocation, "adultery appears to have best resisted the changes brought about by time." Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense,* 33 UCLA L. REV. 1679, 1688 n.55 (1986).

7 SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 441-42 (5th ed. 1989) ("The traditional common law view . . . did not permit a jury to return a verdict of manslaughter in any and all situations which the jury might find reasonably provocative. Only certain narrowly defined provoking circumstances, cases of 'legally sufficient' provocation, could justify a manslaughter verdict. The principal 'legally sufficient' provocation was an actual physical battery. There were a few others, such as personally witnessing a wife having sexual relations with another.").

The justification of this restrictive view was stated as follows in State v. Starr, 38 Mo. 270, 277 (1886):

To have the effect to reduce the guilt of killing to the lower grade, the provocation must consist of personal violence. This rule is well established. . . . There must be an assault upon the person, as where the provocation was by pulling the nose, purposely jostling the slayer aside in the highway, or other direct and actual battery.

8 Currently, there is some limited use of expert testimony in prosecutions of men for assaulting their female partners. *See, e.g.,* Daniel Jay Sonkin & William Fazio, *Domestic Violence Expert Testimony in the Prosecution of Male Batterers, in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 218 (Daniel Jay Sonkin ed., 1987). That testimony has generally been in the form of "battered women's syndrome" testimony, attempting to demonstrate that the victim fits the characteristics of a "battered woman," rather than testimony regarding the characteristics of abusive men.

9 *See, e.g.,* Lauren Robel, The Protective Order Project (unpublished manuscript presented at Law & Society Conference, Berkeley, CA) 1990 (on file with author) (arguing that emphasis on arrest fails to recognize the benefits in terms of increased negotiating power offered to women through the restraining order process).

10 *See* Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged,* JUDGES' J. (Spring 1988), at 8; Myra Sun & Elizabeth Thomas, *Custody Litigation on Behalf of Battered Women,* 21 CLEARINGHOUSE REV. 563 (1987); Lenore E. A. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce, in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE, *supra* note 8, at 127.

11 *See, e.g.,* ELIZABETH BOCHNAK, WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE (1981); CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION (1987); SARA LEE JOHANN & FRANK OSANKA, REPRESENTING . . . BATTERED WOMEN WHO KILL (1989); Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill,* 9 WOMEN'S RTS. L. REP. 227 (1986); Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals,* 140 U. PA. L. REV. 379 (1991); Sue Osthoff, *Making A Difference: Advocating Effectively for Women Who Kill* (National Clearinghouse for the Defense of Battered Women, Philadelphia, PA), 1992; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering,* 9 WOMEN'S RTS. L. REP. 195 (1986) [hereinafter Schneider, *Describing and Changing*]; Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense,* 15 HARV. C.R.-C.L. L. REV. 623 (1980) [hereinafter Schneider, *Equal Rights*]; Elizabeth M. Schneider & Susan D. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Abuse,* 4 WOMEN'S RTS. L. REP. 149 (1978).

12 *See* Maguigan, *supra* note 11, at 464-67. Maguigan provides an exhaustive look at the status of expert testimony regarding "battered women's syndrome" in all 50 states, reporting 44 states that admit the testimony and 6 for which there was no information.

13 *See, e.g.,* Laura Crites, *A Judicial Guide to Understanding Wife Abuse,* JUDGES' J. (Summer 1985), at 4 (describing the program in Honolulu); Ellen Pence & Melanie Shepard, *Integrating Feminist Theory and Practice: The Challenge of the Battered Women's Movement, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 3, at 282 (describing the work of the Domestic Abuse Intervention Project in Duluth, Minnesota); David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 3, at 195-96 (referring to court mandated programs for batterers in Minneapolis, Duluth, Seattle, San Francisco, and Atlanta as being instrumental in bringing about pro-arrest policies).

14 "Specialists in the treatment of male batterers have observed that men are violent as a result of their need to control their partner and not as a result of lack of control." Sonkin & Fazio, *supra* note 8, at 225. "We would argue that the majority of men who use violence against their wives usually enter verbal confrontations with the intentions of punishing, regulating and controlling their wives through various means including the use of physical force." Dobash & Dobash, *supra* note 3, at 286.

15 The lack of scholarly attention to legal doctrine regarding adultery-related killings mirrors the general lack of research regarding gender and criminology. *See* Judith Allen, *Men, Crime and Criminology: Recasting the Questions,* 17 INT'L J. SOC. L. 19 (1989) ("Feminist criminologists . . . identify failure to theorize the basic sex specificities of criminalities as the greatest intellectual flaw in 20th century criminology.").

16 On the other hand, the application of voluntary manslaughter doctrine to *women* who kill husbands or lovers is ably examined by Laurie J. Taylor. Taylor, *supra* note 6.

17 By "innocent" I do not mean that these men are necessarily found innocent, but rather that they do not have the "depraved heart" which, in common law, denotes first degree murder. *See, e.g.,* Maher v. People, 10 Mich. 212 (1862).

> 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, 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.
>
> *Id.* at 218-19 (emphasis added).

18 C. Robert Showalter et al., *The Spousal-Homicide Syndrome,* 3 INT'L J.L. & PSYCHIATRY 117, 139 (1980). See discussion *infra* note 77 and accompanying text, and *infra* notes 175-89 and accompanying text.

19 This view may be supported in the courtroom by expert testimony's reliance on interactionist approaches. *See, e.g.,* Adams, *supra* note 13 (describing family systems models); Michele Bograd, *Family Systems Approaches to Wife Battering: A Feminist Critique,* 54 AM. J. ORTHOPSYCHIATRY 558, 562 (1984) (Portrayals often paint the abusive husband as a sympathetic character-- an "underadequate man"--living with a shrewish "over-adequate" wife. "Overadequate" is a pejorative term, "even though it refers to a battered woman's skills, resourcefulness, and survival abilities . . . [In addition,] the term reflects traditional ideals of husband-wife relations: it means simply that the wife has surpassed her husband on some dimension, be it income, occupational status, verbal fluency, or intelligence."); Peter H. Neidig, *Women's Shelters, Men's Collectives and Other Issues in the Field of Spouse Abuse,* 9 VICTIMOLOGY 464 (1985) (providing an interactionist approach).

20 *See, e.g.,* Ashworth, *supra* note 6, at 307 where the author states:

> Whereas the paradigmatic case of murder might be an attack on an innocent victim, the paradigm of provocation generally involves moral wrongs by both parties. The victim plays an important role in provocation cases, either as instigator of the conflict or by doing something which the accused regards as a wrong against him. Ordinary language

reflects this approach, with characteristic phrases such as "he brought it on himself," "she asked for it," and "it served him right."

21 *See* Jack K. Weber, *Some Provoking Aspects of Voluntary Manslaughter Law,* 10 ANGLO-AM. L. REV. 159, 171 (1981) ("I think [the loss of self control] has to be such that deterrence is no longer a meaningful consideration.").

22 *See, e.g.,* Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man,* 106 U. PA. L. REV. 1021, 1040 (1958) ("The way is open for the courts to discontinue the practice of sending those guilty of manslaughter to institutions under the pretense that they require as long a time to become rehabilitated as those who are guilty of murder.").

23 *See* Ed Stubbing, *Police Who Think Family Homicide is Preventable Are Pointing the Way,* RESPONSE TO VICTIMIZATION WOMEN & CHILDREN, 1990, at 8 (police intervention can deter domestic violence and homicides).

24 556 P.2d 777 (Cal. 1976).

25 Telephone Interview with Barbara Boland, researcher with the American Prosecutor's Research Institute and leading researcher in the field of homicide (Feb. 13, 1992) (no data exists regarding the sentencing disposition of men who kill wives or lovers); *see also* Telephone Interview with Professor Franklin E. Zimring, University of California, Boalt Law School, one of the premier researchers with regard to homicide data (Feb. 13, 1992) (not aware of any such data). National data collection combines data on all non-negligent homicide convictions into one group. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS--1989 390 (Timothy J. Flanagan et al. eds, 1990) [hereinafter SOURCEBOOK--1989].

26 *See, e.g.,* People v. Hyde, 212 Cal. Rptr. 440 (1985) (jury instruction on voluntary manslaughter properly refused where defendant drove a stolen police car disguised as an officer making a traffic stop, and then killed the victim--the boyfriend of defendant's ex-girlfriend). Hyde's argument that he killed in the heat of passion because of his extreme jealousy was rejected by the court because defendant's ex-girlfriend dating another man was not sufficient provocation, and enough cooling time had elapsed to allow whatever passion there was to subside. *Id.* at 473.

27 Maguigan, *supra* note 11, at 433 (studies find that only 8.5% of homicide appeals are discharged or remanded for a new trial (citing JOY A. CHAPPER & ROGER A. HANSON, NATIONAL CENTER FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS: FINAL REPORT 38 (1990)).

28 For example, in a study of men who killed or attempted to kill their wives or lovers, forensic psychiatric researchers noted that even in strict common law jurisdictions, evidence of deliberation and premeditation seldom results in a first degree murder conviction because, "as a practical matter, spouse killers are rarely convicted of first-degree murder." Showalter et al., *supra* note 18, at 140. Anecdotal newspaper coverage suggests the same conclusion. *See, e.g., San Diego County Digest: Escondido,* L.A. TIMES, July 9, 1988, at 8 (man was convicted of voluntary manslaughter and sentenced to two years for the murder of his wife because the jury was persuaded by testimony that his wife may have been having an affair); Roxane Arnold, *Strangled Actress: Did Slayer's Penalty Fit His Crime?,* L.A. TIMES, Dec. 3, 1986, at 1 (John Sweeney, convicted of voluntary manslaughter, served 3 years, 7 months and 27 days for killing his girlfriend, Dominique Dunne. The court ruled inadmissible testimony of Sweeney's prior violence against another ex-girlfriend. Sweeney had assaulted Dominique numerous times before, and killed her when she broke up with him. Dominique told friends that she was "frightened of Sweeney and frustrated by his constant attention and jealousy."); *Man Sent to Prison in Strangling of Wife,* L.A. TIMES, June 28, 1989, at 9 [hereinafter *Man Sent to Prison*] ("Under a plea agreement, Gary Rubenstein, 32, pleaded guilty to voluntary manslaughter March 3 for killing Mary Hennesy Rubenstein on Aug. 8, 1985, after they had argued.") Ellen Goodman, *Why Are the Men Getting Away With Murder?,* ARIZ. REPUBLIC, May 26, 1989, at A15 (writing about three men convicted of voluntary manslaughter for killing their wives).

29 *See generally* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale,* 73 J.L. & CRIMINOLOGY 421, 425-29 (1982) for a brief history of early voluntary manslaughter doctrine.

30 *Id.* at 426.

31 93 ALR 3d 925 § 2, at 927 (1979) ("a homicide, even though intentional, is regarded as the lesser crime of voluntary manslaughter where the killing was committed under the influence of passion produced by an adequate or reasonable provocation and before a reasonable time has elapsed for the passion to cool and reason to assume control. . . . "). *See also* WHARTON'S CRIMINAL LAW § 165, 262 (Charles F. Thorera ed., 1979):

In summary, if there is evidence of provocation, and if the court regards such provocation as potentially adequate, the jury must inquire: (1) Whether the defendant was in fact in the heat of passion; (2) Even if the defendant was in the heat of passion, would the provocation have induced passion in a reasonable man; (3) Even if the provocation would have induced passion in a reasonable man, was there such a time interval that the passion of the defendant had in fact cooled; (4) Even if the defendant's passion had not in fact cooled, given the time interval, would the passion of a reasonable man have cooled.

32 17 Cal Jur 3d (Rev.) Part 1, Criminal Law § 255 (1984). *See also* WHARTON'S CRIMINAL LAW, *supra* note 31, at 239 ("The passion aroused by the provocation must be sufficiently extreme to dethrone reason and prevent cool reflection.").

33 MODEL PENAL CODE § 210.3 (commentaries) ("criminal homicide constitutes manslaughter when: . . . a homicide [is] . . . committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse . . . determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be").

34 WHARTON'S CRIMINAL LAW, *supra* note 31, at 402:

To be sufficient to reduce a homicide to manslaughter, the heat of passion must be such as would naturally be aroused in the mind of an ordinary, reasonable person, under the given facts and circumstances, or in the mind of a person of ordinary self-control. The inquiry is whether the defendant's reason was so disturbed or obscured by passion that would render an ordinary person of average disposition liable to act rashly or without due deliberation and reflection, and permits passion rather than firm judgment.

See also People v. Valentine, 169 P.2d 1 (Cal. 1946):

For the fundamental of the [heat of passion] inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion--not necessarily fear *and never, of course, the passion for revenge*--to such an extent as would render ordinary men of average disposition liable to act rashly . . . .

Id. at 12 (emphasis added).

35 Note, *supra* note 22, at 1023-24.

36 The adultery category would mitigate both a killing of the wife or of her lover. *Id.*

37 Regina v. Mawgridge, 84 Eng. Rep. 1107, 1115 (1707).

[J]ealousy is the rage of a man, and adultery is the highest invasion of property . . . If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law though it may seem hard, that the killing in the one case should not be as justifiable as the other.

Id.

38 83 Eng. Rep. 112 (1671).

39 The purpose of the burning was to record that Manning had the benefit of clergy. Manning's Case, 83 Eng. Rep. 112 (1671).

40 *Id.*

41 Maher v. People, 10 Mich. 212 (1862). The killing of a wife's male lover has historically received even greater sympathy. At one time Georgia, New Mexico, Texas, and Utah provided that it was *justifiable* homicide to kill a wife's lover. *See, e.g.,* Reed v. State, 59 S.W.2d 122 (Tex. 1933) (finding that a wife who killed her husband's lover could not receive the benefit of a state statute that provided that a husband's homicide of "one taken in the act of adultery with his wife" was justifiable homicide); 71 TEX. PENAL CODE ANN. art. 1220 (1936). Some jurisdictions limited justification to cases involving the *prevention* of adultery, finding homicides committed *after* adultery was completed to be voluntary manslaughter. *See, e.g.,* Scroggs v. State, 93 S.E.2d 583 (Ga. 1956) (the court held that there was sufficient evidence to support a finding that the defendant killed the victim to prevent sexual relations between her husband and the victim, thus the killing was justified); Mays v. State, 14 S.E. 560 (Ga. 1891). But at least one state supreme court actually endorsed jury nullification in cases involving after-adultery killings of the wife's lover. *See* Biggs v. Georgia, 29 Ga. 723, 728 (1860) ("[i]s it not [the jury's] . . . right to determine whether in reason or justice, it is not justifiable in the sight of Heaven and earth, to slay the murderer of the respectability of a family, as one forcibly attacks habitation and property?"). *See* Note, *supra* note 22, at 1029 n.61 (citing DEL. CODE ANN. tit. 11, § 575(a) (1953)) (noting that in Delaware killing the paramour received far less punishment than killing the wife: $10,000 fine and thirty years for killing the wife compared with $100 fine and one year in prison for killing the paramour).

42 *See, e.g.,* People v. Chevalier, 544 N.E.2d 942 (Ill. 1989) ("In Illinois, adultery with a spouse as provocation generally has been limited to those instances where the parties are discovered in the act of adultery or immediately before or after such an act, and the killing immediately follows such discovery."); People v. McDonald, 212 N.E.2d 299 (Ill. 1965) (Even where the provocative act is the direct, unexpected and visual discovery of sexual intercourse in progress, the heat of passion defense is still only available to the cuckold who is a lawful spouse).

43 *See* KADISH & SCHULHOFER, *supra* note 7, at 442 ("The restrictive view [of what constitutes legally adequate provocation] has now given way, in most jurisdictions, to [a broader view]: The manslaughter issue must be left to the jury whenever the evidence shows *any* circumstances (whether by conduct or by words alone) that might cause a reasonable person to lose self-control."); Tripp v. Maryland, 374 A.2d 384 (Md. 1977) ("The modern tendency is to extend the rule of mitigation beyond the narrow situation where one spouse actually catches the other in the act of committing adultery.").

44 Kadish & Schulhofer note that: "Few, if any, states have adopted an entirely subjective standard of provocation. The model penal code retains an objective element, but qualifies it by specifying that murder is reduced to manslaughter only when committed under the influence of an extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." KADISH & SCHULHOFER, *supra* note 7, at 442.

45 The "[r]easonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." MODEL PENAL CODE § 210.3(1) (Proposed Official Draft 1962). The majority of states continue to use variants of common law heat of passion doctrine, though a significant minority have adopted the MPC language. Dressler, *supra* note 29, at 432. Dressler also notes that in 1982, 49 states had voluntary manslaughter statutes. *Id.* at 422.

46 Susan S. M. Edwards, *A Socio-legal Evaluation of Gender Ideologies in Domestic Violence Assault and Spousal Homicides,* 10 VICTIMOLOGY 186 (1985).

47 This is not the case when it comes to analysis of the applicability of voluntary manslaughter doctrine to defendants who vary from the "reasonable man" standard--too often been defined as white, able-bodied, male, and heterosexual. *See, e.g.,* Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation,* 14 LOY. L.A. L. REV. 435 (1981) (criminal law's reasonable man standard makes the experiences of women and other minority group defendants invisible); Note, *The Cultural Defense in Criminal Law,* 99 HARV. L. REV. 1293, 1300 (1986) (arguing for a "formal cultural defense" within substantive criminal law in order to better reflect cultural differences of defendants). Laurie Taylor provides a very thoughtful critique of voluntary manslaughter doctrine's application to female defendants. Taylor, *supra* note 6, at 1679 ([T] he legal standards that define adequate provocation and passionate 'human' weaknesses reflect a male view of understandable homicidal violence."). Furthermore, there are a few notable exceptions to this general silence regarding adultery/manslaughter law. *See, e.g.,* JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW: CASES AND MATERIALS 261-68 (2nd ed. 1991) (examining gender and voluntary manslaughter doctrine); *Law Women Find Sexism in 1L Casebook,* THE COMMENTATOR, New York University Law School, Mar. 19, 1984, at 7 (as quoted in JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW: CASES AND MATERIALS, 263 (1st ed. 1986)) (noting that "[t]he common thread running through the majority of the cases in this section [of criminal law casebooks discussing voluntary manslaughter] involves men defending their virility with violence . . . [I]f the provocation rule is used primarily as a defense by men who resort to violence when they feel their masculinity has been threatened, what values are being reflected and perpetuated by the provocation rule?"); Taylor, *supra* note 6, at 1696 ("The law of provocation endorses men's ownership of women's sexuality by expressly sanctioning violent reactions by husbands to their wives' infidelity."). For more general critiques of the "reasonable person" standard see Weber, *supra* note 21.

For an article making an analysis similar to mine in the context of voluntary manslaughter doctrine's application to homicides "provoked" by homosexual sexual advances, *see* Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation,* 80 CAL. L. REV. 133, 135 (1992) (the provision for a voluntary manslaughter jury instruction where the defendant claims provocation by a nonviolent homosexual advance is "immoral and inconsistent with the goals of modern criminal jurisprudence").

48 Though the jealous killing of a wife (i.e., "love-triangle killings") is one of the primary cultural stereotypes of a "heat of passion" killing and adultery is a primary stereotype of law when it comes to defining adequate provocation, in truth, wife-killings actually account for a very small percentage of murders. The vast majority of murders are men killing men. In 1988 males represented approximately 75% of all homicide victims and 60% of the perpetrators. SOURCEBOOK--1989, *supra* note 25, at 390-391, Table 3.130. In 1988, 675 husbands and boyfriends were killed by their partners compared with 1,406 wives and girlfriends. This represented 3.7% and 7.7%, respectively, of the total number of homicide victims. *Id.* at 387, Table 3.127. (These figures may represent underestimates because the data includes 5,992 homicides (32.8%) in which the relationship was unknown.). Zimring notes that male on male homicides are the most likely category to experience sharp increases in rates of homicides while inter-sexual killings remain at a fairly stable rate. Zimring et al., *supra* note 2, at 913, 916.

49 *See, e.g.,* Barbara Hart, *Beyond the "Duty to Warn": A Therapist's "Duty to Protect" Battered Women and Children, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 3, at 234, 240 (providing a list of factors to be used by therapists in evaluating an abusive man's potential lethality); Sonkin & Fazio, *supra* note 8 (describing the use of expert testimony regarding battering men in the context of criminal homicide prosecutions of men who kill wives or lovers).

50 *See, e.g.,* MARVIN WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 203-21 (1958) (sociological study of spousal homicides); George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder,* 10 BULL. AM. ACAD. PSYCHIATRY & L. 271 (1982) (study of 34 offenders psychiatrically evaluated for court); Showalter et al., *supra* note 18 (study of 11 offenders referred by court); Robert A. Silverman & S.K. Mukherjee, *Intimate Homicide: An Analysis of Violent Social Relationships,* 5 BEHAVIORAL SCI. & L. 37 (1987) (sociological study examining police spousal-homicide reports); Zimring et al., *supra* note 2 (analysis of 151 intersexual homicides in Chicago).

51 *See, e.g.,* People v. Cooley, 211 A.2d 173 (Vt. 1962); People v. Rich, 755 P.2d 960 (Cal. 1988), *cert. denied,* Rich v. California, 488 U.S. 1051 (1988).

52 *See, e.g.,* Sonkin & Fazio, *supra* note 8, at 222-23 ("[A] person who has an already established pattern of woman beating or child abuse is likely to continue such abuse unless there is some intervention, such as criminal justice sanctions and/or treatment."); Crites & Coker, *supra* 10, at 12-13 (abusers are likely to repeat their abusive behavior in subsequent relationships); Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse,* SOC. WORK (forthcoming Sept. 1993) (studies indicate that the likelihood of a batterer abusing in a new relationship to be between 57% and 86%).

53 Ptacek, *supra* note 3, at 142-51.

54 Dobash & Dobash, *supra* note 3, at 274. (The violence is frequently a response to the man's perception that his lover is questioning his authority, "challenging the legitimacy of his behavior," or asserting her autonomy.)

55 "[Battering] is a cohesive pattern of coercive controls that include verbal abuse, threats, psychological manipulation, sexual coercion, and control over economic resources." Adams, *supra* note 4, at 13-14. The violence is an "integral part of a continuing relationship." Dobash & Dobash, *supra* note 3, at 272-73. When understood in the context of power and control, the violence is not an isolated act, but rather a part of a system intended to control the woman. Sonkin & Fazio, *supra* note 8, at 228-29; Ellen Pence & Michael Paymar, *Power and Control: Tactics of Men Who Batter* (Minnesota Program Development, Inc., Duluth, Minn.) 1986. Paymar and Pence suggest that abusive men use the following "tactics" of power and control: emotional abuse; isolation; threats including threats of suicide, taking the children, having the woman committed, leaving her penniless, killing or mutilating her or her family; economic abuse, using children either through manipulation or by threatening to keep them from her; intimidation; use of male privilege; sexual abuse, and, physical violence. *Id.*

56 Ptacek, *supra* note 3, at 146-48.

57 *See supra* note 3 and accompanying text.

58 Adams, *supra* note 4, at 14 (noting that "[m]any battered women report that their husbands make frequent jealous accusations. For some abusers, this jealousy has an obsessive quality. . . . [The] presence [of pathological or obsessive jealousy] should be seen as a significant indicator of the potential for homicide."); LENORE E. WALKER, THE BATTERED WOMAN 114 (1979) ("Sexual jealousy is almost universally present in the battering relationship."); Dobash & Dobash, *supra* note 3, at 273 (reporting that among sources of conflict leading to a violent episode, battered women related that "possessiveness and sexual jealously" accounted for 45% of the "typical" episodes); Brisson, *supra* note 2, at 341 (41% of abusive men studied mentioned jealousy as preceding their violence); Sonkin & Fazio, *supra* note 8, at 223 ("Many battered women describe their partners as suspicious to the point of severely curtailing their freedom to participate in out-of-home activities.").

59 *See* Adams, *supra* note 4, at 14 (Many abusers are jealous, but for some this jealousy is "pathological" or they demonstrate "extreme possessiveness" which, when the woman leaves, results in "ongoing harassment and pressure tactics, homicide and suicide threats, uninvited visits at home and work, and manipulation of children."); Sonkin & Fazio, *supra* note 8, at 223.

60 *See* WILLIAM STACEY & ANSON SHUPE, THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA 32-33 (1983) (one in four of abused women studied reported sexual abuse including rape, mutilating the woman's genitals and breasts, excessive sexual demands enforced by the threat of physical assault and frequently accompanied with accusations of infidelity); WALKER, *supra* note 58 (citing incidents of bestiality and sexual sadism).

61 STACEY & SHUPE, *supra* note 60, at 51.

62 Pence & Paymar, *supra* note 55 (listing tactics of power and control).

63 STACEY & SHUPE, *supra* note 60, at 50.

64 Adams, *supra* note 4, at 14 ("Accusations of infidelity or of neglecting the family serve to manipulate the woman into curtailing her contacts with friends, co-workers, and relatives.").

65 Accounts of women in Maluhia O'Wahine, Family Violence Program in Honolulu, Hawaii (on file with author).

66 *See generally* Adams, *supra* note 4, at 13 ("Women are most likely to be murdered while attempting to . . . leave an abusive relationship.").

67 *Id.*

68 Barnard et al., *supra* note 50, at 275 (finding that 56.5% of male domestic killers were separated at the time of the homicide.); Mahoney, *supra* note 2 (the term "separation assault" defines this most lethal form of attack).

69 Hart, *supra* note 49, at 241-42; *see also* Adams, *supra* note 4, at 14 stating that:

> [pathological jealousy] . . . should be seen as a significant indicator of the potential for homicide. [references omitted.] Closely related to this is extreme possessiveness which is often manifested by the abuser's unwillingness to accept the end of the relationship. Women who leave this type of man are subjected to ongoing harassment and pressure tactics including multiple phone calls, homicide or suicide threats, uninvited visits at home or work, and manipulation of the children.

70 Hart, *supra* note 49, at 242 (A woman's attempts to separate are often thwarted by her partner's inability to "let go": he will track her down, often forcing her to return home. Long after she leaves he may continue to threaten her, the children, or other family members, if she does not return; alternatively, he may make repeated and earnest attempts to convince her to reconcile because he has changed).

71 For example, a statute such as Tennessee's which provides that a "deliberate act" is "one performed with a cool purpose" and a "premeditated act" is "one done after the exercise of reflection and judgment" is meant to distinguish the deliberate killer from one who kills under the "heat of passion." See TENN. CODE ANN. § 39-13-201 (1991) ("The definition of 'a deliberate act' is that the act be one committed with 'a cool purpose' and without passion or provocation. This latter phrase is designed to allow the defendant who kills another with passion or provocation to be adjudged guilty of either second degree murder or voluntary manslaughter . . . . ") Yet, the man who kills his wife may be both "impassioned" and calculating. *See infra* notes 216-20 and accompanying text (describing murder defendant Berry's conflicting statements regarding whether or not he planned to kill his wife).

72 Hart, *supra* note 49, at 241.

73 Interviews with battering men in Komo Mai, a Honolulu-based program (on file with author).

74 *Id.*

75 JACK KATZ, SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL 8 (1988).

76 Gary Kleck, *Policy Lessons from Recent Gun Control Research,* LAW & CONTEMP. PROBS., Winter 1986, at 35, 40. *See also* KATZ, *supra* note 75, at 39 (contrary to the assumption that mounting rage spills over into violence, "close accounts [of the killing] reveal a frequent pattern in which an assailant moves into an attack and then rage builds"); Gary Kleck & David J. Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control,* 5 LAW & POL'Y Q. 271, 291 (1983).

77 KATZ, *supra* note 75, at 38 (about 80% of those arrested for murder or non-negligent homicide in 1970 had previous arrests and of those arrested between 1970 and 1975, almost 70% had prior arrest records). Katz describes these killings as sacrificial, noting that "[t]he attackers, however wild and impassioned they appear at the moment, know deeply and in some detail just what they are doing. The typical killer is familiar with the victim, feels at home in the setting, and has often practiced variations on the themes of sacrificial violence." *Id.* at 39. *See also* Kleck, *supra* note 76, at 41 ("Rather than being isolated outbursts, violent acts are almost always part of a continuing pattern of violent behavior, whether the violence is spouse or child abuse or armed robbery committed by 'hardened criminals.'").

78 KATZ, *supra* note 75, at 38.

79 Kleck, *supra* note 76, at 41. *See also* Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment,* WASHINGTON, D.C.: THE POLICE FOUNDATION (1984) (reporting that arrest was twice as great a deterrent as was the practice of mediating domestic violence assaults). Police studies have also found that if the police *arrest,* they are likely to deter further violence. *See, e.g.,* Stubbing, *supra* note 23 (family homicides dropped from nine in 1984 to two in 1988 in Newport News, Virginia and from 13 in 1985 to an average of 8 per year for the years 1988-1990 in Albuquerque, New Mexico as a result of police department arrest policies.). *See also infra* notes 137-38 and accompanying text.

80 *See,* Goodman *supra* note 28 (Dong Lu Chen was sentenced to five years for killing his wife. ("The man cracked, said the judge, adding: 'He was a product of his culture.' The man was Chinese; the wife was unfaithful.").

81 Attempts to gather quantitative data on motivations for male-perpetrated intimate homicides have necessarily relied largely on police reporting and frequently relate to *all* inter-sexual homicides. *See, e.g.,* Silverman & Mukherjee, *supra* note 50, at 42 (finding the three biggest categories of events which precipitated an intersexual homicide to be such non-descript categories as: an argument (55%); unknown (24.6%); and other (15.1%). "[With regard to motive] the information on the police reports is tentative at best and second, it usually consists of police opinion or is one sided (the other side being dead)." *Id.* at 44.

82 *See* Showalter et al., *supra* note 18, at 119 ("[a]ll of these clients [included in the study . . .] were referred for forensic evaluation by their *attorneys* . . . who had special interest in the offender's mental state at the time of the offense") (emphasis added).

83 *Id.* (Showalter et al. determined that 6 of 17 referrals were not suitable for the study because "the homicidal behavior was . . . secondary to a serious psychiatric disorder or serious longstanding character pathology . . . . ").

84 Barnard et al., *supra* note 50, at 274; *see also* Showalter et al., *supra* note 18, at 129 (finding that all of the 11 men studied claimed that their partner/victim was unfaithful).

85 Barnard et al., *supra* note 50, at 274-275, 277. The following story illustrates the intertwining of motivations related to desertion and response to the woman's rejection of the man's dominance: "A male prisoner related a long and elaborate chain of fears of desertion and suspicion of infidelity on the part of his wife. He followed her for days and ended up

murdering her when she insisted she 'must have more freedom' so she could go alone to a nearby health spa." *Id.* at 279. *But see* Silverman & Mukherjee, *supra* note 50, at 42 (reporting that their Canadian research found only 5% of men who killed intimates claimed that the victim was sexually promiscuous. However, this finding relied solely on police homicide reports rather than interviews with the accused).

86 *See supra* text accompanying note 56; *infra* notes 140-44 and accompanying text.

87 Showalter, et al., *supra* note 18.

88 *Id.* at 120. While only 6 of the 11 men studied actually committed a homicide, the attacks by the remaining five were similar in type and motivation and thus considered "functionally equivalent" to a homicide for the purposes of the study.

89 *Id.* at 119.

90 *Id.* at 118-19.

91 Showalter et al., *supra* note 18, at 139.

92 *Id.* at 125.

93 *Id.*

94 *See supra* notes 70-75 and accompanying text (obsession with the woman and "centrality" of the relationship are indicators of particularly dangerous men). Showalter further describes the men's relationships with the victims as one of "childish dependen[ce]." Showalter, *supra* note 18, at 127.

95 Showalter, *supra* note 18, at 128.

96 *Id.* at 127.

97 *Id.*

98 *Id.*

99 Showalter, *supra* note 18, at 127.

100 *Id.* at 128.

101 *See generally* Mahoney, *supra* note 2, (importance of recognizing assaults on a woman's ability to separate).

102 OCTAVIO PAZ, CONVERGENCES: ESSAYS ON ART AND LITERATURE 40-41 (Helen Lane, trans., 1987).

103 Ptacek, *supra* note 3, at 141 (referring to the work of Scott & Lyman).

104 *Id.* (emphasis added). Ptacek's definitions provide a rough parallel to the definitions of the terms found in criminal law. *See* Dressler, *supra* note 29, at 439. Excuse applies when the defendant does not deny the wrongness of his act, but argues that this state of mind makes him less blameworthy. The classic example of excuse would be not guilty by reason of insanity. Justification, on the other hand, argues that the act was *not* morally blameworthy. The classic example would be self-defense.

105 Adams, *supra* note 4; Ptacek, *supra* note 3, at 143 (56% of the men gave this excuse); Sonkin & Fazio, *supra* note 8.

106 *See* Ptacek, *supra* note 3, at 143 (finding 39% of his samples were violent only with wives or lovers; 33% with partners, children and mothers; only 28% were violent both within and outside of the family).

107 KATZ, *supra* note 75, at 41.

108 Ptacek, *supra* note 3; *see also* Sonkin & Fazio, *supra* note 8, at 228 ("[w]hen a man is asked why he did not kill his victim or why he stopped his violence during a particular incident, he will usually reply, 'I wouldn't want to seriously hurt her or kill her"').

109 Judith McFarlane et al., *Response to Battering During Pregnancy: An Educational Program,* RESPONSE TO VICTIMIZATION WOMEN & CHILDREN, 1987, at 25; Ptacek, *supra* note 3, at 150. Neither do the manner of the attacks match the "out of control" description. For example, women are frequently beaten during pregnancy with the violence deliberately directed at the stomach area; blows are often aimed at unexposed parts of the body that make public detection less likely. Sonkin & Fazio, *supra* note 8, at 229.

110 Ptacek, *supra* note 3, at 149.

111 EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 59, 65-66 (1988) (describing different typologies of batterers including the sociopathic batterer, the antisocial batterer, the chronic batterer, and the sporadic batterer).

112 *See, e.g.,* Ellen Pence et al., *In Our Best Interest: A Process for Personal and Social Change* 33-34 (Minnesota Program Development, Inc., Duluth, Minn.) 1987 (describing the manner in which institutions reinforce a man's dominance and abuse).

113 Ptacek, *supra* note 3, at 154.

114 Adams, *supra* note 13, at 186-87 (abusive man's description of his violence). Adams notes that:

> The notion of provocation is insidious because what is really being said is that the woman has no real right to negotiate with her husband about issues such as how the money is spent, the time he spends away from home, the amount of assistance he might give with household tasks, or about her freedom to go to work, engage in her own hobbies or interests if such negotiations irritate or offend him.

115 Ptacek, *supra* note 3, at 145.

116 *Id.* Needless to say, abusive men are not alone in their willingness to blame their partners for the abuse. The frequency with which judges, police and other legal actors blame the victim of domestic assault for her abuse is well documented in both legal and activist work. *See generally* Laura Crites, *A Judicial Guide to Understanding Wife Abuse,* JUDGES' J., Summer 1985, at 5, 7 ("Gender bias can affect a judge in spouse abuse cases in the following three ways: (1) blaming the

victim for not meeting her husband's needs and for provoking the violence; (2) tending to accept the husband's testimony over his wife's; and (3) identifying with the husband as victimized male."); *Report of the New York Task Force on Women in the Courts: Domestic Violence,* 15 FORDHAM URB. L.J. 11, 32 (1986-87):

Police, court personnel and judges [who hear temporary restraining order hearings] too often presume that the victim provoked the incident, and that the assumed provocation excuses the violence. "Victim blaming is common . . . . Judges say to a woman when she walks in the courtroom, 'What did you do to provoke him?' It is incomprehensible to a judge that this woman could have been battered without some justifying action on her part."

117 People v. Thompkins, 230 Cal. Rptr. 516 (Ct. App. 1987) (reversed first-degree murder conviction, holding that the trial court erred in its instruction to the jury about the difference between premeditation and heat-of-passion. The defendant was separated from wife at the time.).

118 KATZ, *supra* note 75, at 33 (quoting from LONNIE H. ATHENS, VIOLENT CRIMINAL ACTS AND ACTORS 46-48 (1980)).

119 *See* Ptacek, *supra* note 3 at 152 ("Like the abusers interviewed for this study, many clinicians also explicitly state that the [batterer's] violence represents 'uncontrollable rage' or 'uncontrollable aggression' [[[citations omitted] . . . [and] clinicians frequently use explosion metaphors, such as 'violent eruption'; 'temper out-bursts'; or 'explosive rage' [citations omitted].").

120 *See* discussion *infra* notes 128-38 and accompanying text (this cultural understanding is reflected in voluntary manslaughter heat of passion doctrine).

121 Ptacek, *supra* note 3, at 141.

122 Mahoney suggests that one reason the power and control at the core of battering is so difficult to recognize in heterosexual assaults is due to the congruence between the expectations of battering men and those of society in general. This congruence makes the abuser's quest for control (of the woman) invisible in the stories men tell of being out of control (of themselves). Mahoney, *supra* note 2, at 55.

123 17 Cal Jur 3d (Rev) Part 1, Criminal Law § 255 (1984).

124 "At trial defendant . . . claimed . . . that he was provoked into killing her because of a sudden and uncontrollable rage so as to reduce the offense to one of voluntary manslaughter." People v. Berry, 556 P.2d 777, 779 (Cal. 1976).

125 "[D]efendant killed in wild desperation induced by [his lover's] long continued provocatory conduct." People v. Borchers, 325 P.2d 97, 102 (Cal. 1958).

126 Dressler, *supra* note 29, at 439.

127 *Id.*

128 *See generally* CAROL TAVRIS, ANGER: THE MISUNDERSTOOD EMOTION (1982) (the expression of anger and what it is that makes one angry is highly culture specific); Adams, *supra* note 13 at 183 ("What one becomes angry about and how one expresses that anger are greatly influenced by both culture and gender."); Donovan & Wildman, *supra* note 47 (arguing that the "reasonable man standard" should be replaced with one that adjusts for differences in gender, culture, and situation); Note, *supra* note 47 (arguing that the ideal of a plural society requires that culture be taken into

account in determining criminal punishment and that crimes motivated by "a sense of moral and social compulsion" are not readily deterred by criminal sanctions).

129 Ashworth, *supra* note 6.

130 *See, e.g.,* People v. Balderas, 711 P.2d 480 (Cal. 1985); People v. Jackson, 618 P.2d 149 (Cal. 1980) ("[Where burglary victim awakened and began to scream,] [n]o case has ever suggested, . . . that such predictable conduct by a resisting victim would constitute the kind of provocation sufficient to reduce a murder charge to voluntary manslaughter."); People v. Crews, 231 N.E.2d 451 (Ill. 1967) (behavior of two year old child cannot provide legally sufficient provocation to mitigate murder to manslaughter).

131 Dressler, *supra* note 29.

132 *See* TAVRIS, *supra* note 128 and accompanying text.

133 See *supra* note 31 and accompanying text.

134 TAVRIS, *supra* note 128, at 153-54 (emphasis added).

135 *See, e.g.,* People v. Sica, 245 P. 46 (Okla. 1926) ("'Anger' and 'passion' are interchangeable, and mean practically the same thing."); Dressler, *supra* note 29, at 427 n.61 ("[An]ger is the usual emotion alleged in provocation cases."); Taylor, *supra* note 6, at 1680-81 ("[R]age is still the paradigm emotion for heat of passion.").

136 Feminists have noted that while anger may describe the motivation of *men* who kill, it is a poor fit for women who are far more frequently motivated by fear or self-defense. Taylor, *supra* note 6.

137 The commentaries to the MODEL PENAL CODE note:

> [Provocation doctrine] is a concession to human weakness *and perhaps to non-deterrability,* a recognition of the fact that one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence . . . [Further,] [t]he underlying judgment [of common law provocation doctrine] is thus that some instances of intentional homicide may be as much attributable to the extraordinary nature of the situation as to the moral depravity of the actor.

MODEL PENAL CODE Commentaries to § 210. *See also* Ashworth, *supra* note 6, at 310-11 ("It is wise to be skeptical when deterrent arguments are applied to impulsive crimes, especially when the only direct deterrent effect would be limited to the difference between the penalty for murder and the probable sentence for manslaughter upon provocation.").

138 *See supra* note 79 and accompanying text; Patrick A. Langan & Christopher A. Innes, *Preventing Domestic Violence Against Women,* BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (Aug. 1986). U.S. Department of Justice study found that a "woman was 41% less likely to be assaulted again by her spouse or ex-spouse when she called the police." Criminal justice intervention also serves a counter-ideological function because its message of personal accountability challenges the abuser's victim-blaming excuses and justifications. However, differing personality types as well as differing financial circumstances may influence the degree to which arrest deters. LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 17 (1992); EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 89 (1991).

139 *See* KATZ, *supra* note 75, at 12-15 (this is a paraphrase of Katz' "righteous slaughter" term).

140 Smith v. State, 277 S.E.2d 678 (Ga. 1981). For a discussion of this case see Christine Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women,* 1989 U. CHI. LEGAL F. 23, 33 (1989) (discussing, in part, the discontinuity between battered women's *experiences* and the legal view of battered women).

141 Ptacek, *supra* note 3, at 147.

142 *See* Goodman, *supra* note 28, at A15 (describing "the bitch deserved it defense").

143 "[The violence] was a way I could win. She would know that she had gone too far in asking something, in constantly probing, requiring me to answer. So that would let her know how hurt or angry I was feeling." Ptacek, *supra* note 3, at 148.

144 *See id.* (much of what battering men describe as "provocative" echoes their justificatory claims in that both frequently focus on victim blaming related to their partner's failure to know when to concede to their (male) authority).

145 The term is borrowed from Goodman, *supra* note 28.

146 Ptacek *supra* note 3, at 148.

147 Dobash & Dobash, *supra* note 3, at 274.

148 *See, e.g.,* People v. Martinez, 238 Cal. Rptr. 265 (Ct. App. 1987) (despite defendant's claim that he acted in an uncontrollable rage precipitated by finding his girlfriend having sex with another man, there was sufficient evidence of motive and planning to support a first degree murder conviction where defendant desired revenge and wished to punish his girlfriend); People v. Hyde, 212 Cal. Rptr. 440 (Ct. App. 1985) (trial court's refusal to give a voluntary manslaughter instruction was proper where defendant, charged with murder of his ex-girlfriend's boyfriend, masqueraded as a police officer in order to kidnap the victim, thus demonstrating premeditation inconsistent with a heat of passion defense); People v. Cancino, 73 P.2d 1180 (Cal. 1937) (first degree murder conviction affirmed where defendant killed girlfriend after suspecting her of having an affair and waited outside her apartment in order to catch her. "[W]hile it is true that the abandonment of all sense of moral duty on the part of the unfortunate woman was exhibited in a shocking degree, the law will not justify or excuse the putting to death of such person unless in so doing it is necessary for the protection of the life or limb of the one who kills.").

149 *See* text accompanying note 148.

150 Ashworth, *supra* note 6, at 307 (emphasis in the original). Voluntary manslaughter doctrine has long been understood to draw both from excuse and justification (or partial justification) doctrine. Dressler, *supra* note 29.

151 *See* Dressler, *supra* note 29, at 434-44 ("justifications and excuses are generally mutually exclusive"). Excuse doctrine looks to the state of mind of the accused to determine whether or not the accused may fairly be held accountable for the killing. Justification doctrine looks instead to the social harm of the killing--determining that, under the circumstances, the killing represents less social harm than would have resulted had the defendant not killed. Justification doctrine assumes that the killer had the *capacity* to choose whether or not to kill, but the circumstances so constrained his options as to justify his decision; excuse doctrine assumes that the killer had no such capacity to choose. *Id.* at 439.

152 TAVRIS, *supra* note 128, at 60 ("[t]he law allows individuals to become angry enough to kill, but only if they kill in the service of society's dominant values, and only if they kill without premeditation or self-control-- 'in the heat of

passion"'). *See also* Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History,* 38 HASTINGS L.J. 195 (1986) (suggesting that the doctrine's limitations failed to successfully coopt the "cuckold's" need for revenge).

153 Goodman, *supra* note 28.

154 *Id.* at A15 (emphasis added). When the jury verdict became public, the trial judge's office was flooded with thousands of protest letters. The judge responded to the public outcry by sentencing Ratcliff to two life sentences for his assault on the police officers, in addition to 10 to 15 years for voluntary manslaughter. *Id.*

155 "[H]usbands are more willing to count even severe acts of violence (e.g., choking, punching, beating someone up) as self-defense rather than violence. [References omitted.] Frequently, what abusers report as self-defense is in reality violent retaliation." Adams, *supra* note 4, at 13-14.

156 The following dialogue recorded in a court mandated group for abusive men serves to illustrate this point:

Facilitator: What changed for you, Bill, after you were put on probation?

Bill: It seems like she can say anything she wants now because she knows if I get mad, I'll end up in jail.

Frank: Yeah, they know they've got you over a barrel.

Facilitator: What do you mean "they've got you over a barrel?"

Bill: You know, she knows that the guy can go to jail. . . . Sandy [my wife] says to me, "If you ever touch me, I'll call the cops and you'll go to jail." She uses it as a threat.

Facilitator: How is that a threat? She's telling you that if you assault her, she'll call the police and you will end up in jail. That doesn't sound like a threat, but a commitment to doing whatever she can to protect herself from getting hit again.

Bill: Well, yeah, but it's the tone of voice and all that. She uses it to get me. She knows I'm not going to hit her.

Pence & Paymar, *supra* note 55, at 165.

157 Brisson, *supra* note 2 and accompanying text; Mahoney, *supra* note 2.

158 KATZ, *supra* note 75, at 18, 22-26 (a theme of self-righteous anger runs through many of Katz's accounts, thus blurring the distinction between a claim of provocation and a claim of *right*).

159 *Id.* For example, Katz believes that the man who feels humiliated by his partner's infidelity feels that "cuckold" has come to define him--he is no longer in control of the public definition of who he is. He may transcend this humiliation through rage followed by violence, thus allowing himself to "recapture" his social self. Katz fails, however, to identify the gendered nature of his analysis. For example, he states that "humiliation always embodies an awareness of impotence," without noting that "impotence" is a term generally humiliating only for *men. Id.* at 24.

160 *Compare* Commonwealth v. Coleman, 322 N.E.2d 407, 414 (Mass. 1975) ("[m]anslaughter in the 'heat of passion' sense is not plausible because there was time for cooling off") *with* People v. Berry, 556 P.2d 777 (Cal. 1976) (whether or not the time elapsed between the provoking event and the killing was sufficient for a reasonable person's passion to have cooled is a jury question) *and* GA. CODE ANN. § 16-5-2 (Michie 1984 & Supp. 1986) (the jury "in all cases shall be the judge" of whether or not an interval of time between the provocatory act and the killing was sufficient "for the voice of reason and humanity to be heard . . . "); *compare* State v. Guebara, 696 P.2d 381, 386 (Kan. 1985) ("Mere words or gestures, however insulting, do not constitute adequate provocation. . . . ") *with* People v. Wickersham, 650 P.2d 311, 321 (Cal. 1982) (quoting People v. Berry, 556 P.2d 777 (Cal. 1976) ("'there is no specific type of provocation

required . . . and verbal provocation may be sufficient"'); *compare* State v. Gounagias, 153 P. 9 (Wash. 1915) (rejecting cumulative provocation argument, holding that as a matter of law an event that preceded the killing by two weeks could no longer provide adequate provocation) *with* People v. Borchers, 325 P.2d 97 (Cal. 1958) (sufficient provocation may be the result of a "series of events over a considerable period of time").

161 KATZ, *supra* note 75, at 26-31 (humiliation is to feel "morally assault[ed]," in contrast to the feeling of rage which "turn[s] the structure of . . . humiliation on its head", while humiliation makes the person feel "small," rage "proceeds in an upward direction." Rage, therefore, transforms humiliation and serves to avenge and protect the humiliated person from further humiliation or annihilation.) This reassertion of himself as the one in control is, of course, predicated on sexist constructions of "male" and "female." It is his "maleness" which is threatened and must be defended. "[With justifications], [a]s in the example of 'provocation', there is a theme of self-right-eousness about the violence. . . . [I]t is a sense that the privileges of male entitlement have been unjustly denied." Ptacek, *supra* note 3, at 148.

162 Lynne Henderson, *Rape and Responsibility,* 11(1,2) LAW & PHIL. 127 (1992). *See also* State v. Thornton, 730 S.W.2d 309 (Tenn. 1987).

163 Henderson, *supra* note 162, at 5.

164 *See* discussion *supra* notes 113-22 and accompanying text. Of course, distinguishing the "battering context" from the "rape context" is quite artificial. The abuse that abusive men visit upon wives and lovers, frequently includes rape. *See generally* DIANA E.H. RUSSELL, RAPE IN MARRIAGE (1982) (discusses both the frequency of rape in marriage and its correlation with other physical abuse).

165 *See* Ptacek, *supra* note 3, at 152; R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 133 (1979) (Ptacek notes that the equation of verbal aggression with physical assault trivializes the violence and implies that battering is caused by "nagging," which sociologists Dobash and Dobash redefine as "continued discussion once the husband has made up his mind."); Daniel G. Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat? A Feminist Perspective on the Empirical Findings, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 3, at 90, 100 ("Men tend to label violent responses to verbal abuse as 'self-defense'. . . . The men are defending their self-image rather than defending themselves from physical harm. Saving face is a particularly strong motive when the woman is, or suspected to be, sexually unfaithful.")

166 For example, Jack Katz appears to equate a woman's "ridicule" of a man's virility to a man's physical assault. KATZ, *supra* note 75, at 37-38, 48 (describing a man's physical assault resulting in a black eye as a "sacrificial marking" the equivalent to a woman's *verbal* aggression: "A woman can distinctively mark a man by ridiculing his virility and, whether or not the woman works, by shaming him for failing to uphold the traditional, symbolic male responsibility for the economic status of the household.").

167 *See, e.g.,* GLORIA STEINEM, OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 201-03 (1983) (citing research finding that men talk *more* than women).

168 *See generally* Adams, *supra* note 13 (describing therapeutic models for men who batter that teach communication skills).

169 Adams, *supra* note 13, at 183 (quoting Ellen Pence, *The Justice System's Response to Domestic Assault Cases: A Guide to Policy Development* (1984): "abusive men are already 'experts at venting their anger' and . . . they often justify their angry outbursts on the grounds of being honest about their feelings.")

170 *Supra* note 7 and accompanying text.

171 I am indebted to Mark Kelman who first suggested to me that the interesting question is "what makes adultery *like* a physical assault?"

172 WHARTON'S CRIMINAL LAW, *supra* note 31, at 244.

173 *See* PERKINS & BOYCE, *supra* note 5, at 94.

Under the sound rule, recognized by most courts, informational words are placed upon a different footing than insulting words. The sound theory is that it is the fact, or alleged fact, which really constitutes the adequate provocation, but the sudden disclosure of the fact may have the same effect as if it had just happened. Thus an intentional killing may be manslaughter only if the deceased had just told the slayer that he had . . . committed adultery with her. . . .

Id. Strickland v. State, 357 S.E.2d 85 (Ga. 1987) (where one spouse taunts the other spouse with prior acts of adultery, that is sufficient provocation to reduce a homicide from murder to voluntary manslaughter because it is the adulterous conduct, not the words themselves "which engender the sudden violence and irresistible passion upon which the voluntary manslaughter offense is predicated."). *See also* Commonwealth v. Greene, 362 N.E.2d 910, 913 (Mass. 1977); Commonwealth v. Berry, 336 A.2d 262 (Pa. 1975). The exception has always had significant limitations: the attack must follow the confession closely in time and the defendant who already knew of the adultery is ineligible to make the claim because the provocation was not "sudden". Of course, significant indications of premeditation may also prevent the question of provocation from reaching a jury. *See, e.g.,* People v. Martinez, 238 Cal. Rptr. 265 (Ct. App. 1987) (first degree murder conviction affirmed where defendant had repeatedly threatened to kill victim if he caught her with another man).

174 *See* 2 ALR 1292, 1294 (1965) (noting that the following are excluded from the "words alone" rule: (a) threats; (b) conduct presenting a mixed issue of threat and insult where it is unclear which provoked the killing; (c) insults accompanied by some type of physical battery; (d) an admission of adultery by a wife to her husband, or words to the effect that she intended to commit adultery).

175 It is not uncommon for a commentator to invoke in the same article both major rationales for heat of passion doctrine: i.e., these killings are not amenable to deterrence and these killers are unlikely recidivists. *See, e.g.,* Note, *supra* note 22, at 1038 (the author notes that "[i]t might also be suggested that if such homicides are committed by excitable people consumed by the heat of passion, it is unlikely that such individuals could or would stop to consider the legal consequences of their act before they engage in its commission," but ends the article by stating, "[t]he way is open for the courts to discontinue the practice of sending those guilty of manslaughter to institutions under the pretense that they require as long a time to become rehabilitated as those who are guilty of murder").

176 Showalter et al., *supra* note 18, at 139 (emphasis added). *See also* BUZAWA & BUZAWA, *supra* note 138, at 56-57 ("Court personnel tend to believe that defendants in a relationship case may be influenced by relationship itself. Thus they are perceived as not being a 'hard case' and much less likely to be recidivistic than those responsible for violence, property loss, theft against strangers . . . . ").

177 *Id.* Showalter bemoans the common law's inadequacy, at recognizing the situation of this kind of killer because "[the law] is oblivious to the victim's role in his or her own demise" in what Showalter earlier described as a "classic illustration of 'victim-precipitated homicide [].'" *Id.* at 118.

178 *See supra* note 52 and accompanying text.

179 *See, e.g., infra* notes 180-84 (discussion of Garcia, 789 P.2d 960 (Cal. 1990)); see *infra* note 212 (Berry, accused of killing his wife, had prior assault conviction for stabbing former wife); Mike McDevitt, *Judge OKs Evidence in Homicide,* PENINSULA TIMES TRIBUNE, Apr. 18, 1990, at B5 (man accused of strangling two different women with whom he had romantic relationships); *San Diego County Digest: Local News in Brief: Escondido,* L.A. TIMES, Dec. 6, 1988, at

M3 (man charged with murdering his girlfriend had prior manslaughter conviction for killing his first wife); *Man Sent to Prison, supra* note 28 (man wanted for killing wife is turned in by girlfriend who feared for her own safety); Arnold, *supra* note 28 (in prosecution of man convicted of voluntary manslaughter for killing girlfriend the court disallowed evidence that defendant repeatedly beat a *former* girlfriend).

180 Garcia v. Superior Court, 789 P.2d 960 (Cal. 1990).

181 *Id.* at 962 (The probation officer told Grace that she "[didn't] have anything to worry about" and that Johnson was still in love with her and "repeatedly asked her if she really wanted to end the relationship.").

182 The opinion's only reference to this fact is its reference to Johnson as "a convicted murderer on parole." *Id.* at 961. The relevance of this murderous history is completely missed in the court's assessment of the parole officer's culpability for making false statements to Grace regarding Johnson's non-dangerousness. *Id.* at 964.

183 Mahoney suggests that the recidivism of "separation assaults" requires further examination, but is suggested in cases such as *Garcia.* Telephone Interview with Martha Mahoney, Professor of Law at University of Miami Law School (Jan. 1993); *see also,* Mahoney, *supra* note 2, at 77 ("The parole officer misrepresented Johnson's danger to Morales with respect to the very issue of measures regarding *separation.*") (emphasis in original).

184 Garcia, 789 P.2d at 962. State law prevented the parole officer from giving Grace information regarding Johnson's criminal record. *Id.* at 963 n.2. However, the officer also stated that Johnson's crime "was not the type which would indicate that Johnson represented a danger to [Morales's] children." *Id.* at 962. As Mahoney notes, this statement was a patent falsehood: "[T]he possibility of [Grace's] murder and the possibility of harm to themselves in the course of a murderous attack were 'danger' shown by Johnson's prior conviction." Mahoney, *supra* note 2, at 77 n.345.

185 See *infra* discussion of *People v. Berry* (psychiatrist argued that victim precipitated her own death by taunting and sexually teasing the accused).

186 *See, e.g.,* MILDRED DALEY PAGELOW, WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES (1981) ("if [the battering] behavior appears to be accepted by his spouse because of lack of negative feedback, he is most likely to continue [to batter]."); *see also* Mahoney, *supra* note 2, at 31-32 (while Pagelow's analysis identifies power and control issues in battering, it then "obscures them again by indirectly holding the woman responsible for the batterer's continued control efforts[.]").

187 Bograd, *supra* note 19, at 562 (Systems models typically see the family as a structural system unit in which relationships are "complementary" and violence is used to reestablish "homeostasis" when that complementariness is disturbed.) *See also* Adams, *supra* note 3, at 13-14 ("[a]ccording to the interactionist perspective, battering is not characterized as one partner attempting to control or dominate the other but by the couple's combined communicational deficits and the attempts of both partners to coerce and otherwise incite the other"). Adams quotes the following interactionist account of battering:

> Consort battering [sic] fits very well into the model of coercive exchanges building up to aggression by one party and forced submission by the other partner. . . . It hardly matters whether the husband or the wife initiated the first unpleasant event, for they both respond by trying to control the other person via escalation of negative remarks and threats, until one of them loses control and resorts to physical force to make the other one submit.

Id. (quoting JEANNE P. DESCHNER, THE HITTING HABIT: ANGER CONTROL FOR BATTERING COUPLES (1984)).

188 For example, this view is demonstrated by the reluctance of civil judges to deem wife abuse relevant to the determination of custody. Not only have women been blamed for their ex-partner's abuse, but judges have been extremely reluctant

to examine the issue of whether or not the abuser is likely to re-abuse in subsequent relationships with women. The belief that the abuse is the result of the particular dynamics of a given relationship, if not the result of the behavior of a particular woman, have clearly influenced this judicial reluctance. *See generally,* Crites & Coker, *supra* note 10.

189 In reality, studies that have attempted to identify the personality type of women likely to be battered have failed. *See generally* MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION 3-12 (1992) (recent studies focus on the effects of wife abuse on a woman's psychological state, rather than on an assumed psychological pre-disposition to be battered); Pagelow, *supra* note 186, at 168 (contrary to the popular understanding, only about one-fourth of the battered women studied witnessed spouse abuse in their home of origin, compared to *half* of the abusive men studied); Stacey & Shupe, *supra* note 60, at 55 (contrary to popular belief, nearly half of the women entering the shelter ranked high in self-esteem).

190 *See supra* notes 25-28 and accompanying text.

191 Elizabeth Rapaport's study of capital murder convictions suggests that there is a "domestic [violence] discount" which serves to view domestic violence cases, particularly those in which a man kills in response to his partner's threat to leave him, as less serious. Elizabeth Rapaport, When is Domestic Homicide a Capital Crime?: Gender Differences in America's Death Rows in the Post-Furman Era 25, presentation for Law & Society Meeting (May 28-31, 1992) (on file with author). Rapaport notes that "[i]t is fair to conclude-- regardless of whether one would wish to see domestic violence more heavily sanctioned--that it is not a wall between premeditated and unpremeditated murder that shelters domestic killers from capital responsibility but rather *our cultural ranking of domestic violence as less morally serious* than predatory crime[s] [which are more likely to result in a death sentence]." *Id.* at 23 (emphasis added).

192 Phyllis Goldfarb notes that the *appellate* court focus of critical legal studies scholars limits the accuracy of their resulting social theory. Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory,* 43 HASTINGS L.J. 717, 731 (1992). This article attempts to enlarge the scope of its analysis by addressing the critical question: How does this all play out at *trial?*

193 People v. Berry, 556 P.2d 777 (Cal. 1976). This analysis relies not only on the California Supreme Court opinion, but also the trial transcript and the transcript of Berry's confession to the police. People v. Albert Joseph Berry, No. 88-2b Crim. No. 19194 (Superior Ct. of the City and County of San Francisco, 1974), Trial Transcript and Transcript of Statement of Albert Joseph Berry taken at Homicide Detail, Hall of Justice, San Francisco, August 1, 1974.

194 *See* KAPLAN & WEISBERG, *supra* note 47.

195 Berry offered no corroboration of his account of the facts other than the psychiatrist's professional judgment that he was not lying. Berry, 556 P.2d at 779 n.3.

196 *Id.* at 780.

197 *Id.* at 780.

198 *Id.* at 781.

199 *See, e.g.,* People v. Borchers, 325 P.2d 97 (Cal. 1958) (upholding trial court's decision to reduce a second degree murder conviction to one for voluntary manslaughter). The court in *Borchers* held that "the trial judge could well have concluded that defendant was roused to a heat of 'passion' by a series of events over a considerable period of time: [the victim's] infidelity, her statements that she wished she were dead, her attempt to jump from the car [they were riding in on the night of the homicide], her repeated urging that defendant shoot her, Tony [her quasi-adopted son], and himself on the

night of the homicide, and her taunt, 'are you chicken."' *Id.* at 102. The *Borchers* court concluded that "defendant killed in wild desperation induced by [the victim's] long continued provocatory conduct." *Id.*

200 556 P.2d at 780 n.3.

201 *Id.* at 779.

202 The indictment alleged this prior felony conviction, but on appeal to the Supreme Court the Attorney General conceded that the trial court's acceptance of Berry's admission was improper. *Id.* at 778 n.2.

203 Blinder's testimony also, presumably, went to Berry's diminished capacity defense. The trial court's refusal to instruct on voluntary manslaughter in the context of a diminished capacity defense was upheld on appeal. *Id.* at 781-82.

204 Trial Transcript at 144, Berry, No. 88-2b Crim. No. 19194.

205 *Id.* at 145.

206 For example, Dr. Blinder acknowledges that Berry's act of homicide was likely in response to Rachel's attempt to leave him, *id.* at 177, and that Berry's knife assault on his second wife was shortly after she threatened to leave him, *id.* at 143, and that Berry destroyed the stereo of a girl friend when she threatened to leave him, *id.* at 145.

Q. Is it also reasonable to say that he killed because she was going to leave him, is that correct?

A. You are putting it rather badly, but in a sense that is accurate.

Id. at 177. *See also* Mahoney, *supra* note 2, at 74 (describing *Berry* as a "hidden separation assault" case).

207 Trial Transcript at 144, Berry, No. 88-2b, Crim. No. 19194.

208 An expert likely would have testified that Berry was an example of a batterer. *See, e.g.,* Sonkin & Fazio, *supra* note 8, at 223 (describing abusive men as dependent on their female partners); Don Dutton et al., *Severe Wife Battering as Deindividuated Violence,* 7 VICTIMOLOGY 13, 17 (1982) (describing battering men as typically emotionally isolated with an "exaggerated dependance on the female [partner]." The authors further note that "for battering males [,] acute anxiety accompanies perceived rapid changes in socio-emotional distance (or intimacy) within relationships."); Dobash & Dobash, *supra* note 3 (describing the way in which abusive men "set up" situations in which they can justify feeling "provoked"); Dutton et al., *supra* note 208, at 27 (describing destruction of property as a frequent example of both threatening behavior and emotional abuse).

209 Trial Transcript at 145, Berry, No. 88-2b Crim. No. 19194 (describing Berry's destruction of a lover's stereo).

210 The court recounts Blinder's testimony regarding Rachel's provocative behavior and then concludes: "Dr. Blinder testified that *as a result of this cumulative series* of provocations, defendant . . . was in a state of uncontrollable rage, completely under the sway of passion." People v. Berry, 556 P.2d at 780. In dismissing Berry's claim for an instruction on diminished capacity, the court again takes Blinder's description of Berry's cumulative passion out of context: "[Blinder] stated that the time of the killing, defendant was in [a state] . . . of uncontrollable rage [which was] . . . 'a product of having to contend with what seems to me an incredibly provocative situation, an incredibly provocative young woman, *and that this immediate situation was superimposed upon Mr. Berry having encountered the situation time and time again." Id.* at 782 (emphasis added.) The court concludes that this testimony relates to "a course of provocatory conduct

on the part of Rachel," *id.,* but fails to mention that the situation that Berry "encountered time and time again" did not refer merely to his experience with Rachel, but encompassed his entire life experience with women.

211 Trial Transcript at 141-45, Berry, No. 88-2b Crim. No. 19194 (emphasis added).

212 *Id.* Though the exact nature of the charge is not apparent, it was a felony and Berry was currently on parole for the crime. In Berry's own testimony he says he stabbed his former wife 4 times with a butcher knife. *Id.* at 253. The prosecutor intimates that it was actually 11 times with a 15 inch butcher knife. *Id.* at 155. Blinder's devaluations of the severity of domestic violence--i.e., "and [her condition] was not serious"--is a bias shared by many mental health professionals as well as among the criminal justice system. *See generally* Adams, *supra* note 13 (describing treatment models for men who batter).

213 Trial Transcript at 175, Berry, No. 88-2b Crim. No. 19194 (emphasis added).

214 *Id.* at 167. Research regarding battered women has provided no such psychological typology. *See* Dutton et al., *supra* note 208. Though significant commonalities exist between abusive men, no such similarities exist between women subject to a man's abuse.

215 Trial Transcript at 156-57, Berry, No. 88-2b Crim. No. 19194 (emphasis added).

216 Statement of Berry at 16, No 88-2b Crim. No. 19194.

217 People v. Berry, 556 P.2d at 780 ("[T]he long course of provocatory conduct . . . had resulted in intermittent outbreaks of rage. . . . ").

218 *See supra* notes 70-75 and accompanying text.

219 Statement of Berry at 23, No. 88-2b Crim. No. 19194.

220 Trial Transcript at 273, Berry, No. 88-2b Crim. No. 19194.

221 Statement of Berry at 3, No. 88-2b Crim. No. 19194.

222 The term is a paraphrase of Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings,* 65 S. CAL. L. REV. 1283, 1285 (1992) ("If abuse is asserted, 'failure' to exist must then be explained.").

223 *See id.* at 1286-89 ("The woman's very *presence* in the battering relationship is used against her in several ways."). Blinder's testimony gave an answer to the "why does she stay?" question that was satisfying in its completeness and, at the same time, resonated with deeply imbedded masochism stereotypes of battered women: She "stayed" with Berry because she wanted to die. Trial Transcript at 151, Berry, No. 88-2b Crim. No. 19194.

224 Mahoney, *supra* note 222, at 1300. Mahoney notes that "the question 'why didn't she leave?' shapes the discourse on battering . . . [and] directs attention away from the batterer's quest for power and control, shifting inquiry to the legitimacy of *response* in the person who was harmed." *Id.* (emphasis in original).

225 *Id.* at 1287.

226 People v. Berry, 556 P.2d at 779 (Rachel scratched Berry "deeply many times" in attempting to defend herself.).

227 *Infra* note 240 and accompanying text.

228 Rachel told her friends she was afraid of Berry. *See* Trial Transcript at 347-48, Berry, No. 88-2b Crim. No. 19194 (Direct examination of Mrs. Lichaa, Rachel's former co-worker; Rachel told Mrs. Lichaa, shortly before she was killed, that she was scared that Berry would kill her.).

229 *See* discussion *supra* note 201 and accompanying text. Though Blinder's testimony serves to "explain" why Rachel stayed, the fact is she did *not* stay--Berry returned.

230 *See* Statement of Berry, at 6, 8-9, 14-15, and 21, Berry, No. 88-2b Crim. No. 19194. Those motivations were (1) to make her stop screaming; (2) to stop her plan to blame Berry for an auto accident which seriously injured a pedestrian and for which she was responsible; (3) revenge for money she had borrowed from Berry and later refused to repay; (4) revenge for the arrest warrant Rachel had initiated; (5) retaliation for her threats to tell Berry's probation officer about the two previous attacks.

231 People v. Berry, 556 P.2d at 780. The California Supreme Court's opinion seems to also imply that Rachel's screaming was another provocative event. *Id.* at 781 ("[Berry's rage] reached its final culmination in the apartment when Rachel began screaming.").

232 *Id.* at 779.

233 *Id.*

234 Berry, 556 P.2d at 781.

235 *Id.* at 779.

236 *Id.*

237 Statement of Berry at 9, Berry, No. 88-2b Crim. No. 19194.

238 *Id.* at 14.

239 Trial Transcript at 161-62, Berry, No. 88-2b Crim. No. 19194.

240 *Id.* (emphasis added).

241 This combination of controls is precisely the balance that many women attempt to strike with temporary restraining orders. *See* Robel, *supra* note 9 (arguing that temporary restraining orders sometimes have the benefit of providing the abused woman with an increased ability to negotiate with the abuser or provide controls on the abusive behavior). These statements seem to also indicate that a serious minimization of Rachel's fear and danger. This minimization is further

evidenced by Blinder's description of an earlier choking attack: "Finally, exhausted, the Defendant asked his wife to please shut up so he could get some sleep. . . . She continues. Finally, he grabs her around the neck and chokes her until she almost faints. The next ten days are characterized by bitter fights over his *purported* possessiveness and abuse of her." Trial Transcript at 147, Berry, No. 88-2b Crim. No. 19194 (emphasis added).

242 People v. Berry, 556 P.2d at 781.

243 *See supra* note 130 and accompanying text (predictable conduct of a resisting victim cannot provide adequate provocation to mitigate a crime of murder to manslaughter). *See, e.g.,* People v. Johnson, 146 Cal. Rptr. 476 (Ct. App. 1978) ("Berry killed his wife with the telephone cord in an attempt *to keep her from screaming.*") (emphasis added).

244 Statement of Berry at 14, Berry, No. 88-2b Crim. No. 19194 ("[Rachel] walked in and started screaming, and I grabbed her and I said, shut up . . . . And she wouldn't stop screaming, and I got scared."). *Id.* at 21 ("[Rachel] comes in, she sees me, she starts screaming . . . . And she didn't stop screaming. She said the police are outside, and I said, I don't care if the police are out there or not. I said all I want to do is talk to you. And then she grabbed me and started biting, trying to bite. So I threw her down on the floor and I grabbed the cord. I said, *now you'll shut the hell up,* won't you."). If indeed Rachel's screaming played a role in Berry's decision to kill her, it may very well be because he feared arrest.

245 Trial Transcript at 268, Berry, No. 88-2b Crim. No. 19194.

246 *See supra* note 205 and accompanying text (describing Blinder's testimony characterizing Berry as chronically abused by women); *see* Trial Transcript at 242-43, Berry, No. 88-2b Crim. No. 19194 (Berry describing the unfaithfulness of his first wife), at 245-46 (describing his mother's rejection of him as an adult), at 248-49 (describing himself as "feeling useless" with his second wife because she "had completely taken over"), at 252-53 (explaining his stabbing of his second wife as the result of her involvement with another man), at 254 (girlfriend he met after second divorce locks him out of the house simply because "[they] just didn't get along"), at 256 (describing his assault on Rachel Pessah, allegedly because of her involvement with Yacob), and at 268 (describing second assault on Rachel allegedly in response to her refusal to "let" him leave and because she stated that he didn't care about his children.).

247 Berry testified that much of the statement was not true because his state of mind was self-destructive and he was intent on "putting . . . premeditating murder one on [himself]." Berry Trial Transcript at 276, Berry, No. 88-2b Crim. No. 19194.

248 *See supra* note 231 and accompanying text.

249 Statement of Berry at 18, Berry, No. 88-2b Crim. No. 19194.

250 *Id.*

251 Berry's explanation for why he killed Rachel instead of just divorcing her, plays heavily on themes of victimization: "I had so much planned in the future, everything. We were going to open up a restaurant when she came back. Had it all planned we were going to move, we were going to get out of that apartment because of bad memories . . . . I never denied her anything. She could have anything--as a matter of fact, when she was in Israel I sent her my last God damn hundred dollars." Statement of Berry at 18, Berry, No. 88-2 b Crim. No. 19194.

252 *See* Mahoney, *supra* note 2, at 74 (describing *Berry* as a case of "separation assault").

253 *See* Rapaport, *supra* note 191, at 26:

> Excessive psychologizing and individualized consideration of the suffering of denied domestic killers tends to allow men to retain by force and threat of force that which the equality of the sexes and the reform of marriage was designed to remove: their right to control the women in their lives. . . . [[[Those who commit "predatory" murders] also have emotional lives; but the criminal law has been more resistant to folding the emotional life of predators into sentencing considerations than it has in the case of domestic crime.

254 *See supra* note 79 and accompanying text; *supra* note 138 and accompanying text.

255 *See* Rapaport, *supra* note 191 (with "predatory" crimes the emotional life of the accused is not so thoroughly examined).

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APPENDIX 4

Buchhandler-Raphael, Fear-Based Provocation 67 Am UL Rev 1719 (2018)

ARTICLE: FEAR-BASED PROVOCATION

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Highlight

Psychological research has long established that anger may result in aggressive acts, sometimes even fatal ones. Accordingly, the provocation defense provides that murder charges may be mitigated to voluntary manslaughter charges if evidence establishes that the defendant acted under the influence of a "sudden heat of passion" resulting from "adequate provocation." The modern rationale underlying provocation doctrine rests on the idea that a defendant's intense anger had resulted in loss of self-control, and therefore, he or she ought to be partially excused.

*Case law demonstrates, however, that defendants sometimes **kill** out of fear of physical violence threatened by the deceased. For example, persons who have endured long-term physical abuse by the deceased may **kill** their abusers out of fear of future violence--even if at the moment of the **killing**, the deceased was not posing an imminent threat to the defendant's life. In circumstances where defendants are unable to satisfy the requirements of self-defense, provocation might be the only viable defense that would mitigate a murder conviction to voluntary manslaughter. Yet, existing provocation doctrine is unfit to capture the distinct features characterizing the reaction of fearful defendants. Commonly perceived as an anger-centric defense, the defense's elements mostly accommodate the typical responses of defendants who acted quickly, immediately following a single and sudden triggering incident, and before any lapse of time allowed them to regain control.*

This Article offers three major contributions to challenge existing view of provocation: first, it considers psychological research that found that fear, similarly to anger, may also significantly interfere with individuals' decision making processes by disturbing rational judgment, therefore sometimes leading to lethal aggression. Second, drawing on this research, this Article argues that provocation doctrine should be reconstructed to also include a fear-based prong. Third, recognizing fear-based provocation calls for rejecting the loss of control paradigm that currently dominates judges' and jurors' perception of the defense. In its place, this Article advocates focusing on the fearful defendant's fear of violence threatened by the deceased that caused a significant impairment

in the defendant's thought processes, resulting in obscured judgment and reasoning. The reconstructed defense would also include an objective component, under which, the defendant would have to prove that a person of ordinary disposition would also experience such emotion and respond rashly without exercising reason and judgment.

Text

[*1721] INTRODUCTION

Psychological research has long established that anger may result in aggressive acts, sometimes even fatal ones. [1] Accordingly, the provocation defense provides that murder charges may be mitigated to voluntary manslaughter charges if evidence establishes that the defendant acted under the influence of a "sudden heat of passion" resulting from "adequate provocation." [2] While traditionally, the common law recognized only predefined categories as amounting to adequate provocation, most jurisdictions today have expanded the scope of their provocation defense, leaving the jury to determine whether the defendant acted in response to being adequately provoked by the deceased. [3] The defendant's reaction is now measured against an objective standard of reasonableness, as the defense requires that a reasonable person in the defendant's situation would have been similarly provoked. [4]

Presumed to be the main emotion to trigger provocation, anger also plays a key role in the rationale that undergirds the contemporary understanding of the defense--that is the notion of loss of self-control. This notion rests on acknowledging that the defendant experienced a sudden intense passionate emotion that resulted in undermined **[*1722]** capacity to control aggressive behavior. [5] The defendant's impairment in his or her ability to exercise control may warrant mitigated charges. [6]

Theorizing provocation as an anger-based defense aligns with the responses of defendants who "lost it" or "snapped," "lashing out" in sudden rage. The paradigmatic example of provocation envisions an ordinary ***male*** perpetrator who suddenly becomes enraged at his unfaithful or departing wife, resulting in his loss of control and in ***killing*** her before having a chance to regain control. [7] The image of provocation as ***male***-centric, anger-based defense looms large in the public's imagination, thus shaping juries' decisions about whether defendants' responses warrant sympathy and compassion. This perception of anger-based provocation plays a critical role not only in the

[1] *See* Nico H. Frijda et al., *Relations Among Emotion, Appraisal and Emotional Action Readiness*, 57 J. PERSONALITY & SOC. PSYCHOL. 212, 220 (1989) (finding that anger was associated with the desire to change the situation and to fight or harm others).

[2] *See infra* Part I.A.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* In this Article, I refer to this prevailing perception of provocation as anger-based provocation.

[7] *See, e.g.*, *Girouard v. State, 583 A.2d 718, 719-20 (Md. 1991)* (explaining that the defendant ***killed*** his wife after she verbally taunted him and announced that she was going to file for divorce). While the layperson's perception of the provoked man typically includes a sexually unfaithful wife, most cases where men ***kill*** their spouses involve victims who merely announced their plan to leave the relationship. See generally Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, *106 YALE L.J. 1331, 1352-53 (1997)* (noting that over one-quarter of cases that reached the jury where defendants claimed that they acted under extreme emotional disturbance involved victims who terminated the relationship).

theoretical underpinning of the defense, but also in constructing its elements; in many jurisdictions, for provocation to be adequate, the defendant must have reacted aggressively immediately following a sudden triggering event, before any lapse of time allowing the opportunity to cool off and regain self-control. [8]

While anger-based provocation dominates the way that courts and commentators conceive of the defense, anger is not the only intense emotion that might lead to fatal aggression. Defendants may ***kill*** out of fear engendered by their perception of danger, after the deceased's behavior had led them to believe that they faced a physical threat to their lives. [9]

The circumstances underlying fear-based provocation cases vary, generally falling under two categories. The first encompasses defendants who fell prey to prolonged physical abuse, including not only those ***battered*** by their intimate partners and children ***battered*** by their **[*1723]** parents, but also abused people outside the domestic violence context, such as those who were harassed by the deceased. Take, for example, a case where a seventeen-year-old youth shot and ***killed*** two brothers who had continuously harassed, stalked, and threatened him with a shotgun in the year preceding the shootings. [10] The second category consists of defendants who acted in response to fear of physical harm threatened by the deceased in typical ***male***-on-***male*** confrontations. For example, some cases involve drug deals gone sour or disputes over money, resulting in defendants' shooting and ***killing*** the deceased. [11]

In these circumstances, defendants typically claim self-defense, arguing that they reasonably feared for their lives. Yet the underlying circumstances often cast doubt on whether these killings satisfy the elements of self-defense. To be acquitted of homicide on self-defense grounds, the defendant must not be the initial aggressor and must have reasonably believed that the use of deadly force was *necessary* to protect against the aggressor's *imminent* use of deadly force. [12] In situations where the deceased was not presenting any imminent risk of death or serious bodily injury to the defendant, where use of deadly force was unnecessary because a safe retreat was possible, or where the defendant knowingly entered threatening circumstances, defendants would likely fail to meet the elements of self-defense. [13] In circumstances falling short of a right to self-defense, defendants' main grounds for mitigating

[8] See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 530 (7th ed. 2016) (discussing the four elements of the common law "adequate provocation" defense).

[9] In this Article, I use the terms "fear-based provocation" and "fearful killers" when referring to killings stemming from defendants' fear of the deceased.

[10] *Osby v. State, 939 S.W.2d 787, 788-89 (Tex. App. 1997); see infra* Part II.A.1.b for further discussion of the case.

[11] *See, e.g.*, *Blake v. State, 739 S.E.2d 319, 320-21 (Ga. 2013)* (detailing the dispute over a marijuana sale that lead to the shooting); State v. Levett, No. C-040537, 2006 WL 1191851, at *1-3 (Ohio Ct. App. May 5, 2006) (explaining that the defendant shot the deceased over a seventy five dollar debt). For further discussion of these cases, see *infra* Part II.B and Part IV.D.

[12] *See* DRESSLER, *supra* note 8, at 224.

[13] *See* Joshua Dressler, ***Battered Women*** *and Sleeping Abusers: Some Reflections*, *3 OHIO ST. J. CRIM. L. 457, 459-61 (2006)* (discussing *State v. Norman, 366 S.E.2d 586 (N.C. Ct. App. 1988)* (explaining why an abused defendant will likely fail to meet the elements of self-defense in non-confrontational killings involving a sleeping abuser).

murder charges to manslaughter charges rest on a provocation claim. [14] Yet relying on the provocation defense raises a **[*1724]** separate set of obstacles when defendants ***kill*** out of fear rather than out of anger. [15]

Courts and commentators sometimes recognize that the concept of "passion" is sufficiently capacious to encompass any violent, intense, high wrought, or enthusiastic emotion, which allows them to consider a range of emotions, including fear. [16] Yet, this is a minority position, and anger mostly remains the emotion that is typically claimed in provocation cases. [17] While other emotions may be considered, they are not separately conceptualized as an alternative basis for the provocation defense. [18] Instead, courts discuss fear extensively when examining the elements of self-defense. [19]

Fear and its implications, however, remain under-theorized in scholarly accounts of the provocation defense. Despite the fact that the provocation defense may sometimes be the only viable grounds for mitigating murder to manslaughter, existing law often does not offer a doctrinal basis for doing so, especially in situations where defendants acted not out of anger, but out of fear, and in circumstances falling **[*1725]** short of self-defense. [20] This lacuna is hardly surprising as the law often categorizes behaviors into binary classifications, treating them under separate doctrines. [21] Existing doctrines thus compartmentalize the emotions of anger and fear into their respective domains: while provocation is predicated on anger, self-defense rests on fear.

[14] *See* DRESSLER, *supra* note 8, at 530 (describing that, under common law, an intentional homicide may be reduced to a charge of voluntary manslaughter if the offense was committed "as the result of 'adequate provocation'"). In some jurisdictions, defendants might claim imperfect self-defense to reduce murder to voluntary manslaughter if they subjectively believed that use of deadly force was necessary. For discussion of the relationship between fear-based provocation and imperfect self-defense, see *infra* Part II.C.

[15] *See, e.g.*, Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 977 (2002) (challenging the call to abolish the provocation defense by observing that "provocation represents the only (or at least, best) partial defense to murder available to ***battered women*** who killer their abusers in many (perhaps most) jurisdictions" and noting that "[t]o abolish the defense is to deny some ***women*** (***battered*** or otherwise) the ability to claim a provocation defense" (footnote omitted)).

[16] *Id. at 971* (clarifying that mitigation requires an "event that results in the actor feeling rage or some similar overwrought emotion"); *see also* Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U.MICH. J.L. REFORM 143, 161 (observing that "under the traditional approach, provocation is effectively restricted to the passions of anger and fear").

[17] Pillsbury, *supra* note 16, at 161 (noting that the inquiry focuses on what a reasonable persons views as a provoking event).

[18] Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 328 (1996) (acknowledging and arguing against the generally accepted notion that emotions are immaterial to self-defense considerations).

[19] *See, e.g.*, *Brantley v. State, 91 N.E.3d 566, 573 (Ind. 2018)* (finding that "terror sufficient to establish the fear of death or great bodily harm" was sufficient to prove self-defense); CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 127 (2003) (stating that the traditional self-defense doctrine requires a belief that the person "is in imminent or immediate danger of unlawful bodily harm" from the deceased); *see also* Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597, 589 n.17 (2004) (reviewing CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003)) (observing that, "[w]hile anger is the most common emotional basis for the partial defense of provocation, fear of serious bodily harm or death is the emotion that justifies the complete defense of self-defense").

[20] *See* Lauri. J. Taylor, Comment, *Provoked Reason in Men and* ***Women****: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1715 (1986) (noting that the provocation doctrine is not necessarily available for ***battered women*** who are responding to past abuse rather than current imminent harm).

[21] *See, e.g.*, Susan Stefan, *Silencing the Different Voice: Competence, Feminist Theory and Law*, 47 U. MIAMI L. REV. 763, 792 (1993) (asserting that the law provides two rationales, "incompetence or lack of capacity" and "coercion or duress," for explaining an individual's inability to act autonomously).

This apparent theoretical dichotomy between anger and fear also carries practical implications. In many jurisdictions, courts conceive of self-defense and provocation as mutually exclusive claims. [22] Viewing anger as solely triggering provocation, whereas treating fear as solely triggering self-defense, courts often refuse to instruct the jury on voluntary manslaughter in cases where defendants ***killed*** out of fear rather than out of anger. [23] But even in jurisdictions where such instructions are given, juries' prevalent assumptions concerning the anger-based view of provocation undermine the likelihood that they would accept the defense's theory that the defendant was adequately provoked due to fear. [24] In addition, defendants who raise a fear-based provocation defense are likely to face significant hurdles, mostly due to the cooling off and suddenness requirements. [25] Existing provocation doctrine thus sometimes **[*1726]** proves too narrow, failing to offer a doctrinal basis for mitigation to defendants who reacted aggressively out of fear in response to the deceased's threatening violence. Cases involving defendants who ***kill*** due to genuine fear of violence, albeit falling short of self-defense, therefore call for developing a theoretical basis for recognizing such fear as an alternative basis for triggering the provocation defense.

This Article's key argument is that provocation doctrine should be reconstructed to recognize both anger and fear as qualifying triggers for the defense. Psychological research suggests that fear significantly interferes with individuals' thought processes by disturbing rational judgment and diminishing reasoning mechanisms. [26] Drawing on this line of research, this Article calls for adding a fear prong to the provocation defense in order to take into account fear as triggering certain killings, in situations where self-defense's elements cannot be established. The perpetrators' diminished reasoning and judgment due to fear warrant partially excusing them by mitigating their crimes from murder to manslaughter. Such mitigation acknowledges that the criminal culpability and moral blameworthiness of defendants who acted out of fear is diminished compared to defendants who coldly calculated a ***killing***.

In order to recognize fear-based provocation as a defense, judges and jurors must abandon their current focus on loss of control. Existing perception of anger-based provocation as grounded on a loss of control rationale has obscured the fact that the defense's elements are incompatible with some of the common reactions of fearful people, and most notably the fact that fear impairs thought processes, obscuring defendants' judgment and reasoning. Moreover, provocation's persistent requirements of a cooling off period and a sudden triggering incident prove especially problematic for fearful killers. Perpetrators may respond violently only after a lapse of time between the event or events that triggered the fear and the ***killing***. Furthermore, fearful killers sometimes act in response to the cumulative effect of several provoking incidents, rather than a single provocative event. This Article advocates for a

[22] *See infra* Part II.B (discussing the relationship between the two claims and the legal dependence theory).

[23] *See infra* Part II.A-B (discussing cases where courts refused to recognize defendant's fear as a basis for provocation).

[24] In Maine, the definition of provocation includes not only anger but also fear. *See* ME. REV. STAT. tit. 17-A, § 203(1) (2003) ("A person is guilty of manslaughter if that person: . . . (B) [i]ntentionally or knowingly causes the death of another human being . . . while under the influence of extreme anger or extreme fear brought about by adequate provocation."). In *State v. Hanaman*, the defendant claimed that he had stabbed his girlfriend after he had noticed her reaching out for a "shiny" object which he believed to be a knife, but the court rejected the defendant's argument for a provocation jury instruction because the record failed to show that he acted based on anger or "extreme" fear. *See* 38 A.3d 1278, 1281-84 (Me. 2012).

[25] *See* Pillsbury, *supra* note 16, at 166-67 (suggesting that current provocation law presents significant obstacles for victims of domestic abuse who ***kill*** their intimate partners following a "cooling off period"). It should be stressed, however, that this problem is not necessarily unique only to provocation claims which are based on fear. In jurisdictions that require "sudden" provocation, courts may also deny anger-based provocation claims based on the theory that there was no evidence showing a sudden triggering incident. *See, e.g.*, State v. Newell, No. 2004CA00027, 2004 WL 2676336, at *3 (Ohio Ct. App. 2004) (refusing to admit evidence of past incidents where the deceased physically abused the defendant on the grounds that the incidents were too distant in time from the shooting, and therefore the defendant had plenty of time to cool off).

[26] *See infra* Part III.A.

more expansive framework for provocation, which not only recognizes fear as triggering the defense, but also takes into account the psychological **[*1727]** findings about how fear affects perpetrators' actions and incorporates them into the defense's case.

The premise underlying this Article is that all human lives are of equal value, and abusers do not deserve less legal protection than abused defendants. While this Article strongly denounces any form of calculated violence, whether it be deliberate vigilantism or revenge ***killing***, it aims to identify a doctrinal basis for reducing murder to manslaughter in cases where mitigation--as opposed to complete acquittal--might be normatively warranted. In doing so, its goal is to launch a much-needed discussion on the interrelationship between the closely related emotions of anger and fear by considering the way they operate--sometimes jointly--to impair defendants' reasoning and judgment.

This Article proceeds as follows: Part I begins with an overview of current provocation law, demonstrating that the anger-based perception plays a central role under most formulations of the defense. It concludes by sketching the main scholarly attack on provocation, which mostly perceives the defense as sexist, misogynist and "anti-***women***." Responding to this feminist critique of provocation, Part II first considers additional stakeholders, other than angry men who ***killed*** their spouses, who may also rely on the defense. It identifies several categories of fearful killers, whose fear of physical harm by the deceased provoked them to ***kill***. It then examines the relationships between self-defense and provocation, explaining why courts often view the doctrines as mutually exclusive rather than supplementary bases for mitigation and also considers why the doctrine of imperfect self-defense often fails to provide grounds for mitigation. [27] It further elaborates on why these defenses ought to be viewed as non-conflicting and complementing one another. Part III develops the theoretical basis for recognizing fear-based provocation by considering psychological research on fear and the way it affects individuals' thought processes. It then demonstrates why existing elements of provocation are incompatible with the reactions and mental states of fearful killers. Part IV outlines the elements of fear-based provocation: a subjective prong, emphasizing the provoked defendant's state of mind, namely, fear that results in significant impairment in thought processes, and an objective prong, which measures a defendant's **[*1728]** emotional response against that of an ordinary person of average disposition and self-restraint. It addresses potential criticism of expansion of provocation to include fear and concludes with a test case, demonstrating how the proposed fear-based provocation would apply in a case where the defendant's conduct fell short of self-defense.

I. PROVOCATION AS AN ANGER-BASED DEFENSE

While states treat the provocation defense differently, the vast majority of jurisdictions adopted some version of the defense, which recognizes that emotions often affect defendants' criminal behavior. [28] The provocation defense acknowledges the role that intense emotions play in triggering aggressive acts by mitigating murder to voluntary manslaughter if the defendant was acting under the influence of a sudden heat of passion resulting from adequate provocation. [29] Commentators portray the defense as a concession to "the frailty of human nature," expressing

[27] Imperfect self-defense doctrine mitigates murder charges to voluntary manslaughter in circumstances where defendants subjectively but unreasonably believed that the use of deadly force was necessary. For further discussion of the elements of imperfect self-defense, see *infra* Part II.C.

[28] *See* Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1031 (2011) (noting that "some version of the provocation defense is part of the law in almost every U.S. state").

[29] *See* Dressler, *supra* note 15, at 959 n.5 (stating that "[p]rovocation law is all about emotions, most notably anger").

compassion towards defendants who ***killed*** while experiencing intense passionate emotions as a result of the deceased's wrongdoing. [30]

American jurisdictions today significantly vary in the formulations adopted for the provocation defense, making it difficult to draw accurate generalizations about the specific requirements necessary to prevail on the defense. [31] 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 (MPC's) alternative defense--extreme emotional disturbance (EED). [32] These defenses are outlined briefly below.

[*1729] *A. Provocation's Heat of Passion*

Under the common law's traditional provocation doctrine, the defendant must have ***killed*** the deceased while acting under the sudden influence of intense passion brought about by the deceased's adequate provocation. [33] The common law adopted a narrow view of the defense, under which only predetermined five categories of deceased's wrongdoing amounted to legally adequate provocation, including: "(1) an aggravated assault or battery; (2) mutual combat; (3) commission of a serious crime against a close relative of the defendant; (4) illegal arrest; and (5) observation of spousal adultery." [34] 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. [35] Furthermore, the adequacy of the provocation was mostly predicated on the deceased's perpetrating some illegal act against the defendant. The deceased's wrongdoing constituted the triggering incident for the defendant's acting under the influence of a sudden passionate emotion. [36] Such wrongdoing mostly consisted of some form of physical violence against the defendant or a family member, with the defendant's observing his wife's sexual infidelity being the only exception. [37]

Courts gradually abandoned this narrow position after they acknowledged that the rigid categories were too constraining. [38] 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. [39]

[30] *Maher v. People, 10 Mich. 212, 219 (1862)* (commenting that the law recognizes the difference between ***killing*** "under the influence of passion or in heat of blood . . . rather than of any wickedness of heart").

[31] *See* Stephen P. Garvey, *Passion's Puzzle*, *90 IOWA L. REV. 1677, 1691 (2005)* (observing that given the divergent views of the provocation defense, there is "no canonical definition" of the defense); *see also* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of Rationale*, *73 J. CRIM. L. & CRIMINOLOGY 421, 432-34 (1982)* (describing the inconsistent language courts use to describe provocation, as well as what constitutes "adequate" provocation).

[32] *See* 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)* (noting that the other forty jurisdictions currently use the modern test for provocation).

[33] *Dandova v. State, 72 P.3d 325, 332* (noting that at common law, emotion sufficient to claim self-defense must stem from adequate provocation).

[34] DRESSLER, *supra* note 8, at 531 (footnotes omitted).

[35] JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 46, 49 (1992) (explaining that theories point to men not only resenting an affront to their honor but also to retaliate).

[36] *Id.* at 51.

[37] *Id.* at 48.

[38] *See* Dressler, *supra* note 31, at 431 (acknowledging that a significant number of states have adopted the MPC's approach allowing the test to be more subjective).

[*1730] Today, courts may reduce a murder charge to voluntary manslaughter where the defendant committed an intentional homicide in a sudden heat of passion caused by adequate provocation, provided that the defendant did not have a reasonable opportunity to cool off and there was a causal link between the provocation and the homicide. [40] The key elements of the defense incorporate 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 defendant was reasonably provoked to react violently. [41] The reasonableness inquiry focuses on whether a reasonable person in the defendant's situation would have similarly been provoked into a heat of passion by the deceased's behavior and would not have cooled off in the interval of time between the provocation and the delivery of the fatal blow. [42]

The objective reasonableness inquiry measures the defendant's reaction against that of an ordinary person, with normal temperament and capacity for self-control. [43] An objective requirement for adequate provocation appears to reject a subjective approach; however, such objective inquiry is inherently subjectivized to incorporate some of the defendant's personal characteristics, such as physical traits like weight, height, and age. [44] This position may give a defendant a jury instruction on voluntary manslaughter in a variety of circumstances. [45] Most jurisdictions, however, exclude the defense in cases involving words alone, without the **[*1731]** deceased's additional provocative action, no matter how offensive or insulting these words might have been to the specific defendant. [46]

In addition, courts and commentators distinguish between two types of reasonableness. "Act reasonableness" refers to assessing the reasonableness of the defendant's act of ***killing***, essentially asking whether a hypothetical reasonable person in the defendant's shoes would have similarly ***killed***, whereas "emotion reasonableness" refers to evaluating whether the defendant's extreme passionate emotion was reasonable under the circumstances, essentially

[39] *Maher v. People, 10 Mich. 212, 220-22 (1862)* (finding that it is better to "let the evidence go to the jury under the proper instructions" because "the question of the reasonableness or adequacy of the provocation must depend upon the facts of each particular case"). While many courts adopted an open-ended approach to provocation, many jurisdictions continue to exclude "mere words" from the scope of provocation. *See* LEE, *supra* note 19, at 31-33. Additionally, in response to the critique that the provocation defense privileges ***male*** defendants, the "reasonable man" standard has evolved into the gender-neutral term "reasonable person." *See id.* at 26 (noting that "[t]he modern approach to provocation appears to establish general equality by giving men and ***women*** equal access to the defense").

[40] *See generally* DRESSLER, *supra* note 8, at 530.

[41] Berman & Farrell, *supra* note 28, at 1042.

[42] *See* WAYNE R. LAFAVE, CRIMINAL LAW 820 (5th ed. 2010) (defining provocation which would have cause a reasonable man to lose his normal self-control).

[43] *See* DRESSLER, *supra* note 8, at 532.

[44] *Id.* at 534.

[45] While the adequacy of the provocation is typically left to the jury to be determined by a reasonableness standard, a scholarly debate emerged on what factors may the reasonableness inquiry take into account. It remains ambiguous what precisely juries may consider when they are instructed to evaluate the defendant's reaction to a provocative incident according to the ordinary person "in the actor's situation" and what "the actor's situation" includes. *See* DRESSLER, *supra* note 8, at 534-35 (noting that "there is a movement . . . to include at least some of the defendant's personal characteristics and life experiences in the 'ordinary/reasonable person' standard"). For a collection of some of the different positions on the reasonableness requirement in provocation law, see Cynthia Lee, *Reasonable Provocation and Self-Defense: Recognizing the Distinction Between Act Reasonableness and Emotion Reasonableness, in* CRIMINAL LAW CONVERSATIONS 426-34 (Paul H. Robinson et al. eds., 2009).

[46] *See, e.g.*, *Girouard v. State, 583 A.2d 718, 722 (Md. 1991)* (holding that taunts were not sufficient to establish adequate provocation). Even threatening words ordinarily are not regarded in themselves adequate provocation, unless they are accompanied by conduct indicating a present intention and ability to cause physical harm, they might amount to adequate provocation. *See, e.g.*, *Wood v. State, 81 A.3d 427, 438 (Md. 2013)* (explaining that although the court recognized the provocation, it was not adequate to be regarded as adequate provocation).

asking whether a reasonable person would be likely to act rashly after experiencing such intense emotion. [47] While in some jurisdictions, juries are instructed to assess a defendant's "act reasonableness," in others, juries are instructed to evaluate "emotion reasonableness." [48]

[*1732] *B. Extreme Emotional Disturbance*

While the scope of the provocation defense has expanded over the years, several of its defining elements continue to pose significant difficulties for defendants trying to rely on it. These obstacles are primarily the provocation's cooling off requirement and the requirement that the provoking incident be sudden. Heeding calls to reform provocation doctrine, the MPC proposed a much broader version of the defense: the extreme mental and emotional disturbance (EMED).

EMED 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." [49] 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. [50]

Courts r that satisfying the subjective component of EED requires a wholly subjective jury "determination that the . . . defendant did in fact act under [EED], [and] that the claimed explanation as to the cause of [the] action is not contrived or sham." [51] Courts stress, however, the additional objective component of the defense by clarifying that there has to be a "reasonable explanation or excuse for [the] emotional disturbance," rather than an excuse or explanation for the ***killing*** itself. [52] Courts further note that even though the reasonableness of the explanation or

[47] *See* LEE, *supra* note 19, at 269-70 (demonstrating difference between act reasonableness and emotional reasonableness by examining a case where a jury rejected a self-defense claim because it found that the defendant's action was not reasonable); *see also* Terry Maroney, *Differentiating Cognitive and Volitional Aspects of Emotion in Self-defense and Provocation, in* CRIMINAL LAW CONVERSATIONS 436-37 (Paul H. Robinson et al. eds., 2009) (suggesting that, rather than importing an act reasonableness requirement into provocation doctrine, the law should broaden the inquiry into emotion-reasonableness by further dividing the concept of emotion-reasonableness into its cognitive and volitional aspects); Jeremy Horder, *Different Ways to Manifest Reasonableness, in* CRIMINAL LAW CONVERSATIONS 440-41 (Paul H. Robinson et al. eds., 2009) (arguing that Lee's view regarding the act/emotion reasonableness does not "track the distinction between justification and excuse" and that requiring the jury to consider the reasonableness of the act is problematic given the fact now provocation may also cover insulting words alone).

[48] *Compare*, *Dennis v. State, 661 A. 2d 175, 179 (Md. Ct. Spec. App. 1995)* (describing the objective "reasonable man" test, which "requires that the provocation shall be such as might naturally induce such a man, in the anger of the moment, to commit the deed"), *with* *People v. Beltran, 301 P.3d 1120, 1133, 1136 (Cal. 2013)* (rejecting the state's theory that the jury should assess the reasonableness of defendant's act of ***killing*** and holding instead that California's provocation law requires "emotional reasonableness," namely adequate provocation is demonstrated when a reasonable person would have been provoked to act rashly if experiencing the extreme passionate emotion).

[49] *See* Model Penal Code § 210.3(1)(b) (1985).

[50] *See* Robinson, *supra* note 32, at 25 (listing Hawaii, Montana, Nevada and New Hampshire as states that use EMED; Arkansas, Connecticut, Delaware, Kentucky, New York, North Dakota, Oregon and Utah as states that use EED; and, DC and the remaining 38 states as jurisdictions that use common law provocation).

[51] *People v. Casassa, 404 N.E.2d 1310, 1316 (N.Y. 1980).*

[52] *Id. at 1316; see also* *Smith v. Perez, 722 F. Supp. 2d 356, 369-70 (W.D.N.Y. 2010)* (explaining the elements of the EED defense, which include a reasonable excuse for the defendant's lack of self-control).

excuse is "determined from the viewpoint of a person in the [actor's] situation under the circumstances as the [actor] believed them to be," the essence of the inquiry remains objective. [53]

[*1733] EED significantly differs from the provocation defense as it removes some of the key limitations that characterize provocation. [54] First, it eliminates the requirement for adequate provocation, namely, to prevail on the EED defense, the defendant does not need to prove that he or she was provoked by the deceased's triggering wrongful act, as long as the defendant was acting under an EED for which there was a reasonable explanation. [55] Put differently, the state of emotional disturbance does not hinge on some specific wrongdoing perpetrated by the deceased against the defendant. 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. [56] Furthermore, EED rejects provocation's suddenness requirement, recognizing the cumulative effect of a series of incidents that slowly accumulated, culminating in the homicide. [57] Finally, unlike common law provocation, words alone, unaccompanied by any action, may also lead a defendant to experience emotional disturbance. [58]

The remainder of this Article focuses on common law-based provocation jurisdictions as opposed to EED defense jurisdictions for two reasons. First, the provocation defense has proven to be resilient to change, resulting in the adoption of the EED defense only in a minority of jurisdictions. [59] Second, in jurisdictions that have adopted the EED formulation, the defense is sufficiently expansive to recognize a broader spectrum of emotional impairments, including those based on fear. In contrast, in common law-based provocation jurisdictions, voluntary manslaughter provisions pose significant challenges to defendants who wish to claim that they were provoked to ***kill*** out of fear rather than out of anger, as Part II elaborates.

[*1734] *C. Provocation's Critique*

The perception of the enraged man who ***killed*** his wife upon witnessing her sexual unfaithfulness, continues to dominate the widespread image of the provocation defense. This popular account has resulted in extensive criticism

[53] *Casassa, 404 N.E.2d at 1315-16* (quoting *N.Y. PENAL LAW § 125.25(A)(1)(a)* (McKinney 2006)).

[54] *See* DRESSLER, *supra* note 8, at 720 (comparing heat of passion to EED).

[55] *Id.* at 721 (noting that a specific provocative act is not required to trigger the defense).

[56] *Id.*

[57] *See* Forell, *supra* note 19, at 604-05 (supporting the elimination of the cooling off requirement because extreme emotion may develop over time).

[58] *See, e.g.*, Dressler, *supra* note 31, at 423-25 n.22 (noting that rage may result primarily from "mental peculiarity," even when there is no physical provocation).

[59] *See* Berman & Farrell, *supra* note 28, at 1039-40 (noting that the common law's version of provocation remains intact even in many jurisdictions that adopted modern criminal codes, yet they continued to embrace some formulation of traditional provocation).

launched against the defense. [60] The provocation defense has been subject to what Professor Dressler calls a massive scholarly "attack," [61] igniting numerous debates and filling voluminous law review articles. [62]

Expanding the scope of provocation to cover a myriad of circumstances allegedly triggering loss of control has led scholars to argue that the provocation defense is overbroad and vague, as its elements are too loosely construed, allowing defendants to raise it in a host of what commentators view as inappropriate cases that do not warrant mitigation. [63] One well-debated critique--collectively referred to by Professor Aya Gruber as "the feminist critique" [64] --is directly relevant to understanding why, despite various expansions in some aspects of the provocation defense, courts and commentators remain reluctant to enlarge other aspects of the **[*1735]** defense, refusing to extend it to also recognize defendant's fear of violence as a triggering incident for provocation.

The "feminist critique," namely, gender-based objections to the provocation defense and its negative impact on ***women***, laments that it is a ***male***-centered defense, which is not only deeply gendered but is also "anti-***women***." [65] The defense, the argument continues, rests on sexist and gender-biased norms, perpetuating archaic masculinity perceptions, which operate to privilege violent men to the disadvantage of abused ***women***. [66] Those opposing the current construction of the provocation defense stress that the defense unjustifiably provides mitigation to controlling men who ***killed*** their female intimate partners not upon catching them cheating, but instead, after learning that they wished to end the abusive relationship. [67]

Professor Victoria Nourse has launched powerful arguments against the expansive scope of the provocation doctrine. [68] Based on extensive empirical research, Nourse concluded that the doctrine disadvantages ***women*** because it unjustifiably gives men who ***killed*** their departing wives in an emotional outburst of jealous rage self-

[60] For some examples of scholarly critique of the defense, see, e.g., Donna K. Coker, *Heat of Passion and Wife* ***Killing****: Men Who* ***Batter****/Men Who* ***Kill***, 2 S. CAL. REV. L. &***WOMEN***'S STUD. 71, 91-93 (1992) (criticizing the use of the provocation defense by ***batters***); HORDER, *supra* note 35, at 49 (questioning the retribution-based justification for crimes committed in response to any "loss to the cuckhold"); Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 221-22 (2005) (hypothesizing that "the odds are good that many people have discovered their spouses to be committing adultery and yet refrained from ***killing*** them").

[61] Dressler, *supra* note 15, at 960-61 ("Heat-of-passion law has been the subject of ethical, and most especially, feminist attack.").

[62] *See, e.g.*, Nourse, *supra* note 7, at 1332, 1394 (discussing modern critiques of the provocation defense, including its disadvantages on ***women***); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1332 (2001) (arguing that society has long since abandoned the gender norms undergirding the provocation defense); Rozelle, *supra* note 60, at 197-98 (criticizing adultery-based provocation as resulting from "fundamental misunderstandings" of passion and the nature of the defense); Coker, *supra* note 60, at 91 (1992) (denouncing "classic" heat of passion stories).

[63] *See, e.g.*, LEE, *supra* note 19, at 1-6 (describing inappropriate uses of the provocation defense, which mainly fall under three categories: cases involving jealous men who ***killed*** their sexually unfaithful or departing spouses, cases involving men who ***killed*** homosexual men for making sexual advances (commonly referred to as "gay panic" cases), and cases involving claims of self-defense by white defendants who ***killed*** black individuals due to racialized fear).

[64] *See* Aya Gruber, *A Provocative Defense*, 103 CAL. L. REV. 273, 276 n.16 (2015) (defining the "feminist critique" broadly as "all gender-based objections to the provocation defense and not just those lodged by self-described feminists or otherwise connected to a specific feminist theory").

[65] *Id.* (pointing out the law's tendency to disadvantage ***women***).

[66] *Id.*

[67] *See* Nourse, *supra* note 62, at 1342-45 (emphasizing that "between forty-five and fifty-sex percent of all intimate homicides men commit involve some element of separation" (footnotes omitted)).

[68] *See generally id.* at 1331-32.

described as a "heat of passion response," a jury instruction on voluntary manslaughter. [69] By recognizing provocation, Nourse continued, the law encourages abused ***women*** to remain in abusive relationships because their acts of departure supply controlling men with a possible basis for the law's compassion. [70]

Furthermore, a critical component of the feminist critique concerns provocation law's emphasis on the loss of control rationale. [71] Adherence to the loss of control rationale, Nourse argued, obscures normative questions about which types of losses of control warrant mitigation and which do not. Nourse proposed limiting the provocation defense by recognizing only a "warranted excuse," namely, that a ***killing*** may be partially excused only if the defendant's emotional reaction to the deceased's wrongdoing is warranted, which is measured against the wrongfulness of the deceased's behavior. [72] Defendants should only be **[*1736]** able to rely on provocation if they responded to an unlawful act that the law independently punishes. [73]

Thanks in large part to the feminist critique, many scholars find inherent flaws in the provocation doctrine. [74] Pitted against the conventional wisdom that the provocation defense mostly provides violent angry men an unjustifiable basis for reducing murder to manslaughter, a proposal to further expand existing provocation doctrine might seem like swimming against the current.

Feminist scholars' arguments against the defense, however, focus on the assumption that it mostly serves to benefit angry men who ***killed*** their departing spouses in an emotional outburst. [75] But the scholarly emphasis on the angry ***male*** defendant claiming loss of control is single dimensional, resulting in general animosity towards the defense and in reluctance to consider any further expansion in its scope. [76] One of the implications of the pervasiveness of the feminist critique is that it has obfuscated a holistic evaluation of the doctrine, including its potential to provide mitigation to additional classes of defendants in other contexts beyond cases of abusive men who have ***killed*** their abused spouses. By mostly focusing on the implications of provocation on these cases, commentators neglect to consider a host of additional circumstances, over and above the domestic violence context, that might give rise to the provocation defense. [77]

[69] *Id.* at 1332-33.

[70] *Id.* at 1334.

[71] *Id.* at 1333, 1369-70.

[72] *Id.* at 1394.

[73] *Id.* at 1396 (noting that this view would exclude the defense in cases where defendants angrily reacted to 'defendants' lawful and blameless acts, such as breaking up, because these defendants' emotions cannot be regarded as normatively warranted).

[74] *See* Gruber, *supra* note 64, at 276-77 (offering arguments to counter this scholarly agreement and noting that the critique has proven so powerful that most criminal law casebooks now mention it immediately after introducing the defense).

[75] *See id.* at 287.

[76] I am nowhere suggesting that feminist scholars are behind provocation law's failure to also include a fear-based prong as part of the "heat of passion" defense. Most feminist scholars, however, argue that ***battered women*** who ***killed*** their abusive spouses even while they were sleeping or otherwise not presenting an imminent deadly threat, ought to be fully acquitted based on self-defense, rather than partially excused based on provocation. Yet, it is unlikely that feminist scholars would object to female defendants raising fear-based provocation after ***killing*** their abusive spouses. Rather than implying that feminists might object to defendants' reliance on fear-based provocation, I suggest here that the prevalent view that the provocation defense disadvantages ***women*** explains the general reluctance to advocate further broadening of the defense, in a way that would also allow fearful but violent ***male*** defendants to assert provocation.

[77] *E.g.*, Gruber, *supra* note 64, at 313-14 (observing that the feminist critique of provocation does not consider ***women*** who ***kill*** in the heat of passion and successfully assert the defense).

[*1737] The prevalent hostility towards provocation often results in the defense proving too narrow for many defendants, precluding mitigation where it might be warranted. The current provocation defense fails to account for the narratives of defendants whose fear of the deceased's violence triggered their killings, but in circumstances falling short of self-defense. [78] Further, critics' assumptions that provocation is inherently "anti-***women***" has hindered doctrinal developments that would expand the defense to include a fear-based prong in a way that might benefit additional classes of fearful killers. These include not only female perpetrators who were subjected to continuous intimate partner ***battering***, but also perpetrators in typical ***male***-on-***male*** confrontations. Part II identifies additional categories of fearful killers who might benefit from recognizing a more expansive interpretation of fear-based provocation.

II. PROVOCATION'S ADDITIONAL STAKEHOLDERS

In order to fully capture provocation's impact on different groups of marginalized defendants, courts and commentators must look beyond anger and gender. In a provocative article, which is not only the latest major contribution to the academic discussion of the provocation defense but also one of the few exceptions to the scholarly attack on the defense, Professor Aya Gruber defends the doctrine by offering counterarguments to the main claims that have been launched against it. [79] Gruber contends that narrowing provocation to exclude men who ***killed*** their spouses from its scope might also affect different classes of defendants, including ***women***. [80] While she concedes that provocation might be successfully used by violent ***male*** killers, she recognizes this possible outcome as a cost of having such a defense. [81] She further argues that contrary to prevalent assumptions, empirical evidence undermines, rather than supports, the assertion that provocation's primary function is to under-punishmen whomurder ***women***. [82] Moreover, **[*1738]** she asserts that such evidence also undermines the assumption that provocation necessarily disproportionally burdens ***women*** by discriminating against them because female defendants are more successful at claiming provocation compared to ***male*** defendants. [83] Gruber stresses that since ***women*** often endure ***male*** violence, but other times are perpetrators of violence against their abusive spouses, it is "futil[e] . . . to make a generalist discrimination case against provocation" because sometimes provocation law favors a man, but other times it favors a ***woman***. [84] Gruber also urges to look beyond the gender-based aspects of provocation by acknowledging that it potentially provides a basis for mitigation and mercy to marginalized defendants in a regime of overly punitive policies and mass incarceration. [85]

[78] These cases often also fail to establish an imperfect self-defense claim, in those jurisdictions that recognize such a partial defense. For further discussion of imperfect self-defense, see Part II.C.

[79] *See* Gruber, *supra* note 64, at 313-14.

[80] *Id.* at 332 (asserting that "[t]he defense does not necessarily burden ***women*** unfairly nor does it particularly privilege sexist men").

[81] *Id.* at 311-12 (addressing the costs and benefits of recognizing a broad provocation defense).

[82] *Id.* at 307-12 (emphasizing that ***male***-on-female intimate killings comprise only ten percent of all homicides and that young men of color or more likely to be harmed by a limitation or elimination of provocation).

[83] *Id.* at 313-16.

[84] *Id.* at 319.

[85] *See id.* at 331-32 (emphasizing that "the call for greater penal severity in the wake of crimes against ***women*** may have a greater connection to mass incarceration than provocation critics realize"); *see also* Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 149-55 (2014) (examining multiple reform proposals and concluding that "[m]urder apparently marks the dividing line where . . . anxiety over the criminal system's treatment of marginalized defendants gives way to preoccupation with marginalized victims' rights to retribution").

The key argument that this Article makes in the following sections draws on Gruber's observation that the provocation defense carries important value to defendants in varied contexts, over and above the paradigmatic scenario of the abusive man ***killing*** his spouse. While Gruber's work focuses on defending existing provocation doctrine against critique, it neither proposes further expansions to the doctrine, nor does it consider the specific implications of the doctrine for fearful killers. Further, Gruber's scholarship does not suggest that fear should be recognized as an additional and distinct trigger for the provocation defense. This Article aims to pick up the argument where Gruber left off, by proposing that courts expand the provocation defense to include a fear-based prong to complement the commonly recognized element of anger. It begins with identifying fearful killers as provocation defense's additional stakeholders by considering cases where defendants ***killed*** others out of fear of physical violence.

A. Fearful Killers

The image of the angry ***male*** killer not only pervades legal scholarship, with its emphasis on the gendered-based implications of the provocation defense, but it also dominates jurors' perception of **[*1739]** provocation. [86] Case law, however, suggests that this prevalent narrative is not only partial but also inaccurate, as defendants request a jury instruction on voluntary manslaughter in a myriad of circumstances, not only in cases involving angry ***male*** defendants who ***kill*** their departing spouses. [87] Recognizing a host of circumstances that might give rise to the provocation defense, including when female defendants ***kill*** their abusive intimate partners, offers counterarguments to the feminist critique that the defense necessarily harms ***women*** and mostly benefits violent men.

One clarification is warranted here. Accurate empirical evidence regarding the actual number of cases involving defendants who ***killed*** out of fear of violence is lacking. [88] Like the vast majority of criminal trials, many of these cases resolve in plea agreements; therefore, data on cases in which a voluntary manslaughter instruction was sought, and particularly on whether it was based on a fear-based claim or an anger-based claim, is limited. [89] The ubiquity of plea bargaining creates a host of problems, among them, the absence of abused people's narratives in the criminal justice system. This problem is particularly exacerbated in cases involving defendants' background circumstances of long-term abuse, raising a concern that the widespread practice disadvantages ***battered*** defendants who ***kill*** their abusers. [90] Further, in many of these cases, there are no juries who will hear testimonies concerning the gruesome details of the defendants' physical abuse. The result is that the legal community and the public are deprived of the opportunity to **[*1740]** fully understand why some abused defendants' fear of their abusers led them to use lethal violence even when there was no imminent threat of harm present at the time of the ***killing***.

[86] *See* Berman & Farrell, *supra* note 28, at 1037 (explaining that historically, anger was the sole emotion underlying the provocation defense, with other emotions explicitly rejected). Anger and rage were perceived as the righteous response of a man whose honor, judged by masculine norms, had been wrongly violated by the provoking actor, or in other words, "[a] gravely affronted man was justified in responding physically and angrily." *Id.*

[87] *See* Gruber, *supra* note 85, at 186 n.299 (providing a collection of cases in which defendants sought voluntary manslaughter instructions outside of the domestic violence context).

[88] *See* Steven J. Sherman & Joseph L. Hoffman, *The Psychology and Law of Voluntary Manslaughter: What Can Psychology Research Teach Us About the "Heat of Passion" Defense?*, 20 J. BEHAV. DECISION MAKING & L. 499, 512 (2007) (noting the absence of data regarding voluntary manslaughter cases).

[89] *See* Gruber, *supra* note 85, at 175 (noting that precise statistics regarding the provocation defense are hard to find).

[90] *See* Peter Margulies, ***Battered*** *Bargaining: Domestic Violence and Plea Negotiations in the Criminal Justice System*, *11 S. CAL. REV. L. & **WOMEN**'S STUD. 153, 155 (2001)* (arguing that "the current plea bargaining system forces survivor-defendants to accept inequitable consequences").

The following subsections identify two classes of fearful killers who might benefit from recognizing fear-based provocation: abused defendants who ***kill*** their abusers, both in and out of the domestic violence context and ***male***-on-***male*** confrontational encounters.

*1. Abused people who **kill** their abusers*

Cases involving abused defendants who ***kill*** their abusers, often following long-term abuse, do not accurately map into the criminal justice system's categorical rubrics of a culpable defendant and a blameless victim. [91] These cases are more nuanced than this familiar dichotomy; abused killers are not only criminal defendants who have ***killed*** others but are also themselves victims of the deceased's physical violence. Similarly, the deceased individuals are not only homicide victims, but are also physical abusers who abused the defendants often over a prolonged period of time. This category is further subdivided into cases involving domestically abused defendants, namely victims of intimate partner ***battering*** and children ***battered*** by their parents, as well as defendants who were subjected to physical abuse by non-intimate partners, including victims of stalking, harassment, and bullying.

*a. Intimate partner **battering** and **battered** children*

After enduring long-term periods of physical, emotional, and psychological abuse, abused people sometimes ***kill*** their abusive intimate partners. [92] Studies have long found that the rate of ***women*** who ***kill*** is lower compared to men, [93] but when they do so, they often **[*1741]** ***kill*** abusive ***male*** partners in response to repeated physical abuse. [94] While initially, the law focused exclusively on ***women*** as victims of intimate partner ***battering***, societal perceptions have shifted to recognize that even though victims of domestic violence are still predominantly ***women***, some men may also be victims of such abuse. [95]

Case law demonstrates that victims of domestic violence sometimes ***kill*** their abusive partners out of fear of future violence, convinced that their lives are endangered. [96] Defendants who have suffered domestic abuse typically

[91] *See* Mark A. Drumbl, *Victims Who Victimise*, 4 LONDON REV. INT'L L. 217, 218 (2016) (acknowledging that some victims might be "imperfect" and some killers might be "tragic," blurring criminal law's binary categorization that classifies victims as "pure" and killers as "ugly").

[92] *See generally* Kit Kinports, *Defending **Battered Women**'s Self-Defense Claims*, 67 OR. L. REV. 393, 393-94 (1988) (drawing a link between ***women*** who suffer domestic abuse and ***women*** charged with murdering their husbands); Coker, *supra* note 60, at 73-74 (highlighting the increasing prevalence of cases involving abused ***women*** who murder their abusive husbands).

[93] Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27, 34 (2006); *see also* ELIZABETH SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 470 (3d ed. 2013) (noting that today relatively few ***women*** actually ***kill*** their abusers and the number of ***males killed*** by their female intimate partners has declined 75% from 1976-2005). This decline is attributed to "access to shelters and other resources, increased police intervention, more aggressive prosecutions and the availability of civil restraining orders," which give abuse victims more options than resorting to homicide. *Id.*

[94] *See* LEE, *supra* note 19, at 27 (stating that "most ***women*** who ***kill*** their ***male*** partners do so after suffering tremendous physical and psychological abuse").

[95] *See* Jamie R. Abrams, *The Feminist Case for Acknowledging **Women**'s Acts of Violence*, 27 YALE J.L. & FEMINISM 287, 289 (2016) (noting the importance of acknowledging ***males*** as potential victims of domestic violence); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on **Woman**-Abuse*, 67 N.Y.U. L. REV. 520, 542-43 (1992) (discussing the lack of scholarship regarding domestic violence in lesbian and gay relationships, which occurs at approximately the same rates as it does in heterosexual relationships).

[96] *See, e.g.*, People v. Humphrey, 921 P.2d 1, 3 (Cal. 1996) (describing that the defendant's abusive husband threatened to ***kill*** her and shot at her the day before she ***killed*** him); State v. Norman, 378 S.E.2d 8, 9-11 (N.C. 1989) (detailing the defendant's history of abuse at the hands of the victim and her testimony that she believed "he would ***kill*** [her] if he got a chance").

raise a self-defense claim when they are prosecuted for homicide, arguing that they subjectively believed that the deceased threatened them with deadly force. [97]

Beginning in the mid--1980s, following Dr. Lenore Walker's landmark psychological research, courts began to allow parties to introduce into evidence testimonies of physically abused ***women*** regarding their subjective perception of the immanency and necessity of using deadly force against their abusive partners. [98] Walker coined the term "***battered woman***'s syndrome" to explain why many physically abused ***women*** do not leave their abusive partners despite the continuous cycle of ***battering***. [99] Walker's research identified a cluster of features that characterize abused ***women***'s responses to ***battering***, including deep concern that leaving their partners might result in more ***battering*** and **[*1742]** becoming trapped by their own fear, which plagues them, leaving them prey to a psychological paralysis that hinders their ability to break free or seek help. [100] Courts have accepted this line of research for the purpose of understanding the key role that subjective fear of future abuse plays in shaping the typical response of ***battered women***. [101]

Much scholarship has been written on ***battered*** spouses who ***killed*** their abusers out of fear, in what they subjectively believed to be a defensive strike. [102] The vast majority of this scholarship considers the legal obstacles facing ***battered*** defendants who ***killed*** their abusers when trying to establish that these defendants acted in self-defense. [103] Self-defense's restrictive elements pose significant challenges for such defendants. First, the crux of self-defense lies with proving the objective reasonableness of the defendant's belief that the use of lethal force was both necessary and imminent. [104] This depends on the extent to which the objective inquiry is subjectivized to recognize the defendant's own unique personal experiences as a ***battered*** spouse. [105]

Additionally, the "temporal proximity" between the deceased's threat of violence and the abused defendant's use of deadly force presents a significant hurdle, with courts requiring the threat to be imminent or immediate. [106] The most difficult cases involve defendants who ***kill*** their abusers when they were not presenting any imminent threat at

[97] *See* Forell, *supra* note 93, at 28-29 (noting that ***women*** who ***kill*** their abusive spouses often raise a provocation defense); *see also* SCHNEIDER ET AL., *supra* note 93, at 473.

[98] *See* State v. Kelly, 478 A.2d 364, 368, 371-77 (N.J. 1984) (acknowledging Dr. Walker's research in holding that expert testimony regarding ***battered woman***'s syndrome is admissible in court).

[99] *See* id. at 371-72 (discussing Dr. Walker's research regarding the cyclical nature of abuse).

[100] Id. at 372. Other features include "low self-esteem, traditional beliefs about the home, the family, and the female sex role, tremendous feelings of guilt that their marriages are failing, and the tendency to accept responsibility for the batterer's actions." *Id.*

[101] *See id.* (describing how ***battered women*** can feel trapped by their abusers, leading to a subjective fear that their abusers present an imminent threat).

[102] *See, e.g.*, Dressler, *supra* note 13, at 461, 463; *see also* Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused* ***Woman*** *and a Sleeping Man*, 16 BUFF. ***WOMEN***'S L.J. 65, 82 (2008) (observing that fear is the primary emotion experienced by ***battered women*** who ***killed*** their sleeping abusers).

[103] *See generally* ELIZABETH M. SCHNEIDER, ***BATTERED WOMEN*** AND FEMINIST LAWMAKING 117 (2000) (explaining that "[i]t is now generally recognized that ***women*** defendants face substantial hurdles in pleading self-defense" because it is difficult for them to satisfy the legal requirements of self-defense claims).

[104] *Id.* (examining the elements of self-defense and discussing the difficulties with asserting such a defense).

[105] *See* id. at 139 (noting that a subjective reasonableness standard contemplates reasonableness from the ***battered woman***'s mindset).

[106] *See* Holly Maguigan, ***Battered Women*** *and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PENN. L. REV. 379, 414 (1991) (highlighting the distinction between past abuse and an instant threat).

[*1743] the time of the ***killing***. [107] One example includes defendants who ***kill*** abusers who were sleeping. [108] In those non-confrontational killings, or killings done during a lull in the violence, establishing self-defense's elements is especially challenging. [109] Arguably, in view of their prior abuse, these ***battered*** individuals have a reason to fear renewed violence in the near future, even in circumstances where the threat of deadly force against them was not imminent. Yet, defendants claiming self-defense in these situations typically fail because decision makers find that the threat of using deadly force was not of an imminent nature. [110]

Moreover, the proportionality between the violence threatened and the violence used in self-defense raises a specific problem for abused ***women***, as a key question becomes whether their smaller stature permits them to use a weapon when it would not be appropriate for a man to use one in similar circumstances. [111] A final obstacle concerns the retreat requirement, which some jurisdictions incorporate in their self-defense statutes; while there is no requirement that a co-occupant retreat from her home, judges and juries may confuse the question of whether the defendant had a duty to retreat with the question of why she did not leave the abuser, blaming her for putting herself in the way of violence. [112]

[*1744] Given the difficulties of establishing self-defense's elements where abused people ***kill*** their abusive partners out of fear of future violence but in non-confrontational circumstances, the provocation defense often remains the only doctrinal basis for potentially mitigating murder charges to voluntary manslaughter charges. [113] Yet, establishing the provocation defense presents its own challenges because existing provocation's elements are

[107] *See* Kimberly Kessler Ferzan, *Defending Imminence: From* ***Battered Women*** *to Iraq*, 47 ARIZ. L. REV. 213, 232 n.101 (2004) (listing cases where defendants ***killed*** their abusive spouses in self-defense when they were not currently being abused at the time of the ***killing***); *see also* Jane Campbell Moriarty, *"While Dangers Gather": The Bush Preemption Doctrine,* ***Battered Women****, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (2005) (criticizing courts for not allowing self-defense claims when abused defendants do not "fit precisely within a traditional self-defense posture" because there was no imminent threat at the time of the ***killing***).

[108] State v. Norman, 378 S.E.2d 8, 12-13 (N.C. 1989) (holding that a defendant who ***killed*** her abusive husband while he was sleeping was not entitled to a self-defense jury instruction because she did not introduce evidence to demonstrate that she believed deadly force was necessary to protect her from imminent harm).

[109] *See* Dressler, *supra* note 13, at 457-58 (discussing efforts by domestic violence advocates to persuade courts to recognize self-defense claims in cases of non-confrontational killings).

[110] In non-confrontational ***killing*** cases, courts are reluctant to admit expert evidence on ***battering*** and its effects on the abused defendants. *See, e.g.*, Commonwealth v. Everett, No. 2046 WDA 2014, 2016 WL 1615523, at *15-17 (Pa. Super Ct. Apr. 21, 2016) (declining to admit expert testimony of abuse on the basis of ***battered woman***'s syndrome or PTSD); Commonwealth v. Grove, 526 A.2d 369, 371-72 (Pa. Super. Ct. 1987) (holding that it was not an error to exclude evidence of a twenty-two-year history of abuse when the wife ***killed*** her drunk and sleeping husband).

[111] *See, e.g.*, State v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977) (en banc) (recognizing differences in size and strength as relevant to self-defense's elements).

[112] *See* Nourse, *supra* note 62, at 1236-38 (discussing self-defense's imminence requirement and finding that, in cases involving ***battered women***, courts confuse the proper question of the imminence of the threat with the improper question of why the defendant remained in an abusive relationship, thus creating a retreat rule).

[113] *See* Caroline Forell, *Domestic Homicides: The Continuing Search for Justice*, 25 AM. U. J. GENDER SOC. POL'Y & L. 1, 6 (2017) (noting that "[p]eople who ***kill*** their batterers are particularly deserving of a choice other than acquittal or murder"). Some jurisdictions allow an imperfect self-defense claim, mitigating murder charges to manslaughter if the use of deadly force was not objectively necessary or was excessive. For further discussion of imperfect self-defense as an alternative to fear-based provocation, see Part II.C. In addition, in jurisdictions with penal codes influenced by the MPC, the defendant may also claim that she ***killed*** her abuser under duress as these codes do not preclude the defense of duress in murder cases. *See* Dressler, *supra* note 13, at 470 (suggesting that abused defendants who ***kill*** their sleeping abusers may raise duress as a defense in non-confrontational killings to bypass the imminence requirement in select states influenced by the MPC).

mostly unfit to capture the typical responses of abused people who feared physical violence at the hands of their abusers. Defendants 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. [114] Further, provocation's requirement that the provoking incident be "sudden" also poses difficulties for these abused defendants because many jurisdictions do not recognize the cumulative effect of a series of triggering events that slowly build up over a prolonged period of time. [115]

[*1745] The recent Ohio decision in *State v. Goff* [116] illustrates the shortcomings of the use of the provocation defense by a defendant who ***killed*** her abusive husband out of fear of physical harm but in circumstances that fell short of self-defense. [117] This case concerns the rocky marriage of Megan and William, who first developed a sexual relationship when Megan was fifteen-years-old and William was forty-years-old. [118] When Megan was nineteen-years-old they married and had two children, but their marital relationship gradually deteriorated. [119] Megan claimed that William was not only emotionally abusive, but that he had also threatened to ***kill*** both her and their children on multiple occasions. [120] Once William kicked their son in the stomach, Megan left the marital residence with their children, moved to a domestic violence shelter, and filed charges against William for domestic abuse. [121] In several phone conversations, William repeatedly told Megan that he would ***kill*** her and their children. [122] Megan testified that one night, after another phone conversation with William in which he again told her that he would ***kill*** her and their children, she believed he would follow through with his threats. [123] The next day, motivated by her intent to try to persuade William to ***kill*** her instead of the children, Megan drove to William's house, armed with two guns. [124] Upon entering the house, Megan testified that she felt trapped in the house after

[114] *See* Pillsbury, *supra* note 16, at 166 (suggesting that current provocation law presents significant obstacles to victims of domestic violence who ***kill*** their intimate partners after the abuse has ceased, thereby surpassing the "cooling off" time period).

[115] *See* People v. Sepulveda, 65 P.3d 1002, 1007 (Colo. 2003) (citing Coston v. People, 633 P.2d 470, 473 (Colo. 1981); People v. Lanari, 926 P.2d 116, 121 (Colo. App. 1996)) (noting that "cumulative provocation is an insufficient basis for a heat of passion instruction"); *see also* Christine Belew, Comment, ***Killing*** *One's Abuser: Premeditation, Pathology, or Provocation*?, 59 EMORY L.J. 769, 800-01 (2010) (observing that provocation law requires a "sudden" loss of control, thus presenting an obstacle for ***battered women*** whose fear of their abusers accumulates slowly, resulting in ***killing*** but without any triggering event that leads to a sudden loss of control). *But see, e.g.*, State v. Avery, 120 S.W.3d 196, 205-06 (Mo. 2003) (en banc) (stressing that "prior provocation can never be the sole cause of sudden passion" but acknowledging that evidence of past abuse "may be relevant to show why, when combined with other evidence of events occurring immediately before the incident, the precipitating incident was adequate to show sudden passion").

[116] No. 11CA20, 2013 WL 139545 (Ohio Ct. App. Jan. 7, 2013).

[117] *Id.* at *3.

[118] *Id.* at *1.

[119] *Id.* at *1-2.

[120] *Id.* at *1.

[121] *Id.* (noting that as a result of Megan's complaint, police recovered sixty-three guns from the marital residence).

[122] *Id.* at *2.

[123] *Id.*

[124] *Id.*

William blocked the exit. [125] He then told her that her mother "was going to have a birthday present and it was going to be two dead grand kids and a dead daughter." [126] In response, Megan fatally shot William. [127]

Megan was charged with aggravated murder. [128] At her trial, Megan testified that she shot William in self-defense and that she suffered **[*1746]** from ***battered woman***'s syndrome. [129] The claim was supported by a psychiatrist's testimony indicating that when she shot William, Megan believed that William presented an imminent threat to her and her children. [130] While the trial court instructed the jury on self-defense, it refused to instruct them on either imperfect self-defense or on provocation, both of which could have resulted in mitigating the murder charge to the lesser offense of manslaughter. [131] Ultimately, the jury rejected Megan's self-defense claim and found her guilty of murder. [132]

On appeal, the defendant argued that the jury should have been instructed on both imperfect self-defense and provocation. [133] The court of appeals rejected both claims, affirming the defendant's murder conviction. [134] The court quickly dismissed the defendant's imperfect self-defense claim, holding that Ohio law does not recognize this defense, and therefore it was not an abuse of discretion for the trial court to refuse to instruct the jury on a defense that the state's law does not incorporate. [135] While the court analyzed in-depth the defendant's claim that the jury should have been instructed on voluntary manslaughter on the theory that she was adequately provoked by the deceased's threats, it ultimately held that there was no evidence that she was under the influence of "*sudden passion*" or "*sudden fit of rage*" when she shot her husband. [136] Instead, the court noted that the evidence only supported **[*1747]** the claim that the defendant feared her husband; yet fear is not a sufficient basis for instructing

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at *3.

[129] *Id.* (detailing Megan's testimony at her second trial after the Ohio Supreme Court reversed her first conviction on Fifth Amendment grounds).

[130] *Id.*

[131] *Id.* The doctrine of imperfect self-defense allows mitigation of murder charges to voluntary manslaughter in cases where defendants subjectively but unreasonably believed that use of deadly force was necessary. *See infra* note 263 and accompanying text. While several jurisdictions adopted this defense, Ohio's law does not recognize it, as the *Goff* court explains. Goff, 2013 WL 139545, at *1. For further discussion of impartial self-defense, see *infra* Part II.C.

[132] *Id.* Megan was first convicted of murder in a bench trial and the conviction was affirmed by the court of appeals. *Id.* However, after the Ohio Supreme Court found that her right against self-incrimination was violated, she received a new trial and a jury again convicted her of murder. *Id.* The latter trial is the subject of the discussion here. *See also* State v. Goff, 942 N.E.2d 1075, 1088 (Ohio 2010) (reversing Megan's first conviction and remanding the case for a new trial).

[133] Goff, 2013 WL 139545, at *3 (listing the issues Megan appealed after her second trial).

[134] *See id.* at *8-12 (holding that the trial court did not issue erroneous jury instructions and affirming Megan's conviction).

[135] *See id.* at *8 (explaining that, although Ohio does not recognize the doctrine of imperfect self-defense, Megan argued the trial judge should have given the jury instruction because thirteen other jurisdictions allow for imperfect self-defense).

[136] *Id.* at *9-11 (emphasis added) (quoting State v. Rhodes, 590 N.E.2d 261, 261 (Ohio 1992)). Interestingly, in 1974, the Ohio legislature adopted the MPC's EED defense, which does not require any triggering incident. *See* LEWIS R. KATZ, ET AL., BALDWIN'S OHIO PRACTICE CRIMINAL LAW § 95:11 (3d ed. 2017). However, in 1982, the Ohio legislature reversed course by re-adopting the common law's provocation defense, incorporating anew the "sudden fit of rage" notion. *Id.*

the jury on voluntary manslaughter. [137] The court further held that evidence that defendant feared that her husband would ***kill*** her and their children only supported a self-defense jury instruction. [138] The court clarified that "[w]hile self-defense requires a showing of fear, voluntary manslaughter requires a showing of rage, with emotions of anger, hatred, jealously, and/or furious resentment." [139] Furthermore, since the evidence established that the defendant acted out of fear, rather than out of anger, the court found that the trial court was correct in refusing to instruct the jury on voluntary manslaughter. [140]

Goff sharpens the normative question of whether the law ought to treat abused defendants who were subjected to prolonged abuse by their spouses, including continuous threats to ***kill*** them and their children, as killers who deserve the highest level of criminal culpability and moral stigma, namely, murder. While Ohio law labels Megan a "murderer," she is the epitome of a fearful killer who deserves mitigation. Megan's deep fear that her abusive husband was going to ***kill*** her and their children plausibly raises a moral plea to partially excusing her lethal reaction. Such mitigation is warranted not because the ***killing*** was justified (or even partially justified) but because the law ought to recognize that since the judgment mechanisms of fearful killers are impaired, they ought to be partially excused. [141]

Ohio law, however, provides no doctrinal basis for allowing juries to partially excuse defendants like Megan. To begin with, based on the facts leading to the shooting, Megan did not act in self-defense because at the moment of the shooting, William was not presenting any *imminent* threat to ***kill*** her or their non-present children. Moreover, nothing suggests that William carried a gun at the time when Megan arrived at the house, armed with the two guns. [142] Conceding that **[*1748]** Megan's case does not warrant acquittal based on a self-defense claim, the key question becomes: is the murder conviction warranted, or should she be convicted instead of voluntary manslaughter?

Goff demonstrates the ways in which the law often leaves abused defendants who ***kill*** their abusive spouses in circumstances where complete acquittal based on self-defense is inappropriate without any potential defenses for reducing the murder charge to manslaughter. In cases like this, where the abused defendant's conduct fell short of self-defense, and the jurisdiction does not recognize an imperfect self-defense, the disconcerting, yet inevitable, outcome is a murder conviction. [143]

Abused partners are not the only abused people who ***kill*** their abusers, as adolescent children may also ***kill*** an abusive parent after enduring continuous physical abuse. [144] Child abuse is the primary cause of parent ***killing***

[137] *Goff, 2013 WL 139545,* at *10.

[138] *Id.*

[139] *Id.* at *9 (internal quotation marks omitted) (quoting State v. Levett, No. C-040537, 2006 WL 1191851, at *4 (Ohio Ct. App. May 5, 2006)).

[140] *Goff, 2013 WL 139545,* at *10.

[141] *See infra* Part III.A. (elaborating on fear's impact on perpetrators' judgments).

[142] *See Goff, 2013 WL 139545,* at *2 (providing no factual indication that William had a weapon when Megan confronted him).

[143] *See infra* Part IV for a discussion of how recognizing fear-based provocation might have offered defendants like Megan a potential defense that could have mitigated her murder conviction to manslaughter.

[144] *See* Mavis J. Van Sambeek, *Parricide as Self-Defense*, 7 LAW & INEQ. 87, 91 (1988) (noting a correlation between child abuse and parricide); *see also* PAUL MONES, WHEN A CHILD ***KILLS***: ABUSED CHILDREN WHO ***KILL*** THEIR PARENTS 6-7 (1991) (examining the case of Lizzie Borden, who was arrested for ***killing*** her parents in 1892).

(parricide), typically involving boys ***killing*** their ***fathers***. [145] After courts acknowledged that nothing supports limiting the effects of domestic abuse only to ***battered*** intimate partners, the term "***battered*** children syndrome" was coined. [146] Arguably, the rationale for recognizing the plight of the ***battered*** child who resorts to parricide is even more powerful than that of the ***battered*** intimate partner; the latter are adults, with easier access to authorities and shelters, whereas ***battered*** adolescents, whose brains are not fully developed, are more vulnerable to the impact of continuous domestic **[*1749]** abuse as they are emotionally and economically dependent on the abusive parent and unable to escape the abusive environment. [147]

The recent case of Bresha Meadows serves to highlight the gap in the law between fear of future violence and adequate provocation in cases where self-defense is not viable as a complete defense to murder. [148] In 2016, fourteen-year-old Bresha Meadows shot and ***killed*** her ***father***, Jonathan Meadows, while he was sleeping. [149] In 2011, Bresha's mother Brandi had left the deceased and filed a police report alleging that he subjected her to a pattern of continuous physical abuse. [150] Documentation pertaining to these proceedings showed that Brandi told authorities that she was afraid for her life, that the deceased was "capable of extreme violence," and that he had threatened to ***kill*** her and their three children. [151] Brandi further told authorities that the deceased physically abused her and terrorized their children, stating that, "In the 17 years of our marriage he has cut me, broke my ribs, fingers, the blood vessels in my hand, my mouth, blackened my eyes . . . If he finds us, I am 100 percent sure he will ***kill*** me and the children." [152] Similar to many people who suffer domestic abuse, Brandi returned to her abusive husband, refusing to file additional complaints with the police. [153] Other family members supported the fact that Bresha had witnessed her ***father*** physically abuse her mother for years and listened to him threatening her

[145] Van Sambeek, *supra* note 144, at 104; *see also* *Menendez v. Terhune, 422 F.3d 1012, 1017, 1029 (9th Cir. 2005)* (considering the appeal of two young men who ***killed*** their abusive ***father***, as well as their mother who acquiesced to the ***father***'s abuse). For further discussion of *Menendez*, see Section C below.

[146] *See, e.g.*, *State v. Janes, 822 P.2d 1238, 1242 (Wash. Ct. App. 1992), remanded by 850 P.2d 495 (Wash. 1993).* In *Janes*, a seventeen-year-old young man argued that he suffered from "***battered*** child syndrome" after he shot and ***killed*** his stepfather upon his stepfather's return from work. *822 P.2d at 1239-40.* The Washington Court of Appeals accepted his argument, stressing that Washington uses a subjective standard to evaluate the reasonableness of a defendant's response and does not require evidence that actual physical violence was threatened at the moment of the ***killing***. *Id. at 1241-42.*

[147] *See* Terry A. Maroney, *The False Promise of Adolescent Brain Science in* ***Juvenile*** *Justice*, *85 NOTRE DAME L. REV. 89, 92 (2009)* (discussing the evidence "that adolescent brains are not fully developed" (quoting *in re* *Stanford, 123 S. Ct. 472, 474 (2002)* (Stevens, J., dissenting from denial of certiorari)); *see also* *Janes, 822 P.2d at 1240* (describing the defendant's relationship with his stepfather and his history of abuse).

[148] *See* Jonah Engel Bromwich, *Bresha Meadows, Ohio Teenager Who Fatally Shot Her* ***Father***, *Accepts Plea Deal*, N.Y. TIMES (May 23, 2017) (discussing the terms of the plea bargain in this case), *https://www.nytimes.com/2017/05/23/us/bresha-meadows-**father-killing**.html?_r=0*.

[149] Melissa Jeltsen, *Bresha Meadows, Teen Who* ***Killed*** *Allegedly Abusive Dad, Given Second Chance*, HUFFINGTON POST: BLACK VOICES, (May 22, 2017, 4:20PM), *http://www.huffingtonpost.com/entry/bresha-meadows-sentencing-**killed-father**_us_5922e800e4b094cdba55b95d*.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

mother with harming her and her siblings. [154] Bresha had twice ran away from her abusive ***father***, but she was forced **[*1750]** to return home after the authorities said that their hands were tied without an official complaint from Bresha's mother. [155]

Bresha was initially charged with aggravated murder. [156] Given the unique circumstances of the case, including the defendant's tender age, the prosecutor agreed to a plea agreement under which Bresha pleaded guilty to involuntary manslaughter, accepting the terms of a settlement deal stipulating that she would remain in a ***juvenile*** detention center where she would get outside psychiatric treatment and eventually be released to her family for a two-year supervision period. [157]

In this case, mitigating the murder charge through exercising prosecutorial discretion was warranted. Arguably, justice was served here, as applying the criminal justice system's full-blown and heavy-handed approach seems unjust. At the conceptual level, however, the outcome in Bresha's case provides neither principled nor transparent doctrinal basis for understanding the theoretical grounds for reducing the level of the crime and specifically why mitigation was warranted.

One ramification of the prevalence of plea bargains, where the basis for mitigation is not specified, is that homicide law is left in a state of doctrinal confusion, as Bresha's case and Goff's case fail to neatly fit into existing doctrines of either self-defense or provocation. These cases poignantly demonstrate that the law provides no grounds for mitigating murder charges to voluntary manslaughter in cases where defendants ***killed*** out of fear but in circumstances falling short of self-defense. Even young Bresha could not have established either a perfect or imperfect self-defense claim, had the case not resolved in a plea bargain, because she ***killed*** her ***father*** while he was not presenting any imminent threat. Given the absence of a coherent conceptual basis for mitigating Bresha's murder charge, it is likely that the prosecution would not have been so willing to show similar mercy and compassion had Bresha been an adult. Goff's murder conviction indeed confirms this assumption.

b. Non-intimate physical abuse, harassment, and bullying

Fear-based provocation's stakeholders include not only victims of domestic violence but also people who ***kill*** their non-intimate tormentors **[*1751]** out of fear of physical violence. [158] In the typical scenario, defendants have been subjected to prolonged emotional and physical abuse by the deceased, including continuous physical harassment and bullying. [159] After enduring extensive periods of physical abuse resulting in being placed in

[154] *See* Andrea Simakis, *Bresha Meadows' Cousin Says He Also Was Abused by Jonathan Meadows*, THE PLAIN DEALER (May 21, 2017), http://www.cleveland.com/metro/index.ssf/2017/05/bresha_meadows_cousin_says.html (providing the account of Bresha's cousin, who temporarily lived with the family, witnessed the deceased abuse family members, and told the authorities that the deceased has abused him too).

[155] *See* Bromwich, *supra* note 148.

[156] *Id.*

[157] *Id.* (noting that Bresha could have her criminal record sealed after three years and erased after five).

[158] *See, e.g.*, Ketcham v. State, 780 N.E.2d 1171, 1175 (Ind. Ct. App. 2003) (outlining how the deceased chased after the defendant and assaulted the defendant's friend before the defendant ***killed*** him); State v. Timpe, No. CA2015-04-034, 2015 WL 8151297, at *1, *3 (Ohio Ct. App. Dec. 7, 2015) (detailing how the defendant stabbed his brother during a physical fight in which his brother was choking him); Cook v. State, 784 S.E.2d 665, 666-67 (S.C. 2015) (describing how the defendant ***killed*** his neighbor after the deceased continuously berated him).

[159] *E.g.*, Ketcham, 780 N.E.2d at 1178 (emphasizing that the evidence showed that the defendant personally sought out the deceased in order to stop the deceased from harassing and bullying him).

constant fear of their abusers, defendants might ***kill*** their abusers out of fear of infliction of future violence. [160] Notably, in these situations, both the abused defendants and the deceased abusers are predominantly men. [161]

In cases where immediately prior to the ***killing***, the deceased and the defendant engaged in a violent altercation, defendants might be able to establish that because of previous abuse, they acted out of pure anger. It is likely that in such cases involving physical confrontations, some defendants might receive a jury instruction on voluntary manslaughter based on the theory of anger-based provocation. These cases are compatible with the law's long-standing recognition of the masculine-based category of mutual combat as sufficient for adequate provocation. [162]

In *Ketcham v. State*, [163] the deceased and two others were driving a car when they spotted the defendant riding his bicycle. [164] The deceased began chasing the defendant, first by car, then on foot. [165] The defendant was able to flee and retrieve a gun, only to locate the deceased and ***kill*** him. [166] The evidence at trial established that the **[*1752]** deceased had previously bullied the defendant and that "[the defendant] was 'tired of being harassed,' 'chas[ed]' and 'pick[ed] on.'" [167] The evidence further established that the defendant deliberately went out looking for the deceased because he was sick of the deceased trying to beat him up. [168] The state charged the defendant with murder, but the trial court instructed the jury on murder and voluntary manslaughter, which is defined under Indiana law to include intentional killings resulting from "*sudden heat*." [169] The defendant was convicted of voluntary manslaughter and on appeal sought a jury instruction on involuntary manslaughter, claiming that he only wanted to scare the deceased by ***battering*** him. [170] The Indiana Court of Appeals affirmed the voluntary manslaughter conviction, holding that the evidence did not support the conclusion that defendant only intended to injure the deceased. [171] While the defendant prevailed based on a voluntary manslaughter jury instruction, the instruction was hinged on an anger-based, rather than on a fear-based view of provocation. [172] The court's

[160] *E.g.*, *Timpe, 2015 WL 8151297,* at *1 (commenting that the defendant's presentence investigation found that, on top of the emotional and physical abuse inflicted by his brother, the defendant was also bullied at school and had developmental and mental health issues).

[161] *See* DRESSLER, *supra* note 8, at 531 (articulating that "mutual combat" and "aggravated assault or battery" were permitted under common law).

[162] *See* HORDER, *supra* note 35, at 52 (discussing how, as the common law developed, there were cases between men "in which a certain degree of retaliation upon provocation was regarded in law as a . . . right response" and suffered no criminal liability for it).

[163] *780 N.E.2d 1171 (Ind. Ct. App. 2003).*

[164] *Id. at 1174-75.*

[165] *Id. at 1175.*

[166] *Id.*

[167] *Id. at 1175* (alterations in original).

[168] *Id. at 1178, 1181.*

[169] *Id.* (listing the multiple instructions the trial court gave to the jury); *IND. CODE § 35-42-1-3(a)(2)(b)* (2017) (emphasis added) (defining of voluntary manslaughter).

[170] *Ketcham, 780 N.E.2d at 1178.*

[171] *Id.* (citing *Lynch v. State, 571 N.E.2d 537, 539 (Ind. 1991)).*

[172] *Id.* at 1175 (citing § 35-42-1-3(a)(2)(b)).

language implied that the defendant was overwhelmed by anger because he was tired of being harassed and bullied by the deceased. [173] Notably, the court made no reference to the fact that defendant also feared the deceased. [174]

Yet, in arguably similar circumstances, where the evidence does not clearly establish defendants' anger-based response, but rather one that is triggered mostly by fear, defendants might not receive such jury instructions, especially in jurisdictions that define provocation in terms of "a sudden fit of rage." [175] Moreover, research suggests that the emotions of anger and fear often operate jointly, resulting in impairment in defendants' reasoning and judgment. [176] These situations raise a concern that similarly situated defendants who ***kill*** out of fear might be **[*1753]** treated differently by different courts, with some receiving a jury instruction on voluntary manslaughter, while others will not.

The above concern becomes especially apparent in circumstances where defendants' responses appear to be motivated mostly by fear of serious physical harm inflicted by the deceased, rather than by anger. In some cases, where defendants cannot establish self-defense, they often have no defense, other than provocation, to allow the jury to consider reducing murder to manslaughter. For example, in *Osby v. State*, [177] a seventeen-year-old African American youth ***killed*** two unarmed African American men who were, at the time of the shooting, being held back by the defendant's friends. [178] The defendant confessed to ***killing*** both decedents but argued that he acted in self-defense. [179] He claimed that during the year that preceded the shootings, the two men had repeatedly harassed him for payment of a gambling debt, including threatening him and members of his family with violence, and that on at least one occasion, the two men had stalked and threatened him with shotguns. [180] The defendant argued that he believed that the only way for him to avoid death or serious bodily injury at their hands was for him to ***kill*** them first. [181] To buttress his self-defense claim, the defendant wanted to introduce a psychologist's expert testimony concerning the defendant's fearful state of mind at the time he committed the homicides. [182] The psychologist would have testified that at the time of the shooting, the defendant had some symptoms of posttraumatic stress disorder (PTSD), although he could not make a diagnosis of PTSD. [183] While the trial court instructed the jury on

[173] *Id.*

[174] *Id.*

[175] *See supra* Part II.A.1 for discussion of provocation under Ohio law; *see infra* Part II.A.2 for discussion of Georgia law.

[176] *See infra* Part III.A (discussing psychological research suggesting that anger and fear are often difficult to distinguish, sometimes jointly triggering provocation); *see also* Pillsbury, *supra* note 16, at 147-48 n.13 (observing that "having a reason to fear will also provide a reason to rage").

[177] *939 S.W.2d 787 (Tex. App. 1997).*

[178] *Id. at 788-89;* Lori Montgomery, *'Urban Survival' Rules at Issue in Trial*, WASH. POST (Oct. 26, 1994), *https://www.washingtonpost.com/archive/politics/1994/10/26/urban-survival-rules-at-issue-in-trial/d1a78564-773e-45a9-a406-a5aa3b0a0b9f*.

[179] *Osby, 939 S.W.2d at 787-88.*

[180] *Id. at 788.*

[181] *Id. at 788-89.*

[182] *Id. at 789.*

[183] *Id.*

self-defense, it refused to admit the psychologist's testimony, and the jury rejected Osby's self-defense claim and convicted him of the two murders. [184]

Osby appealed, claiming that the expert testimony should have been introduced into evidence and that he acted in self-defense. [185] The Texas Court of Appeals affirmed the murder convictions, holding that the expert testimony was properly excluded [186] and that the evidence did **[*1754]** not establish self-defense because Texas law requires a reasonable person in the defendant's situation to retreat and the defendant failed to do so. [187] The court stressed that the deceased were both unarmed and restrained by the defendant's friends at the time of the shooting, establishing a path for retreat, which precludes self-defense. [188]

*2. **Male**-on-**male** physically threatening encounters*

Another category of defendants who might seek a voluntary manslaughter jury instruction on the theory that their fear of the deceased provoked them to **kill** encompasses **male**-on-**male**, physically threatening encounters. These situations may occur in a variety of social settings and a host of human interactions such as drunken bar arguments. [189] Other cases where defendants claim that they **killed** out of fear involve gang fights between two rival groups [190] or drug deals gone sour. [191] In these encounters, perceiving a threat to their physical safety, defendants became fearful for their lives and **killed** in circumstances falling short of self-defense. [192]

Similarly to defendants who were harassed and bullied by the deceased in non-domestic settings, defendants in this category are also predominantly men. Empirical evidence also shows that an overwhelming majority of incarcerated killers convicted of murder are young African **[*1755]** American men. [193] Moreover, a significant number of homicides occur following threatening **male**-on-**male** encounters where defendants faced deep fear for their lives.

[184] *Id. at 787, 789.*

[185] *Id. at 789, 791.*

[186] *Id. at 791.*

[187] *Id. at 791-93* (citing *Tex. Penal Code Ann. § 9.32(a)(2)(A)* (West 2007)). Attempts to rely on a theory characterized as "urban survival syndrome," defined as an intense fear or a heightened sense of danger created in urban areas, especially the fear that black people have of other black people, have never succeeded in courts. *See* Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication and Black Rage*, *74 N.C. L. REV. 731, 740 n.35 (1996).*

[188] *Osby, 939 S.W.2d at 792.* The provocation defense was not raised here, as Texas law does not recognize provocation as a basis for mitigating murder to manslaughter. It only recognizes anger-based provocations as a mitigating circumstance during the sentencing phase.

[189] People v. Memory, *105 Cal.Rptr. 3d 353, 356 (Cal. Ct.App. 2010)* (analyzing a situation where a fight broke out in the parking lot of a bar between a group of large, drunk young men and the defendants, who were members of an infamous motorcycle club, resulting in the defendants **killing** a member of the drunken group and injuring two others).

[190] People v. Vargas, No. B252005, 2015 WL 3831469, at *1-3 (Cal. Ct. App. June 22, 2015) (detailing how the defendant, who was not a member of any gang, was shot and **killed** while fighting with three members of the Mara Salvatrucha gang).

[191] *See, e.g.*, *Blake v. State, 739 S.E.2d 319, 320-21 (Ga. 2013)* (describing a defendant who shot his drug dealer because he thought that the quantity of drugs was insufficient); State v. Levett, No. C-040537, 2006 WL 1191851, at *1 (Ohio Ct. App. May 5, 2006) (involving a defendant who shot his supplier after refusing to pay him).

[192] *See infra* Part II.B below for discussion of specific cases that demonstrate the problems that the provocation defense raises in **male**-on-**male** confrontations.

[193] *See* Gruber, *supra* note 85, at 185 ("[T]he population of homicide defendants largely is composed of men of color.").

[194] Young African Americans are the type of defendants who are prone to be treated harshly by the heavy-handed criminal justice system, with its disparate effect on racial minorities. [195] While self-defense and provocation defenses are often criticized on the grounds that they harm racial minorities, [196] expanding the scope of the provocation defense to recognize fear-based provocation would operate to benefit racial minority defendants. The ramification of enlarging provocation law to allow defendants to claim that fear provoked them to ***kill*** is that courts would give more jury instructions on voluntary manslaughter, therefore decreasing the chances that these defendants, including many racial minorities, would be convicted of murder. [197]

Arguably, existing provocation defense already covers cases involving typical ***male***-on-***male*** threatening confrontation scenarios. [198] Traditional provocation law had always recognized mutual quarrel or combat and defendant's serious assault by the deceased or threat of imminent assault by the deceased as behaviors amounting to adequate provocation, therefore giving some defendants jury instructions on voluntary manslaughter. [199] Yet, some ***male***-on-***male*** threatening encounters fall short of a sudden physical confrontation that precedes the ***killing***. [200] **[*1756]** Defendants may further perceive risks or dangers emanating from deceased's behaviors even before a mutual quarrel ensues or, alternatively, after it has already ended. [201]

More importantly, anger-based provocation is predicated on the notion of defendants who suddenly became enraged and lost control. [202] In the absence of evidence that a defendant's ***killing*** was motivated by anger, instead demonstrating that he or she ***killed*** out of fear, many courts refuse to instruct juries on voluntary manslaughter. [203] This happens mostly in jurisdictions that perceive provocation and self-defense as mutually exclusive claims, rather than supplementary ones. [204] The section below examines cases involving defendants in typical ***male***-on-***male***

[194] *Id.* (arguing that any change or limitation on the provocation defense will mostly affect men of color who commit non-intimate killings).

[195] Voluminous scholarship is devoted to the heavy handed criminal justice system and its disparate effects on racial minorities. *See, e.g.*, Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1254-56 (2005) (noting that policies meant to increase the severity of punishment for violent crimes will disproportionally affect black offenders). Further discussion of these disparate effects exceeds the scope of this paper.

[196] *See generally* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 398-400 (1996) (explaining that "racial stereotypes about either the defendant or the deceased can influence the reasonableness determination" in self-defense cases).

[197] *But see* Gruber, *supra* note 85, at 185-86 (acknowledging that while reliable data is scarce, there is limited evidence that "narrowing provocation would burden defendants other than privileged sexists and homophobes").

[198] *See generally* DRESSLER, *supra* note 8, at 531 (acknowledging that common law allows for claims of provocation in certain circumstances, including "an aggravated assault or battery" and "mutual combat").

[199] *Id.* (listing the early common law categories for adequate provocation).

[200] *See id.* at 531-32 (outlining circumstances that do not rise to the level of adequate provocation).

[201] *See id.* at 223-25 (discussing when deadly force may be used in self-defense).

[202] *See* Dressler, *supra* note 15, at 971 (explaining that the provocation defense includes a triggering event "that results in the actor feeling rage or some similar overwrought emotion").

[203] *See, e.g.*, Blake v. State, 739 S.E.2d 319, 321-22 (Ga. 2013) (finding the trial court did not err in refusing to instruct the jury on voluntary manslaughter when Blake testified that he acted in self-defense and "out of fear for his life); *see also supra* Section II.A.1 (discussing abused victims and partners as defendants who ***kill*** out of fear, yet the jurisdictions do not consider fear as adequate provocation).

[204] *See supra* Section 1.A.1-2 for Ohio courts' view of the defense as mutually exclusive; *see e.g.*, Blake, 739 S.E.2d at 321-22 (distinguishing between provocation and self-defense).

threatening encounters. It demonstrates the dilemma that these fearful killers face when building their defense on self-defense or provocation grounds in jurisdictions that view these defenses as conflicting, rather than cumulatively.

B. Self-Defense and Provocation as Mutually Exclusive: "Catch 22" Dilemma

Fearful killers are likely to raise both a self-defense claim and a provocation claim, making an evaluation of the interrelationship between provocation and self-defense appropriate. Granted, a defendant's first line of defense would rest on self-defense because accepting that claim results in complete acquittal, whereas a provocation claim may result in a voluntary manslaughter conviction.

The elements of self-defense include necessity, imminence, proportionality, and a requirement that the defendant is not the initial aggressor. [205] Defendants must prove that they were justified in using deadly force against another because they honestly and reasonably believed that they were in imminent or immediate danger of deadly force from the aggressor and the use of force was necessary to avoid the **[*1757]** danger. [206] In the cases discussed earlier, at least one of these elements could not have been established, for example, if the defendant's fear of deadly force was not objectively reasonable, if there was no imminent threat of deadly force, or if the defendant could have safely retreated. [207]

A failure to meet self-defense's requirements often leaves provocation as the only defense that may reduce murder charges to voluntary manslaughter charges. [208] Yet, the provocation doctrine is in a state of disarray, with neither consistent nor predictable outcomes. [209] While in one jurisdiction provocation would have been recognized, mitigating murder to manslaughter, similar facts in another jurisdiction would not lead to recognizing the defense, resulting in a murder conviction. [210] Defendants claiming that they preemptively attacked the deceased out of fear rather than out of mere anger, but in circumstances falling short of self-defense, are likely to face significant obstacles in establishing provocation's elements. This becomes especially problematic in jurisdictions that view self-defense and provocation as mutually exclusive rather than as supplemental claims. [211]

The Georgia Supreme Court decision in *Blake v. State* [212] exemplifies circumstances where self-defense and provocation were viewed as conflicting claims. In this case, the defendant purchased marijuana from the deceased

[205] DRESSLER, *supra* note 8, at 223-24, 226.

[206] *See* LEE, *supra* note 19, at 127, 134 (explaining the necessity requirement of self-defense and the problems with requiring both an honest and reasonable belief of danger).

[207] *See, e.g.*, Osby v. State, 939 S.W.2d 787, 791-92 (Tex. App. 1997) (holding that a reasonable person under the same circumstances would have retreated, so the defendant's use of deadly force was not self-defense).

[208] Some jurisdictions recognize a claim for imperfect self-defense if the defendant subjectively but unreasonably believed that the use of deadly force was necessary. For further discussion of imperfect self-defense claims and the relationship between this doctrine and fear-based provocation, see Part II.C.

[209] *See* Nourse, *supra* note 62, at 1341-42 (noting the efforts that attorneys have made to clarify terms like "heat of passion" and "emotional distress").

[210] *Id.* (noting that the "reasonable man" standard is applied differently in different jurisdictions, some states require a "sudden" passion and others allow emotion to build over time, and some jurisdictions reject claims based on "mere words" while others embrace them).

[211] *See supra* subsection I.A.1-2 for Ohio courts' view of the defenses as mutually exclusive.

[212] 739 S.E.2d 319 (Ga. 2013).

at a bar. [213] Upon receiving the drugs, the defendant believed that the deceased had "shorted" him and a verbal argument ensued. [214] After repeatedly claiming that the amount of marijuana the deceased gave him was incorrect, the defendant demanded his money **[*1758]** back. [215] The deceased refused, telling the defendant to "get [his] pistol" if he wanted the money. [216] At this point, the defendant pulled out a gun and shot the deceased twice, ***killing*** him. [217] The defendant was charged with murder and claimed that he shot the deceased in self-defense because he believed the deceased and his friends were armed. [218]

After Blake's self-defense claim was rejected, [219] he argued on appeal that the jury should have been instructed on voluntary manslaughter. [220] In Georgia, a defendant is entitled to a jury instruction on voluntary manslaughter if there is slight evidence that he or she ***kills*** "solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." [221]

Applying Georgia's provocation law in *Blake*, the court stressed that the defendant testified that he acted out of fear of imminent harm and that he was not the aggressor during the incident. [222] The court also emphasized that the distinguishing characteristic between voluntary manslaughter and justifiable homicide is whether the accused was so influenced and excited that he reacted passionately rather than simply to defend himself. [223] Moreover, the court continued, although the defendant claimed that he thought the deceased was armed and was frightened by the deceased's friends, the evidence failed to meet the standard required for voluntary manslaughter conviction. [224]

Based on these factual conclusions, the court held that the trial court had not erred when it refused to instruct the jury on voluntary manslaughter. [225] The Georgia Supreme Court declined to recognize that a defendant's fear for his life may support both self-defense and a provocation defense. [226] The holding stands for the proposition that,

[213] *Id. at 320.*

[214] *Id. at 320-21.*

[215] *Id.*

[216] *Id. at 321* (alterations in original).

[217] *Id.*

[218] *Id. at 321-22.*

[219] *See* id. at 321 (holding that there was sufficient evidence in the record that the jury could find beyond a reasonable doubt that the defendant did not shoot in self-defense).

[220] *Id.*

[221] *See GA. CODE ANN. § 16-5-2* (2011).

[222] *Blake, 739 S.E.2d at 321-22* (stressing that the defendant testified that at the time of the shooting he was not angry or hostile toward the deceased).

[223] *Id. at 322* (citing *Bell v. State, 629 S.E.2d 213 (Ga. 2006); Worthern v. State, 509 S.E.2d 922 (Ga. 1999);* ***Howard v. State, 372 S.E.2d 813 (Ga. 1988)).***

[224] *Id.*

[225] *Id.* (affirming the defendant's conviction but vacating the defendant's sentence and remanded for resentencing).

[226] *Id.* at 321-22. Georgia courts have repeatedly held that neither fear that someone was going to pull a gun nor fighting prior to a homicide are types of provocation demanding a voluntary manslaughter charge. For a similar analysis and conclusion, see, e.g., *Brown v. State, 755 S.E.2d 699, 702 (Ga. 2014); Hicks v. State, 695 S.E.2d 195, 197-98 (Ga. 2010); White v. State, 695 S.E.2d 222, 224 (Ga. 2010); Nichols v.*

[*1759] in jurisdictions like Georgia, provocation and self-defense are mutually exclusive claims, and if a defendant grounds his or her defense on fear and thus on a right to exercise self-defense, a jury instruction on provocation will not be given.

Taken together, these decisions sharpen the problems stemming from the judicial view of the defenses of provocation and self-defense as mutually exclusive. Under this construction, the same evidence that supports a self-defense claim cannot constitute "sudden passion," a "fit of rage," or "loss of control" as contemplated by an anger-based provocation defense. [227] As *Goff* and *Blake* illustrate, courts often insist that while self-defense requires a showing of fear, provocation requires a showing of anger, rage, or furious resentment. They reject the idea that the same evidence supporting defendants' claims that they feared for their lives may also support a voluntary manslaughter instruction based on the theory that fear triggered the ***killing***. Under this restrictive view, in order to successfully establish provocation, defendants must prove that anger motivated the ***killing*** or that their fear of the deceased transformed into rage. Evidence of the defendant's fear, however, in itself and without accompanying anger, does not give a defendant a jury instruction on voluntary manslaughter. This judicial view conceives of anger and fear as not only undergirding conflicting defenses, but also as completely separate emotions. By compartmentalizing anger and fear into their respective defenses, these courts reject the possibility that fear may trigger both self-defense and provocation.

[*1760] The challenges facing defendants who ***killed*** out of fear but not in self-defense are not unique to jurisdictions that categorically view self-defense and provocation as mutually exclusive. Even in jurisdictions that do not view these defenses as strictly incompatible claims, fearful killers who raise provocation are likely to encounter a host of hurdles. The main obstacle is that existing provocation doctrine is predominantly theorized as an anger-based defense, suggesting that the defendant must respond in a sudden impulse of loss of control without an opportunity to cool off, as a typical, angry defendant would. These elements do not fit the typical responses of fearful killers who may outwardly appear calm and in control, acting in a calculated manner rather than out of a sudden impulse, and often after some time has passed between the provoking incident and the ***killing***.

Furthermore, the 2015 South Carolina decision in *Cook v. State* [228] demonstrates that only angry killers whose acts externally manifested as an "uncontrollable impulse to do violence" may obtain a voluntary manslaughter jury instruction. [229] In this case, the defendant, who lived in the apartment above the deceased, claimed that the deceased had constantly insulted him by calling him a "snitch." [230] On the day of the ***killing***, the defendant was walking with his girlfriend when he encountered the deceased. [231] The deceased made a series of threats to the

State, 563 S.E.2d 121, 122 (Ga. 2002). Notably, in *Francis v. State*, the defendant ***killed*** his wife, claiming that she had subjected him to prolonged physical and verbal abuse. 766 S.E.2d 52, 57 (Ga. 2014). The Georgia Supreme Court held that an instruction on voluntary manslaughter was not warranted despite the fact that the deceased had committed past acts of violence against the defendant, that she had told defendant the previous evening that she was going to ***kill*** him, and that she allegedly came at him with a knife. *Id.* The court held that "several hours had passed between the wife's confrontation and the shooting." *Id.* Therefore, while the deceased's alleged brandishing of knife supported a finding that defendant acted "to repel an attack," it did not support the conclusion that he was angered and reacting passionately. *Id.* The court concluded that the evidence established that the defendant had shot his wife because "he was scared of her, and . . . not angered or impassioned when [the] ***killing*** occurred." *Id.*

[227] *See also* People v. Pouncey, 471 N.W.2d 346, 350-51 (Mich. 1991) (observing that "[the defendant's] emotional state did not reach such a level that he was unable to act deliberately" and that he testified that "he was not angry at all").

[228] 784 S.E.2d 665 (S.C. 2015).

[229] *Id. at 668* (quoting State v. Niles, 772 S.E.2d 877, 880 (S.C. 2015)).

[230] *Id.* at 666.

[231] *Id.*

defendant and used explicit and profane language aimed at the defendant and his girlfriend. [232] Later that night, the deceased again accosted the defendant and threatened to "shoot him in broad daylight." [233] The defendant claimed that the deceased's hands were in his back pocket, leading him to suspect that the deceased was about to pull out a gun and shoot him. [234] The defendant further claimed that he tried to walk away, but the deceased persisted, threatening to ***kill*** him. [235] The defendant stated that, "[T]he dude was coming up and before I knew it, I fired a shot." [236] The defendant then fired a second shot, ***killing*** the deceased. [237]

[*1761] The defendant was indicted for murder and claimed that he acted in self-defense. [238] Interestingly, in *Cook*, it was the state who requested that the court instruct the jury on voluntary manslaughter while the defendant was the one objecting to such instruction, arguably, because he believed that he could be fully acquitted on self-defense grounds. [239] The trial court instructed the jury on voluntary manslaughter. After the jury found the defendant guilty of voluntary manslaughter, he appealed. [240]

On appeal, the defendant argued that the voluntary manslaughter instruction was erroneous because he had acted out of fear rather than out of "an uncontrollable impulse to do violence." [241] Surprisingly, the court accepted the defendant's argument, concluding that the evidence suggested that Cook either acted in self-defense or with malice, but not under heat of passion. [242] The court stressed that the evidence did not establish that Cook acted in an uncontrollable manner and was "incapable of cooling off." [243] Instead, the evidence showed that he talked softly to the deceased and calmly attempted to walk away. [244] The court therefore reversed the defendant's conviction for voluntary manslaughter, resulting in the defendant's complete acquittal of any homicide and preventing a subsequent murder offense from being brought in the future. [245] The *Cook* decision stands for the proposition that

[232] *Id.*

[233] *Id.* (internal quotation marks omitted).

[234] *Id.*

[235] *Id.* at 667.

[236] *Id.* (internal quotation marks omitted).

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *Id.* at 667-68 (quoting State v. Niles, 772 S.E.2d 877, 880 (S.C. 2015)).

[242] *Id.* at 668.

[243] *Id.*

[244] *Id.*

[245] *Id.* at 669 (finding that, because of the erroneous jury instruction, "[Cook] will not have to face a jury of his peers on the charge of murder again" (alterations in original) (quoting State v. Cooley, 536 S.E.2d 666, 670 (S.C. 2000)). Under South Carolina law, to prove voluntary manslaughter, the state bears the burden of demonstrating beyond a reasonable doubt that the defendant unlawfully ***killed*** another in sudden heat of passion based on sufficient legal provocation. *See* ANDERSON, S.C. REQUESTS TO CHARGE - CRIMINAL, § 2-7 (2d ed. 2012). Conversely, in other jurisdictions, such as California, Florida, and Maine, defendants bear the burden of establishing that they acted under sudden heat of passion to reduce their murder charge to voluntary manslaughter. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 684-85 (1975) (questioning the constitutionality of a Maine statute requiring the defendant to bear the burden of proof); ***People v. Rios, 2***

defendants cannot be convicted of voluntary manslaughter if the **[*1762]** evidence establishes that they ***killed*** the deceased out of fear of death but in a manner suggesting that they were acting under control rather than loss of control and irresistible impulse. [246]

Judicial refusal to recognize provocation and self-defense as cumulative rather than conflicting claims stems from an assumption that different response mechanisms underlie these distinct doctrines; self-defense assumes a cognitive-based decision, namely, a choice followed by a carefully calculated risk-assessment under which the use of deadly force was imminently necessary for defensive purposes. This view further assumes that the choice was a cold, deliberate, and reasoned decision. In contrast, provocation assumes the opposite response, namely an emotional reaction triggered by anger resulting in loss of control. Self-defense and provocation doctrines are therefore predicated on contrasting understandings of defendants' behaviors because an inability to exercise restraint is incompatible with a deliberated and reasoned decision to ***kill*** in self-defense. The thought processes and response mechanisms of fearful killers are simply inconsistent with those of angry defendants.

Given the conceptual understanding of self-defense and provocation as irreconcilable claims, defendants and their defense attorneys might find themselves in an untenable "'Catch 22' dilemma." [247] In jurisdictions that view provocation and self-defense as conflicting, rather than cumulative defenses, defendants are forced to make a strategic choice between claiming that they ***killed*** out of fear and claiming that they ***killed*** out of anger, as grounding their case on self-defense precludes them from relying on provocation. While the advantage of a successful self-defense claim is obvious since it results in complete acquittal, [248] solely relying on it is risky because of the far-reaching implications of a murder conviction if the jury is not persuaded that use of deadly force was necessary or imminent.

Alternatively, to avoid the risk of the jury rejecting a self-defense claim, defendants may choose to plead guilty to voluntary manslaughter. The problem with that strategy is that defendants **[*1763]** forego the possibility of complete acquittal and will be convicted of voluntary manslaughter, even if the circumstances underlying their case arguably could have established the elements of self-defense. This problem is especially disconcerting given the fact that the vast majority of criminal cases resolve in guilty pleas. [249] The concern here is that some defendants may initially choose to plead out to voluntary manslaughter charges, waiving the opportunity to be acquitted on self-defense grounds. The second issue with attempting to rely on provocation in cases where defendants choose to go to trial rather than plead guilty to voluntary manslaughter is that fearful killers might face judicial reluctance to recognize fear as triggering provocation in jurisdictions that insist that only anger triggers the defense. [250]

P.3d 1066, 1074 (Cal. 2000) (maintaining that the defendant has the obligation of showing evidence to raise doubt of his guilt of murder); *Villella v. State, 833 So. 2d 192, 195-96 (Fla. Dist. Ct. App. 2002)* (noting the importance of defendant providing evidence to support that defendant acted in the heat of passion).

[246] *See, e.g.*, *State v. Oates, 803 S.E.2d 911, 923-24 (S.C. Ct. App. 2017)* (holding that a defendant's fear may warrant a voluntary manslaughter jury instruction *only* if the evidence shows that the fear "*manifest[ed] itself in an uncontrollable impulse to do violence*," but not if the defendant's fear was manifested "in a deliberate, controlled manner" (emphasis added) (quoting *State v. Starnes, 668 S.E.2d 604, 609 (S.C. 2010)).*

[247] English Law Comm'n, Report No. 290, Partial Defences to Murder 51 (2004), *http://www.lawcom.gov.uk/app/uploads/2015/03/lc290_Partial_Defences_to_Murder.pdf*.

[248] *See* DRESSLER, *supra* note 8, at 207, 223 (explaining that justifications result in acquittal and stating that self-defense is a justification).

[249] *Id.* at 230 (elaborating on general circumstances for accepting pleas).

[250] *Id.* at 539 (questioning whether any "adequately provoked" killers are more justified in their killings, but recognizing that anger or other passion as the catalyst for these killings).

Courts' reluctance to recognize that defendants' fear may give rise to both self-defense as well as to the provocation defense has not been subject to scholarly critique. A review of the literature reveals that commentators have yet to suggest that provocation law ought to recognize fear as an additional basis for triggering provocation. Commentators' treatment of self-defense and provocation shows that the prevalent scholarly view is that fear is the emotion underlying self-defense while anger sustains provocation. [251] For example, Professor Cynthia Lee's book *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* provides an in-depth examination of the notion of reasonableness with respect to both provocation and self-defense doctrines. [252] In two separate parts, Lee first examines "crimes of passion" under provocation defense, then considers "crimes of fear" under the doctrine of self-defense. [253] The completely isolated treatment of the emotions of anger and fear as respectively rooting the defenses of provocation and self-defense reinforces the familiar idea that provocation is an anger-based defense whereas self-defense is fear-based. This view implies that fear alone does not trigger provocation. Professor Reid Fontaine further sharpens the distinct operation of anger and fear under two separate doctrines by observing that "reactive violence is exemplified by a 'heated' emotional retaliation . . . in response to a situation that is perceived to be wrongful or threatening . . . [and] is **[*1764]** normally engaged out of anger toward a perceived provoker (e.g., heat of passion) or fear of a perceived threat (e.g., self-defense)." [254]

The dichotomy between anger and fear, which the scholarly view of provocation and self-defense reinforces, is hardly surprising as criminal law often breaks down behaviors into binary categories, such as guilty/not-guilty and blameworthy/non-blameworthy. [255] Here, the law perceives fear as conceptually fitting within self-defense doctrine and anger as suitable for the provocation doctrine. Such a binary dichotomy refuses to recognize that behavior that is triggered by deep fear exists on a continuum and that the same conduct that may give rise to self-defense may also establish fear-based provocation. The unwillingness to consider the implications of fear on the provocation doctrine results in refraining from further delving into the interrelationship between these two emotions, resulting in fear-based provocation remaining under-theorized.

One way to resolve defendants' dilemma of having to choose between claiming self-defense or provocation is the solution that this Article proposes below. [256] But before moving forward, the following subsection takes a brief detour to consider imperfect self-defense claims and particularly the scope and limitations of these claims. It explains why recognizing fear-based provocation offers a preferable legal doctrine in cases involving fearful killers who ***killed*** in circumstances falling short of perfect self-defense even in jurisdictions that also recognize imperfect self-defense.

*C. Imperfect Self-Defense and Defendants Who **Killed** out of Fear*

[251] *See* LEE, *supra* note 19, at 7, 10.

[252] *Id.* at 25, 131-32.

[253] *See id.* at 15-124 (discussing anger); *id.* at 125-200 (discussing fear).

[254] *See* Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27, 31 (2009).

[255] *See* Drumbl, *supra* note 91, at 218-19 (observing that criminal law envisions "finality, disjuncture and categor[ies]," viewing victims as "pure and ideal" and killers as "unadulterated and ugly").

[256] *See infra* Part IV.

Traditionally, self-defense has been conceptualized as an "all or nothing" defense, meaning that the defendant was either justified in using deadly force and acquitted of any crime or unjustified and convicted of murder. [257] Many jurisdictions today still adhere to this **[*1765]** position, recognizing only perfect self-defense. [258] Influenced by the MPC, a growing number of jurisdictions now recognize imperfect self-defense in cases where defendants subjectively but *unreasonably* believed that the use of deadly force was necessary, resulting in a voluntary manslaughter conviction rather than in complete acquittal. [259]

Arguably, the fearful killers described in the previous sections could raise an imperfect self-defense claim if they ***killed*** in circumstances falling short of a perfect self-defense. Professor Caroline Forell, for example, argues that the doctrine of imperfect self-defense already addresses circumstances where reducing murder charges to manslaughter charges might be warranted when fearful killers react unreasonably and are unable to establish a perfect self-defense. [260] Forell's view further reinforces the chasm between anger and fear by proposing to explicitly exclude defendants' fear from the scope of the provocation defense, specifically limiting the operation of the defense only to anger-triggered homicides. [261]

A number of reasons support the conclusion that recognizing fear-based provocation provides not only a preferable defense compared to imperfect self-defense, but also an additional doctrinal basis for mitigating murder to voluntary manslaughter. To begin with, a significant number of **[*1766]** jurisdictions do not recognize the doctrine of imperfect self-defense. [262] In these jurisdictions, the provocation defense remains the *only* viable defense that might reduce murder charges to manslaughter. [263] Excluding fear from the scope of the provocation defense leaves defendants in these jurisdictions with one of two possibilities: either prevailing on perfect self-defense grounds or being convicted of murder. Limiting the scope of the provocation defense strictly to anger-based claims deprives

[257] *See generally* DRESSLER, *supra* note 8, at 234 (noting that the common law rule did not recognize imperfect self-defense claims in cases of defendants' unreasonable beliefs about the necessity of using deadly force).

[258] A significant number of jurisdictions, including those following the MPC, refuse to recognize the doctrine of imperfect self-defense. *See, e.g.*, TEX. PENAL CODE ANN. § 9.32 (West 2007) (providing the elements of self-defense, while not including an imperfect self-defense claim); Patrick v. State, 104 So. 3d 1046, 1056 n.3 (Fla. 2012); People v. Reese, 815 N.W.2d 85, 87 (Mich. 2012); State v. Williams, 774 A.2d 457, 463 (N.J. 2001); State v. Goff, No. 11CA20, 2013 WL139545, at *8 (Ohio Ct. App. Jan. 7, 2013); State v. Garcia, 883 A.2d 1131, 1139 (R.I. 2005); State v. Sams, 764 S.E.2d 511, 517 (S.C. 2014); State v. Shaw, 721 A.2d 486, 488 (Vt. 1998).

[259] *See, e.g.*, People v. Blacksher, 259 P.3d 370, 421 (Cal. 2011) (finding that jury instructions for voluntary manslaughter may be given when the ***killing*** was committed under the unreasonable but good faith belief in the need to act in self-defense, since the ***killing*** is considered to be done without malice). Maryland also recognizes perfect and imperfect self-defense. *See* State v. Smullen, 844 A.2d 429, 439 (Md. 2004). Some jurisdictions allow an imperfect self-defense claim in cases where defendants were nondeadly aggressors who used deadly force when they could have retreated. *See* State v. Vigilante, 608 A.2d 425, 430 (N.J. Super. Ct. App. Div. 1992).

[260] *See* Forell, *supra* note 19, at 439 (suggesting that imperfect self-defense is more appropriate and should be used when the ***killing*** was unreasonable but the defendant reasonably feared imminent bodily injury or death); *see also* Forell, *supra* note 93, at 69-70 (expressing preference for changes in self-defense laws rather than in provocation laws to address the problem of ***battered women*** who ***killed*** their domestic partners out of fear of violence, who should often be acquitted or not charged of any homicide).

[261] *See* Forell, *supra* note 19, at 438-39.

[262] Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 101 (2010); *see also supra* note 258 (listing examples of jurisdictions that do not recognize imperfect self-defense doctrine).

[263] *See* Pillsbury, *supra* note 16, at 147 (observing that in states that do not recognize imperfect self-defense, the provocation doctrine may be the only doctrinal basis for mitigating murder to manslaughter).

defendants whose behavior warrants mitigation, including those who suffered domestic abuse, any doctrinal basis that might have allowed reducing their murder charges to manslaughter. [264]

But even in jurisdictions that recognize imperfect self-defense, fear-based provocation remains critically important because it adds another basis for mitigation, reaching circumstances that imperfect self-defense would not cover. An imperfect self-defense claim is predicated on the theory that the defendant subjectively but unreasonably believed that use of deadly force was immediately necessary to defend against imminent danger of death or great bodily injury. [265] Imperfect self-defense thus assumes that mitigating murder to manslaughter is warranted because the defendant overreacted to a perceived threat, even if it was an objectively unreasonable and excessive reaction. [266] In many situations, however, defendants are not entitled to either self-defense or imperfect self-defense for reasons unrelated to the reasonableness of their beliefs, but mostly given their inability to establish the critically important imminent threat element. [267]

The doctrine of imperfect self-defense is unable to mitigate murder to manslaughter in cases where there was no *imminent* threat of using **[*1767]** deadly force by the deceased. Importantly, the imminent nature of the threat remains a critical requirement under both perfect and imperfect self-defense claims. [268] An imperfect self-defense claim is predicated on a defendant's actual belief that the deceased threatened immediate bodily harm, implying a calculated risk assessment that is grounded in a cognitive-based decision, that there is an *imminent need* to use deadly force. [269] Notably, defendants are unable to prove that the threat to use deadly force against them was imminent in circumstances involving non-confrontational killings, either because the deceased were sleeping at the time of the ***killing*** or otherwise not presenting any imminent threat. [270] For example, in *Goff*, even assuming that Ohio did recognize imperfect self-defense, nothing in the evidence suggested that the deceased presented an imminent threat to ***kill*** the defendant and/or the children who were not present at the time of the ***killing***. [271] Thus, if defendants are unable to establish that the threat to use deadly force against them was of an imminent nature, the elements of imperfect self-defense will not be met.

Additionally, provocation and imperfect self-defense are doctrinally distinct defenses, requiring proof of completely different elements. [272] For example, imperfect self-defense requires, among other elements, imminent threat to use

[264] *See* Cynthia Lee, *Response to Professor Forell, in* CRIMINAL LAW CONVERSATIONS 445-46 (Paul H. Robinson et al. eds., 2009) (arguing that a victim of domestic abuse would likely not receive a jury instruction on self-defense in a jurisdiction that did not recognize a fear provocation).

[265] *See* DRESSLER, *supra* note 8, at 235.

[266] *Id.*

[267] *See* State v. Norman, 378 S.E.2d 8, 12-13 (N.C. 1989) (stressing that the defendant, who had ***killed*** her sleeping husband, could not request a jury instruction based on either perfect or imperfect self-defense because the evidence did not demonstrate that she had reacted to an imminent threat of bodily harm or death).

[268] *See* Menendez v. Terhune, 422 F.3d 1012, 1028-29 (9th Cir. 2005) (noting that the defendant must show that he actually believed that the peril was imminent).

[269] *See* id. at 1030 (emphasizing that the provocation defense is not available if there is a sufficient gap of time, a "cooling off period," between the provocation and the act).

[270] *See*DRESSLER, *supra* note 8, at 536 (lack of imminence in non-confrontational killings).

[271] No. 11CA20, 2013 WL 139545, at *1 (Ohio Ct. App. Jan. 7, 2013) (holding that Ohio law does not recognize the imperfect self-defense doctrine). For further discussion of *Goff*, see *supra* Part II.A.1.a.

[272] *See* Ramsey, *supra* note 262, at 100 (noting that heat of passion and imperfect self-defense are two distinct doctrines).

deadly force, [273] while provocation requires intense passion that distorted defendant's judgment. [274] In fact, to reduce murder charges to manslaughter based on provocation, the defendant is not required to prove that there was an imminent need to use deadly force. [275] Instead, the defendant must prove that the **[*1768]** deceased's behavior triggered an emotional outburst that interfered with defendant's rational thinking. [276]

The infamous trial of Lyle and Erik Menendez, who were charged and convicted of ***killing*** their parents, provides an example where a California court refused to instruct the jury on imperfect self-defense due to lack of evidence that the deceased posed an imminent peril of deadly force to the defendants. [277] In this case, the prosecution argued that the defendants ***killed*** their parents in order to obtain an early inheritance. [278] The defense's theory, however, was that the defendants ***killed*** out of fear that their parents were going to ***kill*** them, following long years of continuous physical and sexual abuse of the defendants. [279] Erik Menendez testified that, five days before the killings, he told his brother, Lyle, about the years of sexual abuse he had suffered by their ***father***. [280] Lyle confronted their ***father***, Jose, who subsequently yelled at Erik for disclosing the abuse to his brother. [281] At trial, Erik claimed that this argument, together with the years of abuse and threats, made him believe that his parents would ***kill*** him and his brother. [282]

The defendants' main line of defense rested on an imperfect self-defense doctrine, but the trial court refused to instruct the jury on this theory. [283] The California Court of Appeals affirmed the lower court's refusal to instruct the jury on imperfect self-defense, upholding the murder convictions. [284] The court of appeals held that the defense did not present sufficient evidence that at the moment of the ***killing***, the defendants had an actual fear and the need to defend against *imminent* peril to life or great bodily injury. [285] The court noted that in the time between the confrontation with their ***father*** and the killings, the defendants retrieved shotguns from a car, reloaded them with better ammunition, and returned to the house before opening fire on their unarmed parents. [286] The court further stressed that Erik understood **[*1769]** that there was no imminent peril, but rather the threat of future harm,

[273] *Id.*

[274] *Id.*

[275] *Id.* at 36 n.7 (explaining that some MPC states mitigate murder to manslaughter when the defendant claimed to have reacted to an extreme emotional disturbance).

[276] *See Fontaine, supra* note 254, at 29-30 (recognizing that adequate provocation entails "provocation by the victim that would be sufficient to significantly undermine the rationality of a reasonable person").

[277] *Menendez v. Terhune, 422 F.3d 1012, 1030 (9th Cir. 2005).*

[278] *Id. at 1017.*

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id. at 1023-24, 1028.*

[284] *Id. at 1028-29.*

[285] *Id.*

[286] *Id. at 1028.*

and held that self-defense cannot be based on such prospective fear. [287] The fear that their parents had the capacity to and might, at some point, harm the defendants, continued the court, was insufficient to entitle them to imperfect self-defense jury instruction. [288]

While the provocation defense was not raised at the Menendez trial, it is plausible to surmise that had the Menendez defense relied on the theory of fear-based provocation, the jury might have been persuaded to return a voluntary manslaughter verdict. Unlike imperfect self-defense, the defense of fear-based provocation does not require proof that the defendant faced an immediate threat of physical harm. [289] Instead, it requires evidence that the defendant's thought process, reasoning, and judgment were significantly impaired as a result of fear of the deceased's inflicting physical harm. [290]

Moreover, to establish imperfect self-defense, defendants still have to prove that they subjectively believed that the deceased threatened them with use of deadly force, as opposed to non-deadly force. [291] Provoked killers do not need to prove that they believed deadly force was about to be used against them. [292] There might be circumstances where defendants persuade the jury that their judgment was impaired as a result of fear even if they fail to make the case that they feared use of *deadly* force against them, for example, if there was no evidence that the deceased possessed a weapon.

Given the conceptually distinct bases for the two defenses, a jury might reject the theory of imperfect self-defense, yet still plausibly accept the theory of provocation, as dismissing one of these theories does not necessarily result in dismissing the other. [293] Since the two defenses require proof of different elements, there might be cases in **[*1770]** which fear-based provocation and imperfect self-defense claims overlap, but in others, they might not, as the discussion of the Menendez case suggests. This conclusion demonstrates that both of these doctrines are necessary as they provide distinct and cumulative grounds for mitigation.

Finally, from a normative perspective, fear-based provocation is preferable to imperfect self-defense. Since self-defense is predicated on the theory of justification, the implication of accepting the claim is a normative determination that the defendant's act of ***killing*** was justified. [294] An imperfect self-defense claim therefore implies that the defendant is *partially* justified, because he or she reacted unreasonably. [295] In contrast, most

[287] *Id.*

[288] *Id. at 1030*.

[289] *See, e.g.*, Ramsey, *supra* note 262, at 100.

[290] *See infra* Part IV.

[291] *See* Ramsey, *supra* note 262, at 100 (noting that self-defense claims can be raised only by defendants who "believed that deadly force was necessary for self-protection . . . in the face of mortal danger").

[292] *See id.* (explaining that fear, which can provide the basis for a provocation defense, can be induced by non-mortal threats).

[293] *Id.* at 100-01; *see also* People v. Thomas, *160 Cal. Rptr. 3d 468, 480 (Cal. Ct. App. 2013)* (noting that even when facts "fit more precisely with a homicide mitigated by imperfect self-defense . . . they may also show that [the defendant] was guilty only of voluntary manslaughter because when he shot [the victim] his passion was aroused and his reason was obscured due to a sudden quarrel").

[294] *See* RICHARD J. BONNIE ET AL., CRIMINAL LAW 487 (4th ed. 2015) (highlighting a North Carolina Supreme Court opinion that stressed the need for an imminent threat to justify a self-defense homicide).

[295] *See, e.g.*, Steffani J. Saitow, Note, ***Battered Woman*** *Syndrome: Does the "Reasonable* ***Battered Woman****" Exist?*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 329, 360-61 (1993) (considering the imperfect self-defense doctrine in the context of ***battered women*** who ***kill*** their abusers).

commentators agree that provocation rests on the theory of partial excuse, rather than on partial justification. [296] Recognizing fear-based provocation means that the law acknowledges that fearful killers ought to be partially excused, given their impaired judgment, even if the ***killing*** is not partially justified. The normative difference between the justificatory and excusatory bases is critical; the theory of partial excuse is preferable because it retains the normative conclusion that the defendant's ***killing*** is still wrong. The fearful killer is only partially excused because the law recognizes that the killer's overreaction, given the emotional state of fear of physical harm, makes the killer less morally culpable compared to an actor who did not experience such fear. Fear-based provocation is therefore more compatible with the premise that the value of the sanctity of life is superior to other values, even if the law recognizes that some defendants ought to be partially excused if they find themselves in predicaments that they subjectively, but **[*1771]** unreasonably, perceived as posing deadly threats. In light of the distinct bases, which imperfect self-defense and provocation are predicated upon, the defenses should not be viewed as mutually exclusive but instead as supplemental. Therefore, the jury should be instructed on both defenses. [297]

III. THEORIZING FEAR

Having identified the necessity for recognizing fear-based provocation, this part provides the theoretical basis for adding a fear prong to the defense by delving into some of the psychological findings that explain why such an expansion is warranted. It begins with considering the psychological research on fear, and particularly, how fear affects individuals' decision making, then moves to examine the implications of these psychological insights on the scope of fear-based provocation.

A. The Psychology of Fear

Early psychological research has focused exclusively on cognitive-based processes, emphasizing intellectual and thinking processes and ignoring the role that emotions play in influencing individuals' decision making. [298] In recent years, psychological research has increasingly grown, particularly the subfield of the effects of emotion on individuals' judgment and decision making (JDM). [299] Ample research now examines the interplay between emotion and cognition, acknowledging that they are deeply intertwined and investigating the powerful influence of their effect on actors' behavioral choices. [300]

Although psychologists identify distinct mechanisms and thought patterns associated with anger and fear, some common features underlie both; psychologists now agree that both anger and fear potently, pervasively, and

[296] Voluminous scholarship is devoted to discussing whether provocation is an excuse or a justification. *See, e.g.*, Dressler, *supra* note 15, at 971 (asserting that provocation is a partial excuse defense); Joshua Dressler, *Provocation: Partial Justification or Partial Excuse*?, 51 MOD. L. REV. 467, 475 (1988) (arguing that the extent of provocation's wrongfulness plays a role in deciding if the killer's response is excusable). *But see* Berman & Farrell, *supra* note 28, at 1034 (acknowledging that some commentators understand that provocation has both excusatory and justificatory aspects and advocating that provocation should be considered both a partial excuse and a partial justification); Kahan & Nussbaum, *supra* note 18, at 307-08 (1996) (advocating for an evaluative understanding of criminal law defenses, including provocation and self-defense, that evaluates and judges defendants' actions and reasons).

[297] *See infra* Part IV, for a proposal to make self-defense and fear-based provocation cumulative rather than alternative claims.

[298] *See* Jennifer S. Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799, 800 (2015). The psychological literature uses the acronym "JDM" to refer to this subfield of judgment and decision making. *Id.* (highlighting the traditional focus of psychological research to contrast it with the new JDM model).

[299] *Id.*

[300] *See, e.g.*, Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice*, 14 COGNITION & EMOTION 473 (2000) (arguing that emotions result from a tendency to perceive new events the same way as prior events were perceived). The term "affect" in psychology refers to the experience of emotion and the interaction with stimuli.

predictably influence individuals' decision **[*1772]** making. [301] Decision making processes consist of "perception, understanding, reasoning, and choice," all of which are influenced by experiencing the intense emotions of anger and fear. [302] Furthermore, these emotions may constitute harmful drivers of decision making, "often produc[ing] influences that are unwanted and nonconscious." [303] They induce responses, including behavioral ones, "that enable the individual to deal quickly with encountered problems or opportunities." [304] Psychological research shows that emotions impact decision making in a way that can override otherwise sensible courses of action and that both anger and fear may significantly undermine rational decision making, obscuring reason and judgment. [305] Professor Terry Maroney observed the relationship between the psychological research and the law, noting that research establishes that emotions can sometimes have a disruptive effect and that their presence may disturb rationality. [306]

Examining how fear operates, researchers observe that individuals' decision making processes, when faced with threatening situations, include perception of the risk, appraisal of the risk, formation of relevant beliefs about the situation, and choice of a course of action. [307] These stages are all adversely affected by the experience of extreme fear, leading individuals to make irrational decisions that they would not have made but for their perception of extreme risk. [308] Psychological research also finds that fear often generates a nearly automatic response, including striking out. [309] Furthermore, research suggests that fear, and the reactions to it, are almost involuntary and difficult to "cognitively override." [310]

[*1773] While anger and fear share some notable common features, social psychologist Jennifer Lerner and her colleagues' research found that even though both anger and fear are negative emotions of the same valence, there are important differences in the thought processes that underlie them. [311] This research compared the operation of anger and fear, examining how these emotions shape the content of thought via appraisal tendencies. [312] Drawing on what they refer to as appraisal tendency framework, they found that anger and fear can exert opposing influences

[301] Lerner et al., *supra* note 298, at 816.

[302] *See* Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1392 (2006).

[303] Lerner et al., *supra* note 298, at 816.

[304] Lerner & Keltner, *supra* note 300, at 476 and accompanying notes.

[305] *See* George F. Lowenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 269 (2001) (arguing that emotions can cause almost uncontrollably destructive behavior in the face of cognitive evaluation); *see also* Sherman & Hoffman, *supra* note 88, at 499 (arguing that the doctrine of self-defense assumes that emotions have an effect on decision making).

[306] *See* Maroney, *supra* note 302, at 1403.

[307] *See* Sherman & Hoffman, *supra* note 88, at 511 (contending that fear shares the same mental process as anger and all other emotions).

[308] *Id.*

[309] *See* Elizabeth A. Phelps et al., *Intact Performance on an Indirect Measure of Race Bias Following Amygdala Damage*, 41 NEUROPSYCHOLOGIA 203, 203-04 (2003) (explaining that the part of the brain responsible for fear is subject to nearly automatic responses to stimuli).

[310] Maroney, *supra* note 302, at 1407.

[311] Lerner et al., *supra* note 298, at 804.

[312] *Id.*

on choices and judgment. [313] In other studies that examine risk-taking, Lerner and her colleagues compared risk perceptions of angry and fearful people. [314] They found that angry people view negative events as predictably caused by, and under the control of, other individuals. [315] They also found that fearful people generally made pessimistic judgments of future events. [316] They further demonstrated that fear involves low certainty, powerlessness, and a low sense of control over the situation, which are likely to produce a perception of negative events as unpredictable and situationally determined. [317] In sum, these research findings demonstrate that fearful individuals consistently made judgments and choices that were relatively pessimistic and amplified their perception of risk in a given situation, in contrast to angry participants who were more likely to disregard risks. [318]

Since psychologists now agree that emotions serve "an adaptive coordination role" that trigger a set of behavioral responses, [319] one important implication of these research findings concerns individuals' resulting behavioral responses to fear. Psychological researcher Joseph Cesario notes that the behavioral outcomes of fear may consist of five distinct responses, including flee, freeze, hide, attack, and assess risk. [320] While lay societal perceptions often assume that fear is more likely **[*1774]** to result in a flee or freeze response rather than in aggression, Cesario found that the more common responses to fear are either flight or fight. [321]

In addition, psychological research finds that the particular reaction taken in response to fear depends on multiple features stemming from the circumstances underlying the threatening situation, including the nature, size, and distance of the threat, the possibility and ease of escaping or hiding from the threat, and the clarity of the threat. [322] Other research suggests that there are also gender-based, social, and cultural aspects determining the response to fear. [323] For example, ***women*** are more likely to scream or call for help while men are more likely to physically attack in a similar circumstances. [324]

[313] *Id.* at 804-05 (defining appraisal tendency framework as "a multidimensional theoretical framework for linking specific emotions to specific judgment and decision making outcomes").

[314] Lerner & Keltner, *supra* note 300, at 473.

[315] *Id.* at 47.

[316] Lerner & Keltner, *Fear, Anger, and Risk*, 81 J. OF PERSONALITY & SOC. PSYCHOL. 146, 147 (observing that similar patterns were found in subsequent studies in which they experimentally induced participants to feel anger and fear).

[317] Lerner & Keltner, *supra* note 300, at 478-79.

[318] *Id.* at 480.

[319] *See* Lerner et al., *supra* note 298, at 808.

[320] *See* Joseph Cesario et al., *The Ecology of Automaticity: How Situational Contingencies Shape Action Semantics and Social Behavior*, 21 PSYCHOL. SCI. 1311, 1312 (2010).

[321] *See id.* (highlighting that responses to stimuli are affected by the form of the stimuli and the recipient's relationship to the stimulating behavior).

[322] Elise J. Percy at al., *"Sticky Metaphors" and the Persistence of the Traditional Voluntary Manslaughter Doctrine*, *44 U.MICH. J.L. REFORM 383, 419 (2011).*

[323] *See* D. Caroline Blanchard et al., *Human Defensive Behaviors to Threat Scenarios Show Parallels to Fear- and Anxiety-Related Defense Patterns of Non-Human Mammals*, 25 NEUROSCIENCE & BIOBEHAVIORAL REVS. 761, 761 (2001) (using rats in an experiment that revealed that rats will engage in defensive-attack behavior if they are unable to flee when under threat).

[324] *Id.* at 767.

Another research finding pertains to the duration of experiencing fear. In general, researchers agree that full-blown emotions are commonly short-lived, and that fear, specifically, is often an acute, sudden, and short-lived reaction to an immediate threat. [325] While "[e]motions are initially elicited rapidly and can trigger swift action," psychological research also recognizes that once activated, "some emotions . . . can trigger more systemic thoughts." [326] Consequently, researchers now "distinguish[] between the cognitive consequences of an emotion-elicitation phase and an emotion-persistence phase." [327] Furthermore, researchers note that fear sometimes carries ongoing consequences--particularly that fear and anticipatory anxiety about a future dangerous event may linger longer in circumstances where a person has been subjected to continuous abuse for an extended period **[*1775]** of time. [328] In such cases, the longevity of the psychological repercussions of past physical abuse continues to have an impact on some individuals' future perception of risk. [329] A growing body of research suggests that victims of long-term physical and emotional abuse experience a variety of symptoms long after the actual abuse has ended, including fear, anxiety, stress, and anger. [330] For example, severe past trauma and abuse that results in intense fear may cause long-term stress, negatively affecting all areas of functioning. [331] Research further shows that domestic violence victims suffer from a host of serious long-term mental health problems even after separating from abusive partners, including depression, anxiety, and PTSD. [332] Moreover, the traumatic effects of physical abuse are especially exacerbated in the case of spousal abuse due to the fact that the abused person is emotionally involved with the abuser, therefore further explaining why fear may linger on, even when the threat of harm has been completely removed. [333]

Taken together, psychological research on the effects of fear, including its possible lingering impact, suggests that while the behavioral consequences of fear are more varied and complex than those of anger, fear, similarly to anger,

[325] *See* Robert W. Levenson, *Human Emotion: A Functional View, in* THE NATURE OF EMOTION FUNDAMENTAL QUESTIONS 123 (Paul Ekman & Richard J. Davidson eds., 1994) (maintaining that the purpose of emotions is to provide a rapid adaptation to environmental changes); *see also* George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORG. BEHAV. & HUM. DECISION PROCESSES 272, 272 (1996) (observing the powerful effect of adaptation and the fact that most individuals' emotional states return to their baseline states over time).

[326] Lerner et al., *supra* note 298, at 816-17.

[327] *Id.* at 817.

[328] Catherine Cerulli et al., "*What Fresh Hell Is This?" Victims of Intimate Partner Violence Describe Their Experiences of Abuse, Pain, and Depression*, 27 J. FAM. VIOLENCE 773, 778 (2012) (finding that victims of physical abuse describe psychological symptoms, including depression, anxiety, panic attacks and flashbacks lasting even beyond the abuse and after criminal prosecution of the abuser).

[329] *See* ILSA EVANS, BATTLE-SCARS: LONG-TERM EFFECTS OF PRIOR DOMESTIC VIOLENCE 4 (2007) (indicating that the effects of domestic violence affect sufferers in multiple facets of their lives long after the initial trauma).

[330] *Id.* at 14.

[331] *Id.*

[332] *See, e.g.*, Carole Warshaw et al., *Mental Health Consequences of Intimate Partner Violence, in* INTIMATE PARTNER VIOLENCE: A HEALTH-BASED PERSPECTIVE (Connie Mitchell & Deirdre Anglin eds., 2009); Debra Houry et al., *Intimate Partner Violence and Mental Health Symptoms in African American Female ED Patients*, 24 AM. J. OF EMERGENCY MED. 444, 445 (2006); DeJonghe ES et al., ***Women*** *Survivors of Intimate Partner Violence and Post-Traumatic Stress Disorder: Prediction and Prevention*, 54 J. OF POSTGRADUATE MED. 294, 294 (2008).

[333] Evans, *supra* note 329, at 13-14.

may also lead to aggressive, possibly lethal, behaviors. [334] Put differently, one of the irrational decisions that fearful individuals may make is an act of ***killing***.

[*1776] A final point concerns the interrelationship between anger and fear. Legal doctrines typically treat anger and fear as distinct emotions. [335] Psychologists, however, disagree with the law's dichotomy, finding that from a psychological perspective, there is often an overlap between experiencing anger and fear. [336] Psychiatrists note that the legal assumption that anger and fear are distinct emotions is mistaken because the two emotions share many similarities from a medical perspective. [337] They stress that "physiologically anger and fear are virtually identical" and that "many mental states that accompany ***killing*** also incorporate psychologically both anger and fear." [338] Therefore, medical and psychological research demonstrates the failings of the legal assumption that fear and anger may be treated differently for the purpose of creating separate defense doctrines. [339]

B. Psychological Research's Implications for Fear-Based Provocation

Psychological research findings offer important insights on the scope of the provocation defense, and particularly on recognizing fear-based provocation. Understanding how fear affects a person's judgment and decision making processes explains why the prevalent perception of provocation as an anger-based defense proves unfit for accommodating the experiences of fearful killers. Since provocation's elements are incompatible with the way fear operates, even in jurisdictions that do not view provocation and self-defense as mutually exclusive, fearful killers trying to rely on provocation are often unsuccessful.

The subsections below elaborate on the three main features that defendants who ***kill*** out of fear experience: (1) fear results in interference with defendants' reasoning and judgment processes; (2) fear is often cumulative, simmering slowly over a prolonged time period; and (3) fear might linger for long periods, resulting in a failure to cool off, even with lapse of time. While these three factors are critical for **[*1777]** recognizing fear-based provocation, they are currently not embedded in existing understanding of anger-based provocation.

1. Fear-based provocation's rationale: impaired judgment

Psychological research reveals that intense fear may result in significantly impaired thought processes, leading defendants to act out of distorted reasoning and judgment. Acknowledging that fear undermines rational judgment explains why fearful people might ***kill***. Yet, as previously noted, the main rationale upon which anger-based provocation is predicated is the notion of loss of control. [340] This model, however, is unsuitable to capture the distinct features characterizing the typical responses of fearful killers.

[334] *See* Cesario, *supra* note 320, at 1314 (showing that an individual could be pushed toward an automatic response of fight or flight solely depending on the location and circumstances of the stimuli).

[335] *See supra* Part II.B (noting that legal scholars mostly address fear through the self-defense doctrine and anger through the lens of provocation). *But cf.* Pillsbury, *supra* note 16, at 147-48 (acknowledging that fear and anger can be difficult to disentangle and often defendants experience both).

[336] *See* English Law Comm'n, *supra* note 247, at 53 (citing the British Royal College of Psychiatrists, Response to Consultation Paper No. 173, for the proposition that anger and fear are not distinct emotions). This finding, among others, led the authors to recommend that British law also recognize fear as triggering provocation defense.

[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] *See supra* Part I.A.

One implication of the psychological finding that fear may impair rational judgment is that fear does not necessarily result in a visible response that may be characterized as loss of control. In fact, fearful killers may outwardly appear calm, cool, composed, and in control of their actions. [341] Defendants who externally exhibit visible signs of control of their emotions may lead decision makers to conclude mistakenly that these defendants ***killed*** in acts of calculated and deliberate revenge, seeking personal vendetta against the deceased individuals who wronged them. But in fact, these fearful killers might have ***killed*** as a result of significant distortion in their judgment and rational thinking. Predicating the provocation defense on the loss of control rationale therefore raises a concern regarding disparate treatment of angry and fearful killers. Angry defendants whose behavior is *externally* manifested as an impulsive act of loss of control might be treated more favorably than fearful killers whose typical response might be perceived by decision makers as the exact opposite of loss of control that is as deliberate and calculated.

Shifting provocation's focal point from loss of control towards the destruction of reasoning and judgment provides a coherent rationale for recognizing fear-based provocation. [342] Conceding that a fearful killer's thought process has been significantly distorted as a result of the deceased's threatening behavior offers normative grounds for **[*1778]** mitigation. When defendants ***kill*** in response to such threats, their moral culpability is diminished compared to defendants who ***kill*** in other circumstances. [343] Put differently, when distortion in a defendant's judgment is powerful enough, it is sufficient to make the act of ***killing*** far less morally culpable than it would have been absent such distortion. Since a defendant's ability to rationally assess the situation is significantly undermined by the impact of fear, mitigating charges from murder to manslaughter is warranted.

Emphasizing the impact of fear on defendants' decision making processes is also consistent with a basic tenet of criminal law, under which the degree of criminal liability ought to be derivative and proportional to the degree of defendants' moral culpability. [344] Recognizing fear-based provocation would allow the law to reflect proper gradations of criminal culpability based on varying levels of moral blameworthiness. Reducing murder to voluntary manslaughter, rather than completely acquitting of any crime, reflects prevailing societal perceptions that ***killing*** in circumstances falling short of self-defense still warrants criminal penalty. [345] But at the same time, it acknowledges that a defendant whose cognitive and volitional capabilities were significantly impaired is not as morally culpable as one whose capabilities remained intact.

Additionally, conceding that both anger and fear may distort rational judgments should also take into consideration the fact that the psychological reality is that these emotions sometimes overlap, operating jointly. [346] Grounding a defense on decision makers' determination of whether the killer was primarily angry or primarily fearful is inherently problematic because it lacks support in psychological research. Since in some cases the same deceased's

[341] *See supra* Part II.A-B (demonstrating courts' emphasis on fearful defendants' appearance at the time of the ***killing*** and the external manifestation of cold, calculated, and in control reaction).

[342] *Cf.* Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 297-98 (2003) (proposing a new "generic mitigating excuse" for defendants who are guilty of ***killing*** but acted, at least partially, responsible based on their lack of capacity for rationality).

[343] *See generally* Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1559 (1999) (observing that moral culpability depends on "whether we intend to do wrong, know that wrong will occur, or have reason to predict that we will do wrong" and concluding that culpability depends on whether a defendant was able to reasonably assess the information to determine that his actions would be wrong).

[344] *See generally* MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 192 (1997) (noting that culpability is both necessary and sufficient as a basis for criminal punishment).

[345] *See supra* notes 257-258 (discussing the lack of recognition of imperfect self-defense under common law and in many jurisdictions).

[346] *See supra* note 298 and accompanying text (describing psychiatrists' consensus that fear and anger often overlap).

behavior that angers a defendant also establishes the defendant's fear of physical violence, legal doctrine ought to acknowledge **[*1779]** that provocation may often be triggered by an indistinguishable combination of fear and anger. If both anger and fear may destruct defendants' rational judgment, even if such destruction is differently manifested, there is no principled basis for the law's privileging one emotion over the other. Anger and fear ought to be similarly treated, with both providing grounds for mitigation of murder charges to manslaughter.

2. The cumulative impact of fear

The provocation defense was traditionally not available to defendants who were subjected to multiple provoking acts over an extended period of time. [347] Existing provocation doctrine still envisions a raging defendant who has undertaken a spontaneous act of aggression, triggered by a single and sudden provoking event. Only a minority of jurisdictions recognize the notion of cumulative provocation, namely the additive effect of previous multiple physical abuses as adequate provocation culminating in the ***killing***. [348] A key impediment to incorporating a fear-based trigger into existing provocation defense lies with many jurisdictions' refusal to recognize the cumulative effect of a series of triggering incidents, increasingly building up over a long period of time. [349] Since many jurisdictions define provocation as requiring a sudden and serious incident, a series of past provoking incidents in the course of prolonged abuse would not satisfy this requirement. [350] This is especially apparent when defendants ***kill*** following the deceased's threat to ***kill*** in the future, but given previous threats of a similar nature, the specific threat preceding the ***killing*** is not deemed in itself sudden and sufficiently serious. [351]

Psychological research demonstrates that particularly in cases of domestic abuse, a ***killing*** may result from a "slow burn" reaction to fear **[*1780]** of an abuser, accumulating over a prolonged time period of abuse. [352] Case law further illustrates that domestically ***battered*** people who were subjected to physical abuse for a long time may ***kill*** their abusers in response to many past abusive incidents. [353] In these circumstances, the ***killing*** is the culmination of slow simmering of multiple incidents, which are often part of a repetitive pattern of abuse that gradually builds up over time. Provocation law's emphasis on the suddenness of the triggering incident proves inapt in cases where defendants did not react in response to one serious sudden incident but rather in response to the cumulative effect of a series of actual or threatened violence.

[347] *See* Below, *supra* note 115, at 793-96, 800-01 (noting that the accumulated fear ***battered women*** experience is not considered a "sudden" loss of control as required by traditional provocation law, but that some English courts recognize cumulative provocation where there is evidence of ***battering*** and "slow burn" response).

[348] Examples of jurisdictions that recognize cumulative provocation include Pennsylvania and California. *See, e.g.*, *People v. Berry, 556 P.2d 777, 780-81 (Cal. 1976)* (recognizing the cumulative effect of verbal taunting as adequate provocation); *Commonwealth v. Stonehouse, 555 A.2d 772, 782 (Pa. 1989)* (recognizing the cumulative effect of deceased's abusive behavior as sufficient provocation).

[349] *See* Pillsbury, *supra* note 16, at 166 (noting that provocation doctrine insists on a cooling off period, preventing defendants who experience multiple provoking incidents from asserting the defense).

[350] *See supra* Part II.A.1 (examining instances of ***killing*** after prolonged abuse).

[351] *See supra* notes 158-61 and accompanying text (discussing cases where the deceased made continuous threats towards the defendant over time).

[352] *See* Martin Wasik, *Cumulative Provocation and Domestic* ***Killing***, 1982 CRIM. L. REV. 29, 30 (1982) (on file with American University Law Review); *see also* English Law Comm'n, *supra* note 247, at 51-51 (discussing defendants who ***killed*** their abusers after being subjected to prolonged and continuous physical abuse).

[353] *See, e.g.*, *People v. Aris, 264 Cal. Rptr. 167, 183 (Cal. Ct. App. 1989)* (upholding a trial court jury instruction that a series of provoking events over a period of time may be sufficient to create heat of passion); *see also* EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 11 (2d ed. 1996) (demonstrating the prevalence and extreme consequences of domestic violence).

3. The lingering effect of fear

The cooling off requirement presents an additional obstacle for fearful killers trying to establish the elements of the provocation defense. Since provocation doctrine requires a sudden act, the presence of a cooling off period typically negates any mitigating effect which the provocation might have had. [354] Most courts require that a relatively short interval--often only a few minutes--occur between the provocation and the ***killing***. [355]

While many jurisdictions have relaxed the cooling off requirement, leaving the issue to the jury, the impact of this element persists as juries might reject the defense in cases where they believe that there was sufficient time for the defendant's passions to cool off. [356] Despite many **[*1781]** jurisdictions' shifting from a stringent cooling off requirement towards evaluating the lapse of time factor under reasonableness standards, provocation's temporal requirement still presents a significant hurdle for fearful killers attempting to raise the provocation defense. [357] This enduring limitation fails to take into account the psychological research findings that fear may carry lingering effects. [358]

Commentators observe that even if the temporal requirement is modified, existing emphasis on the jury's evaluation of the reasonableness of the defendant's reaction to the provoking incident remains problematic, especially for killers who are ***women***. [359] Additionally, the cooling off requirement has proven especially problematic for people who suffered domestic abuse, often ***women***, who endured long term terror by their abusers. [360] These abused people may first exhibit symptoms of depression and desperation and react violently only after a lapse of time between the last ***battering*** incident and the ***killing***. [361] The problem is especially apparent when these defendants

[354] *See, e.g.*, *People v. Fiorentino, 91 N.E. 195, 196 (N.Y. 1910)* (emphasizing a charge of first degree murder will not be mitigated if the defendant acted with premeditation and deliberation after having time to cool off).

[355] *See, e.g.*, Caroline A. Forell & Donna M. Matthews, A LAW OF HER OWN: THE REASONABLE ***WOMAN*** AS A MEASURE OF MAN 176 (2000) (noting that while court generally adhere to the cooling off requirement, many courts stretch the cooling off time when men ***kill*** their intimates).

[356] *See* People v. Millbrook, *166 Cal. Rptr. 3d 217, 231 (Ct. App. 2014)* (discussing whether the defendant had sufficient time to cool off); Nourse, *supra* note 62, at 1244 (commenting that even today, there is a line conceived in time that marks the difference between murder and provoked homicide).

[357] This proves a significant obstacle in jurisdictions that incorporate the suddenness requirement into the statutory definition of voluntary manslaughter, such as Ohio where murder is reduced to voluntary manslaughter only if defendant proves that the homicide occurred while under the influence of sudden passion or in a sudden fit of rage. *See**OHIOREV.CODEANN. § 2903.03* (West 2013). Ohio courts refuse to give voluntary manslaughter jury instructions based on fear-based provocation, holding that past abusive incidents or previous verbal threats do not satisfy the test for reasonably sufficient provocation since there was sufficient time for cooling off. *See*, *e.g.*, State v. Parnell, No. 11*AP-257, 2011 WL 6647293,* at *7 (Ohio Ct. App. Dec. 20, 2011) (finding that the trial court did not err in refusing to instruct the jury on provocation based on the defendant's fear); State v. Adcox, No. 98*CA007049, 2000 WL 422400,* at *3-4 (Ohio Ct. App. Apr. 19, 2000) (holding the trial court did not err in refusing to give instruction on aggravated assault where the defendant contended that he acted in self-defense based on his assertion that he was afraid because the deceased was wielding a knife).

[358] *See supra* Part III.A.

[359] *See* LEE, *supra* note 19, at 46-52 (discussing prevalent assumptions regarding the reasonableness of ***women*** defendants).

[360] *See* Pillsbury, *supra* note 16, at 166.

[361] *See, e.g.*, CHARLES PATRICK EWING, ***BATTERED WOMEN*** WHO ***KILL***: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 61 (1987); Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for* ***Battered Women*** *Who* ***Kill***, 14 LAW & HUM. BEHAV. 579, 586-90 (1990) (proposing an expansion of the self-defense doctrine for ***battered women*** who ***kill*** their abusers after enduring extreme psychological abuse); Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of* ***Battered Women****'s Self-Defense*, *23 ST. LOUIS U. PUB. L. REV. 155, 181-83 (2004)* (explaining that ***battered women*** may feel that they can properly protect themselves only once the abuse has stopped, such as when the abuser is asleep).

kill their abusers in non-confrontational circumstances, **[*1782]** such as when the abusers were sleeping since the defendants had ample time to cool off after the most recent ***battering*** incident. [362] The current view of the provocation defense, with its deeply embedded assumption that passage of time provides defendants with sufficient time to cool off and regain back control, is inconsistent with the actual experiences of these fearful killers.

The judicial reluctance to acknowledge the lingering effects of fear is incompatible with the psychological research. [363] This research buttresses abused defendants' claims that their continuous abuse placed them in a perpetual state of terror that never dissipated, and that their reactive aggression was a response to extreme fear of future violence by the abuser. [364] This research further rebuts the myth that time heals all wounds, supporting ***battered*** defendants' perceptions of long-lasting fear. In sum, the elements of existing provocation defense demonstrate that current law is not informed by the psychological research on how fear operates and its lingering impact.

IV. THE ELEMENTS OF FEAR-BASED PROVOCATION

Recognizing that fear distorts defendants' rational judgment not only provides a framework for fear-based provocation but it also calls for reconstructing the elements of provocation to take this fear into account by determining its effect on defendants' behavior. [365] The sections **[*1783]** below consider the potential implications that the psychological insights might have on the scope of the provocation doctrine by outlining the two key prongs of fear-based provocation.

A. The Subjective Prong: Fear Resulting in Impaired Judgment

The subjective component of fear-based provocation would first require defendants to prove that they acted in response to fear of violence threatened against them by the deceased. [366] Evidence would have to establish that the impact of this fear was so powerful that it overwhelmed the defendant's thought process, resulting in substantial distortion in rational judgment and reasoning mechanisms. [367] Such evidence offers the first step in meeting the

[362] *See, e.g.*, State v. Peterson, 857 A.2d 1132, 1135 (Md. Ct. Spec. App. 2004) (detailing how the defendant shot her abusive partner while he was watching television); State v. Urena, 899 A.2d 1281, 1284 (R.I. 2006) (explaining that the defendant left her house to avoid escape her abusive boyfriend, but stabbed him later that night after he followed her to her friend's house).

[363] *See supra* Part III.A.

[364] *See* ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND ***BATTERED WOMEN*** WHO ***KILL***: A NEW FRAMEWORK, 120-21 (2002) (noting that ***battered woman***'s heightened sensitivity to danger from their intimate abusers may cause an apprehension of future danger, even in non-confrontational situations); *see also* SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER, 142-44 (1998) (observing that traditional provocation doctrine presents significant obstacles in cases where abused ***women*** ***kill*** their abusers not in response to immediate violence but instead, after exceeding the time limit of the cooling off period).

[365] By proposing that the elements of fear-based provocation take into account cumulative fear and the lingering effect of fear, I am nowhere suggesting that the elements of anger-based provocation should not recognize the effect of cumulative anger and the fact that in some circumstances, defendants' anger may linger for a long time, without cooling off. Since this Article focuses on fear as an additional qualifying trigger for provocation, elaborating on the notions of cumulative anger and on the fact that anger, just like fear, may linger over time, exceed the scope of this paper. For now, however, suffice it to say that I believe that anger-based provocation should also be expanded to recognize cumulative anger, and that anger also may linger over time. For a comparative perspective on adding fear as an additional prong to trigger provocation under English law, see CORONERS AND JUSTICE ACT 2009, c. 25, Part 2, Ch. 1, § 55 (Eng.).

[366] The defense might also recognize that the defendant acted not only in response to threat against them but also against another individual, most notably, a family member or a close friend. This possibility calls for considering who else, beyond family members, ought to be covered here. I leave this issue for another paper.

[367] *Cf.* People v. Beltran, 301 P.3d 1120, 1130 (Cal. 2013) (elaborating on the elements of California's anger-based provocation, which focus on whether the defendant experienced such intense emotional provocation that it obscured any reason or judgment).

subjective prong because it recognizes that fear impairs judgment, which is the underlying rationale for fear-based provocation.

In addition, defendants would have to prove that they responded to fear of *physical* harm as opposed to other types of fear, such as fear of infliction of emotional pain, economic harm, reputational harm, perception of honor violation, or fear related to custody battles. [368] The threat of physical harm serves as a limiting mechanism that excludes from the scope of the provocation defense threats of a non-physical nature. In contrast to self-defense, however, the harm threatened does not necessarily have to be deadly harm, as long as it is serious harm of a physical nature.

While evidence that defendants' fear obscured their judgment is necessary to prove fear-based provocation, it is not sufficient. Additionally, fear-based provocation's subjective prong should encompass an additional feature that limits the scope of the defense, namely that the aggression must be in **[*1784]** response to a specified threatening behavior by the deceased. [369] Arguably, tethering the defendant's reaction to the deceased's alleged wrongdoing might be conceived as problematic in a modern era that categorically rejects victim blaming strategies in criminal trials. This concern becomes even more apparent when individuals were ***killed*** and cannot respond to the defendants' portrayal of the events. [370] Contemporary understandings of provocation have partially abandoned the previous focus on identifying deceased's wrongdoing, instead shifting most of the inquiry to the defendant's loss of control. [371] Incorporating the deceased's wrongdoing into the defense thus raises some concern that it implicates notions of the deceased's fault, implying that the ***killing*** was somehow justified.

Conceding that making deceased's wrongdoing a part of the defense raises some discomfort, I posit that not only is it already embedded, but that other important considerations outweigh this concern. The requirement that the defendant react in response to the deceased's physically threatening behavior is necessary because it adds a much-needed normative component to limit the operation of fear-based provocation. It is also one of the features that distinguishes fear-based provocation from the EED defense which does not require any deceased's wrongdoing and was rejected by most jurisdictions. [372]

A host of mental problems may similarly affect an individual's behavior, resulting in homicide. [373] Specifically, an individual may suffer from impaired judgment and distortion in rational thinking due to reasons unrelated to the deceased's behavior. Grounding fear-based provocation on a defendant's fear alone, without requiring that the fear stems from the deceased's threat of violence, would result in allowing jurors to **[*1785]** recognize the defendant's

[368] *But see* People v. Wright, 196 Cal. Rptr. 3d 115, 142-44 (Cal. Ct. App. 2015) (holding that the trial court erred in refusing to instruct the jury on voluntary manslaughter based on the defendant's claim that her non-abusive boyfriend would take custody of their child, but that the error was harmless because there was sufficient evidence that the ***killing*** was deliberated and premeditated).

[369] The requirement that defendant's fear stems from the deceased's threatening violence also raises the question of misdirected retaliation, namely, situations where the defendant mistakenly ***killed*** an innocent third party rather than the person who placed him or her in fear. Elaborating on whether fear-based provocation should also cover cases of misdirected retaliation exceeds the scope of this paper.

[370] *See generally* Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMPLE L. REV. 645, 646-49 (2003) (discussing how self-defense and other justification defenses serve as "formal victim blaming doctrines in criminal law").

[371] In addition, this shift has resulted in the prevalent view that provocation is a partial excuse rather than partial justification. For an extensive scholarly discussion on the nature of the provocation defense as an excuse or a justification, see generally Berman & Farrell, *supra* note 28, at 1045-65.

[372] *See supra* Part I.B (discussing EED, which does not require that the triggering incident stem from deceased's wrongdoing).

[373] People v. Casassa, 404 N.E.2d 1310, 1317 (N.Y. 1980) (holding that defendant's mental disability was peculiar to him and unworthy of mitigation).

unique personal idiosyncrasies, such as possessing an especially fearful personality, as basis for mitigation. In some cases, these idiosyncrasies may amount to personality disorders that are characterized by anxious and fearful thinking or behavior. [374] Reducing the charges based on fear-based provocation in these circumstances is unwarranted because the underlying rationale for mitigation in such cases would have been defendants' specific mental disorders rather than genuine fear of the deceased's infliction of violence. The addition of a fear prong as a basis for mitigation is not predicated on incorporating defendants' mental abnormalities into the provocation defense. Fear-based provocation excludes such cases from the scope of the defense, acknowledging that they might be separately addressed as part of a different defense, which is predicated on mental disorders. [375]

Rather than grounding a defense in defendants' emotional and mental disorders, the basis for fear-based provocation rests on a temporary distortion of rational judgment stemming from actual physical threats. Recognizing that a defendant acted in direct response to fear of the deceased's threat of violence draws a normative line between cases where the defendant might be partially excused because fear provoked the ***killing*** and those in which other reasons, unrelated to the deceased's threatening behavior, distorted rational judgment.

Finally, as psychological research suggests, fear and anger are not completely separate emotions and might operate jointly in impairing defendants' judgments. [376] In some cases, the same deceased's conduct that causes defendant's anger might also cause defendant's fear. Recognizing fear-based provocation should correspond to the psychological understanding that fear and anger are not mutually exclusive emotions and that sometimes both emotions may overlap. The fact that defendants acted out of fear for their physical safety does not necessarily mean that they were not also angry. The reconstructed **[*1786]** provocation defense ought to provide that the defendant acted in response to either anger, fear, or their combination.

B. The Objective Prong: A Person of Average Disposition Standard

Fear-based provocation's subjective prong rests on a descriptive psychological understanding of fear's negative effect on defendants' judgments. Yet, a subjective component in itself does not provide decision makers with any guidance as to which types of impaired judgments warrant mitigating murder to voluntary manslaughter. From a normative perspective, adding an objective prong to the elements of fear-based provocation is necessary to constrain the operation of the subjective prong.

The objective prong would compare a defendant's aggressive reaction to that of an ordinary person, meaning a person of average disposition, in the same situation. The ordinary person is different from a reasonable person because an act of ***killing*** is never considered reasonable absent self-defense. [377] This ordinary person possesses ordinary temperament, tolerance, and self-restraint, and is similarly situated with respect to defendant's sex, age, and circumstances. [378] By measuring a defendant's response against that of a person of average disposition, the

[374] Psychiatry classifies personality disorders into three categories with Cluster C personality disorders further divided into three subcategories: avoidant personality disorder, dependent personality disorder and obsessive-compulsive personality disorder. *See Personality Disorders*,MAYOCLINIC (Jun. 12, 2018, 8:26PM) http://www.mayoclinic.org/diseases-conditions/personality-disorders/symptoms-causes/dxc-20247656.

[375] I leave open here the question of under what circumstances mitigating charges for defendants with mental disorders is normatively warranted. Further elaborating on this issue exceeds the scope of this Article.

[376] *See supra* notes 304-306 and accompanying text.

[377] *See* DRESSLER, *supra* note 8, at 532, 534 (providing several examples of how jury instructions have articulated the reasonable or ordinary person standard).

[378] *See* People v. Beltran, 301 P.3d 1120, 1125 (Cal. 2013) (discussing the person of an average disposition standard); *cf.* CORONERS AND JUSTICE ACT 2009, c. 25, Part 2, Ch. 1, § 54-55 (Eng.) (providing a defense of loss of control, which abolishes traditional provocation defense and adds a fear-based prong as a "qualifying trigger" for the defense if the defendant can prove that the ***killing*** was the

objective prong encompasses a necessary normative component which guides juries in considering whether the defendant's fear and reaction, given the specific circumstances, warrant mitigation. This view further aligns with other defenses that criminal law recognizes, such as duress, which also include similarly normative determinations. [379]

Measuring a defendant's response to that of an ordinary person with average disposition calls for considering whether this standard should rest on evaluating the defendant's fear, or rather his or her act of **[*1787]** ***killing***. [380] Addressing this point, the California Supreme Court in *People v. Beltran* [381] reaffirmed the former approach, holding that "emotion reasonableness" remains the correct standard for evaluating whether provocation was adequate. [382] In this case, the defendant, a jealous and controlling man who had physically abused the deceased throughout their two-year intimate relationship, stabbed the deceased to death with a kitchen knife after she left him and started dating another man. [383] The defendant was charged with murder and the trial court instructed the jury on both murder and voluntary manslaughter based on provocation. [384] The court rejected the state's position that the standard is whether an average person of ordinary disposition would necessarily ***kill***, as the defendant had. [385] Instead, it accepted the defense's position that the provocation involved must cause a person of average disposition, in the same situation and knowing the same facts, to act rashly under the influence of such intense emotion that judgment or reasoning process was obscured. [386]

The decision is likely to raise further feminist scholarly attacks on the provocation defense given the disturbing circumstances underlying the defendant's abhorrent behavior. [387] However, despite the defense-friendly jury instruction on voluntary manslaughter, in *Beltran*, the jury did not accept the defense's theory that the defendant was provoked and convicted him of second degree murder. [388] Setting aside the specific facts of *Beltran*, this Article argues that the legal standard that was adopted is warranted and ought to be incorporated into fear-based provocation's objective prong. A fearful killer's response ought to be measured against that of an ordinary person of average **[*1788]** disposition who experienced similar impairment in rational thought process, which might have

result of loss of self-control attributable to the defendant's fear of violence from the deceased, and requiring that a person of defendant's age and sex, with a normal degree of tolerance and self-restraint, and in the circumstances of defendant might have reacted in the same or in a similar way to defendant).

379 *See* Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 552 (2012) (discussing the normative aspect of the provocation defense).

380 *See supra* Part I.A. (elaborating on Lee's distinction between "act reasonableness," which focuses on whether a reasonable person in the defendant's situation would have similarly responded by ***killing*** another person, and "emotion reasonableness," inquiring into whether the defendant's emotional outrage or passion was reasonable).

381 301 P.3d 1120 (Cal. 2013).

382 Id. at 1136.

383 Id. at 1123-24.

384 Id. at 1124.

385 Id. at 1130-31.

386 Id. at 1135-36 (affirming the lower court's jury instruction).

387 *See* Gruber, *supra* note 64, at 276; *see also supra* notes 64-84 and accompanying text (discussing feminist theories).

388 People v. Beltran, No. A124392, 2013 WL 6498987, at *18 (Cal. Ct. App. Dec. 11, 2013) (showing that, on remand, the court affirmed the defendant's conviction of second degree murder).

led him or her to act out of disturbed judgment. A court using this framework would take into consideration objective factors like a defendant's age and gender as well as other relevant surrounding circumstances.

Rejecting a standard that requires that an ordinary person, in the defendant's situation, would necessarily ***kill*** is consistent with the key rationale for recognizing fear-based provocation, namely, the understanding that intense fear may result in significant impairment in rational thinking. Moreover, adopting a standard that requires that any ordinary person of similar disposition would necessarily react to the threat by ***killing***, conflates the elements of self-defense and provocation. Self-defense law focuses on the reasonableness of the defendant's beliefs or reasons for the ***killing*** by requiring a determination that a reasonable person would also believe that the use of deadly force was necessary under similar circumstances and would necessarily ***kill*** the attacker. In contrast, provocation focuses on the effect of intense emotions on the defendant's judgment rather than on the reasonableness of the belief that the ***killing*** was necessary. Therefore, the standard to assess the adequacy of provocation ought to focus on the ordinary person experiencing intense emotion that similarly distorts judgment.

C. Potential Criticism of Fear-Based Provocation

The proposal to recognize fear-based provocation is likely to raise a number of objections. On one end of the spectrum, conservative scholars and proponents of "tough on crime" laws and policies are likely to reject any attempt to expand the scope of the provocation defense, arguing that the law should deter dangerous emotional outbursts leading to violent behavior. [389] A different version of such objection might suggest that the law should adhere to a position that views all legally sane defendants as autonomous individuals, who are capable of exercising free will choices. [390] The law's commitment to nonviolence as an essential societal norm should therefore preclude **[*1789]** defendants from relying on arguments that demonstrate a choice to devalue the sanctity of human life. [391] Critics would also likely suggest that the proper phase for considering mitigating circumstances, such as fearful killers' prolonged physical abuse, is the sentencing phase, rather than during the initial determination of guilt. [392]

On the other end of the spectrum, liberal scholars, concerned with the over-punitive criminal justice system, might argue that expanding the basis for voluntary manslaughter convictions would result in disadvantaging defendants who could have benefited from a more flexible self-defense statute. [393] These critics might further contend that one implication of recognizing fear-based provocation is embracing a "tough on crime" agenda rather than providing an additional basis for acquittal of any homicide offense.

Another potential critique stems from concerns that recognizing fear-based provocation might embolden defense attorneys' endeavors to rely on questionable psychiatric testimony to establish various forms of "syndromes." [394] Notoriously dubbed "the abuse excuse," defense attorneys previously attempted to expand the scope of self-defense

[389] *See generally* Dressler, *supra* note 15, at 960 (noting that "one might expect law-and-order advocates to criticize a doctrine that can permit an intentional killer to avoid conviction for murder").

[390] *See* DRESSLER, *supra* note 8, at 540 (observing that some critics attack the defense on voluntariness grounds, claiming that provoked killers find it hard to control themselves, rather than actually lacking the ability to do so).

[391] *See generally* PILLSBURY, *supra* note 364, at 145 (noting that a provoked ***killing*** is considered a crime of violence, which carries serious legal consequences).

[392] *See generally* Peter Arenella, *Demystifying the Abuse Excuse: Is There One*?, 19 HARV. J.L. & PUB. POL'Y 703, 704 (1996).

[393] *See* Forell, *supra* note 113, at 29 (arguing that ***battered women*** who ***kill*** their abusers should be given more opportunities to rely on self-defense by proving that the homicide was justified, rather than merely rely on the provocation defense, which only provides an imperfect form of justice).

[394] *See generally* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996).

doctrine by including additional circumstances that existing laws do not recognize. [395] For example, defense attorneys have tried to introduce evidence about defendants' fear of threatening gang members in high-crime neighborhoods under a theory of "urban survival syndrome." [396] **[*1790]** Courts have consistently rejected these claims, and scholars have characterized them as relying on "junk science." [397]

Conceding that some of these objections have merit and raise valid concerns, I argue that considering the tradeoffs between the costs of expanding provocation law and its overall benefits leads to the conclusion that the benefits outweigh the costs. Expanding the scope of provocation law to recognize a fear prong would provide defendants with a potential basis for mitigation in a host of threatening circumstances, whereas under current laws, these defendants would likely be convicted of murder because they did not act in self-defense. Commentators criticize the criminal justice system's over-punitive incarceration laws and policies, including the statutorily mandated imposition of minimum terms of imprisonment for murder convictions. [398] One notable aspect of this critique concerns the disparate effects of mass incarceration and mandatory minimum sentences on racial minorities. [399] While fully addressing this critique exceeds the scope of this Article, the underlying goal behind the call to recognize fear-based provocation is to alleviate existing problems of draconian sentencing structures, which mandate minimum sentences for murder convictions, particularly their disparate effects on racial minorities. Expanding provocation law by recognizing classes of fearful killers who might be able to persuade courts to give voluntary manslaughter jury instructions offers one step in this direction.

Furthermore, the proposal includes a built-in mechanism to address potential concerns that fear-based provocation might appeal to adherents of a "law and order" agenda by contracting the scope of self-defense doctrine. It does this by clarifying that a court should only give a voluntary manslaughter instruction as a supplemental alternative once the main line of defense, likely self-defense, is rejected. Put another way, defendants ought to rely on fear-based provocation as **[*1791]** expansionary and additive to self-defense and imperfect self-defense claims. The proposal rejects any understandings that view fear-based provocation as either substitutionary to the supremacy of self-defense or as constraining self-defense's scope.

Regarding objections that reject recognition of additional forms of "abuse excuses" for defendants claiming prolonged physical abuse, fear-based provocation does not draw on any "syndromes," whose purpose is to pathologize defendants in the eyes of the jury by suggesting that defendants' mental disorders contributed to the

[395] The term "the abuse excuse" was coined by Alan Dershowitz. *See generally* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 3 (1994) (defining "abuse excuse" as "the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation"); *see also* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 140 (1995) (asserting that the "abuse excuse" is used by defendants to gain sympathy from the decision makers).

[396] *Osby v. State, 939 S.W.2d 787, 792 (Tex. Ct. App. 1997); see also* Falk, *supra* note 189, at 740-41 (examining cases using the "urban survival syndrome" defense); BONNIE ET AL., CRIMINAL LAW 492 (4th ed. 2015) (discussing attempts to establish an "urban survival syndrome" defense).

[397] *See* Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk*, *40 WM. & MARY L. REV. 1, 7 (1998)* (comparing expert testimony regarding ***battered woman***'s syndrome, which is recognized by members of the medical community, to testimony regarding urban survival syndrome, which is not medically recognized).

[398] *See, e.g.*, Anne R. Traum, *Mass Incarceration at Sentencing*, *64 HASTINGS L.J. 423, 428 (2013)* (noting that the incarceration rate in the United States is nearly seven times the rate in Western Europe); Forell, *supra* note 113, at 6-7 (noting that mandatory sentencing prevents restricting or eliminating provocation).

[399] *See generally* Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, *98 CAL. L. REV. 1023, 1029 (2010)* (observing that African Americans and Latinos have higher rates of incarceration than whites).

killing. [400] Recognizing fear-based provocation rests on taking into account the pervasive impact of fear on defendants' judgments in a way that is divorced from the realm of mental disorders.

D. A Test Case: Applying Fear-Based Provocation

The elements of fear-based provocation necessitate consideration of a case where under current law, the defendant was convicted of murder but the proposed defense could have resulted in a jury instruction on voluntary manslaughter.

The facts of *State v. Levett* [401] illustrate the potential change that adopting fear-based provocation could make by providing defendants who ***killed*** out of fear with a doctrinal basis for mitigating murder to manslaughter in circumstances falling short of self-defense. [402] In *Levett*, the deceased supplied the seventeen-year-old defendant with drugs so that the defendant could sell them and later give money from the sale to the deceased. [403] On the day of the incident, the defendant, his friend, and his brother encountered the deceased, who demanded that the defendant pay him. [404] A physical confrontation ensued in which the deceased was the initial aggressor, and hit the defendant and his brother. [405] A witness testified that after the deceased noticed that the defendant had a gun, he tried to take refuge in her car, but the defendant shot the **[*1792]** deceased through the window. [406] The defendant was indicted for murder and claimed that he acted in self-defense. [407] He testified that he believed that the deceased was going to get a gun, and that he ***killed*** him out of fear for his life. [408]

The trial court instructed the jury only on self-defense, explaining that "the defendant must prove that he was not at fault in creating the situation giving rise to the assault," that he had an honest and reasonable grounds to believe that he was in imminent danger, "that his only means of retreat from such danger was by the use of deadly force, and he had not violated any duty to retreat to avoid danger." [409] The jury rejected the defendant's self-defense claim and convicted him of murder. [410]

On appeal, the defendant argued that the trial court erred by refusing to instruct the jury on voluntary manslaughter based on the theory that he was provoked to ***kill*** out of fear that the deceased was about to retrieve a gun. [411] The

[400] See Anne C. Coughlin, *Excusing* ***Women***, 82 CAL. L. REV. 1, 4-5 (1994) (observing the problematic implications of attempts to rely on evidence of "***battered woman***'s syndrome" to acquit female defendants on the theory of self-defense, and that the downside of introducing evidence of ***women***'s abnormality is portraying them as mentally deviant and inferior).

[401] No. C-040537, 2006 WL 1191851 (Ohio Ct. App. May 5, 2006).

[402] *Id.* at *3.

[403] *Id.* at *1.

[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.* at *2.

[408] *See id.* (explaining that the defendant testified that "[I] [t]hought he was going to take my life, that's what I was thinking: either me or him" (alteration in original)).

[409] *Id.* at *3.

[410] *Id.* at *1.

[411] *Id.* at *4.

court rejected this claim, holding that the evidence did not support a jury instruction on voluntary manslaughter because, under Ohio law, such instruction is given only if there is evidence that the defendant acted out of sudden passion or a fit of rage. [412] The court further held that the evidence supporting the claim of self-defense--that the defendant feared for his and his brother's safety--did not constitute sudden passion or a fit of rage as contemplated by the voluntary manslaughter statute. [413] While self-defense requires a showing of fear, the court continued, "voluntary manslaughter requires a showing of rage, with emotions of 'anger, hatred, jealousy, and/or furious resentment.'" [414] To receive a jury instruction on voluntary manslaughter, the defendant should have introduced evidence that he was provoked to ***kill*** in a state of sudden passion or fit of rage, which he failed to do. [415] Since the defendant claimed that he feared that the deceased was about to shoot him, the **[*1793]** court concluded that this evidence did not suffice to establish provocation. [416] Levett's murder conviction was therefore affirmed, and he was sentenced to eighteen years to life in prison. [417]

Levett poignantly exemplifies the way courts often view self-defense and provocation as mutually exclusive rather than supplemental doctrines. As one Ohio court stated: "[A]n instruction on voluntary manslaughter and self-defense is erroneous because the two legal theories are incompatible . . . . Voluntary manslaughter requires that the defendant be under the influence of sudden passion or a fit of rage, while self-defense requires the defendant to be in fear of his own person safety." [418]

As a thought experiment, let us hypothesize what might have happened had the proposed fear-based provocation provision applied and a jury instruction on voluntary manslaughter had been given in *Levett*. First, the defendant could have requested that the court instruct the jury on both self-defense and fear-based provocation as supplemental defenses. The defendant's first line of defense would remain self-defense, as accepting it would lead to acquittal of any homicide offense. However, if the jury rejected the self-defense claim, it would still be able to consider reducing the murder to voluntary manslaughter, based on the theory that defendant feared that the deceased was going to shoot him, and that this fear impaired his rational judgment.

In *Levett*, the evidence clearly established that the defendant's shooting fell short of self-defense since the deceased presented no imminent threat of shooting the defendant when he ran away, trying to shield himself inside the female witness's car. [419] The circumstances surrounding the incident, however, including witnesses' testimonies, indicate that the deceased not only initiated the aggression towards defendant and his brother but also stated that he was going to retrieve his gun. [420] Given this evidence, it is likely that Levett genuinely feared that the deceased was about to shoot him, and that this intense fear, stemming from the deceased's threatening behavior, overwhelmed him and distorted his judgment. It is likely, therefore that Levett could have established the subjective component of fear-based provocation.

[412] *See id.* (finding that "[f]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage" (alteration in original) (quoting State v. Mack, 694 N.E.2d 1328, 1331 (Ohio 1998)).

[413] *Id.* at *4-5.

[414] *Id.* at *4 (quoting State v. Perdue, 792 N.E.2d 747, 750 (Ohio Ct. App. 2003)).

[415] *Id.* at *4-5.

[416] *Id.* at *5.

[417] *Id.* at *1.

[418] State v. Jefferson, 971 N.E.2d 469, 473 (Ohio Ct. App. 2012).

[419] Levett, 2006 WL 1191851, at *1.

[420] *Id.*

The main hurdle that Levett would have faced had fear-based provocation been adopted would be proving the objective prong of the **[*1794]** defense, namely, that a defendant with an ordinary temperament, tolerance and self-restraint, might have experienced similar fear that significantly impaired his judgment, causing him to act rashly without deliberation. Establishing this element hinges on introducing sufficient evidence that an ordinary seventeen-year-old youth, standing in the defendant's shoes and facing similar surrounding circumstances, would have similarly experienced significant impairment in judgment due to fear for his life that would have led him to respond aggressively--even if not necessarily to ***kill***.

Importantly, instructing the jury on voluntary manslaughter will not necessarily result in the jury's acceptance of the defense's fear-based provocation theory. Establishing the elements of this defense is contingent on factual determinations that would be left for the jury to decide. It is plausible that even if the jury in *Levett* had been instructed on voluntary manslaughter, they would have rejected the option of mitigating murder to manslaughter, and conclude that the ***killing*** was unprovoked by either anger or fear. Granted, the jury could have reasonably concluded, based on the evidence, that Levett was motivated by desire for revenge, and therefore should not enjoy any mitigation. However, a rational jury could have also reasonably concluded that Levett ***killed*** out of deep fear for his life, therefore warranting partially excusing his act by reducing the offense to voluntary manslaughter. Providing the jury with additional basis for mitigation would not have necessarily resulted in automatically reducing Levett's murder charges. Instead, fear-based provocation would have merely expanded the options that the jury might have considered, leaving them to decide whether mitigation was warranted.

CONCLUSION

Recently, there has been an emergence of a growing body of psychological research on the effects of emotions on individuals' thought processes, judgment, and reasoning. [421] The law is increasingly following through, as it evolves to recognize the pervasive effect that intense emotions, including anger and fear, have on shaping criminal behavior. [422] This Article is yet another piece in this puzzle, as it calls **[*1795]** on legislatures and courts to consider the insights that might be gained from psychological research on the way fear operates.

This Article has largely focused on the effects of fear on defendants who ***killed*** those who placed them at risk of violence. Yet, another area in which individuals' emotions impact their decision making, albeit in a more implicit and nuanced way, concerns juries' choices about whether a defendant is entitled to certain defenses such as self-defense and provocation. Considering provocation's stakeholders suggests that some defendants who raise the defense are likely to be perceived by juries as sympathetic, thus warranting compassion and mercy, while others are likely to be viewed as unsympathetic and morally blameworthy killers, thus leading juries to reject their claim for mitigation.

This Article invites questioning into whether decision makers' sympathy ought to shape the scope of the provocation doctrine. People who suffer from intimate partner ***battering*** and ***battered*** children are mostly sympathetic defendants. They are often ***women*** who fit stereotypical perceptions about femininity, including weakness, helplessness, and passivity. Given the sordid nature of some of these domestic abuse cases, abused defendants are often perceived as deserving compassion and mercy. Yet, in closer cases, involving less agreeable defendants who raise diffuse claims of fear and prior abuse, prosecutorial discretion might sway towards a more heavy-handed punitive approach. After all, drug dealers, violent gang members, or drunken participants in bar brawls, all armed with guns, and not shying away from aggression, are hardly the type of defendants that

[421] *See supra* Part III (discussing the psychological research on fear).

[422] For scholarship on the relationship between law and the emotions, see generally Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006); THE PASSIONS OF LAW (Susan Bandes ed., 1999).

prosecutors or juries are likely to sympathize with and afford leniency. [423] Arguably, many readers would balk at the idea of further enlargement of a defense that is already perceived as inherently problematic. Critics might wonder why mitigating the charges against violent, dangerous and mostly ***male*** killers, is normatively warranted.

But should emotions like sympathy and compassion shape the scope of criminal responsibility? This Article concludes that from a normative perspective, decision makers' sympathy and compassion towards certain defendants should *not* matter for the purpose of determining whether defendants who ***killed*** out of fear of violence ought to receive a jury instruction on voluntary manslaughter. Mitigating charges to a lesser **[*1796]** offense is warranted not because a defendant appears worthy of mercy but because the law ought to recognize that fear undermines rational judgment. The fact that defendants' abilities to rationally assess threats is significantly impaired when facing deep fear pertains directly to the scope of criminal liability and moral blameworthiness rather than to the sentencing phase. Recognizing fear-based provocation provides a mechanism for diminishing the effect of juries' emotions on their decision on whether a defendant should prevail on the provocation defense. It therefore provides a principled and coherent basis for mitigating murder to manslaughter that is consistent with a sliding scale approach towards defendants' moral culpability.

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[423] *See* Gruber, *supra* note 85, at 185-87 (discussing non-intimate defendants' claims for provocation).

APPENDIX 5

Brief of Amicus Curiae National Clearinghouse for the Defense of Battered Women in Support of Beth Ann Markman, *Commonwealth of Pennsylvania v Beth Ann Markman* Docket No. 371 (2003)

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 371 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE
V.
BETH ANN MARKMAN,
APPELLANT

BRIEF FOR *AMICUS CURIAE* NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, et. al.

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STATEMENT OF JURISDICTION

Amici adopt the Statement of Jurisdiction set forth in the Amended Brief for Appellant.

SCOPE OF REVIEW AND STANDARD OF REVIEW

Amici adopt the Scope of Review and Standard of Review set forth in Amended Brief for Appellant.

ORDER OR OTHER DETERMINATION IN QUESTION

Amici adopt the statement of Order or Other Determination in Question as set forth in Amended Brief for Appellant.

INTERESTS OF *AMICI*

Amici are nonprofit local, state, and national battered women's and women's legal organizations. *Amici* have first-hand knowledge about the physical, emotional, and psychological effects of battering. *Amici* collectively work with thousands of battered women each year, including women who are charged with crimes that result from their experiences of abuse. *Amici* are committed to ensuring that battered women defendants, like all defendants, receive the full benefit of rights and protections designed to ensure fair trials, verdicts, and sentences.

Based on their collective experience, *amici* understand that, when a history of abuse is relevant to the issues in a criminal case, the jury must fully understand that history, the cumulative effects of the abuse, and its relationship to the legal issues in the case. *Amici* also understand that all too often, battered women are misunderstood and perceived as responsible for their victimization. Such misconceptions often interfere with the ability of the criminal justice system to treat battered women fairly and according to the legal rules applicable to all defendants. *Amici* believe that it is essential, particularly where a battered defendant's liberty and life are at stake, that both the judge and jury base their decisions on accurate information about battered women's experiences, free of misconceptions and stereotypes. Otherwise, as happened in this case, the jury does not have the necessary tools and contextual information with which to evaluate the evidence presented, and cannot reach a fair or reliable determination of guilt.

Finally, in a capital case, a battered woman defendant, like all other defendants, is entitled to a penalty proceeding that comports with fundamental notions of justice, including an

opportunity to confront the evidence against her, to present all relevant mitigation, and to be protected from inadmissible and prejudicial evidence.

Unless criminal processes contain the same rights and protections for battered women defendants as for all defendants, victims of domestic violence will be further victimized by the system itself.

Therefore, *Amici* respectfully urge this Court to REVERSE Ms. Markman's conviction and sentence.

National Clearinghouse for the Defense of Battered Women

The National Clearinghouse for the Defense of Battered Women, founded in 1987, works to ensure justice for battered women charged with crimes, where a history of abuse is relevant to the woman's legal claim or defense. We provide technical assistance to battered women defendants, defense attorneys, battered women's advocates, expert witnesses, and other members of the community. Our legal team assists on a wide variety of cases, including those involving self-defense/defense of others, coercion and duress, crimes of omission (such as failing to protect one's children from a batterer's violence), and cases where the history and impact of the abuse help to explain the defendant's behavior and/or rebut the *mens rea* element of the crime.

The National Clearinghouse does not advocate any special legal rules for battered women defendants. Battered women are entitled to the same rights and protections as all other criminal defendants, and we are committed to safeguarding those rights and protections. To this end, the National Clearinghouse seeks to educate those involved in the criminal legal system about battering and its effects, so that legal decisions affecting battered women defendants are not based on misconceptions.

Among the most fundamental rights of any criminal defendant are the right to have the jury instructed on the theory of defense and the right to present the jury with all relevant evidence. When a battered woman is charged with a crime against a third person, and there is record evidence that she was subject to violence and threats from her batterer/codefendant, which a person of reasonable firmness in her situation could not resist, she is entitled to receive proper jury instructions on her duress theory of defense. Further, in deciding whether to bar the instruction based on a conclusion that she "recklessly placed" herself in the situation, the trial court must fully consider the record evidence of her situation as a battered woman, free from faulty assumptions and judgments about battered women's experiences. Finally, to have a meaningful opportunity to defend against the charges, she must be able to present expert testimony on domestic violence and lay testimony about her prior abusive experiences, as that testimony is often critical in helping the jury understand her claim of duress. Otherwise, as happened in this case, she is effectively deprived of her right to present a meaningful defense.

When a battered woman defendant faces the ultimate penalty of death, she, like all criminal defendants, must have the opportunity to confront all evidence against her, including that which contradicts her claims of abuse and duress. Her sentencing jury must be permitted to consider all relevant mitigation evidence and only those aggravating factors permitted by law. Without these safeguards, her sentence of death is inherently unreliable and fundamentally unjust.

Accordingly, we urge this Court to REVERSE the conviction and sentence of Ms. Markman.

National Coalition Against Domestic Violence

The National Coalition Against Domestic Violence (NCADV), a nonprofit organization founded in 1978 and incorporated in the state of Oregon, provides a national network for over 2,000 local programs serving battered women and their children. We offer technical assistance, general information and referrals, community awareness campaigns, public policy advocacy, and sponsor a national conference every two years. NCADV is extremely concerned about battered women charged with crimes and their right to a fair trial.

NCADV joins the brief of *amicus curiae* to assist the Supreme Court of Pennsylvania in its consideration of the *Markman* case, and Ms. Markman's defense as a battered woman. In order to avoid punishing battered women further, courts must make every effort to get beyond the myths and misconceptions of abuse and understand the power and control that an abuser can have over his victim. In a capital case such as this, where Ms. Markman offered expert testimony relevant to her claim of duress due to domestic violence, such evidence should be admissible to ensure her right to a fair trial.

As a national voice on behalf of victims of domestic violence, NCADV is aware of many of the myths and misconceptions that work as barriers and result in injustice for battered women. In this case, it is clear that misinformation in regards to Ms. Markman interfered with her right to a fair trial. NCADV urges the Court to reverse her conviction in the interest of justice.

National Network to End Domestic Violence

The National Network to End Domestic Violence (NNEDV), a membership and advocacy association made up of forty-eight State and Territory domestic violence coalitions, was founded in 1991 and incorporated in the District of Columbia as a nonprofit organization. NNEDV is working to create a social, political and economic environment in which violence

against women no longer exists. Our member coalitions represent more than 2000 local battered women's programs and domestic violence shelters. Our mission is to ensure that public policy is responsive to the needs of battered women and their children, and to enhance the capacity of those who provide direct services to victims. NNEDV has played a critical role in development and implementation of the Violence Against Women Act over the past decade.

Our member coalitions and local programs work with battered women and their children every day, and are acutely aware of the common misperceptions about the causes and impact of domestic violence. Battered women are often blamed for the abuse they are experiencing, and the reality of the violence they are experiencing is frequently ignored. Many of our member programs have participated in fatality review teams designed to review domestic violence homicides. These teams consistently find that the most dangerous time for a victim is when she is trying to separate from an abuser. During this risky period, the perpetrator often escalates the physical, sexual and emotional abuse they are in inflicting, making it impossible for the victim to escape the violence.

We are deeply concerned about the case of *Commonwealth v. Markman*, because it shows the further victimization battered women experience when misinformation about domestic violence interferes with their right to a fair trial. It is critical that expert testimony about the severe and escalating nature of domestic violence be heard in such cases, and that juries be instructed to determine if a battered woman acted under duress. Without the presentation of critically important evidence and jury instructions, battered women will not be treated fairly within the criminal justice system. We urge you to reverse the conviction of Ms. Markman.

National Domestic Violence Hotline

The National Domestic Violence Hotline, a nonprofit organization and project of the Texas Council on Family Violence, provides comprehensive services to battered women and their children by operating a 24-hour, 7-day a week National Hotline. NDVH is extremely concerned about battered women charged with crimes and their right to a fair trial.

Through our work, we know that battered women face many injustices as a result of myths and misconceptions about their experiences of abuse. We speak to women on a daily basis that have their assaults, injuries, and lives minimized by representatives of the justice system who still speak to domestic violence as only a "family" issue. What we know from talking to battered women is that an educated legal system provides for greater safety for her and a higher level of accountability for those who choose to abuse.

We are deeply concerned when misinformation interferes with a battered woman's right to a fair trial. We know how important expert testimony can be in countering myths and misconceptions about domestic violence. We are particularly concerned that Ms. Markman was prevented from presenting expert testimony on battering and its effects which was admissible and relevant to her claims. Further, as in this case, when a battered woman presents sufficient evidence of duress by her batterer, she should be allowed to have the jury instructed on that defense. We believe Ms. Markman was denied a fair trial. Therefore, we respectfully urge you to reverse her conviction.

Pennsylvania Coalition Against Domestic Violence

The Pennsylvania Coalition Against Domestic Violence, Inc. (PCADV) is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of victims of domestic violence and their minor children.

PCADV is a membership organization of 64 shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For over twenty years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence.

PCADV is deeply concerned about battered women charged with crimes and their right to a fair trial. PCADV is also concerned about the many injustices that result from the myths and misconceptions regarding the abusive experiences that battered women face, particularly as it affects their ability to obtain a fair trial. In this instance, Ms. Markman offered expert testimony relevant to her claims, testimony that is admissible under the Rules of Evidence, and that should have been permitted. In addition, Ms. Markman was wrongly precluded from presenting evidence of duress by her batterer and was denied the opportunity to present such evidence in tandem with a jury instruction on that defense. These actions denied Ms. Markman a fair trial; a trial that should have allowed her the opportunity to fully present viable defenses to the crime for which she was charged. In the interest of justice and fairness, we respectfully urge that Ms. Markman's conviction be reversed.

PCADV joins the brief of *amicus curiae* to assist the Supreme Court of Pennsylvania in its consideration of the critical issues surrounding this appeal.

Women Against Abuse

Women Against Abuse is a nonprofit organization founded in 1975 and incorporated in the state of Pennsylvania. Women Against Abuse provides comprehensive services to battered women and their children by offering a 24-hour hotline, Emergency Shelter Services, Legal

Advocacy and Representation, and Transitional Housing. Women Against Abuse is extremely concerned about battered women charged with crimes and their right to a fair trial.

Women Against Abuse is deeply concerned when misinformation interferes with a battered woman's right to a fair trial, especially when legal decisions are based upon this misinformation. When a battered woman offers expert testimony, as Ms. Markman did, that is admissible and relevant to her claim, she should be permitted to present it. Further, as in this case, when a battered woman presents sufficient evidence of duress by her batterer, she should be allowed to have the jury instructed on that defense. We believe Ms. Markman was denied a fair trial. Therefore, we respectfully urge you to reverse her conviction.

Women's Center & Shelter of Greater Pittsburgh

The Women's Center & Shelter of Greater Pittsburgh, a non-profit organization founded in 1974 and incorporated in the State of Pennsylvania, provides comprehensive services to battered women and their children. Women's Center & Shelter is extremely concerned about battered women charged with crimes and their right to a fair trial.

Through our work, we know that battered women face many injustices as a result of myths and misconceptions about their experiences of abuse. Women's Center & Shelter believes that the trial court erred in failing to instruct the jury on duress and in precluding the expert on domestic violence at the guilt phase. This case presents a tragic injustice for a battered woman, resulting in the death penalty.

We believe Ms. Markman was denied a fair trial and we urge you to reverse her conviction. Misinformation and misinterpretation on expert testimony on "battered women syndrome" denied the jury the opportunity to hear information that could have explained how the abuse affected Ms. Markman and to counter challenges to her claims of being battered.

Women's Center & Shelter of Greater Pittsburgh respectfully urges you to reverse her conviction.

Women's Law Project

The Women's Law Project (WLP) is a non-profit public interest legal center dedicated to improving the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. WLP has offices in Philadelphia and Pittsburgh, Pennsylvania and engages in national advocacy on a wide variety of issues. Since its founding in 1974, the Law Project has engaged in extensive activities challenging gender discrimination in employment, education, insurance, and in family matters relating to custody, support, domestic violence and divorce. Assisting women who are victims of domestic violence, in particular, has been a major focus of both the telephone counseling service, which handles more than 5,000 inquiries a year, and the Law Project's litigation efforts, which include both original litigation and participation as *amicus curiae.* WLP joins in the brief of *amicus curiae* in support of Ms. Markman to urge the court to reverse her conviction based on critical evidence about the effects of domestic violence.

STATEMENT OF THE QUESTIONS ADDRESSED BY *AMICI*

I. THE TRIAL COURT'S REFUSAL TO GIVE A DURESS INSTRUCTION, DESPITE RECORD EVIDENCE SUPPORTING A DURESS DEFENSE, WAS CONTRARY TO APPLICABLE LAW AND BASED ON MISCONCEPTIONS ABOUT THE REALITIES OF MS. MARKMAN'S EXPERIENCES AND THE EXPERIENCES OF BATTERED WOMEN GENERALLY.

A. The Record Evidence of Housman's Violence and Threats Against Ms. Markman Required an Instruction on Duress.

1. The Record, Viewed in the Light Most Favorable to Ms. Markman, Created a Question for the Jury as to Whether She was Subject to Duress Pursuant to 18 Pa.C.S. § 309(a).

2. The Record, Viewed in the Light Most Favorable to Ms. Markman, Created a Question for the Jury as to Whether she "Recklessly Placed Herself in the Situation" Pursuant To 18 Pa.C.S. § 309(b).

B. The Trial Court's Rulings Barring the Duress Defense were Based on Incorrect Factual Assumptions about the Realities of Ms. Markman's – and other Battered Women's – Experiences.

1. The Assumption that by Failing to Leave or Call Police, Ms. Markman was Responsible, as a Matter of Law, for her Subsequent Victimization, Ignores the Complexity and Realities of Her Experiences as a Battered Woman and is Contrary to Precedent, Policy and Social Science Research.

2. Faulting Ms. Markman for Not Leaving Ignores the Stark Reality that Battered Women Often Face Increased Violence or Death when they Attempt to Separate, and Ignores the Record Evidence Showing that Housman's Violence Did Increase When She Tried to Separate.

3. Faulting Ms. Markman for Not Attempting to Leave or Get Help During Momentary Lapses in Housman's Physical Violence Ignores the Reality that Housman's Abuse was a Pattern of Coercion and Control which Kept Ms. Markman in an Ongoing State of Terror.

II. THE PRECLUSION OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS, BASED ON A MISUNDERSTANDING OF THE CONTENT AND PURPOSE OF THAT TESTIMONY AND A MISAPPLICATION OF APPLICABLE LAW, SEVERELY PREJUDICED THE DEFENSE AND REQUIRES REVERSAL.

A. Expert Testimony On Battering and Its Effects is Relevant and Admissible to Support a Claim of Duress.

B. The Trial Court's Rulings Precluding Expert Testimony Were Based On a Fundamental Misunderstanding of the Content and Purpose of Expert Testimony on Battering and Its Effects.

C. The Proffered Expert Testimony Was Critical For a Proper Assessment of Ms. Markman's Claims, and Its Preclusion Constitutes Reversible Error.

III. THE TRIAL COURT REVERSIBLY ERRED BY PRECLUDING MS. MARKMAN'S TESTIMONY REGARDING HER PRIOR EXPERIENCES OF ABUSE, WHICH WAS RELEVANT AND NECESSARY TO SUPPORT HER DURESS CLAIM.

IV. THE ABSOLUTE BAN ON CROSS-EXAMINATION OF HOUSMAN'S PENALTY PHASE WITNESSES WHO ATTESTED TO HIS NONVIOLENCE, VIOLATED MS. MARKMAN'S RIGHTS TO CONFRONTATION AND TO PRESENT ALL RELEVANT MITIGATION, AND LEFT HER UNABLE TO CONFRONT NONSTATUTORY AGGRAVATION, RESULTING IN AN UNRELIABLE DEATH SENTENCE.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in Amended Brief for Appellant at 9-14. Additionally, given the importance of particular facts with respect to the issues raised by *Amici* in this brief, it is necessary for *Amici* to recite in some detail certain facts relating to these issues, as set forth below.[1]

Testimony of Ms. Markman, Corroborated by Lay Witnesses and Documentary Evidence, Regarding Housman's Escalating Abuse of Ms. Markman in the Months and Weeks Prior to the Incident.

Ms. Markman met Housman approximately two years before the incident and, shortly thereafter, he began to physically abuse her. Initially, his abuse included pushing, shoving, grabbing, and throwing her on the floor, N.T. 890-900, progressing to a point where she considered being grabbed around the neck and pushed against a wall as "light stuff." N.T. 901-02. The abuse worsened to include hitting, punching her about the face and body, and choking her. N.T. 903-08, N.T. 698-99 (corroboration by Chris Moffit who witnessed Housman beat and throw her to the floor). On at least one occasion, Housman told her to "shut the fuck up" and that if she did not be quiet he would snap her neck. N.T. 906, 903-08. When Ms. Markman called the police, they said they could not do anything "unless he actually did something." N. T. 909, 166.

The abuse escalated in the months leading up to the killing, which occurred in early October 2000. In August 2000, Housman hit her on the head causing a lump the "size of a golf ball," giving her black eyes, and causing her to become dizzy, have headaches and lose balance. N.T. 909-10. She went to Carlisle Hospital for treatment for these symptoms, N.T. 673-77, 910; Defense Exhibit 9, Records from Carlisle Hospital Emergency Room, and told the nurse that she

[1] The prosecution disputed Ms. Markman's version of both the prior abuse as well as the incident itself. The facts recited here are based on the evidence presented or relied upon by the defense.

was in a car accident because she was afraid of getting Housman in trouble if she told the truth. N.T. 913.

Housman's escalating abuse was corroborated by other witnesses who saw more frequent and severe bruising than usual on Ms. Markman in the months leading up to the incident. N.T. 709-11, 809-10. Witnesses saw her black eyes, N.T. 684, and the large lump on her head. N.T. 709-11. Her neighbor testified to seeing bruises across her bust, body, face, and neck with eyes so black that Housman referred to her as a "raccoon," during the summer just prior to the incident, when "it seemed like everything exploded." N.T. 743-45. Ms. Markman's employer corroborated the existence of black eyes and black and blue marks on her arms in the months preceding the incident, including what appeared to be a handprint. N.T. 734-36. The abuse was further corroborated by the trailer park manager who was a Commonwealth witness. She testified that around August 2000, she saw Ms.Markman's dark black and blue eyes; that Ms. Markman said Housman hit her; that Ms. Markman wanted to get him off the lease; and that she had dark bruising on her arms twice between August and September. N.T. 157-59, 177.

Approximately one month prior to the incident, Ms. Markman tried to get an emergency protection order against Housman, fearing he would be angry because she had "put him out." N.T. 949-50. She called the domestic violence hotline, telling them about some of the more recent incidents of abuse, and how he had damaged her car and broke back into her trailer. N.T. 950-52; Defense Exhibit 16, Domestic Violence Hotline Intake Form showing call from Ms. Markman on September 1, 2000. She scheduled an interview for the protection order but ultimately did not show up because she feared that he would get angry at her "and find a way to get a hold of me." N.T. 952. She feared Housman especially when he was angry: "[W]hen he got mad and really angry is when the hitting got worse." N.T. 950, 952-53. After a brief

separation, Housman moved back into the trailer but the abuse began again. N.T. 925-26, 953-54.

Approximately a week before the incident, Ms. Markman tried to separate from Housman telling him that he could have "everything" but to just let her leave. N.T. 956. He told her she wasn't going anywhere, and when she tried to leave toward the kitchen, he pinned her between the ferret cage and the wall and, as she tried to get away, he grabbed her with a wire around her throat and pulled her down to the couch. N.T. 956-57. He told her she "wasn't fucking going nowhere" holding his hand on her throat, ordered her to the bedroom, N.T. 957, and forced her to have sex while she was crying and shaking. N.T. 958. During the rest of that week, Housman's abuse continued, including covering her mouth and nose with his hand and pushing down harder on her mouth as she screamed louder. N.T. 959.

Several days before the incident, Ms. Markman again attempted to evict Housman from the trailer. N.T. 967-69. She called him at his job, told him that she had caught him in more lies, and that he was out for good. N.T. 968. She then called her friend, Jessica Wahl, to come over and sit with her because she was scared of what Housman would do to her when he got home. N.T. 969. That afternoon, she also spoke with the trailer park manager, Sandra Kautz, to tell her that there might be problems when Housman returned. N.T. 970-71. Kautz told her that she could stay in the trailer, but this time Housman had to be out for good. *Id.,* 163-64, 178.

Despite Ms. Markman's demand to Housman to leave, he was there at the trailer when she later returned. N.T. 972, 713. Ms. Markman told him he had to get out and went to the back bedroom to avoid a confrontation with him. N.T. 973, 713. She and her friend then discovered that he was doing something under the hood of Ms. Markman's car and Ms. Markman called the police. N.T. 974. When the police arrived, she told them she was putting Housman out, and she

feared he was pulling wires off of her car to disable it, as he had done in the past. N.T. 975. She also told the police about how he had hit her and was abusive. N.T. 976. The police officer spoke with Housman and then told Ms. Markman that he couldn't make Housman leave and that the trailer park manager, would have to evict him. N.T. 977. The park manager told Housman that he would have to leave or face a trespassing charge. N.T. 181.

Despite being ordered to leave, Housman remained near the trailer and Ms. Markman again told him he had to get out. N.T. 978-79. Housman called her a bitch and a whore and left the trailer. N.T. 979. She remained in the trailer with her friend, knowing at one point that Housman was back on the front porch, and did not say anything further to him "[c]ause it wouldn't have did any good…[c]ause he was going to do what he wanted to do anyhow." N.T. 979-81. Later, after her friend had to leave, Ms. Markman also left the trailer, chaining the front door, and leaving through the back door in the hope that Housman would assume, as he always did, that the back door was locked. N.T. 981-82, 719.

Evidence of Housman's Extreme Abuse and Coercion in the 48 Hours Preceding and During the Incident.

Ms. Markman described in detail the horrific abuse that she experienced over the next 48 hours that led up to and included the incident. When she returned to the trailer between approximately 12:30 or 1:00 a.m. on October 3, 2000, she found Housman in the trailer. N.T. 983-84. He grabbed her by the throat and pushed her into the counter. Ms. Markman testified that Housman started asking "where the fuck I had been" and "tapping on my crotch area, telling me, who you been with? And he just kept squeezing." N.T. 984. She then saw he had a knife *Id*. Housman held the knife against her throat, cut off her shirt and bra and told her to undress. N.T. 984-85. He got on top of her, had the knife against her throat, and said, "you think you are getting away with all of this." He then told her she was going to "take care of him," sliding the

knife down her throat in between her breasts. He threatened to cut her throat if she didn't write a note to Leslie White (the victim) saying she (Ms. Markman) was in Virginia (as he had previously told Leslie White). N.T. 985-86. He moved the knife down to her stomach and slapped it against her face. He held the knife to her and raped her. N.T. 986. He walked her to the bathroom and stayed by the door until she came out. He then grabbed her as she came out and slammed her against the sink. N.T. 986-87. He told her that if she didn't do what he wanted, he would kill her that night and that he had nothing to lose because she had messed up his only chance with White. N.T. 987. When Housman left Ms. Markman to go to the bathroom, he tied her hands and feet, and stuffed underwear in her mouth. N.T. 987. Housman's abuse and restraint continued through the night and into the next day. N.T. 988.

The following day he untied her and had her make him something to eat. N.T. 988-89. When Ms. Markman's friend, Baker, came over that afternoon, he ordered Ms. Markman to dress. He threatened that if Ms. Markman told anyone what went on that night, he would put a .45 to her head. N.T. 989-90. Ms. Markman went to Baker's trailer, told her what was going on, and showed Baker the marks on her stomach. N.T. 991-93. Baker corroborated the presence of cut marks on Ms. Markman's chest, stomach, and legs, N.T. 843-44, but was precluded from testifying about what Ms. Markman told her. N.T. 825. Baker and other witnesses corroborated that Ms. Markman was crying and sobbing while at Baker's trailer. N.T. 825, 1175-88.

Ms. Markman told Baker not to call the police because Houseman said "he would come back and put a .45 in my head." Ms. Markman described what she told Baker about the "look" in Housman's eyes that night; that "he just looked pure evil," and had a look she had never seen before. N.T. 993. Baker then came down to the trailer with Ms. Markman. At that point, Ms.

Markman thought Housman was going to leave because he would have thought Baker called the police. N.T. 994-95. Housman told Baker he was in fact leaving, *Id*., and Baker left the trailer.

Rather than leaving, however, Housman continued to abuse Ms. Markman. He made Ms. Markman undress, raped her again, and kept the knife beside him. N.T. 995-96. Ms. Markman testified that "the sex would be rough…him holding me by my throat, holding me by my hair…." N.T. 997. When she awoke the following afternoon, the day of the homicide, Housman still had the knife. Ms. Markman testified:

> After everything he had did, I wasn't about to try and do anything…[t]ry to leave the trailer…I didn't even want to argue with him. I sat there with my mouth closed."

N.T. 999.

Housman told her to drive him in the car to Sheetz (a place to make a phonecall) and she complied. N.T. 1000. He still had the knife, *Id*., even during the time he made the telephone call to Leslie White. He told Ms. White that his father had died (which was not true) and asked her to come to the trailer. Ms. Markman did not know he was going to call Ms. White. N.T. 1001-02.

When they returned to the trailer, Housman pushed the knife into Ms. Markman's side and told her to "get the fuck back in the trailer." N.T. 1004. Once in the trailer, Ms. Markman tried to run to the back door to get out but Housman grabbed her and hit her in the mouth with his fist. N.T. 1006. When she tried to run to the front door, he grabbed her hair, put the knife to her throat, and said, "[I]f you don't do what I tell you to do, I'm going to send you home in pieces to your daughter." N.T. 1006. Ms. Markman believed he meant it. *Id.*

Housman ordered Ms. Markman to the back bedroom, and she remained there when Leslie White arrived. N.T. 1007-08. Subsequently, Ms. Markman came out of that room

because she could not breathe. N.T. 1008. Housman whispered in Ms. Markman's ear, "you are going to help me. Remember what I told you before." N.T. 1009.

Housman ordered Ms. Markman to tie up Leslie White. Ms. Markman complied because she recalled what Housman had threatened:

> …[that] if I didn't do what he said, that he would send me home in pieces to my daughter…[a]nd after what I had just been through the past couple days with him, I believed what he said. I didn't want to do it.

N.T. 1012.

She also complied with his order to gag Leslie White knowing Housman still had the knife. She tied the gag loosely hoping that White could get it off. N.T. 1014. She obeyed Housman when he told her to go outside with him while White was inside and tied up. She complied because he still had the knife and she was scared. N.T. 1013-16. Ms. Markman did not try to run or yell for help because:

> I thought he would have got a hold of me before I even tried to go anywhere. And I thought he would have did something to me then. And I didn't know what he was going to do to her [White] either.

N.T. 1016.

Subsequently, back in the trailer, Ms. Markman went to get White some water, when she heard White scream and saw Housman choking her. N.T. 1016. He ordered Ms. Markman to pull the gag up, which she did. N.T. 1016. After White got her hand up under the speaker wire, Housman got behind White and "put her up in the crook of his arm." N.T. 1016-17.

Ms. Markman did not try to stop Housman. She testified that, "I thought he was going to kill me. He was sitting there killing somebody else. So why wouldn't I think he could do me next?" N.T. 1018. After witnessing Housman kill Ms. White, Ms. Markman was terrified. She complied with Housman's further directions, N.T. 1018-20, and was not thinking of trying to get

away because she was so afraid. N.T. 1022. Her terror was reinforced by Housman's warped directions to her to feel the corpse. N.T. 1027-28.

Before speaking with police, Housman told her to remember what he had told her, "that the only way she was ever leaving him was in a body bag." N.T. 1037. She lied to the officer because she was afraid, N.T. 1039, and told them things to deflect blame and attention from Housman. N.T. 1040. Ms. Markman testified:

> "He had told me a number of things any number of times. The main one was you aren't going nowhere unless you're in a body bag. He knew people in South Carolina from this supposed gang that he used to run with. He knew where my daughter was. He knew where my parents were."

N.T. 1040.

Ms. Markman testified that there were times she was away from Housman but that she did not tell anyone about what he had done or what was going on because she was scared, N.T. 1049, and she did not feel that she could escape him. N.T. 1057. Ms. Markman testified that she participated in the crime out of fear that Housman would kill her, a fear that was based on Housman's escalating violence. e.g., "William Housman holding a knife to my neck…days before that keeping me tied up in my house, raping me, torturing me." N.T. 1057. Ms. Markman did not feel that she could escape him. *Id*.

Proffered Expert Testimony on Battering and its Effects.

The trial court precluded the testimony of forensic psychologist, Dr. Dawn Hughes, who would have offered detailed testimony about the nature and dynamics of domestic violence generally, and Ms. Markman's experiences specifically, and how those experiences might be relevant to claim of duress. This testimony was set forth in Dr. Hughes' report, Defense Exhibit 15, accepted in full for the purpose of the proffer. N.T. 945-46, 1197. Dr. Hughes would have testified *inter alia,* regarding the general concept of domestic violence as a pattern of power and

control, that includes many different forms of abuse; the specific forms of abuse and control to which Ms. Markman was subject; the many coping strategies that Ms. Markman used to try to survive and reduce Housman's violence including, primarily, acquiescence and compliance; how Ms. Markman's experiences of prior abuse informed her behaviors and perceptions; and the probability that Ms. Markman was at high risk for recurrent, serious or lethal violence at the time of the incident. She would have testified very specifically regarding how an individual subject to intimate violence may become a victim of coerced compliance, and how the pattern of abuse experienced by Ms. Markman, with its rapid escalation leading up to the incident, might be relevant to a determination of coerced compliance at the time of the coerced act. Defense Exhibit 15 at 13-20.

Proffered Evidence of Ms. Markman's Prior Abusive Experiences

The trial court also precluded testimony from Ms. Markman regarding her prior abusive experiences by persons other than Housman, which was contained in the report by Dr. Dawn Hughes. Defense Exhibit 15; N.T. 892-94. Ms. Markman would have testified, *inter alia*, to a long history of physical, sexual, and other abuse, including being physically abused by her stepfather; witnessing her stepfather's frequent and severe abuse of her brother; being taken against her will to a hospital, put to sleep, and forced to have an abortion; being beaten by different men in two successive relationships; being beaten, raped and mugged when she was a prostitute; and later being forced to prostitute, and physically and emotionally abused by her husband. *See* Defense Exhibit 15 at 3, "Trauma History."

Housman's Confession and Other Evidence Admitted at the Penalty Phase

The Commonwealth's evidence included Housman's confession, a tape of which was played to the jury, and presented with an accompanying transcript, and which was admitted into

evidence at the guilt and penalty phases. N.T. 438, 441, 613-14, 1277. The confession, redacted at trial to substitute for Ms. Markman's name, stated, *inter alia*, that Housman had never abused Ms. Markman; that it was her idea to kill White; that she ordered Housman to strangle White; and that Housman complied for fear that she would kill him by hitting him with a hammer. *See* Commonwealth Exhibits 83A, 83C; Amended Brief for Appellant at 44-47.

Additional evidence presented at the penalty phase by Housman included his sister who said that there was no fighting or abuse in any of Housman's prior relationships, N.T. 1293, and a psychologist who testified that after investigation and evaluation, he found that Housman had no history of violence or "acting out" behaviors, and that Housman was insecure and lacked initiative. N.T. 1308, 1311-12.

The trial court prohibited Ms. Markman from questioning any of the witnesses or evidence presented by Housman at the penalty phase. N.T. 1279.

SUMMARY OF ARGUMENT

Amici contend that the trial court erred by failing to instruct the jury on duress despite abundant record evidence, including testimony from Ms. Markman, corroborated by other lay and documentary evidence of abuse, that she was subject to duress as defined by applicable law. The court further erred by precluding expert testimony on battering and its effects[2] which would have provided information needed to understand Ms. Markman's experiences of abuse and fairly assess her claims, unencumbered by misconceptions about battered women. The trial court also improperly precluded Ms. Markman from testifying about her prior abusive experiences, which were directly relevant to the elements of her duress claim.

The penalty phase proceedings were fraught with dire constitutional error, including a bizarre ruling by the trial court banning Ms. Markman from any cross-examination of Housman's witnesses, including his lay and expert witness attesting to his nonviolence. The

[2] At the outset, it is important to explain the terminology used in this brief. *Amici* use the term "battering and its effects" to describe the substance of expert testimony regarding abuse. However, such evidence is sometimes referred to as "battered woman syndrome" evidence, an idea first conceptualized in the late 1970s and coined as a term by psychologist Lenore Walker in the early 1980s. *See* Lenore E. Walker, The Battered Woman (1979) and The Battered Woman Syndrome (1984). During the last 25 years, extensive research has been done focusing on battering and its effects upon women and children. As the professional literature has grown, the term "battered woman syndrome" has become less and less adequate to describe accurately and fully the current body of knowledge about battering and how battering affects its victims. Many domestic violence experts now agree that the term "battered woman syndrome" is too limiting in that it fails to account for the diversity of both battering situations and women's responses. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1196 (1993); *People v. Humphrey*, 13 Cal. 4th 1073, 1083 n.3, 921 P.2d 1, 7 n.3 (1996); *McNeil v. Middleton*, 344 F.3d 988, 990 n.3 (9th Cir. 2003). Experts and social scientists now are replacing the term "battered woman syndrome" with "battering and its effects" in legal and scholarly treaties to better describe the experiences, beliefs, perceptions, and realities of battered women's lives. *See, e.g.,* National Institute of Justice, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trial;* Report Responding to Section 40507 of the Violence Against Women Act, NCJ 160972 (1996); Mary Ann Dutton, *Understanding Women's Responses*; Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 975-76 (1995). *E.g.,* LA. CODE EVID. ANN. ART. 404(A)(2) (West 1989); MASS. GEN. LAWS ANN. CH. 233, § 23E (West 1994); NEV. REV. STAT. 48.061 (1993); OKLA. STAT. ANN. TITS. 22, 40.7 (West 1992). Courts have also recognized the problematic nature of the term "battered woman syndrome," and the desirability of using more expansive terms to describe battered womens' experiences. *See*, *e.g.*, *Humphrey*, 13 Cal. 4th at 1083 n.3, 921 P.2d at 7 n.3; *McNeil*, 344 F.3d at 990 n.3.

penalty evidence also included Housman's confession that accused Ms. Markman of being the kingpin and coercer, cutting to the heart of her mitigation and biasing the jury to sentence her to death. This confession, purportedly redacted at trial, was accompanied by summation by Housman's counsel that, in effect, exposed Ms. Markman as the other person to which the confession referred.

This case starkly illustrates the tragic injustice that results when legal decisions affecting basic criminal rights are based on misinformation. Beth Markman is a severely battered woman who was coerced into participating in a homicide by her batterer/codefendant, William Housman. During the course of their two-year relationship, Ms. Markman was the victim of extreme brutality at the hands of Housman. In the 48 hours prior and leading up to the incident, Housman's violence escalated to include unlawful restraints and repeated rapes and beatings. Housman also threatened Ms. Markman with death and dismemberment if she did not comply with his orders to participate in the homicide.[3]

Given the record evidence of duress presented, the trial court had no factual or legal basis for its drastic findings that Ms. Markman was not subject to duress, and had "recklessly placed" herself in the situation *as a matter of law*. These conclusory findings were based largely on the court's own incorrect assumptions that by remaining with, returning to, and failing to leave Housman and the situation at hand, Ms. Markman was at fault as a matter of law, and therefore "reckless" within the meaning of the statute. Yet, decisional law permitting a judicial finding of "recklessness" involves defendants who can in no way be likened to Ms. Markman, such as the felon or the drug dealer who agrees to rob but is forced to murder. To even compare a battered woman who returns to her batterer, unknowing of his criminal scheme and under threat of death and dismemberment, to a willing criminal who returns to his cohorts to assist with a crime,

[3] *See* Statement of the Case.

shows a grave misunderstanding of the plight of battered women and the complexities of the age-old question, "why don't battered women just leave?"

The trial court's rulings are based largely on myths about battered women that have been repudiated by this Court. These myths include that battered women are "free to leave" the relationship or the situation at anytime, and the judgment that they are "blameworthy" because they brought the abuse on themselves, or were otherwise responsible for the abuse. *Commonwealth v. Watson*, 494 Pa. 467, 472, 431 A.2d 949, 951-52 (1981); *Commonwealth v. Dillon*, 528 Pa. 417, 429-30, 598 A.2d 963, 969-70 (1991); *Commonwealth v. Stonehouse*, 521 Pa. 41, 61-65, 555 A.2d 772, 783-85 (1989) (plurality). This Court has been vigilant in ensuring that such misconceptions and incorrect judgments about battered women do not interfere with a jury's assessment of their defenses. *Stonehouse*, 521 Pa. at 61-65, 555 A.2d at 783-85. It is arguably even more egregious when misinformation interferes, not with a jury verdict, but rather with the trial court's threshold decisions of whether evidence or a defense even gets to jury in the first place.

The trial court's preclusion of expert testimony on battering and its effects resulted in the prosecutor and codefendant's lawyer being able to exploit these same repudiated myths that Ms. Markman was "free to leave" at anytime and blameworthy for returning to Housman. The trial court misapprehended the nature and content of expert testimony on battering and its effects which was admissible under Pennsylvania law and necessary to counter precisely those "erroneous battered woman myths upon which the Commonwealth built its case." *Stonehouse*, 521 Pa. at 65, 555 A.2d at 784-85.

Tragically, Ms. Markman now stands before this Court convicted of capital murder and condemned to die having been wholly deprived of any meaningful right to defend. In keeping

with this Court's precedent, and the axiom that principles of criminal law must never be based on misconceptions about surrounding social realities, *Amici* respectfully urge the Court to REVERSE both the conviction and the sentence of death.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO GIVE A DURESS INSTRUCTION, DESPITE RECORD EVIDENCE SUPPORTING A DURESS DEFENSE, WAS CONTRARY TO APPLICABLE LAW AND BASED ON MISCONCEPTIONS ABOUT THE REALITIES OF MS. MARKMAN'S EXPERIENCES AND THE EXPERIENCES OF BATTERED WOMEN GENERALLY.

A. The Record Evidence of Housman's Violence and Threats Against Ms. Markman Required an Instruction on Duress.

The record contains abundant evidentiary support for the defense of duress and, therefore, required an instruction on that defense. *Commonwealth v. Weiskerger*, 520 Pa. 305, 312-13, 554 A.2d 10, 14 (1989). Ms. Markman presented evidence of her experiences of threats and violence and of her forced participation in the crime. This evidence far exceeded the quantum of evidence required for a duress instruction under state law. In a case where the record evidence supporting the defense was clear and plentiful, the trial court's extreme measure of barring the defense as a matter of law, violated this Court's precedent and deprived Ms. Markman of her constitutional right to present a defense.

Pennsylvania Standard for Duress and Instructional Rulings

In order to prove duress pursuant to 18 Pa.C.S. § 309, there must be evidence that:

> (1) there was a use of, or threat to use, unlawful force against the defendant or another person; and (2) the use of, or threat to use, unlawful force was of such a nature that a person of reasonable firmness in the defendant's situation would have been unable to resist it ….

Commonwealth v. DeMarco, 570 Pa. 263, 272, 809 A.2d 256, 261 (2002).

This same standard governs whether the accused "recklessly placed" him/herself in a situation where it was probable s/he would be subject to duress, and therefore forfeits the right to the defense pursuant to 18 Pa.C.S. § 309(b):

> [L]ike the test for determining whether the defendant was subject to duress, the test for determining whether a defendant acted recklessly under Section 309 is a hybrid

> objective-subjective one (citations omitted). The trier of fact must decide whether the defendant disregarded a risk that involves a gross deviation from what an objective "reasonable person" would observe if he was subjectively placed "in the [defendant's] situation."

18 Pa.C.S. § 309(b)(3).

In determining whether there was evidentiary support requiring a duress instruction, the trial court was bound to view the evidence in the light most favorable to Ms. Markman, *Commonwealth v. Black,* 474 Pa. 47, 372 A.2d 627 (1977), and forbidden from itself making credibility judgments about that evidence. *Commonwealth v. Lightfoot*, 538 Pa. 350, 354-55, 648 A.2d 761, 764 (1994); *Commonwealth v. Kyslinger*, 506 Pa. 132, 136, 484 A.2d 389, 391 (1984); *Commonwealth v. Brown*, 491 Pa. 507, 512, 421 A.2d 660, 662 (1980); *DeMarco*, 570 Pa. at 271, 809 A.2d at 261.

1. The Record, Viewed in the Light Most Favorable to Ms. Markman, Created a Question for the Jury as to Whether She was Subject to Duress Pursuant to 18 Pa.C.S. § 309(a).

A correct application of the standards for duress and for instructional review compels the conclusion that an instruction was required. Ms. Markman presented lay evidence of the abuse she suffered at the hands of Housman through her own testimony. This evidence was corroborated by a number of witnesses and documentary evidence. *See* Statement of Case. She testified specifically about the severe violence she experienced just prior to and during the time that she was ordered by Housman to participate in the crime. *Id.* She unequivocally testified that she participated only because she was forced to and that she had no advance knowledge of Housman's criminal scheme. Based on her history with Housman and his escalating abuse during the days leading up to the incident, she believed she had no alternative but to follow Housman's orders that she participate. Even if there was evidence directly contradicting these

facts, *which there was not*, she would still be entitled to a duress instruction, viewing the evidence in this case in the light most favorable to her.

The primary reasoning of the trial court in precluding the instruction was that Ms. Markman failed to avail herself of "reasonable opportunities" to escape prior to, during, and even after the incident. Trial Court Opinion (hereafter "Opinion") at 79-83. The court found that, because Ms. Markman failed to take advantage of what it deemed reasonable opportunities to escape, she was not in imminent danger. It concluded that even if Ms. Markman met the test for duress as defined in 18 Pa.C.S.§ 309(a), she recklessly placed herself in the situation within the meaning of 18 Pa.C.S.§ 309(b). Opinion at 83.

This Court has required duress instructions pursuant to 18 Pa.C.S. § 309(a) based on record evidence far less supportive of the defense than the evidence in this case. In *Commonwealth v. Kyslinger*, the Court reversed based on the trial court's failure to instruct on duress. In that case, the defendant was charged with writing a bad check. The evidence of duress was that defendant's creditors visited him from out of state, demanded immediate payment for a period of two-hour, and said "if we go home [to another state], you're going with us." *Kyslinger*, 506 Pa. at 136, 484 A.2d at 391.

In *Kyslinger*, there was not even an explicit threat that the defendant would be hurt if he did not comply but, rather, only an implication that he would be harmed. The Court cited defendant's own testimony of his interpretation of these threats ("the only way they were going to leave town or let me out of their sight was if I gave them a check."). *Id*. By contrast, in the instant case, the record is replete with evidence of Housman's *actual* use of violence and his *explicit* threats of death or dismemberment. There was also evidence of Ms. Markman's belief that if she did not comply she would be killed. *See* Statement of Case. If the defendant in

Kyslinger was entitled to a duress charge then, *a fortiori*, Ms. Markman was also entitled to one. This Court's reasoning in *Kyslinger* requiring duress instructions is even more compelling in this case: "Where there is evidence to support a claimed defense, it is 'for the trier of fact to pass upon that evidence and improper for the trial judge to exclude such consideration by refusing to charge.'" *Kyslinger*, 506 Pa. at 136, 484 A.2d at 391 (quoting *Brown*, 491 Pa. at 512, 421 A.2d at 662).[4]

In *DeMarco*, where this Court recently clarified Pennsylvania duress law, the record evidence of duress requiring an instruction was far less compelling than the evidence here. In *DeMarco*, the defendant was charged with perjury for testifying at trial differently from his preliminary hearing testimony and from his prior statements to police. He claimed he changed his story because he was under duress due to threats and violence from his roommate. The defendant testified that his roommate shot him with a BB gun, choked him, and threatened to deprive him of his social security checks or kill him if he did not testify as instructed. *DeMarco,* 570 Pa. at 274-75, 809 A.2d at 263. He also presented evidence that he suffered from a mental impairment and seizures, and lived with his coercer with no transportation or money to try to find other housing. *Id*.

The record in *DeMarco* was found to be "clearly sufficient" to create a jury question on duress under 18 Pa.C.S. § 309(a), i.e., whether the defendant was subject to force and threats that a person of reasonable firmness in his situation would have been unable to resist. *Id*. If that

[4] *Compare Commonwealth v. Santiago*, 462 Pa. 216, 340 A.2d 440 (1975) (duress not available as a matter of law where record contained *no* evidence that defendant's drug possession and concealment was at direction or control of another person, and the defendant relied solely on outdated common law presumption that wife's actions were coerced by husband); *Commonwealth v. Hilburn*, 746 A.2d 1146 (Pa. Super. 1999) (duress unavailable as a matter of law where the only evidence supporting claim of duress was mental health evidence suggesting emotional disturbance).

record was "clear" for the purpose of a jury instruction, then the record here, which contains far more evidence of threats, violence, and fear, is clearly sufficient to warrant an instruction.

2. The Record, Viewed in the Light Most Favorable to Ms. Markman, Created a Question for the Jury as to Whether she "Recklessly Placed Herself in the Situation" Pursuant To 18 Pa.C.S. § 309(b).

Given that Ms. Markman met the test for duress pursuant to 18 Pa.C.S. § 309(a), she was entitled to an instruction unless she "recklessly placed [herself] in the situation in which it was probable she would be subject to duress," within the meaning of 18 Pa.C.S. § 309(b). The essence of the trial court decision was that she was "reckless" because she returned to the abusive relationship with Housman, and did not leave prior to, during or, after the killing. Opinion at 79-83.

Statutory and decisional law shows that a judicial finding of "recklessness" as a matter of law, resulting in the extreme measure of barring the duress defense entirely, has been found appropriate only in circumstances where the defendant's culpability in bringing about the situation is clear. *See*, *e.g.*, *Commonwealth v. Pelzer,* 531 Pa. 235, 612 A.2d 407 (1992) (recklessness of the accused in bringing about the situation in which he was later subject to duress was "obvious" (see discussion below)). Such circumstances include, for example, where the defendant freely and willingly participates in a criminal plan or scheme that later turns awry, i*d.*, or connects himself with known criminal activity that involves conscious creation of a risk of duress. *Commonwealth v. Knight*, 416 Pa. Super. 586, 596-600, 611 A.2d 1199, 1205-06 (1992) (citations omitted).

The Model Penal Code, from which the Pennsylvania duress statute is derived, 18 Pa.C.S. § 309 Official Comment (1972), is instructive on the issue of recklessness. The Commentary to Model Penal Code, § 2.09(2), (which is identical to 18 Pa.C.S. § 309(b)) states:

> [The recklessness exception] … will have its main room for operation in the case of persons who connect themselves with criminal activities, in which case it would be very difficult to assess claims of duress.

MODEL PENAL CODE AND COMMENTARIES, Pt. I § 2.09 at 379.

The Commentary goes onto highlight an example of recklessness, that of a person who agrees to participate in a felony with others while armed, but who then claims duress as a defense to the resulting murder. MODEL PENAL CODE AND COMMENTARIES, Pt. I § 2.09 at 379, n.48 cmt. *See also Knight,* 416 Pa. Super. at 597-99, 611 A.2d at 1205-06 (concluding that the term "recklessly" as defined in the Model Penal Code was meant to have "a particular meaning that was obviously more than negligence" and requires that "a criminal defendant has to consciously create the risk of becoming subject to duress" such as where the defendant connects himself with the criminal activity, and had a "full opportunity to avoid coercion," citing Sheldon S. Toll, *A Practitioner's Guide to Defenses Under the New Pennsylvania Crimes Code*, 12 Duq. L. Rev. 849, 857 (1974)).

This Court's decision in *Commonwealth v. Pelzer* is consistent with the Model Penal Code interpretation of when recklessness may be found as a matter of law. The facts of *Pelzer*, where this Court held that the exception applied, are strikingly similar to the single example of recklessness identified by the Model Penal Code and recited above. The defendant in *Pelzer* admitted to freely and willingly planning and implementing a scheme in which he would help to kidnap and rob the victim. During that scheme, he was ordered by one of his cohorts to murder the victim, and he defended the murder on the basis of duress. *Compare* MODEL PENAL CODE AND COMMENTARIES, Pt. I § 2.09 at 379, n.48 cmt. The record evidence of duress in *Pelzer* was defendant's own statement showing that he had left and returned to the crime-in-progress many times before he was ever threatened with any violence. *Pelzer*, 531 Pa. at 247-48, 612 A.2d at

414. This Court held that Pelzer's recklessness was "obvious" and therefore duress was barred as a matter of law:

> The emphasized portions of the [defendant's] statement make it abundantly clear that appellant had frequent opportunities to withdraw from the conspiracy if that had been his intent, but he repeatedly returned voluntarily to continue the criminal operation. His self-serving statement also implies that throughout the episode he was being coerced into participating in brutal acts which were repugnant to his kinder nature. Nothing, however, can be more obvious than that he knowingly placed himself a situation in which it was probable that he would be subjected to duress. As a matter of law, then, the defense of duress was not available to appellant. His own assertions defeated any claim of duress, and there was no other evidence supporting the defense, so it was proper for the trial court to refuse to charge the jury on duress.

Id. at 248, 612 A.2d at 414.

In stark contrast to *Pelzer*, the record in this case, when viewed most favorably to Ms. Markman, shows that she did not agree to, or willingly help Housman with his scheme; rather, her "participation" was coerced and forced from the outset. She did not even *knowingly* (let alone recklessly or even "negligently") connect herself with criminal activity. Rather, Ms. Markman was herself the victim of Housman's criminal activity and his crimes against White occurred long after Ms. Markman was already subject to his intense violence and brutality.

Moreover, the evidentiary support for Pelzer's duress claim was paltry in comparison to that of Ms. Markman. Pelzer offered only his "self-serving" statement that *implied* he did not want to participate in the crimes leading up to the alleged coercion at gunpoint. By contrast, Ms. Markman presented abundant evidence, through her own testimony as well as documents and lay witnesses, that she suffered actual violence at the hands of Housman and was subject to his continuing abuse and threats of harm if she did not comply.

Pelzer's claim of duress, which exemplifies the kind of claim that the duress statute seeks to bar based on the recklessness exception, is simply incongruous with Ms. Markman's claim of duress. The case of a willing felon who, in the midst of his felonious scheme, finds himself

subject to a threat he did not anticipate, can in no way be compared to that of a woman who enters into, not a criminal enterprise, but rather an intimate relationship that turns into a nightmare of physical and psychological brutality.[5]

This Court's decision in *DeMarco* further compels the conclusion that the trial court erred in finding recklessness as a matter of law. With respect to the specific issue of whether DeMarco was barred from claiming duress under this exception, this Court held that despite "apparent" opportunities to "escape," (e.g., being physically capable of leaving his coercer, and not going to the police even when he was in court in police presence), he was still entitled to have the jury decide that issue. The Court stated:

> While these factors may call into question whether Appellant recklessly placed himself in a situation where it was probable that he would be subject to duress, we do not find that they made it completely obvious, as in Pelzer, that that was the case. This is particularly so in light of the evidence of Appellant's situation…

DeMarco, 570 Pa. at 275-76, 809 A.2d at 263-64.

[5] Curiously, the trial court recites the facts of *Pelzer* in support of its conclusion in this case, omitting mention of the glaring distinction that Mr. Pelzer freely, and under no threat of harm, agreed to and returned to the criminal operations with his armed cohorts. *See* Opinion at 83-84. The trial court also omits discussion of the facts of the other leading decision of this Court, *DeMarco*, 570 Pa. 263, 809 A.2d 256, which, as explained in the text, supports Ms. Markman's position. Instead, the trial court relies on lower court decisions which are inapposite. The case it relied on, *Commonwealth v. Baskerville,* involved a sufficiency claim where, unlike in this case, *the duress instruction was given,* and `in any event, as in *Pelzer*, the defendant admitted to joining his conspirators knowing that they were about to rob the victim. *Commonwealth v. Baskerville*, 452 Pa. Super. 82, 86-87 n.1, 90-91, 681 A.2d 198, 198 n.1, 200-01 (1996). *Commonwealth v. Berger*, 417 Pa. Super. 473, 612 A.2d 1237 (1992), likewise does not squarely address the issue in this case since it involved an ineffectiveness challenge. Unlike this case, where all factual inferences must be resolved in favor of Ms. Markman, and reversal is necessary if there is any evidentiary support for her claim, Ms. Berger had the burden to prove ineffectiveness and the lower court decision had to be affirmed unless it was not supported by the record. Moreover, the *Berger* decision, on the merits, is inconsistent with this Court's precedent. It is distinguishable from *Pelzer* in that Ms. Berger was coerced by her abuser from the outset and did not freely and willingly enter into a criminal enterprise. It is inconsistent with *DeMarco* in that the court failed to properly consider Ms. Berger's situation as required by *DeMarco* and, factually, *Berger* is at least as compelling as *DeMarco* in creating a jury question about recklessness.

Likewise, while the trial court here might have believed that Ms. Markman's "apparent" opportunities to escape were factors that "called into question" whether she recklessly placed herself in the situation, those factors were far less indicative of "recklessness" than the factors in *DeMarco,* found by this Court insufficient to bar duress as a matter of law. [6]

On the instant record, the only way for a trial court to reach the drastic conclusion that duress was barred as a matter of law was to overlook binding precedent of this Court and to engage in a factfinding[7], rather than a reviewing, function.

[6] Other state and federal decisions support the right of a battered defendant to a duress instruction when she presents evidence of abuse leading to forced participation in a crime. *See*, *e.g.*, *United States v. Ramos-Oseguerra*, 120 F.3d 1028 (9th Cir. 1997), *rev'd on other grounds by United States v. Nordby,* 225 F.3d 1053 (9th Cir. 2000) (duress instruction given where battered woman claimed duress as defense to drug charges over lengthy conspiracy; while not required in this case, more specific instruction directly tying battering evidence to duress defense could be warranted); *State v. B.H.*, 2003 N.J. Super. LEXIS 352 (Nov. 17, 2003) (approved for publication) (where battered woman claimed duress from abusive codefendant/batterer as defense to charge of sexually assaulting stepson, she received full duress instructions, and trial court should have given more explicit instructions directing jury to consider expert testimony as to all elements of her duress claim); *State v. Lambert*, 173 W. Va. 60, 312 S.E.2d 31 (1984) (where battered woman claimed she was coerced by abusive husband into participating in welfare fraud scheme, trial court committed reversible error in failing to give proper instruction on coercion which, in this jurisdiction, would have negated intent); *State v. Williams*, 132 Wash. 2d 248, 937 P.2d 1052 (1997) (battered woman defendant entitled to duress instruction in welfare fraud case; evidence of battering relevant to subjective belief and reasonableness and trial court erred in finding no immediate harm); *Horton v. Massie*, 203 F.3d 835 (10th Cir. 2000) (unpublished opinion) (counsel ineffective for failing to request duress instruction since evidence sufficient for instruction where battered defendant testified she participated in crime because she feared batterer would otherwise shoot her; fact that she was in physical control of car when she drove victim to location of the murder did not negate the defense); *United States v. Nelson*, 966 F. Supp. 1029 (D. Kan. 1997) (duress instruction given where battered defendant claimed duress; court addresses issues of expert evidence on battering); *United States v. Rouse*, 168 F.3d 1371 (D.C. Cir. 1999) (on claim of newly discovered evidence of abuse supporting duress defense, court acknowledges such claim could be grounds for relief but here trial court made credibility determination).

[7] The record is replete with examples of how the court inappropriately resolved issues of fact. By way of a few examples, the court draws its own conclusion that although Ms. Markman "claims" to have kicked him out, she "consistently" let Housman return. Opinion at 79. This is a characterization that necessarily required the trial court to weigh the evidence, by, for example, discounting Ms. Markman's testimony about the times Housman refused to leave. *See* N.T. 956-58; 967-69; 972, 978-79; 983-84. The trial court even goes so far as to fault her for being with two men during a time period in which she kicked Housman out, an obvious value judgment on the court's part. Opinion at 80. The ultimate conclusion that she "passed up multiple opportunities to flee the scene," Opinion at 81, presumes as a factual matter that such "opportunities" existed, even though, in light of her history with Housman, they arguably did not.

B. The Trial Court's Rulings Barring the Duress Defense were Based on Incorrect Factual Assumptions about the Realities of Ms. Markman's – and other Battered Women's – Experiences.

In deciding whether Ms. Markman met the standard for duress, or was barred because she "recklessly" placed herself in the situation, the trial court had to assess the record evidence regarding what a reasonable person would have done, if subjectively placed in Ms. Markman's "situation" and taking into account salient "situational" factors. *DeMarco,* 570 Pa. at 274, 809 A.2d at 263. In this case, those situational factors consisted of the circumstances surrounding Ms. Markman's experiences of abuse at the hands of Housman, ultimately leading up to the circumstances she faced at the time of the killing.

In finding that Ms. Markman failed to take advantage of opportunities to escape, and was therefore "reckless" within the meaning of the duress statute, the trial court failed to properly consider her "situation" as a victim of Housman's violence, and instead relied largely on classic misconceptions about battered women generally, and judgments about Ms. Markman specifically. For example, as demonstrated below, the court's reasoning implies that Ms. Markman had a duty to leave the relationship with Housman since he was a known abuser, long before the incident itself; that she could have left during any temporary reprieves in the physical violence, regardless of the intensity or severity of Housman's threats, or his warnings of increased danger; that help was just around the corner, if only she would have yelled out, ran away, or called the police; and that if she did finally leave during any of these moments, she would have been safe from Housman.

Correspondingly, Ms. Markman's seeming inaction by failing to take these steps is considered by the trial court to be proof of her "recklessness." *See, e.g.,* Opinion at 83, 85-87. This reasoning is grounded in the judgment that she was "blameworthy" and therefore

responsible for her subsequent victimization by Housman including, ultimately, his coercing her into participating in the killing.

Such incorrect assumptions about Ms. Markman and her predicament as a battered woman interfered with the trial court's assessment of the record evidence of duress and lead to its erroneous conclusion that the instruction was barred as a matter of law.

1. The Assumption that by Failing to Leave or Call Police, Ms. Markman was Responsible, as a Matter of Law, for her Subsequent Victimization Ignores the Complexity and Realities of Her Experiences as a Battered Woman and is Contrary to Precedent, Policy and Social Science Research.

The idea that a battered woman has a duty to leave the abuser and the situation, and that she can do so safely, is one of the most pervasive and damaging misconceptions about battered women. As explained by one leading commentator:

> Perhaps the most commonly asked question about the battered woman (especially in the forensic context) is, Why didn't she leave? The question, to some extent, suggests that the battered woman, by remaining in (or returning to) an abusive relationship, is deviant, odd or blameworthy in some way. Further, the question assumes not only that there are viable options for alternative behavior, but that she should have employed them, and that doing so would have lead to her safety.

Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1226-27 (1993).

Social science research confirms the persistence of beliefs by laypersons that if a battered woman "stays" she is either exaggerating the extent of the abuse, and/or is responsible for the abuse. *See* Diane R. Follingstad, Margaret M. Runge, April Ace, Robert Buzan & Cindy Helff, *Justifiability, Sympathy Level, and Internal/External Locus of the Reasons Battered Women Remain in Abusive Relationships*, 16 Violence and Victims 621, 622 (2001) ("…[L]ay persons often search for explanations as to why the woman stays in the abusive relationship…they may actually view her decision to stay in the relationship as an explanation for her victimization…); Charles Patrick Ewing & Moss Aubrey, *Battered Woman and Public Opinion: Some Realities*

Abuse the Myths, 2 Journal of Family Violence 257, 263 (1987) ("a substantial proportion of the public (from which juries are drawn) subscribes to various stereotypes or 'myths' about battered women. More than one-third of those surveyed seem to believe that a battered woman is at least partially responsible for the battering she suffers and that if she remains in a battering relationship, she is at least somewhat masochistic, and probably emotionally disturbed. Moreover, nearly two-thirds of those surveyed apparently believe that a battered woman can 'simply leave' her batterer."); Tracy Bennett Herbert, Roxane Cohen Silver & John H. Ellard, *Coping with an Abusive Relationship: How and Why do Women Stay?*, 53 Journal of Marriage and the Family 311 (1991) (even if they believed she did not provoke the abuse, observers still believed battered women were responsible for finding a solution to it, such as leaving).

The decision to bar the duress instruction in this case rested precisely on the incorrect factual assumptions that Ms. Markman could and should have "just left" and because she did not, she was responsible. The court faulted her for not leaving before, during, and after the incident. The court stated: "[E]ven though Markman claims to have kicked Housman out of the trailer...she consistently allowed him to return, resuming their relationship....[She also]...chose not to attend [a Protection from Abuse interview] ... Markman failed to call the police when she was allegedly being abused ...." Opinion at 79-80. As to the day of the killing, the court reasoned that Ms. Markman presumably could have escaped or yelled for help to people in the area while Housman was making the call to White, and had plenty of opportunity to escape while White was at the trailer. Opinion at 80-82.

A finding that a battered woman such as Ms. Markman is responsible for her subsequent victimization by remaining with, returning to, or being unable to leave her abuser is inconsistent with the enlightened decisions of this Court and others which recognize the dilemmas faced by

battered women. This Court has been in the forefront of the effort to understand the reality of battered women's experiences, and the fallacy of blaming them for not leaving. In *Commonwealth v. Watson*, decided nearly twenty years before the instant trial, this Court ruled that the fact finder should consider the history of abuse in deciding whether a defendant acted reasonably in self-defense. *Watson*, 494 Pa. 467, 431 A.2d 949. In so doing, this Court directly repudiated any inference that by failing to leave, she is somehow to blame for subsequent violence that occurs. The Court stated:

> A woman whose husband has repeatedly subjected her to physical abuse does not, by choosing to maintain her family relationship with that husband and their children, consent to or assume the risk of further abuse.

Watson, 494 Pa. at 472, 431 A.2d at 951-52.

In *Stonehouse,* a plurality decision, the Court discussed in detail the "myths that ultimately place the blame for battering on the battered victim." *Stonehouse*, 521 Pa. at 62-63, 555 A.2d at 783. In particular, the Court explained how both the prosecutor and the lower court in that case had relied on the myth that "if appellant had truly been an innocent victim she could have put an end to the relationship" and that her claim of self-defense was unreasonable because of the "continued relationship" with her batterer. *Id*.

In *Dillon*, this Court again discussed the obstacles faced by battered women, again repudiating as "erroneous" the belief that battered women "can easily escape victimization by leaving their tormentors…." *Dillon*, 528 Pa. at 429, 598 A.2d at 969 (Cappy, J., concurring). Justice Cappy noted that many jurors believe myths about battered women and thus are often unable to understand "either why a woman failed to leave her husband or why she did not contact the police for assistance." *Id*. at 431, 598 A.2d at 970. *See also Hernandez v. Ashcroft*, 345 F.3d 824, 836 (9th Cir. 2003) (reviewing battered woman's request for suspension of

deportation under Violence Against Women Act of 2000, Pub. L. No. 106-386, based on her husband's violence, court notes: "Congress recognized that lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes' and that background information regarding domestic violence may be crucial to understand its essential characteristics and manifestations," quoting H.R. REP. NO. 103-395 at 24 (1993)); *Weiand v. State*, 732 So. 2d 1044, 1053-54 (Fla. 1999) (extending duty to retreat to cohabitants would adversely impact battered women and legitimize the "common myth that the victims of domestic violence are free to leave the battering relationship any time they wish to do so, and that the beatings could not have been too bad for if they had been, she certainly would have left, "citations omitted); *State v. Kelly*, 97 N.J. 178, 205-6, 478 A.2d 364, 377-78 (1984) ("…[O]ne of the common characteristics of a battered wife is her *inability* to leave despite such constant beatings…," emphasis in original); *State v. Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984) (discussing need for expert testimony to help explain why a battered woman would not leave her mate); *State v. Hodges*, 239 Kan. 63, 68, 716 P.2d 563, 567 (1986) (expert testimony "would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time.").

When judgments about battered women are based on myths, the focus usually remains on the blameworthiness of the battered woman rather than on the brutality and culpability of the batterer, where it should rightly be. "It is indeed curious that our society instinctively blames the battered woman for not leaving or getting help rather than blame the man who abuses her." *Dillon*, 528 Pa. at 432 n.9, 598 A.2d at 971 n.7 (Cappy. J., concurring). The assumption that she could have simply left or received protection from the batterer, grossly oversimplifies her

predicament as a battered woman and the complexities of why she might have remained in a given situation. As this Court recognized nearly fifteen years before the instant trial:

> '[B]lame the victim' myths [such that if the battered defendant had been truly innocent she would have left, and that she was unreasonable for continuing her relationship with the batterer] enable juries to remain oblivious to the fact that battering is not an acceptable behavior and such myths do not begin to address why battered women remain in battering relationships.…

Stonehouse, 521 Pa. at 63, 555 A.2d at 783.

Social science research confirms that myths about battered women often lead to misplaced blame and an oversimplification of battered women's true experiences:

> The assumptions underlying [the] beliefs [that battered women should just leave] are likely to fail to account for the complexity of the battered woman's situation while also placing much responsibility for ending the abuse on the shoulders of the woman being abused rather than on the individual who ultimately has control over whether or not he abuses his wife. Focusing on whether battered women remain in the relationship with the batterer often diverts attention from where it might be more appropriately aimed—determining why the men abuse the women…

Diane R. Follingstad, Margaret M.Runge, April Ace, Robert Buzan & Cindy Heff, *Justifiability, Sympathy Level, and Internal/External Locus* at 622.

Battered women's responses to their victimization cannot be reduced to a simple dichotomy between either 1) "leaving" and reporting abuse to authorities or 2) "staying" and inviting further abuse. Rather, their responses fall along a wide continuum. Battered women use complex sets of survival strategies for attempting to stop or reduce the likelihood of future or more extreme violence. What may appear as passively "staying" and "putting up" with it may, in reality, be the best way for that particular woman to survive. The fact is that the battered woman herself is often the best judge of what will or will not be most likely to help reduce the violence in a given situation. Barbara Hart, *Beyond the "Duty to Warn": A Therapist's "Duty to Protect" Battered Women and Children*, in Kersti Yllo and Michele Bograd, Feminist Perspectives on Wife Abuse 234 (1988). Further, battered women's strategies for survival are

often active, problem-solving efforts aimed at self-preservation: Jacquelyn Campbell, Linda Rose, Joan Kub & Daphne Nedd, *Voices of Strength and Resistance: A Contextual and Longitudinal Analysis of Women's Responses to Battering*, 13 Journal of Interpersonal Violence 753 (1998); Elizabeth M. Schneider, Battered Women and Feminist Lawmaking at 84 (2000) ("Women who are battered may be unable to bring a battering relationship to an end, but they may be constantly planning and asserting themselves – strategizing in ways that are carefully hidden from the batterer, to contribute to their own safety and that of their children."); Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women: Complex Lives/Difficult Choices at 80 (1998) ("Women are active, they plan in many different ways, and their reactions to their partner's violence vary enormously.").

See also Hernandez, 345 F.3d at 837-38 (finding that batterer's violence constituted "extreme cruelty" justifying suspension of battered woman's deportation, court notes that battered women's strategies to reduce violence "may appear to be the result of passiveness or submission on the part of the victim, when in reality she has learned that these are sometimes successful approaches for temporarily avoiding or stopping the violence," quoting Anne L. Ganley, *Understanding Domestic Violence*, in Improving the Health Care Response to Domestic Violence 18, 34 (1996)).

Research shows that battered women use a variety of survival strategies, and that no single one has been identified as being the most effective in reducing violence. Strategies can range from "formal," such as calling police or seeking help from the courts, to "informal," such as talking to neighbors or friends, to "personal" strategies, such as complying with the batterer's request, avoiding confrontations, or fighting back. Mary Ann Dutton, *Understanding Women's Responses,* 21 Hofstra L. Rev. at 1227-28.

Consistent with this research, the record shows that Ms. Markman used a variety of survival strategies to help reduce the violence. At times, she tried to talk to Housman and get him to leave. N.T. 968-69. She tried to get help from friends, N.T. 969, but only insofar as she believed she could remain safe (e.g., she told Baker not to call police for fear of what he would do to her). N.T. 993. She tried to enlist the aid of others to help her make him leave. N.T. 969, 976. Rather than risk the horrible consequences threatened by Housman, Ms. Markman complied with his demands as a way to survive. N.T. 1006, 1012 ("...if I didn't do what he said, that he would send me home in pieces to my daughter..[a]nd after what I had just been through...I believed what he said."). Ms. Markman primarily tried to avoid confrontation with him, especially near the time of the incident after his violence had increased, N.T. 999, ("I didn't even want to argue with him. I sat there with my mouth closed"), during the crime itself, N.T. 1057, (responding to the question why she participated in the crime, "Because I was afraid for my own life [because of] William Housman holding a knife to my neck...keeping me tied up ... raping me, torturing me..."), and after the homicide as well, N.T. 1040-57, (regarding obeying his commands as to what to tell police).

The trial court did not recognize that Ms. Markman's compliance with Housman might have been a survival strategy for reducing violence. Rather, in deciding the threshold question of whether Ms. Markman "recklessly" placed herself in the situation, it faulted her for failing to use more formal means of seeking help, such as calling the police and following through on a protection order. Opinion at 80, 83, 85. The trial court seemed to believe that these were "better" strategies than the ones Ms. Markman employed.

As this Court has recognized, the idea that calling police is the best or only effective means for reducing violence is yet another misconception about battered women:

> Other myths commonly believed about battered women are that…the police can protect the battered woman (citations omitted.) These myths were also exploited by the prosecutor…who argued to the jury that appellant could have been rescued, if she had wanted to be rescued, by a law enforcement system ready, willing and able to protect women who are victims of domestic violence… (citations omitted).

Stonehouse, 521 Pa. at 63, 555 A.2d at 783-84.

See also Dillon, 528 Pa. at 423, 429-30 n.4, 598 A.2d at 966, 969 n.4 (Nix, C.J., concurring) (Cappy, J., concurring) (erroneous to believe that battered women should call police because police often do not protect them); *Allery*, 101 Wash. 2d at 597, 682 P.2d at 316 (expert helps explain among other things, why woman might not inform police of abuse); *United States v. Lawrence*, 263 F. Supp. 2d 953, 963 n.6 (D. Neb. 2002) (acknowledges factors that influence a battered woman's decision to not seek assistance from or cooperate with law enforcement); *Wildoner v. Borough of Ramsey*, 162 N.J. 375, 392-93, 744 A.2d 1146, 1156 (2000) (reinstating dismissal of batterer's wrongful arrest suit against police, court finds that police were justified to rely on neighbor's account of incident rather than wife's denial, reasoning: "[i]t is well documented that, for a number of reasons, victims of domestic violence often do not report their abuse to law enforcement officers…."); Marsha E. Wolf, Uyen Ly, Margaret A. Hobart & Mary A. Kernic, *Barriers to Seeking Police Help for Intimate Partner Violence*, 18 Journal of Family Violence 121, 124 (2003) ("Some victims who called the police expecting that the batterer would be arrested have felt that their efforts were wasted or left them in a more dangerous environment had they not called the police. As a result, they are reluctant to call again."); Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women; Mary Ann Dutton, *Understanding Women's Responses,* 21 Hofstra L. Rev. at 1229[8]

[8] Likewise, Ms. Markman's failure to follow through in receiving a protection from abuse order – another "formal" strategy – is incorrectly viewed by the trial court as evidence of her reckless failure to escape. Opinion at 80. A very common characteristic in battering relationships is the victim's decision not to proceed with cases in the courts against their batterers. James Ptacek, Battered Women in The

Further, the trial court's decision that Ms. Markman *should* have called the police overlooks the record evidence of her actual experience when she *did* call the police. She testified that when she called police, she was told that "they could not do anything "unless he actually did something." N. T. 909. Only hours before Housman began his two day reign of terror and captivity of Ms. Markman, ultimately leading up to the killing, Ms. Markman had called and personally spoken to a police officer at the trailer park. Despite her telling the officer that she feared he was trying to disable her car, had abused her in the past, and she wanted him out, the officer told her that he couldn't make Housman leave, and that the park manager would have to evict him. N.T. 974-77. Such a response by the very institution charged with her protection would necessarily inform her subsequent decision as to whether to call on them again. Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women.

The trial court seemed to conclude that leaving Housman and calling the police were the only and best ways for Ms. Markman to avoid Housman's violence. These value judgments overlook the realities of Ms. Markman's situation. Her compliance with, and avoidance of, Housman were, in themselves, active strategies that she used to survive.

2. Faulting Ms. Markman for Not Leaving Ignores the Stark Reality that Battered Women Often Face Increased Violence or Death when they Attempt to Separate, and Ignores the Record Evidence Showing that Housman's Violence Did Increase When She Tried to Separate.

To fault Ms. Markman and other battered women for not leaving blindly ignores the reality, repeatedly confirmed by social research, that s*eparation does not necessarily end violence.* On the contrary, leaving often leads to continued or escalated abuse. Jennifer L.

Courtroom: The Power of Judicial Responses (1999). In some cases, women have good reasons not to proceed, such as fear of reprisal from the batterer. National Institute of Justice, *The Validity and Use of Evidence* at 17. Just as failing to call police cannot be considered recklessly disregarding an opportunity for help, neither can failure to complete the protection order process.

Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 Violence Against Women 579, 599 (2002); Ruth E. Fleury, Cris M. Sullivan & Deborah I. Bybee, *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners,* 6 Violence Against Women 1363, 1364 (2000); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991).

The term "separation assault" has been coined to describe this well-documented phenomenon which occurs when the batterer feels he is losing control. Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in Martha A. Fineman & Roxanne Mykitiuk, The Public Nature of Private Violence: The Discovery of Domestic Abuse 59, 79 (1994). Sadly, statistics bear out this reality. Data from national crime surveys in the United States and Canada estimate that compared with married women, separated women are about 25 times more likely to be assaulted by ex-mates and 5 times more likely to be murdered (citing Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 Violence and Victims 3 (1993)). Moreover, it is not necessarily the *act* of separating that triggers more violence, but rather the *decision* to leave, which is often seen as an attempt to challenge the batterer's control. *See* Martha R. Mahoney, *Victimization or Oppression?* at 79 (separation assault "takes place when the batterer feels his control eroding. The most dangerous moment may come when a woman makes a decision to leave, at the moment she actually walks out, or shortly after she has left.*")*; Barbara Hart, *Beyond the "Duty to Warn*;" *See also Weiand*, 732 So. 2d at 1053 (holding that imposing duty to retreat from one's own home when faced with cohabitant attack would adversely impact battered women in part because retreating often increases violence: "Experts in the field explain that separation or retreat can be the most

dangerous time in the relationship for the victims of domestic violence because '[v]iolence increases dramatically when a woman leaves an abusive relationship;'" court also cites studies showing murders of battered victims are often "triggered by a walkout, a demand, a threat of separation ….Thus, the threat of separation is usually the trigger for the violence," citations omitted); *Hernandez*, 345 F.3d at 837 (9th Cir. 2003) ("Significantly, research also shows that women are often at the highest risk of severe abuse or death when they attempt to leave their abusers."); *State v. Reyes*, 172 N.J. 154, 164, 796 A.2d 879, 884 (2002) ("Often victims are at greatest risk when they leave their abuser because the violence may escalate as the abuser attempts to prevent the victim's escape."); *Felton v. Felton*, 79 Ohio St. 3d 34, 40, 679 N.E.2d 672, 676-77 (1997) (discussing strong policy reasons for permitting orders of protection after final divorce because "[t]he risk of assault is greatest when a woman leaves or threatens to leave an abusive relationship. Nonfatal violence often escalates once a battered woman attempts to leave the relationship," quoting Catherine Klein and Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 816 (1993)).

The record in this case illustrates the reality that Ms. Markman experienced severe, increased violence when she tried to leave, and had every reason to expect more violence if she tried again. She greatly feared what Housman would do to her if he found out she was taking steps to separate. She did not follow through with her protection order because she feared that he would be angry, and "find a way to get a hold of me," knowing that when he got angry, "the hitting got worse." N.T. 950, 952-53. On one occasion when she told him to let her leave the trailer, he responded that "she wasn't fucking going nowhere," choked her, pulled her to the couch by speaker wire around her neck, and forced her to have sex. N.T. 956-57.

Not coincidentally, it was after Ms. Markman's most serious attempt at separation that Housman's violence increased dramatically. Just days before the incident, she tried again to evict him, calling her friend to come over because she so feared what he would do, and telling both police and the trailer park manager about his abuse and her wish to make him leave. N.T. 974-79, 983-84. Only hours later did Housman lay in wait for her to return to the trailer and begin his reign of unprecedented terror for the next 48 hours up to, and during the killing, which included unlawful restraint, repeated rapes and assaults, and threats to kill and/or dismember her and her family. N.T. 993-1009.

Had Ms. Markman tried to run, hide, or otherwise take any further steps to leave, in the face of Housman's increasing anger and violence after her prior attempts, she might well have caused even more violence to herself and/or her child, or perhaps become another tragic statistic of those who have died while trying to leave.

In any event, given the record evidence of abuse and duress, it was the *jury* and not the trial judge that needed to assess this reality. Instead, the trial court itself assumed, without consideration of the very real risks of leaving, that Ms. Markman nonetheless should have left, and because she did not, she was "reckless" thus barring duress as a matter of law. Opinion at 83-86.

3. Faulting Ms. Markman for Not Attempting to Leave or Get Help During Momentary Lapses in Housman's Physical Violence Ignores the Reality that Housman's Abuse was a Pattern of Coercion and Control which Kept Ms. Markman in an Ongoing State of Terror.

To properly assess whether Ms. Markman had any reasonable alternatives to participating, the trial court needed to understand that Housman's violence was a pattern of control rather than a series of discrete incidents permitting escape between each one:

> Abusive behavior does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of *the dynamic of power and control* goes beyond these discrete incidents.

Mary Ann Dutton, *Understanding Women's Responses,* 21 Hofstra L. Rev. at 1208 (emphasis added).

See also Martha R. Mahoney, *Legal Images of Battered Women,* 90 Mich. L. Rev. at 53 ("[T]he conception of battering as about power – rather than about incidents of violence or about the psychology of women who experience violence – has been present in some of the psychological and social literature for some time."); Ellen Pence & Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (1993).

Only by understanding domestic violence as a *pattern* of power and control, a "strategy used to subjugate the victim for the gain of the abuser," can a battered woman's responses to that violence be assessed. Michael A. Anderson, Paulette Marie Gillig, Marilyn Sitaker, Kathy McCloskey, Kathleen Malloy & Nancy Grisby, *"Why Doesn't She Just Leave?": A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 Journal of Family Violence 151 (2003). As one expert noted:

> To negate the impact of the time period between discrete episodes of serious violence—a time period during which the woman may never know when the next incident will occur, and may continue to live with ongoing psychological abuse—is to fail to recognize what some battered women experience as a continuing 'state of siege.'…The 'state of siege' can begin with the first identifiable act of violence or abuse in the relationship, and may merely be punctuated by the discrete acts of violence or abuse that follow.

Mary Ann Dutton, *Understanding Women's Responses*, Hofstra L. Rev. at 1208.

See also Hernandez, 345 F.3d at 837 ("The effects of psychological abuse, coercive behavior, and the ensuing dynamics of power and control mean that 'the pattern of violence and abuse can be viewed as a single and continuing entity ... thus, the battered woman's fear, vigilance, or

perception that she has few options may persist…even when the abusive partner appears to be peaceful and calm," citations omitted).

Contrary to these realities, the trial court opinion lists, as discrete, isolated "opportunities," each of the distinct times that Ms. Markman should have escaped, focusing on the times that she was physically able (e.g., when the "knife was not out," when she was "five feet from the door," when she was in the presence of other people; or when she could have gone to police). Opinion at 79-82. This reasoning overlooks the impact of the times between the discrete events of *physical* force or restraint, the continuing "state of siege" to which Ms. Markman was subject, and hence, the reality of Ms. Markman's true "opportunity" for safety. Unduly focusing on only the physical episodes of abuse trivializes a battered woman's true experiences:

> Work with battered women outside the medical complex suggests that *physical violence may not be the most significant factor about most battering relationships*. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an *ongoing* strategy of intimidation, isolation and control that extends to all areas of a woman's life…Sporadic … violence makes this strategy of control effective.

Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995) (emphasis in original).

Ms. Markman testified in detail to an escalating pattern of abuse, which progressed not only with respect to the severity of the violence, but with respect to the seriousness of the threats, culminating with threats to put her in a body bag and send the pieces home to her daughter. N.T. 1006, 1012. She testified that she was terrified, and her fear made it seem impossible to escape even if she may have been able to do so physically. N.T. 1022, 1049. Housman's overall pattern of coercion and control, including his threats, did as much to keep her in an *ongoing state of terror* as did the punctuating events of physical violence:

> Although violence is a universal method of terror, the perpetrator may use violence infrequently, as a last resort. It is not necessary to use violence often to keep the victim in a constant state of fear. The threat of death or serious harm is much more frequent than actual resort to violence. Threats against others are often as effective as direct threats against the victim….

Judith Lewis Herman, Trauma and Recovery at 77 (1992).

See also Hernandez, 345 F.3d at 839-40 (batterer's abuse amounted to "extreme cruelty" justifying suspension of battered woman's deportation even though physical abuse occurred in Mexico; batterer's nonphysical tactics of control, including inducing her to return to him through incessant calls and contrite promises to change, were part of his overall pattern of abuse).

In this particular situation, where the violence quickly escalated just prior to the killing, it is especially unrealistic to expect that she should have escaped at or near the time of the killing. Ms. Markman testified about violence in the days leading up to the homicide that was markedly different from Housman's past abuse because of its sudden increase in severity and duration. Throughout the hours just before Leslie White arrived, Housman held Ms. Markman at knifepoint, naked, raped her at will, and threatened to kill her and her family. N.T. 983-1006. These events, in the context of her past experiences with Housman, operated to heighten her terror and her reasonably based perception that the danger then was like no other.

The record shows that Ms. Markman recognized the escalation in Housman's violence just prior to the killing. Not only did she experience a clear increase in physical violence and threats, but she also recognized a "look in his eyes" of "pure evil" that she had never seen before, even during all the past instances of abuse. N.T. 993. Her ability to read his cues signaling impending danger is consistent with research showing that battered women become, of necessity, expertly adept at predicting danger. *See* Barbara Hart, *Beyond the "Duty to Warn*"; David R. Langford, *Predicting Unpredictability: A Model of Women's Processes of Predicting Battering*

Men's Violence, 10 Scholarly Inquiry for Nursing Practice: An International Journal 371 (1996); Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women. In a recent study of how women predict men's violence, the researchers concluded that battered women become especially able to identify specific changes in the situation and the batterer's affect that served as warning signs. David R. Langford, *Predicting Unpredictability* at 376. Significantly *'[t]he eyes' were repeatedly mentioned as the telltale physical feature warning that a partner had become dangerous*…(emphasis added). *See also* Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women ("A victim saying, 'He gives me the creeps' or 'he's gone crazy' or 'He just has that look in his eyes' … are elements for advocates to consider [along with many others] when trying to identify extreme danger.").[9]

In the context of Housman's increased violence, threats, and warnings, Ms. Markman's compliance with Housman's orders, rather than challenging him, certainly could be considered a survival strategy that was not unreasonable. In fact, avoiding the batterer, like Ms. Markman did, and complying with his demands, are precisely those strategies often used where, as here, there is a sudden increase in violence:

> Avoidance strategies were most often used for prevention when a situation escalated quickly … There were many ways of avoiding confrontation, such as suddenly becoming quiet, placating one's partner, walking away, accepting blame for something, never complaining, or doing as has been instructed.

[9] In *Stonehouse*, the defendant testified at trial that during the final violent encounter during which she killed her batterer in self-defense, she observed, "He [the batterer] was crazy. He didn't even know who I was in his eyes. I never saw him like that." This Court explained how "[e]xpert testimony would also have shown that among battered women who kill, the final incident that precipitates the killing is viewed by the battered woman as 'more severe and more life-threatening than prior incidents.'" *Stonehouse*, 521 Pa. at 55, 64, 555 A.2d at 779, 784 (1989) (quoting Elizabeth M.Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 Harv.C.R.-C.L. L.Rev 623, 625 (1980)). *See also Watson*, 494 Pa. at 473, 431 A.2d at 952 (discussing the importance of a batterer's behavior just prior to a woman's defensive action in assessing her reasonableness); *Humphrey*, 13 Cal. 4th at 1086, 921 P.2d at 8-9 ("As violence increases over time, and threats gain credibility, a battered person might become sensitized and thus able reasonably to discern when danger is real and when it is not."); *Kelly*, 97 N.J. at 207, 478 A.2d at 378 (Battered woman may be "particularly able to predict accurately the likely extent of violence in any attack on her.").

David R. Langford, *Predicting Unpredictability* (emphasis added).

Ms. Markman's testimony fully supports that she avoided confronting Housman and obeyed his orders to participate in the crime, only because she reasonably believed he was serious about his threats. *See* N.T. 999 regarding her avoidance ("I did not even want to argue with him…I just sat there with my mouth closed"; N.T. 1012-22 (testifying that she complied with his orders to gag and tie the victim, did not try to stop him, did not try to get away, because she was terrified, and believed he would do what he had threatened).

The record evidence demonstrates why Ms. Markman so profoundly feared Housman when he ordered her to participate in the homicide. This evidence should have been considered by the trial court for purposes of the duress instruction with all inferences favorable to Ms. Markman. *Black,* 474 Pa. 47, 372 A.2d 627. Yet, the trial court opinion does not differentiate between her "numerous reasonable opportunities," to escape, whether long before the crime, or during or after this dramatic increase in the duration and severity of Housman's violence. Opinion at 79-82. The expectation of the court is that she had a *continuing* duty to leave regardless of the changes in Housman's violence and the realities of her situation.

As to the killing itself, the trial court makes no distinction in her duty to leave either before the during the killing, ignoring the glaring fact that the same man ordering her to participate was then and there killing another woman in cold blood. Obviously, any direct knowledge of a batterer's ability to carry out his threats would inform a battered woman's reasonable perception of danger and her alternatives. Barbara Hart, *Beyond the "Duty to Warn."* What could be more compelling in convincing her of Housman's intention to make good on his threats than witnessing him kill another person before her eyes? Perhaps Ms. Markman summed it up best:

> I thought he was going to kill me. He was sitting there killing somebody else. So why wouldn't I think he could do me next?"

N.T. 1018.

It was for the jury to decide, under all of the circumstances, whether Housman's momentary reprieves in the physical violence, in light of his continuing pattern of coercion and control, gave Ms. Markman any greater opportunity to "escape" before or during the homicide, than when he had the knife to Ms. Markman's throat. This question was part and parcel of the jury's ultimate function: to decide whether a person of "reasonable firmness," if subjectively placed in Ms. Markman's situation, would have likewise been unable to resist Housman's threats; and whether she disregarded a risk that was a "gross deviation" from what a reasonable person would have observed if subjectively placed in her situation. *DeMarco*, 570 Pa. at 272-74, 809 A.2d at 261-63.

On this record, the trial court's preclusion of the duress instruction wholly deprived Ms. Markman of her sole defense in this case, rendering meaningless the promise of her right to defend as guaranteed by state law and the federal constitution. *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," citations and internal quotations omitted); *In re Oliver*, 333 U.S. 257, 273 (1948); *Washington v. Texas,* 388 U.S. 14, 22-23 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations ..."). *See also Bradley v. Duncan*, 315 F.3d 1091, 1099 (9th Cir. 2002) ("[T]he right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the

defense," citations omitted); *McNeil*, 344 F.3d 988 (erroneous imperfect self-defense instruction in case where battered woman killed her abuser violated constitutional rights and required habeas petition to be granted).

The fact that this error emanated from trial court rulings based largely on misconceptions about battered women, makes it especially repugnant to the policy of this Commonwealth to ensure that battered women, like all defendants, have fair trials, unencumbered by misinformation about social realities. *Stonehouse,*521 Pa. 41, 555 A.2d 772.

II. THE PRECLUSION OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS, BASED ON A MISUNDERSTANDING OF THE CONTENT AND PURPOSE OF THAT TESTIMONY AND A MISAPPLICATION OF APPLICABLE LAW, SEVERELY PREJUDICED THE DEFENSE AND REQUIRES REVERSAL.

The trial court precluded the testimony of Dr. Dawn Hughes, a forensic psychologist specializing in battering and its effects.[10] The trial court's rationale demonstrates confusion both as to the admissibility of such testimony in a duress case, and the nature of the testimony actually proffered. Opinion at 73-79. This testimony was essential for the jury to fairly assess the defense claim of duress.

One need look no further than the trial court rulings precluding a duress instruction to vividly demonstrate this point. As discussed in the preceding section, the trial court's review of the evidence to determine whether to instruct on duress, was based on a number of misconceptions about the nature of Ms. Markman's experiences of abuse, including the belief that she had a duty to leave, and that by failing to do so, she was responsible for the ensuing abuse and coercion.

[10] The court admitted Dr. Hughes' report in full as the defense proffer of her testimony. *See* N.T. 945-46; 1197, Defense Exhibit 15.

If a trial court, making critical rulings in a capital duress case, bases its decision on repudiated myths and commonly held value judgments about battered women, then a jury could be expected to do the same. Expert education was desperately necessary for a fair assessment of Ms. Markman's claims.[11]

A. Expert Testimony on Battering and Its Effects is Relevant and Admissible to Support a Claim of Duress.

Unquestionably, expert testimony on battering and its effects is admissible to help the jury understand the honesty and reasonableness of a defendant's belief of danger, and to dispel jurors' myths and misconceptions about battered women. *Stonehouse*, 521 Pa. at 41, 555 A.2d at 785; *Dillon,* 528 Pa. 417, 598 A.2d 963 (Nix, C.J., and McDermott, J. concurring) (Cappy, Larsen, and Papadakow, JJ., concurring); *Commonwealth v. Miller*, 430 Pa. Super. 297, 310-13; 634 A.2d 614, 620-22 (1993); *Commonwealth v. Kacsmar*, 421 Pa. Super. 64, 77-78, 617 A.2d 725, 731-32 (1992) (per curiam).[12] While expert testimony on battering and its effects evolved

[11] The preclusion of the expert testimony made it more difficult for Ms. Markman to convince the judge that the evidence warranted a duress instruction, and, in this sense, placed her in a "catch-22" type situation (e.g., the trial court felt she did not meet her burden to warrant an instruction without such testimony, yet would not permit the testimony either). *Amici* contend that, while preclusion of the expert is related to the instruction issue, the preclusion also operated as an independent error by depriving Ms. Markman of her state and federal constitutional right to present a meaningful defense under recognized state law in violation of the due process clause of the Fourteenth Amendment and the compulsory process clause of the Sixth Amendment. *Chambers,* 410 U.S. at 294 ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."); *Crane*, 476 U.S. at 690-91; *Washington,* 388 U.S. at 19, 22-23; *Davis v. Alaska*, 415 U.S. 308 (1974). *See also Depetris v. Kuykendall*, 239 F.3d 1057 (9th Cir. 2001) (trial court's preclusion of journal containing evidence corroborative of defendant's self-defense claim violated her due process right to present a defense as guaranteed by *Chambers* and *Washington*, and required federal habeas relief).

[12] Testimony about battering and its effects "is a form of social framework testimony that is now admissible in every jurisdiction in the United States." Sue Osthoff & Holly Maguigan, *The Self-Defense Claims of Battered Women* (forthcoming 2004). *See also* National Institute of Justice, *The Validity and Use of Evidence* at 3; Janet Parrish, *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*, 11 Wis. L. Rev. 75 (1996).

in the context of self-defense cases, it has been admitted as evidentiary support other types of cases and situations, including duress.[13]

It is important to note that, historically, there has been much confusion about the purpose of expert testimony on battering and its effects. Initially, some courts (and some defense counsel as well) perceived this testimony as a unique theory of justification or excuse based on the mere fact that the defendant was battered, e.g., a "battered woman defense." *See generally* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 40 U. Pa. L. Rev. 379 (1991) (analyzing assumptions underlying the misperception that traditional self-defense doctrine cannot accommodate the claims of battered women who

[13] *See* National Institute of Justice, *The Validity and Use of Evidence* at 2-4; *State v. B.H.*, 2003 N.J. Super. LEXIS 352 (expert testimony admitted to support battered woman's duress claim as defense to charge of sexual assault; trial court erred by instructing jury to consider expert testimony on battering only with respect to her recklessness in staying with the batterer, as the testimony was also relevant to her honest and reasonable belief of danger and whether person of reasonable firmness in her situation would have resisted the threats); *United States v. Marenghi*, 893 F. Supp. 85, 96 (D. Me. 1995) (in drug prosecution, expert testimony on battering relevant to battered woman's duress defense to help jury understand reasonableness of her actions, and "to [explain] how a reasonable person can nonetheless be, trapped and controlled by another at all times even if there is no overt threat of violence at any given moment;" court specifically notes that there is no reason to preclude expert testimony in duress cases if it is admissible in self-defense cases); *United States v. Brown*, 891 F. Supp. 1501 (D. Kan. 1995) (expert testimony on battering admissible to support duress defense to drug charges); *United States v. Rouse*, 168 F.3d 1371 (D.C. Cir. 1999) (newly discovered evidence that defendant suffered abuse from her codefendant/batterer, including expert testimony, was relevant to her defense to fraud charge but not grounds for relief here since trial court made credibility determination). For cases admitting expert testimony on battering and its effects on issues of intent similar to duress theories, *see, e.g.*, *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992) (denial of funds for expert on battering violated due process since battering was relevant to negate the specific intent element of the aiding and abetting statute where defendant charged as conspirator with batterer in killing third person); *Mott v. Stewart,* 2002 U.S. Dist. LEXIS 23165 (2002) (battered woman's petition for habeas corpus granted where trial court erred in precluding expert on battering offered to negate intent element of child abuse offense); *People v. Minnis*, 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983) (expert testimony admissible to explain battered woman defendant's conduct, not only at time of homicide, but also afterwards in dismembering abuser, to rebut state's interpretation as showing consciousness of guilt).

kill); *Meeks v. Bergen*, 749 F.2d 322 (6th Cir. 1984) (counsel not ineffective for asserting a claim of self defense rather than a "battered wife defense").[14]

Amici have never argued for a separate defense based on "battered woman syndrome" or any other "theory" unique to battered women. Rather, *Amici* simply seek fair application to battered women defendants of the evidentiary rules that apply to all criminal defendants. *Amici* do not advocate a special rule of admission for battered women that would require admission of an expert in every case. *Amici* believe that a court's rulings on admission of such evidence must be based on an accurate understanding of the applicable legal principles, as well as the content of the evidence itself. In this case, the rulings were not based either on applicable legal principles or on the content of the evidence.

Given the standard for duress in the Commonwealth, there is no logical distinction between self-defense and duress cases with respect to the admissibility of expert testimony on battering. If such testimony is admissible and necessary for fairly assessing self-defense claims, it is as least as necessary for fairly assessing claims of duress.

Both self-defense and duress claims require that the factfinder consider the circumstances faced by the defendant in assessing her subjective belief of danger and the reasonableness of that belief. Both of the analogous components of these standards – the defendant's "situation" for duress, and her "surrounding circumstances" for self-defense – require a full consideration of her

[14] While some Pennsylvania decisions have alluded to a "battered woman defense," *see Commonwealth v. Tyson*, 363 Pa. Super. 380, 383, 526 A.2d 395, 397 (1987) (referring to counsel's failure to raise defense of "battered woman's syndrome"); *Commonwealth v. Ely*, 381 Pa. Super. 510, 532, 578 A.2d 540, 541 (1990), it is clear that Pennsylvania law accepts expert testimony on battering and its effects as support of already existing defenses, rather than creating a new a defense. *See Dillon,* 528 Pa. at 425, 598 A.2d at 967 (Nix, C.J., concurring) ("Presently, the law of this Commonwealth does not recognize the battered woman syndrome as a separate and distinct defense, and I am not proposing that we do so now."); *Miller*, 430 Pa. Super. at 313, 634 A.2d at 622 ("The syndrome does not represent a defense to homicide in and of itself, but, rather, is a type of evidence which may be introduced….").

history of abuse at the hands of her attacker or coercer. *DeMarco,* 570 Pa. at 272, 809 A.2d at 262 (jury must consider defendant's "situation" in deciding the issues of "reasonable firmness" to resist the threat and reasonableness in disregarding a risk of probable duress; in assessing the defendant's situation, the court considered history of abuse inflicted on defendant by coercer); MODEL PENAL CODE AND COMMENTARIES, Pt. I § 2.09, 375-76 (recognizing that "long and wasting pressure may break down resistance more effectively than a threat of immediate destruction."); *United States v. Johnson*, 956 F.2d 894, 900 (9th Cir. 1992) (discussing applicability of Model Penal Code to situation of a battered woman); *Stonehouse,* 521 Pa. at 59-66, 555 A.2d at 781-85 (discussing history of abuse as "surrounding circumstances" necessary to consider in assessing self-defense).

To properly *consider* the history of abuse, the factfinder must correctly *understand* that history and how it relates to the claim, a task very difficult to do without the aid of an expert on battering and its effects. An expert can help provide provides the jury with the "social framework" necessary to understand her experiences of abuse, "a social and psychological context in which the trier can understand and evaluate claims about the ultimate fact…" National Institute of Justice, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials;* Report Responding to Section 40507 of the Violence Against Women Act, NCJ 160972 (1996) (citations omitted).

Providing the jury with relevant context is just as necessary in a duress claim as in a self-defense claim. As explained in the seminal report on the validity of expert testimony on battering in criminal cases, including duress cases, published by the Department of Justice:

> ...[F]or a battered woman to prove duress, she must demonstrate her reasonable belief that criminal behavior was necessary in order to avoid the batterer's violent or abusive behavior. *Describing the pattern, over the course of the relationship, of a battered woman's compliance in the context of the batterer's violence or threats [the expert] can*

> *provide a framework for jury evaluation of whether the alleged criminal conduct resulted from duress or coercion*

National Institute of Justice, *The Validity and Use of Evidence* at 3 (emphasis added). *See also* note 13, *supra*; *State v. B.H.*, 2003 N.J. Super. LEXIS at *24 ("[W]e view the duress defense as sufficiently parallel to the justification of self-defense to conclude that expert testimony respecting battered woman's syndrome is available for similar purposes in both cases."); *United States v. Marenghi*, 893 F. Supp. 85 at 96 (D. Me. 1995) ("This Court cannot envision that [expert testimony on battering and its effects] should be excluded in a duress defense when it is admitted in an overwhelming majority of state courts in self-defense cases.") .

The dangers of not presenting expert testimony and risking a verdict based on misconceptions, well-documented in the self-defense context, *see Dillon*, 528 Pa. at 432, 598 A.2d at 970-71,[15] may be even greater in the duress context. The expert in a duress case arguably has to address and combat even more misconceptions than in a self-defense case, due to the difference in the standards. The implicit assumption in a self-defense case that needs correction – that if the abuse was that bad, any reasonable person would have "just left" – is also an *explicit question* in a duress case, through the "recklessly placed" exception of 18 Pa.C.S. § 309(b). In a self-defense case, not leaving the abuser, the situation or the scene can implicitly undermine a finding of reasonableness. In a duress case, the woman's failure to leave not only

[15] In *Dillon*, this Court stated, "The danger of not presenting expert testimony in these cases is that the jury may well be predisposed to judge the actions and reactions of a woman in a position that they cannot hope to comprehend. In my view, many jurors who know nothing about battered women simply find the tales of abuse too incredible to believe and thus, refuse to keep an open mind about the rest of the evidence…The testimony of the expert is intended to refute some of the common prejudices against battered women, thus permitting the jury to have a better ability to judge the evidence rationally, rather than judge it on the basis of an erroneous prejudice." *Dillon*, 528 Pa. at 432, 598 A.2d. at 970-71. *See also Stonehouse,* 521 Pa. at 61-66, 555 A.2d at 782-85; *Miller*, 430 Pa. Super. at 310-14, 634 A.2d at 620-22; *Marenghi*, 893 F. Supp. at 96 ("Without an understanding of how battered woman syndrome instills in an abused person a continuing sense of being trapped and of constant fear, the juror's review of a defendant's allegations that she was in fear of immediate bodily injury will be incomplete and irrelevant to the reality of the situation.").

implicitly undermines a finding that she was reasonable, but can also lead to a mistaken conclusion that she meets the additional *explicit* criteria that she "recklessly placed" herself in the situation, thus invoking the bar of 18 Pa.C.S. § 309(b). As the record in the instant case fully demonstrates, a battered woman's failure to leave in a duress situation, unless understood in the context of her experiences of abuse, can imply that she *voluntarily participated* and unreasonably, recklessly (or even willfully) assumed the risk of any subsequent duress.

In the *Stonehouse* decision, Justice Larsen summed up why the lack of an expert was so damaging to an assessment of appellant's reasonableness:

> …[T]he absence of such expert testimony was prejudicial to appellant in that the jury was permitted, on the basis of unfounded myths, to assess appellant's claim that she had a reasonable belief that she faced a life-threatening situation when she fired her gun at [the decedent/batterer].

Stonehouse, 521 Pa. at 65, 555 A.2d at 784.

In *Stonehouse*, the court found that expert testimony was necessary for the jury to be able to assess Carol Stonehouse's reasonable belief of danger from an abusive husband who she believed was firing at her at the time she shot him. The jury in this case needed expert testimony at least as much as did the jury in *Stonehouse.* This testimony was necessary in order for the jury to assess Ms. Markman's reasonableness in complying with Housman and her "recklessness" in bringing about the situation.[16]

[16] As is true with other forms of expert testimony, the admissibility of expert testimony on battering and its effects is not determined solely by the type of claim involved (e.g., self-defense vs. duress). Rather, the question is whether the proffered evidence meets the standards for admission under applicable law. Admitting expert testimony on battering and its effects in duress cases clearly does. *See* PA. R. EVID. 702 (permitting expert testimony which provides "specialized knowledge beyond that possessed by a layperson [which] will assist the trier of fact to understand the evidence or determine a fact in issue."); *Stonehouse*, 521 Pa. at 61, 555 A.2d at 782-83 (expert testimony on battering is outside of "the ordinary training , knowledge, intelligence and experience of jurors."); *Commonwealth v. Pitts*, 740 A.2d 726, 733-34 (Pa. Super. 1999); *Commonwealth v. Vallejo*, 532 Pa. 558, 561, 616 A.2d 974, 976 (1992).

B. The Trial Court's Rulings Precluding Expert Testimony Were Based on a Fundamental Misunderstanding of the Content and Purpose of Expert Testimony on Battering and Its Effects.

The trial court's primary reason for precluding the expert in this case was that it constituted testimony about "state of mind" not pertinent to a standard of "reasonableness." *See* Opinion at 74-75. ("Dr. Hughes' testimony … would have centered on the defendant's mental state at the time of the murder..." *Id*. at 77).

The trial court seemed to interpret Dr. Hughes' testimony as mental health evidence in the sense of mental capacity. *See* Opinion at 76-77 (comparing Dr. Hughes' testimony to testimony about "emotional disturbance" offered in *Commonwealth v. Hilburn*). However, the expert on battering and its effects aims not to establish a mental health excuse for a woman's conduct, but rather to provide a social framework within which to understand her experiences and responses. Expert testimony on battering and its effects "...provides information about a particular battered woman and the context in which the domestic violence occurred; it places the unique facts of a specific case in a framework of what is known in the literature about battering and its effects." National Institute of Justice, *The Validity and Use of Evidence* at 21. Expert testimony on battering and its effects is offered to explain much more than the "inner workings" of the woman's mind:

> Typically, the testimony offered in forensic cases is not limited to the psychological reactions or sequalae of domestic violence victims, and this has led to confusion about what is encompassed by the term "battered woman syndrome." Expert witness testimony may also be offered to explain the nature of domestic violence in general, to explain what may appear to be puzzling behavior on the part of the victim, or to explain a background or behavior that may be interpreted to suggest than the victim is not the "typical" battered woman or that she herself is the abuser.

Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1195.

Expert testimony on battering and its effects may cover: (a) general information on the dynamics of domestic violence,[17] (b) explanations of the behavior of a battered woman that may seem inconsistent with her being battered, including discussion of common myths and misconceptions about battered women,[18] (d) common reactions that women have to battering,[19] (e) a discussion of the particular facts in the case, to show how they are consistent with a battering relationship,[20] (f) the particular experiences of the battered woman defendant, including her own strategies for stopping the violence, her psychological responses to battering, and the cumulative effects of the battering on her behavior and state of mind.[21] Indeed, this Court's decisions explaining expert testimony about battering and the effects of battering markedly emphasize expert issues other than a woman's psychological state. *See Stonehouse*, 521 Pa. at

[17] Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering,* 9 Women's Rts. L. Rep. 195, 202 (1986); Mary Ann Dutton, *Understanding Women's Response,* 21 Hofstra L. Rev. at 1195.

[18] Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1195; Elizabeth M. Schneider, *Describing and Changing,* 9 Women's Rts. L. Rep. at 202. *See, e.g., Stonehouse*, 521 Pa. 41, 555 A.2d 772; *Dillon*, 528 Pa. 417, 598 A.2d 963; *Kacsmar*, 421 Pa. Super. 64, 617 A.2d 725 (in self-defense case, expert testimony regarding defendant's abuse by his brother as well as testimony about defendant's personality disorder admissible to help explain why defendant felt he could not leave and had to accept brother's dominance and abuse).

[19] Elizabeth M. Schneider, *Describing and Changing* at 202; Martha R. Mahoney, *Legal Images of Battered Women*, 90 Mich. L. Rev. at 36.

[20] Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 Women's Rts. L. Rep. 227, 228 (1986); Kelly, 97 N.J. at 478, A.2d at 378; *State v. Richardson*, 189 Wis. 2d 418, 525 N.W.2d 378 (1994).

[21] Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1215-40. *See also Dillon*, 528 Pa. 417, 598 A.2d 963.

61-66, 555 A.2d at 782-85 (testimony relevant to rebut myths and misconceptions, help jury assess reasonableness).

The trial court concluded that expert testimony on battering and its effects is *only* about a woman's subjective "state of mind." If this were true, this testimony is just as irrelevant to the reasonableness component of self-defense as it is to duress in contravention of applicable decisional law. The objective reasonableness component of self-defense requires a consideration of the defendant's "surrounding circumstances," *Dillon,* 528 Pa. at 424, 598 A.2d at 966-67 (Nix, C.J., concurring). The analogous objective reasonableness requirement of the duress statute requires consideration of the defendant's "situation." *DeMarco*, 570 Pa. at 272-74, 809 A.2d at 261-63. If using an expert to help assess "surrounding circumstances" does not transform the self-defense standard into a purely subjective one, then neither does using an expert in a duress case to help assess the defendant's "situation." In both self-defense and duress cases, lay and expert testimony on battering, when relevant, is necessary to properly assess the objective components of "reasonableness." *Id*.; *Dillon*, 528 Pa. at 424, 598 A.2d at 966-67.

The trial court's reliance on *Commonwealth v. Hilburn*, 746 A.2d 1146 (Pa. Super. 2000) to preclude the expert testimony in this case is misguided. In *Hilburn*, the sum of the evidence offered by the defendant to prove duress in forging drug prescriptions was a psychiatrist who testified that due to the defendant's "emotional and psychiatric condition," she was subject to duress at the time of the forgery. The Superior Court correctly held that this evidence could, at most, establish a "proclivity or suggestion to emotional pressure" which in itself could not establish an imminent threat of harm. *Id.* at 1148.

The evidence proffered by Hilburn to support a duress defense bears not even a slight resemblance to that proffered by Ms. Markman. Ms. Markman presented abundant lay evidence

of duress that in itself warranted an instruction. The expert testimony of Dr. Hughes was not offered as a mental health excuse, nor was it offered to create a duress defense, (as Hilburn's expert was asked to do). The expert testimony was offered to explain, support, and give context to the already existing evidence of duress. By contrast, Hilburn offered no evidence whatsoever of any violence, of how she was coerced, or even of who supposedly coerced her, seemingly relying on her own mental health problems to show duress. The trial court's conclusion that *Hilburn* controls here is based on its fundamental misunderstanding of expert testimony on battering and its effects[22] and its failure to consider the content of the testimony *actually proffered* in this case.

C. The Proffered Expert Testimony Was Critical For a Proper Assessment of Ms. Markman's Claims, and Its Preclusion Constitutes Reversible Error.

The instant record illustrates precisely why expert testimony is often necessary to permit a fair assessment of a battered woman's claim and the resulting prejudice that can occur if it is precluded. The prosecutor and co-defendant's counsel portrayed Ms. Markman as a blameworthy woman who did not "act" like a battered woman should act, and who could have and should have escaped during any temporary lapse in the physical violence. During the trial,

[22] Notably, even if the expert testimony offered had been purely psychiatric in nature, that testimony would still be relevant and admissible as to the subjective belief of danger. *See Commonwealth v. Light*, 458 Pa. 328, 326 A.2d 288 (1974) (preclusion of expert mental health testimony was reversible error where it supported the first prong of reasonableness test for self defense, e.g., whether the defendant held an honest belief of danger); *Pitts*, 740 A.2d 726 (expert testimony that accused suffered from post-traumatic stress syndrome was relevant and admissible to the subjective element of his self-defense claim). Since *DeMarco* expressly requires consideration of the subjective situation of the defendant in a duress case, and the subjective elements of duress and self-defense are indistinguishable, such psychiatric testimony would be equally relevant to duress as to self-defense. As explained in the text, Dr. Hughes' testimony in this case was offered for far more than just her opinions about Ms. Markman's mental health diagnoses. To the extent that Dr. Hughes would have also opined regarding Ms. Markman's psychological distress, Defense Exhibit 15 at 17, that testimony should have been admitted, at least as to the subjective determinations regarding duress.

they both fully exploited – and may have helped amplify – many of the same misconceptions that the trial court used in making its decisions.

Dr. Hughes would have given the jury the essential information it needed to understand Ms. Markman's experiences of abuse in the context of her relationship with Housman. She would have elucidated Housman's conduct as a pattern of control and abuse which, most critically to the allegations of duress, functioned to coerce her compliance through violence and fear. Defense Exhibit 15 at 18-20, Para. 1. Dr. Hughes would have explained how Housman exerted control through not only physical violence, but also through psychological and sexual abuse. She would have explained how all these forms of abuse and control operated to increase Ms. Markman's terror and coerced her compliance. *Id*. She would have testified about his tactics of abuse and control including: coercion and threats; intimidation, stalking; isolation, subjugation; humiliation; his denial that the abuse occurred; blaming her for his use of violence; and his sexual coercion (such as insisting on sex against her will and through physical violence, and other forms of sexual control). Defense Exhibit 15 at 14–16.

Without understanding this reality of how Housman's physical violence only punctuated his overall *pattern* of abuse and control, it is quite likely that the jury perceived his abuse as only discrete physical episodes that weren't all that serious. The prosecutor and Housman's counsel fully encouraged this view by repeatedly minimizing the violence.[23]

[23] *See, e.g.,* N.T. 702 (cross-examination by Mr. Ebert of witness Chris Moffitt: "And the whole time you said you maybe saw one violent act and you may have seen other bruising, less than – five times or less"); N.T. 720-23 (cross-examination by Mr. Ebert of witness Jessica Wahl's description of bruising she witnessed); N.T. 850-51 (cross-examination by Mr. Ebert of defense witness Deb Baker: "Now the only time you saw her with black eyes was...around August the 10th..."); N.T. 1155-56 (Mr. Gilroy questioning Ms. Markman about the incident when she called the police due to Housman's tampering with her car: "You don't have any bruises and you don't have anything wrong with you at that point that you say to the police, look at me, look at me, get this guy out of here?").

The prosecutor and co-defendant's counsel frequently exploited the myth that domestic violence is only physical, and they seemed intent on showing that Ms. Markman was not really battered. The prosecutor and co-defendant's counsel implied that because Ms. Markman did not behave like the weak, shy, timid, frightened stereotypical "battered woman" she was not abused by Housman. Without expert explanation, co-defendant's counsel was able to suggest to the jury that because Ms. Markman might have appeared strong, or engaged in "horseplay" with Housman, she was lying about her accounts of abuse. These suggestions again focused incorrectly on only physical aspects of abuse. Even if the jury believed Ms. Markman may have sometimes appeared like the "stronger" person in the relationship, it did not mean that she was not the victim of Housman's horrific abuse.

Housman's counsel went so far as to explicitly argue that because Ms. Markman did not fit the mold of the stereotypical battered woman, she was lying and guilty:

> Well, you are darn right nobody believed her. Her credibility is in the toilet. How many times did we hear things that were just downright lies?...*She [Ms. Markman] is not the singing nun.* Foul language has Beth Markman's picture next to it in the dictionary.
>
> ... Beth told Ginnie that she would take Will Housman on joy rides....*Now is that the statement of a shy, timid woman who is being abused?…*
>
> … Well, Beth looks at this guy [a witness] and looks at Will, [and says] he's an asshole...*Now, is this a woman who is being abused? Is this a woman who is subservient to this guy?* If this guy is ruling the roost, she doesn't get away with that stuff. She doesn't have the guts to do something like that. It's phenomenal that somebody who is so put upon would appear so aggressive and domineering....

N.T., Opening Statements and Closing Arguments, 38-41 (emphasis added).

The suggestions that the abuse was not really so bad and that Ms. Markman did not "behave" like a battered woman supported the central theme of the Commonwealth's case: that if the abuse was really as bad as she claimed, she would have sought help from police and the

courts, and would have escaped from Housman during any momentary reprieve whether before, during or after the homicide.

Dr. Hughes' testimony would have directly rebutted the classic myths discussed above. Dr. Hughes would have explained to the jury that, like other battered women, Ms. Markman used a variety of strategies to reduce the violence. These strategies included prior efforts to leave and to seek police and court assistance. Defense Exhibit 15 at 16. Dr. Hughes could have explained how these prior experiences informed her subsequent strategies.[24] Significantly, Dr. Hughes would have testified that Ms. Markman's primary strategies were "personal" strategies of compliance and acquiescence with Housman's demands:

> Ms. Markman primarily relied upon numerous personal strategies in an attempt to prevent her boyfriend's assaults. More specifically, she acquiesced [to] his requests, she complied with his implicit or explicit demands, and she did not stand up for herself or her rights. By remaining silent, acting passive when with him and "trying to do everything right" she believed she might not give him a reason to be violent.....

Id. at Para. 9.

In a case that basically boils down to the reasonableness of an accused's compliance, what could be more essential than expert testimony providing specialized knowledge about the dynamics of that compliance? Dr. Hughes' testimony would have directly rebutted the repeated suggestion that Ms. Markman was to blame for failing to use formal strategies such as escape and seeking help through the courts. Dr. Hughes' testimony would have explained to the jury that compliance as a strategy, especially in the context of Ms. Markman's experiences with Housman, could be considered rational and reasonable. At a minimum, Dr. Hughes' testimony could help explain why Ms. Markman's compliance was not unreasonable.

[24] For example, Dr. Hughes mentions in her report that Ms. Markman had tried to leave the relationship twice; had called the police and was told they could not help; had inquired about getting a protective order but was afraid to follow through. Defense Exhibit 15 at 16, Para. 10, 11.

The record is replete with examples of how misconceptions were exploited and left unrebutted. For example, as to Ms. Markman's failure to call police, the prosecutor asked her these questions:

> [Y]ou were capable when you had a problem to have the Pennsylvania State Police come to your house? N.T. 1077.
>
> [Y]ou just gave us an entire litany, a big list of things that happened physically, you didn't call them on those occasions? N.T. 1078.
>
> And then the State Police go away, and then for two days you are terrorized and the State Police aren't called? N.T. 1078.

N.T. 1077-78.

As to "opportunities" for help from the courts and otherwise, consider the prosecutor's exchange with Ms. Markman:

Q. At no time during this entire course of two years did you get a PFA, did you? A protection from abuse order.
A. No, I had went – like I said before, I had started. I had called and I had started to file one, and I never went to the interview…
Q. And you say you withdraw that because you wanted to avoid embarrassment for him at work and –
A. No, not embarrassment for him at work. For the simple fact that the police could have came to his job., he would have got pissed off, and I would have got my ass beat again.
Q. But he wasn't with you at that time?
A. That doesn't matter. He took the siding, the stripping off my door, broke into it one time before. What is to stop him from doing it again?
Q. But you had that opportunity and you didn't do?
A. Right, I didn't.
Q. No matter what else happened to you , you obviously knew where to call and to get help, but it didn't happen?
A. No, it didn't.

N.T. 1080-81.

The prosecutor further continued the implication that it was her fault for failing to get help, by repeating to the jury that if Ms. Markman really wanted to get help or leave, she was certainly

"able."[25] The prosecutor's suggestion that Ms. Markman should have "just left" before, during, and after the incident permeated examination of the witnesses. The prosecutor repeatedly emphasized how easy it would have been for Ms. Markman to "just leave."[26] He also questioned her on the ability to open the doors of the trailer, implying she should have ran out of or not returned to the trailer with Housman. N.T. 1008.

This repeated suggestion by the prosecutor that a simple escape was always possible would have been further rebutted by Dr. Hughes' testimony regarding the increase in violence in month or so before and leading up to the incident. Dr. Hughes would have helped the jury understand that, given the increase in frequency and severity of the abuse, Ms. Markman may have had good reason to be especially fearful. As Dr. Hughes would have testified: "These events [Housman's escalating violence] 'set the stage' demonstrating to Beth Markman that not only are the means available for coercion, but that William Housman was ready and willing to pay the cost that coercion implies." Defense Exhibit 15 at 19, Para. 22. Dr. Hughes would have given the jury the essential information it needed to understand Ms. Markman's experiences of abuse in the context of her relationship with Housman. She would have elucidated Housman's conduct as a pattern of control and abuse which, most critically to the allegations of duress,

[25] *See* N.T. 692 (cross examination of defense witness Lonnie Walker: "There were times you knew that they were capable of separating, that means they didn't live together anymore?"); N.T. 850-51 (Mr. Ebert's cross examination of witness Deborah Baker: "Q. She was certainly capable of taking her person and getting away from William Housman if she wanted to, isn't that correct? A. No; Q. She always went back with him is what you are telling us? A. Yes, she did.); N.T. 723 (cross examination of Jessica Wahl "Q. My point is that she was capable of breaking up with this guy at times, right? A. Right.").

[26] The prosecutor questioned Ms. Markman on failing to escape at the "Sheetz" store where Housman phoned the victim. *See* N. T. 1087 ("Q. [During the phone call, the knife] is not right sticking in to you at that point or anything like that? A. Not, not walking through the parking lot. Q. And there is people all around her, correct? A. Yes.). He also questioned her about her failure to escape during the homicide and just after it. N.T. 1111 ("Q. And he is here, and the victim is in front of him, and you are about, what,, five feet from the front door? A. I was close to the front door."). N.T. 1114.

functioned to coerce her compliance through violence and fear." Defense Exhibit 15 at 14, Para. 1, 18-20.

Likewise, Dr. Hughes would have explained the significance of the sudden escalation of the abuse in the 48 hours leading up to the incident itself. This marked change in the violence had a profound effect on Ms. Markman's level of fear, understanding of his power, and ultimately, her belief that she had to comply to survive. "[E]vents that transpired during the 48 hours immediately before and including the criminal act served to reinforce William Housman's power and control over Beth Markman...thereby increasing her susceptibility to coercive demands." Defense Exhibit 15 at 19, Para. 23.

The prosecution's references to Ms. Markman's actions in the days after the incident could have also been directly rebutted by Dr. Hughes. For example, Dr. Hughes would have testified that, consistent with the literature, Ms. Markman's witnessing Housman murdering Leslie White *"*served to strengthen, not diminish, William Housman's power and control over Ms. Markman*."* Defense Exhibit 15 at 20. In particular, she would have rebutted a major theme in the prosecution's examination – that because Ms. Markman acted "normally" in the days following the incident, she was not credible. Dr. Hughes would have testified:

> For individuals who have been repeatedly victimized, like Ms. Markman, it is not uncommon to return to activities of daily life after an extremely abusive event. Ms. Markman demonstrated this pattern frequently. She suffered beatings by William Housman, and did not talk to friends or coworkers about it. One time, she was strangled and lost consciousness, then raped by William Housman, and the next day, she went about her life without telling anyone. Victims of interpersonal violence often harbor feelings [of] shame and humiliation from having been victimized, and fear that they will not be believed, thus do not disclose the abuse. Such behavior does not suggest that the individual was physically or psychologically unscathed by the trauma. On the contrary, this behavior is often conceptualized in the trauma and victimization literature [as] coping mechanisms, such as denial, defensive avoidance, numbing and dissociation. These coping mechanisms were likely consciously and unconsciously motivated.

See Defense Exhibit 15 at 20, Para. 24(a).

In sum, the trial court's preclusion of Dr. Hughes' testimony in this case created a tragic paradox. On the one hand, as discussed above, the Commonwealth was permitted free reign to elicit evidence exploiting misconceptions about battered women generally and Ms. Markman specifically. On the other hand, Ms. Markman was denied the right to present essential testimony that would have directly rebutted those misconceptions. This permitted a closing argument by the Commonwealth – unchallenged by available (but precluded) defense evidence and argument to the contrary – that sarcastically emphasized precisely those myths that Dr. Hughes could have addressed. In the prosecutor's closing, he frequently – and often sarcastically – urged the jury to imagine all the ways the Ms. Markman could have escaped. He said:

> You can look at those photographs of the Sheetz [where the phonecall was made] out there on Route 11 and you say, *"Oh, my God, there is no way to get away from this"* … And, my God, the phones are right next to the door and there must be sixteen gas pumps there at business hour.

N.T., Opening Statements and Closing Arguments, 110.

> … [Y]ou are watching somebody with a piece of wire like this pulling on it and choking it and putting your arm around and that, ladies and gentlemen, is happening on the couch here, *and here is the door, and your solution is, I am going to stay in here,* I think I will watch this at close range, that says something alot. And you talk, you know, when I said, well, you have to account for the spare room, look at the nature of these doors. This one opens in. And this one means that the door latch would have been right there. You open this, you pull this, even when you're near the couch and you don't understand why an eighteen year old girl is there, and you are out the door in to the middle of the place like this where you can go to [neighbors]. Doesn't happen.
>
> ... Oh my God, it would be absolutely incredible for me to run to any one of these people where I only live 39 feet away from somebody else, get some help. Do anything at this point…
>
> … And now, another decision time. Okay. I know where the State Police are...Follow me. ...Well, let me drive 300 miles...Oh, man, I couldn't possibly think about getting away at all.

Id. at 118 (emphasis added).

In addition to giving needed context to these damaging and sarcastic remarks, expert testimony on battering and its effects would have helped to counter the overall theme of the prosecutor's closing argument which was that "it takes two to tango." *See id* at 103, 127. This statement repeatedly implied that Housman and Ms. Markman were on equal footing in their relationship. Contrary to the evidence of Housman's violence and abuse directed at Ms. Markman, the prosecutor implied that Ms. Markman and Housman were equally intent on killing Leslie White and equal in culpability. Such a conclusion asked the jury to wholly disbelieve Ms. Markman's accounts of abuse and the duress to which she was subject. It seems especially unfair to preclude Ms. Markman from presenting expert testimony that would enlighten the jury about the *inequality* in her relationship with Houseman, and her *forced* participation in the crime, while at the same time permitting opposing argument suggesting a relationship of *full* equality and *willing* participation.

While *Amici* do not contend that an expert on battering and its effects is necessary in every duress case involving a battered woman defendant, the prejudice resulting from the preclusion of the expert in this case is astounding. In a case where, as here, the defense hinges on the credibility of the defendant's claims of fear and abuse; where the expert would have rebutted the very myths upon which both the prosecutor and co-defendant rested their cases; and where the expert would have provided specialized knowledge essential to assessing the statutory elements of the defense, the preclusion of that testimony deprived Ms. Markman of her defense, and requires reversal.

III. THE TRIAL COURT REVERSIBLY ERRED BY PRECLUDING MS. MARKMAN'S TESTIMONY REGARDING HER PRIOR EXPERIENCES OF ABUSE WHICH WAS RELEVANT AND NECESSARY TO SUPPORT HER DURESS CLAIM.

In addition to precluding the relevant and admissible expert testimony necessary to support Ms. Markman's duress claim, the trial court precluded critical lay testimony from Ms. Markman herself about her prior experiences of abuse. This testimony was fundamentally necessary to assessing her claim of duress.

Ms. Markman was prepared to testify about her prior experiences of abuse. These experiences informed her subjective perceptions and objective reasonableness for the purpose of duress. She would have testified about a long history of physical, sexual, and emotional abuse, the accounts of which were contained in the report prepared by Dr. Hughes and accepted as a proffer of Ms. Markman's testimony. N.T. 892-94; Defense Exhibit 15 at 3-4. In her report, Dr. Hughes details the abuse from other people in addition to Housman. Dr. Hughes' report included information that Ms. Markman was physically abused by her stepfather and witnessed her stepfather's frequent and severe abuse of her brother. When Ms. Markman was a teenager, she was taken to the hospital against her will, put to sleep, and forced to have an abortion. She described that incident as "pretty much the ending point for me."

After she left home, Ms. Markman became involved in two successive relationships with men who beat her regularly. She became involved in prostitution and had a number of abusive experiences including being raped, mugged, and threatened with weapons. She then married Steve Markman who beat her, physically assaulted her, emotionally abused her, and forced her to prostitute herself. Defense Exhibit 15 at 3-4.

All of this evidence was especially relevant to assess whether a person of reasonable firmness, *if subjectively placed in her situation*, would have been unable to resist Housman's violence and threats, and to evaluate if Ms. Markman was "reckless" in placing herself in the situation. *DeMarco*, 570 Pa. at 273-76, 809 A.2d 256 at 262-64.

Ms. Markman's prior victimization had a distinct and verifiable effect on her understanding of danger, and the reasonableness of those her understandings. Battering is not a series of isolated incidents. Rather, it is the accumulation, over time, of abuse that must be considered in assessing the impact of the battering:

> Prior victimization (i.e., childhood physical or sexual abuse, witnessing violence toward the mother, physical or sexual violence in dating relationships, rape by stranger, sexual harassment or sexual assault by someone in authority, assault by a stranger) or other forms of childhood trauma … may increase a woman's vulnerability to even greater negative effects of later victimization resulting from subsequent trauma (van der kolk, 1987), including battering. The increased traumatic effects, or compounded trauma, result from the accumulation of victimization experiences that have not been addressed through effective intervention. *The compounded traumatic response may occur with subsequent occurrences of the same type of victimization (i.e., repeated episodes of battering, repeated rapes) or occurrence of multiple forms of trauma (e.g., childhood sexual abuse, rape, battering).*
>
> …[S]ubsequent traumatic events may not only produce their own effects, but may also trigger dormant responses from previous traumas. In such a case, the victim reexperiences the impact of a previous trauma, sometimes for the first time since the original event, simultaneously with experiencing the current trauma, creating a compounded traumatic response. For example, one battered woman who had left a previous relationship in which her husband was severely abusive was exposed to verbal abuse by a new partner in a subsequent relationship. This verbal abuse triggered a fear reaction that was probably far more severe than what might have been expected from the verbal abuse alone.

Mary Ann Dutton, Empowering and Healing the Battered Woman: A Model for Assessment and Intervention at 83-84 (emphasis added).

The prior history of abuse had an important effect on Ms. Markman's perception and reasonableness of her supposed opportunities to escape:

> Some women who have been involved in prior abusive relationships may have a perception that they lack viable alternatives, because the problem is bad or worse elsewhere. This maybe based on their own prior abusive intimate relationships, on witnessing violence in their families of origin, on recognizing violence in the homes of their friends and family members, or on knowing of violence committed by persons who would not be expected to act that way

Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1220.

The duress standard requires an assessment of "reasonableness" from the subjective perspective of the defendant. Without a full understanding of Ms. Markman's subjective situation that central issue could not be decided.

Admission of the prior history of abuse proffered in this case was compelled by decisional law as well as the Model Penal Code on which the Pennsylvania duress law is based. In the *DeMarco* case, the evidence presented by the defendant to establish duress included that: he suffered from seizures, was borderline mentally retarded, and had a plate in his head. *DeMarco,* 570 Pa. at 274, 809 A.2d at 263. In rejecting the Commonwealth's contention that this evidence was not admissible in determining the applicability of the duress defense, this Court stated:

> We find that the above evidence is clearly indicative of stark, tangible ways in which Appellant differs from others in terms of his health and mental capacity, which…is relevant in determining whether a defendant was subject to duress under Section 309, and therefore, it was properly admitted.

Id. at 275 n.8.

In the present case, the evidence regarding Ms. Markman's history of abuse, and its relationship to her situation at the time of the alleged duress, is at least as "stark" and "tangible" as that in *DeMarco*. The horrific experiences of abuse that Ms. Markman suffered before even meeting Housman certainly differentiate her from the norm and, like Mr. DeMarco, bore directly on her situation at the time of the alleged duress.

The Model Penal Code, as interpreted by *DeMarco*, makes clear that the hybrid objective-subjective component of duress is intended to capture these types of prior experience rather than more general differences in individual temperament. For example, the fact that a person just happens to have an agreeable temperament or a moral predisposition of a certain nature, would not suffice. *See id.* at 273, 809 A.2d at 262; MODEL PENAL CODE AND

COMMENTARIES, Pt. I § 2.09 at 375. On the other hand, the core reasoning in admitting particular "verifiable" and "tangible" characteristics of a particular person is that such characteristics are highly relevant to assessment of duress at the time of the incident itself.[27]

It was for the jury to assess whether it believed that the prior abuse had such an impact on Ms. Markman's claims of duress. At the very least, the evidence was relevant and admissible under state evidentiary rules, and was not excluded by any other rule of evidence. Therefore it should have been admitted. *See, e.g., Pitts,* 740 A.2d at 733 (discussing fundamental right of accused to present all relevant evidence not subject to exclusion under other evidentiary rules).

The prior evidence of abuse was admissible and relevant regardless and independent of the proffered expert testimony. Had the expert been permitted to testify, she would have specifically tied this evidence about the defendant's history of prior abuse to Ms. Markman's duress claim. Dr. Hughes would have testified that Ms. Markman's childhood and adult experiences of abuse placed her "at higher risk for victimization and vulnerability to William Housman's coercive tactics on the night of the incident." Defense Exhibit 15 at 17. Due to Ms. Markman's history, Housman's power and control over her was amplified from the first incident of abuse from Housman and was made worse through his abuse during the relationship: "[H]er interpersonal power relative to [Housman] was seriously compromised upon commencement of the relationship, only to be further diminished by his repeated violent assaults and personal attacks." Defense Exhibit 15 at 17. Given Ms. Markman's prior victimization and Housman's increasing violence, it follows that the defendant's ability to resist his threats at the time of the

[27] Evidence of prior abuse by others has also been admitted to support analogous self-defense elements, *See, e.g., Pitts,* 740 A.2d at 732-34 (evidence that defendant was robbed at gunpoint on two prior occasions relevant to his state of mind on the issue of self-defense).

killing, especially after being brutalized more than she ever had before, would have all profoundly impacted her "situation" for the purpose of the duress defense.

IV. THE ABSOLUTE BAN ON CROSS-EXAMINATION OF HOUSMAN'S PENALTY PHASE WITNESSES WHO ATTESTED TO HIS NONVIOLENCE, VIOLATED MS. MARKMAN'S RIGHTS TO CONFRONTATION AND TO PRESENT ALL RELEVANT MITIGATION, AND LEFT HER UNABLE TO CONFRONT NONSTATUTORY AGGRAVATION, RESULTING IN AN UNRELIABLE DEATH SENTENCE .

The sentencing proceedings in this case are replete with grievous constitutional error. After having been portrayed to the jury as a cold-hearted killer who was lying about Housman's abuse and duress, Ms. Markman was then prevented at the penalty phase from even questioning *direct testimony* that *expressly contradicted* her claim that Housman was abusive, including Housman's hearsay confession that she was the killer and coercer. The trial court banned each co-defendant from cross-examining the penalty-phase witnesses of the other, including Housman's expert witness who opined that he had no history of violence or "acting out."[28] N.T. 1279. This unchallenged, hearsay evidence directly undercut Ms. Markman's mitigation. The drastic measure not to allow cross-examination, inconsistent with bedrock principles of capital jurisprudence, permitted a death sentence against Ms. Markman that grossly violated her right to confrontation.

[28] The evidence presented by Housman included his confession to police as well as two lay witnesses and an expert who attested to his nonviolent nature. *See* N.T. 1286-88 (Housman's spiritual counselor, Mr. Collins, testified that Housman was "special" to him, and Housman cried whenever talking about praying for the victim); N.T. 1293 (Housman's sister, Cheryl Gillespie, testified that there was no fighting or abuse in Housman's prior relationships, and he had even tried to calm down a prior girlfriend who wanted to fight); N.T. 1308, 1311, 1312 (Psychologist, Dr. Schneider, testified twice that after investigation and examination of Housman, he found no evidence of a history of "acting out" in violent, hostile, aggressive, or abusive ways toward others "outside of the current instance," N.T. 1308, 1312; that he "read in the newspaper" that Housman had allegedly abused the other defendant" and that his findings were that Housman lacked initiative, was insecure and afraid of being rejected, N.T. 1311; and that he was "struggling to figure out exactly the relationship between these two co-defendants." N.T. 1312). The evidence presented by Housman at trial also included his confession. This evidence was incorporated into the penalty phase, the relevant details of which are discussed in the text.

Further, the joinder of the cases, and prohibition on cross-examination, permitted the jury to consider nonstatutory aggravating circumstance against Ms. Markman, which she was unable to counter. The net result was a death sentence that violated her right confrontation, fundamental notions of due process, and the prohibition against cruel and unusual punishment, as guaranteed by the Sixth, Eighth and Fourteenth Amendments, as well as the Pennsylvania Constitution.

A. The Ban on Cross-Examination and Introduction of Housman's Confession Violated Ms. Markman's Right To Confrontation.

The trial court refused to permit any cross examination of Housman's penalty phase witnesses, each of which contradicted Ms. Markman's claims of his violence and abuse. This ban on cross-examination violated her state and federal rights to confrontation, rights which are at least, if not more, sacrosanct where the issue is not guilt, but rather life and death. *See Ring v. Arizona*, 536 U.S. 584 (2002) (Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, required that the aggravating factor determination be entrusted to the jury); *Davis v. Alaska,* 415 U.S. 308, 316-17 (1974) (ability to expose a witness' bias through cross-examination is important component of the right of confrontation guaranteed by the Sixth Amendment); *Commonwealth v. Green*, 525 Pa. 424, 463-66, 581 A.2d 544, 563-64 (1990) (admission of hearsay statements contradicting mitigation evidence at penalty phase denied defendant of state and federal confrontation rights).

Among the most glaring violations of Ms. Markman's confrontation rights was the admission of Housman's hearsay confession to the police in which he had denied the abuse and told them that Ms. Markman coerced him into participating in the homicide. Housman's confession, redacted at trial by simply replacing Ms. Markman's name with a pronoun, *see* Amended Brief for Appellant at 45, and admitted in full over objection, Commonwealth Exhibit 83B; N.T. 435-36, was expressly reincorporated at the penalty phase. N.T. 1277, 1444, 1448-49.

This statement contained more damaging evidence against Ms. Markman than any other evidence presented by the Commonwealth. It contained the *only* evidence directly contradicting Ms. Markman's accounts of Housman's abuse and the incident itself. Essentially, the statement claimed that the killing was all Markman's idea and she wanted to do it to "get rid of the bitch and our headaches," and that Ms. Markman was the aggressor against both Housman and Ms. White.

The errors pursuant to *Bruton v. United States*, 391 U.S. 123 (1968) and *Gray v. Maryland*, 523 U.S. 185 (1998), extant at trial, *see* Amended Brief for Appellant at 44-47, were magnified to unprecedented proportions by admission of this confession at the penalty phase. In particular, Housman's counsel revealed to the jury in his penalty summation that in fact the confession *did* refer to Ms. Markman, and *should be used against her*. Commenting on Housman's brief penalty phase testimony in which Housman explained his criminal record and expressed remorse, N.T. 1279-82, Housman's counsel argued the following:

> Did anybody ask him about abuse? No. Wasn't asked about that at all. Did I think we needed to address that? No.
>
> … He has a lot to say about Beth Markman's allegations. I didn't think they were appropriate [when he testified]. I don't think it is appropriate that I need to be speaking about them now. Suffice it to say you heard the evidence, and you heard all of the facts during trial.
>
> *…I will leave it to your good judgment if you are going to accept Beth Markman's version of what happened with respect to these wild allegations of abuse. My client's position is it simply did not happen. He told that to the police. We saw no need to address that here during the penalty phase of the trial.*

N.T. 179-80 (emphasis added).

This encouragement to the jury to use Housman's confession to rebut Ms. Markman's claims of abuse erased any doubt that the "other person" to which the confession referred was

Ms. Markman. The result was exactly the kind of intolerable, uncorrectable prejudice that the United States Supreme Court warned against in *Bruton*:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. S*uch a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect . . . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.*

Bruton, 391 U.S. at 135-36 (citations omitted) (emphasis added).

The "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). The "truthfinding function" is supreme where the issue is who shall live or die. *See, e.g.*, *Ring*, 536 U.S. 584 (Sixth Amendment protections apply fully at penalty phase); *Green,* 525 Pa. 424, 581 A.2d 544.

B. The Ban on Cross Examination and Admission of Housman's Confession Prevented Ms. Markman from Fully Presenting All Relevant Mitigation Evidence.

The essence of Ms. Markman's penalty phase defense, like her trial defense, was based on her claims that Housman had severely abused her, culminating in forcing her to participate in the crime. These factual claims supported at least three of her mitigating circumstances including, extreme duress, extreme emotional disturbance, and capacity. N.T. 1443-44; Opening and Closing Arguments at 136, 166-69.

By contrast, Housman's mitigation evidence directly undercut Ms. Markman's factual claims. Housman's evidence portrayed him as a kind, sensitive, insecure, unassertive individual who never abused his girlfriends, was never accused of violence until he met Ms. Markman and, according to expert psychological opinion, was nonviolent. In his statement, he denied ever

laying a hand on Ms. Markman, claimed that it was all Ms. Markman's idea to kill White, and that he, like White, was just a victim of Ms. Markman's violence. Commonwealth Exhibit 83B at 15, 21, 24-25, 28-29, 34-36.

That picture of Housman undermined the foundation on which Ms. Markman's entire mitigation argument rested; that of a cruel, violent and abusive man who forced her to participate. Despite the fact that Housman's evidence cut away at the very core of the basis of Ms. Markman mitigation, she was unable to even question this evidence.

When the state seeks to condemn the defendant to death, the Eighth Amendment requires "precise and individualized sentencing," *Stringer v. Black*, 503 U.S. 222, 232 (1992), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." *Lockett v. Ohio,* 438 U.S. 586, 605 (1978). In *Lockett,* the United States Supreme Court declared that the unfettered ability to consider mitigating evidence is central to the Eighth Amendment's command that a sentencer must treat the capital defendant as a unique human being:

> [t]he sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604.[29]

[29] Since *Lockett,* the Court has consistently invalidated procedures that preclude the sentencer from considering relevant mitigation. *Penry v. Lynaugh*, 492 U.S. 302 (1989) (reversing where jury precluded from considering defendant's mental retardation as mitigation); *Skipper v. South Carolina,* 476 U.S. 1 (1986) (precluding evidence of adjustment to pretrial incarceration constituted reversible error); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (evidence of defendant's organic brain damage constituted mitigation); *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) (sentencer's refusal to consider a defendant's youth and violent upbringing violates the Eighth Amendment); *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) (Sixth Amendment violated by counsel's failure to present mitigating evidence of defendant's background). *See also Commonwealth v. Smith*, 544 Pa. 219, 675 A.2d 1221 (1996) (trial counsel ineffective for failing to investigate and present relevant mental health evidence as mitigation).

Accordingly, both the prohibition against cruel and unusual punishment as well as fundamental notions of due process require that the defendant be allowed to present any and all evidence relevant to mitigation.

Ms. Markman's inability to challenge the damning evidence presented by Housman which undermined the factual bases of her mitigation claims, in effect, prevented her from fully and fairly presenting those claims, in violation of these basic capital sentencing requirements designed to ensure factually correct, individualized and reliable verdicts.

C. The Ban on Cross-Examination and Admission of Housman's Confession Permitted the Jury to Consider Nonstatutory Aggravation Against Ms. Markman Which She Was Unable to Confront.

In sharp contrast to the wide latitude that must be afforded a defendant in presentation of mitigating evidence, that same defendant is constitutionally protected from presentation of aggravating circumstances that go beyond those specifically enumerated in 42 Pa.C.S. § 9711. *See* 42 Pa.C.S. § 9711(a)(2); *Lockett,* 492 U.S. 302; *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (United States Supreme Court's determination that Pennsylvania's death penalty limits evidence regarding aggravation was one of the bases for finding that the statute conforms with the constitutional requirement to "establish rational criteria that narrow[s] the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet[s] the threshold [for imposing the death penalty].").

The admission of Housman's testimonial evidence and confession blatantly violated these fundamental tenets of capital jurisprudence because it amounted to devastating, nonstatutory aggravation against Ms. Markman which she was not even given the opportunity to confront. Housman's witnesses repeatedly testified about his nonviolence, thus clearly suggesting to the jury that Markman was the violent one in the relationship, not Housman. The testimony permitted a

closing by Housman's attorney that directed the jury to consider Ms. Markman's bad and violent influences on him. Housman's counsel argued: "Does it say something to you that the first time he gets involved in anything violent is when he gets involved with Beth Markman?" N.T., Opening and Closing Statements at 189.

Housman's confession was even more damaging, explicitly portraying Ms. Markman as a callous, violent killer who thought nothing of brutally killing White as a solution to the problems she had caused with Housman. *See* Commonwealth Exhibit 83B at 31. As previously described, through his confession, Housman told the jury the gruesome details of a murder that he said was Ms. Markman's idea in the first place. Housman said that Markman told him that if he loved her, he would comply; and he complied only because he "didn't want to die that night" at the hands of Ms. Markman. Commonwealth Exhibit 83B at 29.

Given the jury's ultimate function to determine whether Ms. Markman deserved to die, it is difficult to imagine evidence more prejudicial than uncontested assertions that she was a violent, evil, sadistic, ringleader, willing to kill someone to get "rid of the headaches" that person had caused. Such evidence created a "randomness" in the decision-making process and "a bias in favor of the death penalty," amounting to precisely the kind of vague aggravation indisputably forbidden by the Constitution. *See Kindler v. Horn*, 2003 U.S. Dist. LEXIS 16897 at *73 (E.D. Pa. Sept. 24, 2003) (in joint penalty phase, death sentence reversed on federal habeas grounds, where prosecutor elicited and argued evidence that was mitigating as to codefendant but prejudicial to this defendant, and therefore permitted use of a "vague, aggravating factor in the weighing process," that the defendant, as opposed to his accomplice, was "lead actor" in the crime, thereby creating "possibility not only of randomness, but also of bias in favor of the death penalty."). *See also*

Lockett, 492 U.S. 302; *Blystone*, 494 U.S. 299; *Commonwealth v. Fisher*, 545 Pa. 233, 681 A.2d 130 (1996).[30]

Ms. Markman's inability to challenge this aggravating evidence in the eyes of the jury, to question the bases of the opinions of Housman's witnesses and expert, to expose the true bias and unreliability inherent in Housman's self-serving confession to the police, left Ms. Markman truly defenseless in this battle for her life.

The ultimate consequence of the joinder of the penalty hearings in this case was that Ms. Markman was, in effect, forced to defend against a second prosecutor. Housman's counsel elicited evidence undermining Ms. Markman's pleas for mitigation and helped give the jury reason to sentence her to death. Worse, she was not even given the constitutional tools to defend herself. The antagonism between the defenses at this stage indisputably "crossed the constitutional line." *See Kindler*, 2003 U.S. Dist. LEXIS 16897 at *73.[31]

[30] Significantly, the Commonwealth sought aggravation based only on a single enumerated factor, that the killing was done during the kidnapping. N.T. 1442.

[31] There were compelling reasons to sever for the guilt phase alone, based on the antagonistic defenses and improper introduction of Housman's confession against Ms. Markman. *See* Amended Brief for Appellant at 38-41. The penalty phase consequences of both of these errors were additional exigent reasons why the cases should have been severed, and reasons that should have been fully considered by the trial court in its initial severance determination.

CONCLUSION

Ms. Markman was deprived of the quintessential right to present a meaningful and complete defense, a defense based on proper jury instructions and the presentation of all relevant lay and expert evidence.

The individual rulings resulting in a denial of these rights rested on a misapplication of law and on a grievous misunderstanding of the plight of battered women generally, and the specific experiences that Ms. Markman endured. The prosecutor and codefendant's counsel fully exploited numerous myths and misconceptions about battered women and Ms. Markman as "free to leave" and blameworthy for her subsequent abuse. These biases were reflected in many of the court's rulings. At a minimum, an expert on battering and its effects was necessary to overcome the core misconceptions and judgments that were the driving force of the case against her.

The damaging trial errors set the stage for a penalty phase that was a travesty. By the time of sentencing, Ms. Markman's credibility had already been ravished by the fallacious arguments of counsel that she was not really a battered woman, and that she should have and could have just left and avoided this whole crime. These arguments were permitted to remain unchallenged because the expert testimony which could have rebutted them during trial was not allowed.

Ms. Markman faced this penalty proceeding alongside her coercer. She was silenced in the face of damning, unreliable evidence presented by her batterer that she was a liar and brutal killer. Any remaining credibility that Ms. Markman might have had with the jury at that point, and perhaps, any final chance to be spared, most certainly was eviscerated by the damaging evidence presented by Housman and improperly used against her. Ms. Markman was finally permitted to present her expert on battering and its effects at the penalty phase. But, by that

point, it was too late to undo the damage that had been done to her credibility and to the essence of her defense.

This case is an extreme lesson of why criminal rulings must be based on accurate information rather than on misconceptions, misinformation, stereotypes, and biases. Ms. Markman, like all criminal defendants, was entitled to a judicial determination of her essential legal claims based on controlling law and free of misinformation and moralistic judgments about her situation. She was entitled to have her guilt decided by a jury properly instructed on her defense and properly informed of the realities of her situation. Ms. Markman was entitled to a fair opportunity to save her life, based on full confrontation of the evidence against her, consideration of all relevant mitigation, and only that aggravation enumerated by the Commonwealth. Instead, she had to directly compete with her codefendant, before a jury lacking the information it needed to understand that Ms. Markman was herself a *victim* of Housman's violence.

As emphasized throughout this Brief, *Amici* seek no special treatment for Ms. Markman or any other battered woman defendant. Rather, the goal of *Amici* is to ensure that the same rights guaranteed to all criminal defendants are fairly applied to Ms. Markman and other battered women charged with crimes, free of mistaken judgments about their experiences of abuse that can otherwise lead to tragically unjust, and even deadly, results.

WHEREFORE, for the foregoing reasons, and those in the Amended Brief for Appellant, *Amici* respectfully request this Court to REVERSE the conviction and sentence.

Respectfully submitted,

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APPENDIX 6

Cicchini and White, "Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication" 117 Colum L Rev Online 22 (2017)

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TESTING THE IMPACT OF CRIMINAL JURY INSTRUCTIONS ON VERDICTS: A CONCEPTUAL REPLICATION

Michael D. Cicchini & Lawrence T. White***

INTRODUCTION

The Constitution protects us from criminal conviction unless the state can prove guilt beyond a reasonable doubt.[1] However, after defining reasonable doubt, many trial courts will then instruct jurors "to search for the truth" of what they think really happened.[2] Defendants have argued that such truth-related language reduces the state's burden of proof to a mere preponderance of the evidence. That is, if the jury were to find the state's case only slightly more convincing than the defendant's, it would follow that, in a search for the truth, the jury would be obligated to convict.

Appellate courts, however, consistently reject this argument.[3] Most appellate courts acknowledge that such truth-related language is inaccurate, highly disfavored, and could, in theory, lower the state's burden of proof.[4] However, these courts then go on to conclude, without any empirical support, that such language probably does not cause any actual harm.

In our previous study and article, we put this judicial reasoning to the test.[5] In a hypothetical criminal case, we found that mock jurors who were properly instructed on reasonable doubt convicted the defendant at a rate of 16%.[6] However, mock jurors who received the identical case information and instruction and were also told "not to search for doubt"

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1. In re Winship, 397 U.S. 358, 364 (1970) (holding "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt").

2. See infra note 12 and accompanying text (giving examples of jury instructions from different states).

3. See Michael D. Cicchini & Lawrence T. White, Truth or Doubt? An Empirical Test of Criminal Jury Instructions, 50 U. Rich. L. Rev. 1139, 1158–59 & nn.60–63 (2016).

4. Id. at 1158 n.60.

5. Id. at 1150.

6. Id. at 1155.

but instead "to search for the truth" convicted at a much higher rate of 29%.[7]

In this Piece, we discuss the results of our new study wherein we first attempted a conceptual replication of our previous work and then attempted to identify a cognitive explanation for why truth-related language produces a higher conviction rate. Just as in our previous study, we found that mock jurors who were instructed "not to search for doubt" but instead "to search for the truth" convicted at a significantly higher rate than mock jurors who were properly instructed on reasonable doubt. Unlike our previous study, however, our new study also asked jurors a postverdict question about their subjective understanding of the burden of proof. Through this, we found that jurors who were first instructed on reasonable doubt and then told "not to search for doubt" but instead "to search for the truth" were *nearly twice as likely* to believe they could convict the defendant even if they had a reasonable doubt about his guilt.[8] Even more significant, jurors who held this mistaken belief (regardless of the group to which they were randomly assigned) actually convicted at a rate *2.5 times* that of jurors who correctly understood the burden of proof.[9]

Part I of this Piece details the burden of proof in criminal cases and examines the truth-related language that trial courts commonly tack on to the end of their reasonable doubt jury instructions. It then explains our previous study, including our study design and statistical findings. Part II, the heart of this Piece, examines our new study—a conceptual replication and extension of our previous work. In this Part, we outline our study objectives, formally state our hypotheses, discuss our study design, and explain our statistical findings.

Part III then explains the significance of our findings for trial judges, jury-instruction committees, and appellate courts. We also discuss the cognitive link between jury instructions and conviction rates—that is, truth-related language causes jurors to misunderstand the state's burden of proof, which in turn causes jurors to convict even when they have a reasonable doubt about guilt. Based on our successful replication and new findings, we reiterate our argument from our previous article: In order to protect due process rights, courts should terminate their use of truth-based jury instructions. This Part also discusses the study limitations we corrected by virtue of this conceptual replication, as well as the study limitations that still exist but could be addressed by researchers in future studies.

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7. Id.

8. See infra section II.C (describing the effect of different instructions on mock jurors' responses to the postverdict question).

9. See infra section II.C (describing the relationship between mock jurors' responses to the postverdict question and their conviction rates).

I. PROOF, TRUTH, AND DOUBT

A. *The Burden of Proof in Criminal Cases*

In 1970, the Supreme Court of the United States explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt."[10] However, trial courts are given tremendous leeway in how they instruct jurors on this burden of proof.[11] And in so doing, many trial courts will conclude their instructions not by telling jurors to examine the state's evidence for reasonable doubt but instead by telling them to decide the truth of what they think really happened. In our previous article, we provided examples from 13 jurisdictions, including the following:

> After giving an otherwise legally proper instruction on proof beyond a reasonable doubt, many courts will then instruct jurors that, when reaching their verdict, they should "[d]etermine what [they] think the truth of the matter is and act accordingly." Similarly, other courts instruct jurors that, when reaching their verdict, they should "evolve the truth," "seek the truth," "search for the truth," or "find the truth." Some courts—again, after properly instructing jurors on the concept of reasonable doubt—will explicitly contradict themselves by further instructing jurors that "you should *not* search for doubt. You should search for the *truth*."[12]

Defendants have frequently challenged such truth-related language on appeal. One defense argument is that instructing the jury to determine, evolve, seek, find, or search for the truth of what they think happened diminishes the state's burden of proof. That is, "'seeking the truth' suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a *preponderance of evidence* standard."[13] More to the point, "truth is not the jury's job."[14] Rather, "[t]he question for any jury is whether the burden of proof has been carried by the party who bears it. In a criminal case . . . [t]he jury

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10. In re Winship, 397 U.S. 358, 364 (1970).

11. See Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("[T]he Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.").

12. Cicchini & White, supra note 3, at 1143 (footnotes omitted) (quoting United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir. 1994); United States v. Gray, 958 F.2d 9, 13 (1st Cir. 1992); United States v. Pine, 609 F.2d 106, 108 (3d Cir. 1979); Commonwealth v. Allard, 711 N.E.2d 156, 159 (Mass. 1999); State v. Dunkel, 466 N.W.2d 425, 430 (Minn. Ct. App. 1991) (emphasis omitted); State v. Avila, 532 N.W.2d 423, 429 (Wis. 1995) (emphasis added), overruled in part on other grounds by State v. Gordon, 663 N.W.2d 765 (Wis. 2003)).

13. *Gonzalez-Balderas*, 11 F.3d at 1223 (emphasis added).

14. State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012).

cannot discern whether that has occurred without examining the evidence for reasonable doubt."[15]

Our nation's appellate courts, however, have consistently rejected this argument. With only slight variations in their reasoning, appellate courts conclude that while such truth-related language is disfavored—and could, in theory, diminish the state's burden of proof—it probably does no actual harm.[16] This, in turn, allows appellate courts to affirm defendants' convictions and allows trial courts to continue to instruct juries to search for the truth of what they think really happened, rather than to examine the state's evidence for reasonable doubt.

Based on the plain language of these truth-related jury instructions, we believed the courts' thinking was quite obviously flawed; therefore, we decided to put their judicial reasoning to an empirical test.

B. *The Original Study: Truth or Doubt?*

In our previous study and article, we compared the conviction rates in a hypothetical criminal case.[17] We recruited 200 study participants[18] through Amazon's Mechanical Turk[19] for the purpose of testing the following hypothesis: "[W]hen truth-related language is added to an otherwise proper beyond a reasonable doubt instruction, the truth-related language not only contradicts but also diminishes the government's burden of proof."[20]

To test this hypothesis, each study participant served as a mock juror and received the same case summary materials. More specifically:

> Every mock juror read the same fact pattern in a hypothetical case of sexual assault of a child. The defendant in

15. Id.

16. Cicchini & White, supra note 3, at 1158–59 & nn.60–63. One court, however, stated that such truth-related language "would be error if used in the explanation of the concept of proof beyond a reasonable doubt." *Gonzalez-Balderas*, 11 F.3d at 1223.

17. Cicchini & White, supra note 3, at 1154–56.

18. Our previous study actually consisted of 300 participants; this number was reduced to 298 after excluding two participants who were not U.S. citizens. Id. at 1150–51. However, 98 of the mock jurors were randomly assigned to a separate group that received no reasonable doubt instruction of any kind. Id. at 1154. We discovered that mock jurors who were instructed on reasonable doubt and then told "not to search for doubt" but instead "to search for the truth" convicted at the identical rate as jurors who received no reasonable doubt instruction whatsoever. Id. at 1154–55.

19. Amazon's Mechanical Turk is an online platform for conducting social science research. See Amazon Mechanical Turk, http://www.mturk.com/mturk/welcome [http://perma.cc/8T3A-DJC5] (last visited Oct. 17, 2016). Several studies have found a high degree of similarity between the judgments and behaviors of Mechanical Turk "workers" and of participants recruited in more conventional ways, such as through university subject pools. See Winter Mason & Siddharth Suri, Conducting Behavioral Research on Amazon's Mechanical Turk, 44 Behav. Res. Methods 1, 3–4 (2012), http://sidsuri.com/Publications_filfi/mturkmethods-print.pdf [http://perma.cc/69VN-THJ4].

20. Cicchini & White, supra note 3, at 1150.

> the case was alleged to have touched a fifteen-year-old child's buttocks, over the clothing, for purposes of sexual arousal or gratification. The case summary began with an instruction on the charged crime, including its elements, followed by a 625-word synopsis of court testimony from three individuals: the alleged child victim, the child's mother, and the defendant. The child's accusation was not corroborated by an eyewitness or physical evidence. In essence, the case consisted, as most real-life sexual touching cases do, of an allegation and a denial. The case summary concluded with an 850-word transcript of the prosecutor's and defense lawyer's closing arguments, each arguing the points most favorable to their case.[21]

Before being asked to render a verdict, these 200 mock jurors were randomly assigned to one of two groups, each of which received a *different* instruction on the state's burden of proof.[22] Jurors in the doubt-only group (N = 100) received a legally proper, 269-word burden-of-proof instruction that concluded as follows: "It is your duty to give the defendant the benefit of every reasonable doubt."[23]

Jurors in the doubt-and-truth group (N = 100) received the same instruction except that the conclusion was changed to read as follows: "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth."[24]

The doubt-only group (that received the legally proper instruction) convicted at a rate of only 16%.[25] However, the doubt-and-truth group (that was told "not to search for doubt" but instead "to search for the truth") convicted at the much higher rate of 29%.[26] More specifically:

> This result is significant at the $p < .05$ level, with an exact p-value of 0.028 . . . . [T]he p-value measures the probability of a Type I error, i.e., obtaining a false positive. Therefore, we are more than 97% certain ($1-p$) that the difference in conviction rates between [the groups] is a real difference and did not occur by chance.
>
> This finding provides strong empirical support for our . . . hypothesis that the truth-related language at the end of an otherwise proper reasonable-doubt instruction actually diminishes the government's burden of proof.[27]

We concluded that "[b]ecause 'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable

21. Id. at 1151.
22. Id. at 1152.
23. Id. at 1152–53.
24. Id. at 1153–54.
25. Id. at 1155.
26. Id.
27. Id.

doubt,' our findings provide strong evidence of a serious constitutional problem."[28]

II. THE NEW STUDY: A CONCEPTUAL REPLICATION

A. *Objectives and Hypotheses*

First, our main objective is to test the reliability of our previous finding by replicating the study. In order to do this, we designed and conducted a conceptual replication rather than a direct replication. A conceptual replication retests the original hypothesis but intentionally varies specific features of the original methodology.[29] A benefit of conceptual replication is that it addresses one of the common weaknesses of psychological research: limited generalizability.[30]

More specifically, in our original study as discussed in section I.B, each of the 200 mock jurors read the same case summary about a child sexual-assault allegation. All of the material was held constant between the two test conditions. This consistency allowed us to isolate the effect of the variable being tested: the closing mandate "not to search for doubt" but instead "to search for the truth." However, with such standardization comes limited generalizability. As we cautioned, "we cannot say that the impact of the doubt-and-truth instruction would be identical when applied to different cases."[31]

A conceptual replication allows us to address this limitation by testing our hypothesis under a different set of circumstances. As we discuss below in section II.B, our new study has a larger sample size, a different fact pattern, and includes stronger evidence of the defendant's guilt. We also provided mock jurors with a shorter underlying instruction on reasonable doubt. However, the variable being tested—the mandate "not to search for doubt" but instead "to search for the truth"—is the identical language that we tested in our previous study.

Second, in addition to replicating our study, we also extended our study so as to identify a cognitive link between the change in the test conditions (i.e., adding truth-related language to one group's burden-of-proof instruction) and the change in juror behavior (i.e., a higher conviction rate). In order to accomplish this secondary objective, we added an additional, postverdict question to our test materials. We

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28. Id. at 1157 (quoting In re Winship, 397 U.S. 358, 364 (1970)).

29. See, e.g., Stefan Schmidt, Shall We Really Do It Again? The Powerful Concept of Replication Is Neglected in the Social Sciences, 13 Rev. Gen. Psychol. 90, 91 (2009).

30. Generalizability refers to the extent to which the results of a study can be applied from the study sample to a larger population or from the specific circumstances of the study to other circumstances. For a discussion of external validity (i.e., generalizability) and threats to external validity, see Thomas D. Cook & Donald T. Campbell, Quasi-Experimentation: Design & Analysis Issues for Field Settings 70–80 (1979).

31. Cicchini & White, supra note 3, at 1162.

discuss this and our overall study design below.[32] First, we will formally state our hypotheses.

Our first hypothesis is that when truth-related language is added to an otherwise proper reasonable-doubt instruction, the truth-related lanCguage will diminish the state's burden of proof—i.e., mock jurors will convict at a higher rate. Our second hypothesis is that mock jurors who receive the truth-related language at the end of their reasonable-doubt instruction will *subjectively* interpret their instruction to permit conviction even if they have a reasonable doubt about the defendant's guilt.

B. *Study Design*

To test these hypotheses, we recruited 250 study participants—a 25% increase in the sample size of our original study—through Amazon's Mechanical Turk.[33] These 250 participants served as mock jurors and rendered a verdict in a hypothetical criminal case. To ensure data quality, we monitored the participants and immediately rejected those who completed the task in fewer than three minutes; we replaced them with new participants in order to maintain our desired sample size. Each participant was required to be an adult and a U.S. citizen. After data collection was completed, we discovered that one participant was not a U.S. citizen and one failed to render a verdict; their data were discarded, leaving us with a sample of 248 mock jurors.

Our sample was large and diverse. Participants hailed from 42 different states. Fifty-two percent of participants were female. Participants' ages ranged from 19 years to 73 years; the mean (average) age was 35.8 years, and the median age (50th percentile) was 32 years. The ethnic composition of the sample was also diverse: 74% non-Hispanic whites, 10% African Americans, 5% Hispanics, 5% Asian Americans, 5% mixed race, and 1% other. Fifty-six percent of the participants reported at least a four-year college degree, while an additional 35% have completed some college. Thirteen percent reported having prior jury experience.

Every mock juror read the same fact pattern, which involved two adults interacting at a party and concluded with an accusation of a misdemeanor fourth-degree sexual assault—i.e., the defendant's sexual touching of the alleged victim without her consent. The case summary began with an instruction on the charged crime, including its elements, followed by an 887-word summary of the trial evidence. The evidence consisted of testimony from two witnesses—the accuser and the

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32. Infra section II.B.

33. See supra note 19 and accompanying text (discussing Amazon's Mechanical Turk).

defendant—and a factual stipulation entered into between the prosecutor and defense lawyer.[34]

There were no eyewitnesses to the alleged sexual assault. The accuser immediately reported the incident to law enforcement. The defendant denied the allegation. Both the accuser and the defendant testified and admitted to consuming alcohol during the party at which the sexual assault allegedly occurred. The defendant, however, also admitted to consuming other drugs earlier in the day and admitted to a prior, unrelated instance of untruthful conduct. In order to shorten the overall length of the case summary materials, we did not include closing arguments from the lawyers. We did, however, instruct the jury that the definition of "evidence" includes the testimony of witnesses as well as the factual stipulation.

Before being asked to render a verdict of guilty or not guilty, the 248 mock jurors were randomly assigned to one of two test conditions, each of which received a different jury instruction on the state's burden of proof. Group 1 (N = 124) received a legally proper, 94-word jury instruction that explained the presumption of innocence, placed the burden of proof on the state, and identified the burden of proof as beyond a reasonable doubt. This doubt-only instruction, in its entirety, reads as follows:

> The defendant is presumed to be innocent of the charge. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged. *The government has the burden of proving the guilt of the defendant beyond a reasonable doubt.*
>
> This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.[35]

Group 2 (N = 124) received an identical jury instruction, with one exception. The instruction given to Group 2 concluded with this additional mandate: "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth." This doubt-and-truth instruction, in its entirety, reads as follows:

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34. We included a factual stipulation for two reasons. First, it allowed us to shorten the summaries of the witnesses' testimonies by removing "identity" as an issue in the case. Second, the data used in this study were obtained as part of a larger data-collection effort that included a third group. The inclusion of the factual stipulation allowed us to test an additional hypothesis that is not related to this study but may form the basis for a future article.

35. Comm. on Fed. Criminal Jury Instructions for the Seventh Circuit, Pattern Criminal Jury Instructions for the Seventh Circuit No. 2.03 (1998).

> The defendant is presumed to be innocent of the charge. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged. The government has the burden of proving the guilt of the defendant beyond a reasonable doubt.
>
> This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.
>
> *While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.*[36]

After rendering their verdicts, mock jurors were asked to answer a question about how they interpreted their burden-of-proof instruction. The question posed to all jurors was as follows: "You received an instruction from the judge explaining the prosecutor's burden of proof. Which of the following do you believe is the *most accurate summary* of the judge's instruction?" Jurors were instructed to "choose only *one* answer." Their options were as follows:

> A. If I have a reasonable doubt about the defendant's guilt, I must not convict the defendant.
>
> B. Even if I have a reasonable doubt about the defendant's guilt, I may still convict the defendant if, in my search for the truth, the evidence shows the defendant is guilty.

The study was approved by Beloit College's Institutional Review Board.[37]

C. *Findings*

To test our first hypothesis—that adding truth-related language to the end of an otherwise proper reasonable-doubt instruction will diminish the government's burden of proof—we must compare the conviction rates of Groups 1 and 2.

In Group 1, which received the doubt-only instruction, only 28 of 124 mock jurors returned verdicts of guilt for a group conviction rate of

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36. Id. (emphasis added). This jury instruction includes the Seventh Circuit instruction in its entirety. Id. The additional, truth-related language added to the end of this instruction is the identical language tested in our original study and is taken from Wisconsin's pattern jury instruction on the burden of proof. Wis. Criminal Jury Instructions Comm., Wisconsin Jury Instructions—Criminal No. 140 (2016). This language is similar, and often identical, to the truth-related language used in the 13 different jurisdictions we identified in our original study and article. See Cicchini & White, supra note 3, at 1143 nn.13–18.

37. An institutional review board (IRB) is a committee that reviews and approves research that involves human participants. See Hazel Glenn Beh, The Role of Institutional Review Boards in Protecting Human Subjects: Are We Really Ready to Fix a Broken System?, 26 Law & Psychol. Rev. 1, 25–26 (2002). IRBs ensure that researchers protect the rights and welfare of human subjects. See id.

22.6%. In Group 2, which received the doubt-and-truth instruction, 41 of 124 mock jurors returned verdicts of guilt for a group conviction rate of 33.1%. That is, the conviction rate among jurors who were told "not to search for doubt" but instead "to search for the truth" was almost 50% higher than the conviction rate for jurors who were simply instructed to evaluate the state's case for reasonable doubt.

This result is significant at the $p < .05$ level, with an exact p-value of 0.033. The p-value measures the probability of a Type I error—i.e., the risk of obtaining a false positive when testing a hypothesis, given the two sample sizes and the difference in conviction rates between the two groups. In plain language, we are more than 96% certain (1–p) that the observed difference in conviction rates between Groups 1 and 2 is a real difference and did not occur by chance.[38]

After mock jurors rendered their verdict, they were asked to report how certain they were (on a 10-point scale) that they had made a correct decision. There were no statistically significant differences in levels of certainty between the doubt-only group and the doubt-and-truth group. In fact, both group means were essentially 6.6 (fairly certain) on the 10-point scale.[39]

Participants also answered an attention-check question that tested their recollection of the elements of the charged crime. The question included 5 potential elements, only 3 of which were correct. The attention-check results were encouraging. Nearly 92% of participants correctly identified the elements of the charged crime.[40]

To test our second hypothesis—that mock jurors receiving the doubt-and-truth instruction would *subjectively* interpret it to permit conviction even if they had a reasonable doubt about the defendant's

38. A statistical test for the difference between two proportions produced a Z-score of -1.84. In a one-tailed test, the p-value is 0.033. Researchers use a two-tailed test (also called a two-sided test) when they cannot predict if a test variable will increase or decrease scores. We used a one-tailed test because we had empirical evidence (from our first study) that truth-instructed jurors would convict at a higher rate, not a lower rate. For a full discussion of when to use one-tailed and two-tailed tests, see Arthur Aron & Elaine N. Aron, Statistics for Psychology 199–202 (3d ed. 2003).

39. We also uncovered several subsidiary findings not directly related to the main purpose of our study: (a) women (34%) were more likely than men (22%) to vote guilty ($p < .04$); (b) there were no statistically significant relationships between a participant's verdict and his or her age, education, ethnicity, or prior jury experience; and (c) mock jurors who voted guilty were significantly more certain than other jurors were that they had made the correct decision (a mean score of 7.5 versus a mean score of 6.3 on a 10-point scale, $p < .001$).

40. Our standard for a correct answer was high; the answer of a mock juror who identified the correct elements of the charged crime, but also an incorrect element, was classified as "incorrect." Those mock jurors who voted not guilty were correct 93% of the time, while those who voted guilty were correct 87% of the time. This difference is not large enough to be statistically significant, but it suggests that those mock jurors who paid closer attention to the legal elements of the charge (fourth-degree sexual assault) were less likely to convict.

guilt—participants were reminded that they had received an instruction from the judge about the state's burden of proof. Participants were then asked to indicate the most accurate summary of the judge's instruction by choosing either answer A or answer B. As indicated above, A is the correct interpretation of the constitutionally mandated burden of proof and B is the incorrect interpretation, as it permits conviction even when there is a reasonable doubt about the defendant's guilt.

In Group 1, which received the doubt-only instruction, only 15% of participants selected answer B; that is, only 15% believed they could convict the defendant if they had a reasonable doubt about guilt. However, in Group 2, which received the doubt-and-truth instruction, 28% selected answer B; that is, 28% believed they could convict the defendant even if they had a reasonable doubt about guilt. This difference is highly significant ($p = 0.01$).

Perhaps more importantly, when analyzing the responses across both Groups 1 and 2, a juror's understanding of the burden-of-proof instruction was an incredibly strong predictor of his or her verdict. Of those participants who selected the legally correct answer A—that they could *not* convict if they had a reasonable doubt about the defendant's guilt—only 21% voted guilty. Of those who selected the legally incorrect answer B—that they *could* convict despite their reasonable doubt about the defendant's guilt—54% voted guilty. This difference is highly significant ($p < .001$).

III. IMPLICATIONS AND LIMITATIONS

A. *Discussion: An Even Stronger Case Against Truth*

Our first finding confirms our hypothesis that adding truth-related language to the end of an otherwise proper reasonable-doubt instruction diminishes the state's burden of proof. That is, the jurors in Group 1, who were instructed simply to evaluate the state's evidence for reasonable doubt, convicted at a rate of 22.6%. However, the jurors in Group 2, who were instructed "not to search for doubt" but instead "to search for the truth," convicted at a rate of 33.1%—a conviction rate *nearly 50% higher* than Group 1's rate. This replicates the finding in our original study, which also revealed a statistically significant gap in conviction rates when testing the identical hypothesis.[41]

Our second finding in this study is, in some ways, even more compelling. We hypothesized that jurors who received the doubt-and-truth instruction would be more likely to subjectively interpret the burden of proof to permit conviction even if they had a reasonable doubt about the defendant's guilt. What we found was that in Group 1 (doubt

41. Cicchini & White, supra note 3, at 1155 (finding conviction rates of 16% in the doubt-only group and 29% in the doubt-and-truth group, with a p-value of 0.028).

only), only 15% of jurors believed they could convict the defendant if they had a reasonable doubt about guilt. However, in Group 2 (doubt-and-truth), 28%—*nearly double*—believed they could convict the defendant even if they had a reasonable doubt about guilt.

Even more striking, when analyzing the responses of all participants across groups, jurors who mistakenly believed they could convict, even when they had a reasonable doubt about guilt, found the defendant guilty 54% of the time. This conviction rate is *more than 2.5 times* the conviction rate (21%) of jurors who correctly understood the burden of proof—a highly significant difference.

These findings suggest that we have identified a cognitive mechanism that explains why the truth-related language produces a much higher conviction rate. Specifically, the truth instruction (TI) produces in jurors a mistaken belief (B) about the legally mandated burden of proof, and jurors base their verdicts (V) on that mistaken belief.

That is, in our original study we demonstrated the impact of the truth-related jury instruction on jurors' conviction rates, but we did not attempt to explain why, in a cognitive sense, the truth-related language led so many jurors to find the defendant guilty. In this study, however, we have demonstrated empirically that TI →B and B →V. The mistaken belief B is the intermediate cognitive mechanism that explains the impact of TI on V. In plain language, telling jurors not to focus on doubt but instead "to search for the truth" leads them to form an incorrect understanding of the state's burden of proof. This misunderstanding, in turn, leads many jurors to vote guilty, even when the state has not met its burden.

Because "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt,"[42] courts that tack truth-related language on to their burden-of-proof instructions are creating a serious constitutional problem. Therefore, jury-instruction committees and individual trial judges should eliminate truth-related language from those instructions.[43] Further, such a simple change should not be controversial. No court claims that truth-related language is necessary or even valuable. Rather, such language is merely tolerated based on the assumption that it probably does no actual harm[44]—an assumption that we have debunked by demonstrating that truth-instructed jurors convict at a higher rate.

Further, our second study has not only replicated the result of our first study, but it has also identified a cognitive mechanism that serves as a bridge or link between the legally defective, truth-based instruction and the jurors' higher conviction rate. This makes an even more compelling

42. In re Winship, 397 U.S. 358, 364 (1970).
43. Cicchini & White, supra note 3, at 1158.
44. Id. at 1158–59.

case for the removal of truth-related language from burden-of-proof jury instructions.

B. *Study Limitations and Further Testing*

In our original study and article, we identified five potential limitations that researchers may wish to address in future studies.[45] In this new study, we have addressed two of those five ourselves.

First, by conducting a conceptual replication, rather than a direct replication, we have expanded the generalizability of our findings. In our original article we cautioned that "we cannot know the *extent* to which this effect will also be observed in other cases with different fact patterns."[46] Therefore, in this new study we changed the fact pattern. Instead of a delayed report by a child accuser, we used an immediate report by an adult accuser. We also incorporated more evidence of guilt than in our first study, including the defendant's drug use on the day of the incident and the defendant's prior, unrelated instance of untruthful conduct. Both of these pieces of evidence tend to diminish the credibility of the defendant's testimony.

In addition to changing the fact pattern, we also changed other parts of the case summary to further expand the generalizability of our findings. We eliminated closing arguments of the lawyers on both sides. We added an instruction telling jurors that "evidence" includes the testimony of witnesses, which was designed to correct any misconception that physical evidence is required in order to convict. We also changed the underlying jury instruction on reasonable doubt. Instead of the lengthy, 269-word doubt-only instruction from our original study,[47] we used a much shorter, 94-word doubt-only instruction.[48] What remained unchanged from our original study, however, was the closing mandate (for one of the two groups) that "[w]hile it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth."[49]

Second, we also corrected the problem of some participants' inadequate attention level. In our previous study, we did not reject any study participants and included their data regardless of the amount of time they spent on the task. In this new study, however, we monitored the incoming data and rejected the work of study participants who spent fewer than 3 minutes on the task. These participants were replaced before we concluded the data-collection process. Our attempt to ensure

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45. Id. at 1159–65.

46. Id. at 1161.

47. Id. at 1152–54.

48. As explained earlier in this Piece, states are given tremendous leeway when instructing juries on reasonable doubt. And while the two doubt-only instructions used in our two studies are dramatically different in length and content, both are legally proper.

49. Cicchini & White, supra note 3, at 1153–54.

quality responses was apparently successful, as reflected in the results of our attention-check question. In this new study, nearly 92% of mock jurors were able to correctly identify the legal elements of the charged crime. In our previous study, 84% of mock jurors correctly identified the legal elements.[50]

This leaves three potential study limitations for other researchers to address in the future: our use of the case summary method, the lack of juror deliberations, and participant bias. As we explained in our original study, however, the case summary method may actually be the best method for testing the impact of a jury instruction, as it eliminates extraneous variables, such as witnesses' race and ethnicity, from the equation.[51] With regard to mock-juror deliberations, there is mixed evidence as to their value.[52] Finally, with regard to participant bias, this problem mirrors the problem with real-life juries and, for purposes of controlled studies like ours, is mitigated by the random assignment of participants to test conditions.[53]

CONCLUSION

In our previous study and article, we demonstrated that mock jurors who were first instructed on reasonable doubt and then told "not to search for doubt" but instead "to search for the truth" convicted at a much higher rate than mock jurors who received a legally proper reasonable-doubt instruction. In this new study—a conceptual replication and extension of our previous work—we replicated the results of our original study and identified a cognitive explanation for the difference in conviction rates: Mock jurors who were told "not to search for doubt" but instead "to search for the truth" were nearly twice as likely to mistakenly believe they could convict the defendant even if they had a reasonable doubt about guilt. Further, jurors who held this mistaken belief actually voted to convict the defendant at a rate that was 2.5 times that of jurors who properly understood the burden of proof.

Our original study, our successful replication of that study, and our new empirical findings regarding the cognitive explanation for juror behavior all combine to provide powerful evidence that truth-related language in jury instructions diminishes the constitutionally mandated burden of proof.

50. Id. at 1156.
51. Id. at 1160–61.
52. Id. at 1162–63.
53. Id. at 1164–65.