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PROVOKING CHANGE: COMPARATIVE INSIGHTS ON FEMINIST HOMICIDE LAW REFORM

CAROLYN B. RAMSEY*

The provocation defense, which mitigates murder to manslaughter for killings perpetrated in the heat of passion, is one of the most controversial doctrines in the criminal law because of its perceived gender bias; yet most American scholars and lawmakers have not recommended that it be abolished. This Article analyzes trendsetting feminist homicide law reforms, including the abolition of the provocation defense in three Australian jurisdictions, places these reforms in historical context, and assesses their applicability to the United States. It ultimately advocates reintroducing the concept of justified emotion, grounded in modern equality principles and social values, as a requirement for voluntary manslaughter mitigation.

Two insights guide this Article's critique of partial excuses for murder. First, the revised legal history of intimate-partner homicide presented here demonstrates that the modern version of the provocation defense protects a broader class of angry, jealous, predominantly male defendants than the traditional doctrine of the nineteenth century did. Heat-of-passion claims have become the new "abuse excuse" for men. Second, battered woman syndrome evidence, which is now commonly admitted when abused women stand trial for murder, resonates uncomfortably with insanity claims. Reliance on such evidence ignores the fact that "rational moral actor" theories were also raised successfully in the past to defend domestic

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violence victims who killed their partners. Based on these insights, I argue that the most desirable aspects of the Australian reforms emphasize moral judgment about the defendant's reasons for killing and disfavor concessions to irrationality.

Inspired by Australian efforts, legislatures in the U.S. should implement comprehensive reform of homicide law and sentencing. Yet, even if American states retain rigid sentencing structures, this Article advocates the repeal of the extreme mental or emotional disturbance defense and a reconceptualization of the provocation doctrine, guided by substantive equality principles, to require that the defendant's valuation was justified. Provocation mitigation should be curtailed by categorical exclusions for killings arising from beliefs and passions, including lethal rage at infidelity or the termination of an intimate relationship, that do not comport with evolving social norms. Furthermore, although many battered women charged with murdering a violent spouse can successfully claim provocation under the excuse-based modern doctrine, reformist legislatures ought to provide a new intermediate outcome that fits better with the circumstances of such women's cases.

I. INTRODUCTION

Compared to rape doctrine, American homicide law has changed little in response to feminist concerns about the gender bias of the criminal law, aside from the controversial introduction of battered woman syndrome (BWS) evidence in murder trials. Among nations whose law derives from the English model, the United States led the pack in allowing expert testimony on BWS. Yet three states in Australia—a country that embraced BWS defense strategies comparatively late¹—have taken the boldest strides toward a feminist transformation of homicide law. Victoria, Tasmania, and Western Australia recently made a move that most American scholars and lawmakers have been reluctant to advocate: they abolished the provocation doctrine as a partial defense to murder. Tasmania took this step in 2003 without making other changes to the law of homicide or the admissibility of

¹ See PATRICIA WEISER EASTEAL, *KILLING THE BELOVED: HOMICIDE BETWEEN ADULT SEXUAL INTIMATES* 141-43 (1993) [hereinafter *KILLING THE BELOVED*]; Julie Stubbs & Julia Tolmie, *Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence of Battered Woman Syndrome*, 23 MELB. U. L. REV. 709, 720 (1999) [hereinafter *Falling Short*] (stating that Australian courts have only accepted BWS evidence since 1991); see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 28 (1991) (noting that, in the United States, forensic psychologist Lenore Walker “had introduced expert testimony on battered woman syndrome in sixty-five cases in which battered women had killed or hurt their abusers” by 1986). For more discussion of the BWS theory, including a brief definition, see *infra* notes 128-32, 210, 233-37, 326-27 and accompanying text.

evidence,² whereas Victoria conducted a detailed study of homicide defenses and then enacted comprehensive reforms in 2005.³ Western Australia followed suit in 2008, abolishing provocation manslaughter and establishing a new partial defense for unreasonable self-protective killings similar to that adopted in Victoria.⁴ The changes in all three Australian states embodied a substantive equality position designed to remediate gender imbalances in the impact of the criminal law. But especially in Victoria, reformers cited an additional theoretical basis—a moral objection to the modern provocation doctrine’s failure to distinguish legitimate emotions and beliefs from wrongful ones.⁵ The reformers thus reasserted the relevance of justification, but they were inconsistent about curtailing psychological excuses that reduce culpability in the guilt phase.

This Article applauds the three Australian jurisdictions for striving to achieve substantive gender equality in homicide law. However, to some extent, their approaches embody a pragmatic view of feminist reform that can be characterized as doing whatever works for women in the short term and faulted for failing to articulate a coherent normative theory of criminal responsibility. This Article contends that the criminal law should express consistent moral judgments about the reasons the perpetrator committed homicide, not allow male defendants to excuse their equality-denying violence by claiming to have lost self-control, nor make reliance on psychological theories the primary method of defending women. Inspired by the best aspects of the Australian reforms, American states should move away from partial excuses⁶ for murder that enforce pernicious gender-based

² Criminal Code Amendment (Abolition of Defence of Provocation) Act, 2003, (Tas. Acts No. 15/2003).

³ Crimes (Homicide) Act, 2005, § 6 (Vict. Acts No. 77/2005). For the comprehensive recommendations of the Victorian Law Reform Commission, see VICT. LAW REFORM COMM’N, DEFENCES TO HOMICIDE FINAL REPORT (2004) [hereinafter VLRC, DEFENCES TO HOMICIDE], available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Defences+to+Homicide/>; see also *infra* notes 179-237 and accompanying text (discussing the Victorian Law Reform Commission’s proposals).

⁴ Criminal Law Amendment (Homicide) Act, 2008, § 12 (W. Austl. Num. Acts No. 29/2008). In November 2009, the United Kingdom abolished the provocation doctrine in favor of a revamped partial defense for “loss of control” that requires either fear of serious violence or a justifiable sense of being seriously wronged. Coroners and Justice Act, 2009, c. 25, Part 2, Ch. 1, §§ 54-56. For a brief discussion of the British reforms, which the British Parliament enacted too late to receive comprehensive analysis in this Article, see *infra* notes 92, 308-12 and accompanying text.

⁵ See *infra* notes 180-82, 187-91, 194-200 and accompanying text.

⁶ Excuse defenses embody the view that, although the defendant perpetrated a wrongful act, he should not be blamed or punished because a mental defect or other failing makes him less culpable. Insanity exemplifies a classic excuse defense that leads to acquittal. The modern provocation doctrine, which mitigates murder to manslaughter, is often considered to be a partial excuse. See *infra* notes 89-116 and accompanying text. On the other hand, an

stereotypes and that fail to hold men or women to a high standard of responsibility. In place of the current excuse-based regime of mitigation, legislatures ought to reintroduce the concept of justified emotion, grounded not only in contemporary social norms but also in equality principles. This Article uses history, as well as legal analysis, to assess the Australian homicide law reforms with a focus on those in Victoria. It also advocates changes in the United States, including the abolition of the extreme mental or emotional disturbance (EMED) defense⁷ and the restriction and reconceptualization of the provocation doctrine, which mitigates murder to manslaughter when the defendant claims he acted in the heat of passion.

Reformers in Victoria posited a substantive gender equality rationale for abolishing the provocation defense based on the predominance of men among perpetrators of intimate-partner homicide and the fact that men and women kill in very different contexts.⁸ Substantive equality theories ask whether facially neutral rules have unequal effects.⁹ Thus, while defendants of both sexes can claim provocation, the defense is biased if it disproportionately benefits men, entrenches sexist stereotypes, or fails to recognize women's experiences. Although female defendants can

actor who commits otherwise criminal conduct that is not wrongful, or that is less wrongful, because of the circumstances she faced, including the victim's aggressive behavior, may receive exculpation or mitigation on a theory of justification. Other legal scholars have criticized and modified this framework. I owe an intellectual debt to Dan Kahan and Martha Nussbaum for their convincing discussion of "evaluative" and "mechanistic" approaches to emotion in the criminal law. According to the evaluative conception, emotions "express cognitive appraisals [that] can be morally evaluated" for their appropriateness or inappropriateness. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 273, 278 (1996). In contrast, the mechanistic conception sees emotions as "things that sweep over us, or sweep us away, or invade us, often without our consent or control." *Id.* at 279. Kahan and Nussbaum seek to dispense with the familiar dichotomy of "justification" and "excuse," arguing that it is misleading and inadequate. *See id.* at 318. Nevertheless, this Article uses the "justification" and "excuse" shorthand for both simplicity's sake and because the materials it quotes and interprets use these terms. When this Article refers to "justification," an evaluative approach to the defendant's emotion is intended, whereas "excuse" is used to signify the law's concession to circumstances in which the defendant's will has supposedly been overborne.

⁷ The Model Penal Code (MPC) version of this partial defense, which mitigates murder to manslaughter, encompasses "extreme *mental* or emotional disturbance." MODEL PENAL CODE § 210.3(1)(b) (1962) (emphasis added). However, many states that adopted the MPC's proposal simply provide mitigation for a defendant who "acts under extreme emotional disturbance." *See, e.g.,* N.Y. PENAL LAW §§ 125.20, 125.25 (McKinney 2009). For consistency's sake, this Article uses the acronym "EMED," except when quoted material abbreviates "extreme emotional disturbance" as "EED."

⁸ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 29-30; *see also infra* notes 185-87 and accompanying text (further discussing this rationale).

⁹ *See* Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 4 (1994) (describing the theory of substantive gender equality).

successfully claim the provocation defense (indeed, they may be more successful raising this claim than men are),¹⁰ it does not fit the social situation in which most women kill. Moreover, when men make use of the doctrine, it often provides mitigation for morally reprehensible acts and valuations.

A revised history of homicide defenses supports the abolition or at least the curtailment of the expansive, modern provocation defense by exposing the substantively unequal and morally erroneous impact of supposedly progressive changes in the criminal law. Two flawed historical narratives have impeded effective reforms. The first is the predominantly conservative story of how time-honored defenses became distorted by pseudo-scientific “abuse excuses.”¹¹ In the 1990s, James Q. Wilson and Alan Dershowitz—two American scholars of divergent political perspectives—agreed that a proliferation of “abuse excuses” threatened the legitimacy of the criminal law.¹² The admissibility of BWS evidence to

¹⁰ Despite the predominance of men as offenders in intimate-partner homicide cases, female defendants may actually be more successful in claiming provocation and other mitigating doctrines than male defendants, and they also may receive more lenient sentences than their male counterparts. See VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 28 (citing LAW REFORM COMM’N OF VIC., HOMICIDE REPORT NO. 40, ¶¶ 164, 165, 167-68 (1991)). An early study cited by the Victorian Law Reform Commission presented data on ten women and sixty-five men who raised provocation as a defense: “Of the 10 women who raised provocation, six (60%) were convicted of manslaughter, and three (30%) were acquitted. None were convicted of murder. In comparison, 13 (20%) of the 65 male accused who argued provocation were convicted of murder, 42 (65%) of manslaughter, and six (9%) were acquitted.” *Id.* at 28 n.88. *But cf. id.* at 28-29 (citing a more recent study, which found that very few women raised a provocation defense in Victoria and none were successful).

According to a report on sentencing in Victoria, issued in 2008, women’s sentences for manslaughter were generally less severe than men’s, and men generally had to serve more of their sentences before becoming eligible for parole. See FELICITY STEWART & ARIE FREIBERG, PROVOCATION IN SENTENCING 115-16 (SENT’G ADVISORY COUNCIL 2008) [hereinafter PROVOCATION IN SENTENCING] (on file with author); see also PATRICIA EASTEAL, LESS THAN EQUAL: WOMEN AND THE AUSTRALIAN LEGAL SYSTEM 33 (2001) [hereinafter LESS THAN EQUAL] (finding that in New South Wales and Victoria from 1988 to 1990, men were more likely to be convicted of murder or manslaughter than women and that 75% of the women received a non-custodial sentence or less than five years, compared to only 22% of the men). However, these “lenient” sentences may not actually be more lax if we consider that many women who receive them killed out of fear of a violent aggressor.

¹¹ See generally ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994) (criticizing this trend from a liberal perspective); JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? (1997) (presenting another rendition of this thesis by a conservative social scientist).

¹² Alan M. Dershowitz, *Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?*, 3 BUFF. CRIM. L. REV. 775, 779 (2000) (book review) (noting parallels between his work and that of James Q. Wilson and accusing Wilson of impropriety for borrowing his ideas without attribution).

support battered women's self-defense claims constituted a focal point of their attack.¹³ Although this critique contains at least a grain of truth, it errs in blaming women's rights advocates for the ills of the modern criminal law and in embracing tradition for tradition's sake.

The second narrative—a feminist interpretation polar to the first—recounts an oppression story in which female victims have either been killed by brutal men or convicted of murder in a gender-biased criminal justice system for using violence to defend themselves.¹⁴ This latter narrative draws on historical evidence of women's subordinated status under the system of coverture¹⁵ and the sexist value system that persisted long after that legal regime was dismantled. But it nevertheless overlooks the moral condemnation of violence against women in the past and the role this norm played in convicting male murder defendants and defending women who killed abusive partners.¹⁶ Indeed, feminists have only

¹³ DERSHOWITZ, *supra* note 11, at 11-16; WILSON, *supra* note 11, at 56-58.

¹⁴ See ANGELA BROWNE, WHEN BATTERED WOMEN KILL 165-66 (1987); CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 157-58, 197-98 (2000); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 221 (1993); CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 22-23 (2003); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 113-14 (2000); LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 236-37 (1989); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121-23, 139-40 (1985); see also Susanne Davies, *Captives of Their Bodies: Women, Law, and Punishment, 1880s-1980s*, in SEX, POWER, AND JUSTICE: HISTORICAL PERSPECTIVES ON LAW IN AUSTRALIA (Diane Kirkby ed., 1995) (stating that late nineteenth-century "Australian feminists condemned the law's harsh punishment and inadequate protection of women" and that, even in the late twentieth century, women's "acts of self-preservation tend to be misunderstood and condemned as ruthless and premeditated murder"); Robert M. Ireland, *Frenzied and Fallen Females: Women and Sexual Dishonor in the Nineteenth-Century United States*, 3 J. WOMEN'S HIST. 95, 102 (1992) (describing the nineteenth-century feminist view that the unwritten law embodied a double standard that treated female avengers of sexual dishonor more harshly than male defendants accused of comparable crimes).

¹⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *421, 430 (1765):

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated in that of her husband: under whose being protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert*, *foemina viro co-operta*; is said to be *covertbaron*, or under protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.

¹⁶ For evidence that female defendants who killed their partners were often acquitted, convicted of lesser charges than murder, or given lesser punishments, whereas intimate homicides perpetrated by men increasingly aroused condemnation in the late nineteenth and early twentieth-centuries, see *infra* Parts II.B and II.C. See generally Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. COLO. L. REV. 101 (2006) (making this argument with regard to the American states of New York and Colorado).

belatedly realized that the modern, excuse-based version of provocation actually protects a broader class of angry, jealous male defendants than the traditional doctrine¹⁷ and that BWS evidence resonates uncomfortably with insanity defenses for women.¹⁸

The rationale reformers in Victoria offered for their overhaul of homicide defenses embodied a trenchant reinterpretation of the “abuse excuse” by suggesting that the provocation doctrine operates in similarly pernicious ways.¹⁹ Whereas Wilson wanted to retain the provocation defense,²⁰ opponents of this doctrine in Australia convinced three state parliaments and, to a great extent, the general public that it was gender-biased and primarily operated to excuse male anger, jealousy, and control

¹⁷ The most influential study showing the effects of Model Penal Code reform on intimate homicide cases is Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1331-34, 1352-67 (1997). Since their adoption in the second half of the twentieth century, EMED doctrines have protected men who committed separation murders from the death penalty. See Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1521, 1528 (1996).

¹⁸ For notable feminist critiques of BWS evidence by American scholars, see generally Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211 (2002); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994); see also Crocker, *supra* note 14, 137 (opining that BWS allows the legal system to treat women's cases under a “separate and unequal standard of behavior”); Mahoney, *supra* note 1, at 38-43 (expressing concern that the learned helplessness component of Lenore Walker's theory may lead to stereotyping). For similar Australian perspectives, see LESS THAN EQUAL, *supra* note 10, at 53-54; Jocelyne A. Scutt, *Self-Defence and Women's Lives: Reality and Unreality in Criminal Justice*, in A JURY OF WHOSE PEERS? THE CULTURAL POLITICS OF JURIES IN AUSTRALIA 100, 107-16, 119 (Katy Auty & Sandy Toussaint eds., 2004); Stubbs & Tolmie, *Falling Short*, *supra* note 1, at 714, 720-21, 736-38; Julie Stubbs & Julia Tolmie, *Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?*, in WOMEN, MALE VIOLENCE, AND THE LAW 192, 199-211 (Julie Stubbs ed., 1994) [hereinafter *Battered Woman Syndrome in Australia*]. Celia Wells remarks that “it has . . . recently become de rigeur to note the essentializing and syndromizing effect of the admission of BWS.” Celia Wells, *Provocation: The Case for Abolition*, in RETHINKING ENGLISH HOMICIDE LAW 85, 91 (Andrew Ashworth & Barry Mitchell eds., 2000).

¹⁹ Cf. Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435 (1998) (reviewing JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM?). What is remarkable and exciting about the Victorian reforms is that their proponents convinced such a broad base of supporters—including the parliaments, the press, and many ordinary Australians—of this view.

²⁰ WILSON, *supra* note 11, at 103. To his credit, Dershowitz noted that the heat-of-passion defense could be misused and argued that focusing on alleged provocations diminishes “the moral importance of the other factors that differentiate criminals from law-abiding citizens who are also provoked but do not respond with lawlessness.” DERSHOWITZ, *supra* note 11, at 139.

over women.²¹ Critics of BWS evidence fault it for pathologizing abused women and creating a special category for their conduct,²² but Victoria's reformers recognized that the modern provocation doctrine plays a similar role in male defendants' cases. Urging the abolition of provocation, they called for a transformed regime of homicide defenses in which intimate killings would be understood in a social context and judged from a moral standpoint.²³ Victoria's successful campaign against provocation thus provides an opportunity to examine legislative changes that attempted, albeit inconsistently, to eschew excuses in favor of a moral evaluation of intimate-partner homicide.

Unfortunately, Victoria's reformers did not go far enough in curbing the influence of excuses on the criminal law. Despite elevating the significance of relationship history and social context in terms divorced from psychology, they failed to jettison BWS evidence. Moreover, although they wisely created a legal category of defensive homicide, which serves as a safety net for abuse survivors whom a jury does not want to acquit,²⁴ they did not make sufficiently clear that this mitigating doctrine could be conceived as a partial justification based on a moral judgment about the reasons the defendant killed, rather than as a partial excuse for irrationality. Finally, they imported duress, still tethered to BWS evidence, into their homicide statute,²⁵ which further muddled the evaluative orientation of their reform package.

The weaknesses of Victoria's revolution in homicide law are as instructive as its strengths because they demonstrate the ways in which the feminist re-telling of criminal justice history has obscured the nuanced role of gender in homicide defenses. Despite producing a thoughtful analysis, the Victorian Law Reform Commission (VLRC or Commission)—the statutory body that spearheaded the overhaul—failed to free itself from the shortcomings of the feminist oppression story. A more balanced reading of provocation's evolution yields important insights about the operation of partial defenses. Although excuse-based doctrines have for centuries

²¹ See Crimes (Homicide) Act, 2005, § 6 (Vict. Acts No. 77/2005); Criminal Code Amendment (Abolition of Defence of Provocation) Act, 2003, (Tas. Acts No. 15/2003); VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 27, 29-30, 34. For a discussion of public outrage over the successful use of the provocation doctrine to defend jealous men who killed their female intimate partners, see *infra* notes 163-65, 306 and accompanying text.

²² See *supra* note 18 (collecting feminist critiques); see also WILSON, *supra* note 11, at 56-58 (criticizing BWS evidence from a conservative angle).

²³ See VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at xxi, xxv.

²⁴ Crimes (Homicide) Act, 2005, § 6, 9AD.

²⁵ Crimes (Homicide) Act, 2005, §§ 6, 9AG (Duress) & 9AH (3)(b) & (e) (Family Violence Evidence) (Vict. Acts); see VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 121 (advocating admissibility of BWS evidence in context of duress).

broadcast negative messages about women when used on behalf of abused female defendants charged with murder,²⁶ reliance on excuses coexisted as early as the nineteenth century with an alternate defense strategy—the moral condemnation of violence against women.²⁷ Concern about policing norms of respectable masculinity also helped secure murder convictions of violent men.²⁸ Indeed, only in the last fifty years or so has a turn toward expansive, excuse-based mitigation unmoored from moral judgment significantly enlarged opportunities for men to escape severe punishment for separation killings. To be sure, the historical condemnation of intimate-partner homicide perpetrated by men and the corresponding sympathy for abused women charged with murder arose in part from paternalistic views of the male duty to protect the so-called weaker sex.²⁹ Gender roles have changed dramatically in the last century, but this should not blind feminist reformers to the legal and rhetorical potential of moral judgment in the modern criminal law. Seeing partial defenses through the lens of justification allows us to narrow their operation in a way that tracks a modern appraisal of the values underpinning a defendant's lethal conduct.

This Article proceeds in three major parts. Part II suggests that, in criminal justice systems based on English precedents, the provocation doctrine of the nineteenth and early twentieth centuries offered a narrower safe harbor for violent men than does the modern version. Despite its paternalism, the traditional approach to intimate-partner homicide generally condemned male brutality against women and took past abuse into account in female defendants' cases. Part II thus contends that, rather than supporting the retention of the expansive modern provocation doctrine, historical analysis bolsters the case for its abolition or at least its curtailment.

Part III first provides background information about intimate-partner violence and related laws in modern Australia and expresses concern about feminist approaches that inadvertently expand legal defenses for angry, violent men while they cast women as psychologically damaged. Part III then presents a critical analysis of the homicide reforms enacted in Victoria

²⁶ See, e.g., Ramsey, *supra* note 16, at 126-28 (discussing defenses based on women's supposed irrationality and weakness in late nineteenth-century New York and Colorado); see also Coughlin, *supra* note 18, at 28-42 (comparing BWS to such nineteenth-century excuses as the marital coercion defense, which presumed a married woman who committed a crime did so under her husband's coercion and which was grounded in psychological theories about women's feeble-mindedness).

²⁷ See *infra* notes 82-88 and accompanying text.

²⁸ See *infra* notes 43-50, 53-72 and accompanying text.

²⁹ See *infra* notes 40, 73-74 and accompanying text.

in 2005 and briefly compares them to the abolition of the provocation defense in Tasmania and Western Australia.

Part IV assesses the applicability of the recent Australian reforms to the United States. Because American sentencing regimes are now in flux, some states may be willing to shift consideration of provocation claims to sentencing, as Victoria has done. However, even if constraints on discretion in sentencing preclude a line-by-line graft of Victoria's changes onto American codes,³⁰ moral evaluation informed by equality principles should be adopted and the role of excuse doctrines curtailed. Specifically, in the United States, legislatures ought to repeal EMED statutes based on the Model Penal Code. If the provocation defense is retained in any form, its operation should be restricted by categorical exclusions for unjustifiable beliefs or emotions that led the defendant to kill. American lawmakers can also learn from other aspects of Victoria's reform package. For example, widespread adoption by the states of an imperfect self-defense or "defensive homicide" provision would offer a desirable outcome between murder convictions and acquittals if, in contrast to Victoria's approach, such a defense were expressly theorized as a partial justification stemming from the deceased's violence, rather than as a concession to mental abnormality.

II. THE DOORWAY TO EFFECTIVE CHANGE: REVISING FLAWED LEGAL HISTORIES OF INTIMATE-PARTNER HOMICIDE

A. WHY LEGAL HISTORY MATTERS

Scholars who defend the provocation doctrine often appeal to the weight of history in making their arguments. Joshua Dressler contends that the partial defense has a long heritage that should not be discounted,³¹ and Wilson includes it among the time-honored traditional doctrines he wants to retain.³² Yet neither explains why its age should make it more defensible against charges of its unfairness to women, who for centuries had no hand in establishing or maintaining it. Moreover, even historical arguments against placing the burden of proving heat of passion on defendants concede that the defense could be abolished completely without violating the United States Constitution.³³

³⁰ See *infra* notes 272-79 and accompanying text.

³¹ Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 963 (2002).

³² WILSON, *supra* note 11, at 103.

³³ *Patterson v. United States*, 432 U.S. 197, 228 (1977) (Powell, J., dissenting).

On the feminist side there is a tendency to reduce the history of murder defenses to a simple narrative of gender discrimination against female defendants that is weakened by empirical evidence that women in United States, Britain, and Australia have been acquitted of murder more often than their male counterparts.³⁴ Thanks to Jeremy Horder's influential legal history of the evolution of provocation from a partial justification for defense of honor to a partial excuse for loss of self-control,³⁵ scholars and lawmakers generally realize that the doctrine changed over time.³⁶ Nevertheless, many detractors continue to see the justification- and excuse-based versions of provocation as different forms of the same kind of patriarchy,³⁷ although the latter, more expansive approach is actually much worse.³⁸

The legal treatment of murder cases in the nineteenth and early twentieth centuries embodied two strands. The first strand, which the scholarly literature has more often recognized than the second, was the excusing sympathy of courts, juries, and the public for supposedly damaged, hysterical females.³⁹ If a woman's irrationality was emphasized at trial, the jury would often acquit her on grounds of insanity. However, a second and more remarkable strand existed, too: the moral condemnation of excessively violent men. Over the course of the nineteenth century, this strand increasingly led to murder convictions for male defendants and more lenient treatment of wronged women charged with killing their abusers. Indeed, it allowed female defendants to contend that they had acted as

³⁴ For female defendants' greater likelihood of being acquitted or convicted of a lesser crime than murder, see *supra* note 10 and *infra* notes 76-79 and accompanying text.

³⁵ JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* 2, 23-25, 72 (1992).

³⁶ For example, the VLRC cited Horder's book when it provided historical background to its recommended reforms. See VLRC, *DEFENSES TO HOMICIDE*, *supra* note 3, at 21.

³⁷ See, e.g., Wells, *supra* note 18, at 88 (making such an assumption); "My Twin Sister Was Cut Off in Her Prime and She Will Probably Be out in Maybe Four . . . Five Years": *Murder Law Change*, *HERALD SUN* (Austl.), Nov. 19, 2004, at 7 (reporting that Victoria Attorney General Rob Hulls cited the provocation defense's origin as an honor-killing doctrine as proof that it was outdated, but also criticized it for being used as an excuse).

³⁸ See Nourse, *supra* note 17, at 1332; see also Caroline Forell, *Homicide and the Unreasonable Man*, 72 *GEO. WASH. L. REV.* 597, 609 (2004) (reviewing CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM*) (commenting that the EMED doctrine "is an example of Reva Siegel's 'preservation through transformation,' only worse" because the modern doctrine "does not just preserve the old forms of male bias, it expands them").

³⁹ See Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 *ALB. L. REV.* 973, 993 (1995) (stating that, historically, "the most obvious explanation when an otherwise respectable woman responded violently to abuse was that she was insane"); see also Coughlin, *supra* note 18, at 28-42 (discussing the ways paternalistic sympathy for women's supposed weakness allowed them to escape criminal responsibility).

responsible moral agents, and it permitted courts to bar men's partial-defense theories based on simmering sexual jealousy or other emotions outside the traditional provocation doctrine's narrow bounds.

The gendered values underpinning such appraisals have changed dramatically over time. Extreme violence against women was considered unmanly in the late nineteenth century,⁴⁰ whereas today we condemn it as the sexist denial of women's equality and autonomy. Nevertheless, historically, legal outcomes in domestic murder cases came closer than might be expected to what many modern feminists consider desirable. I do not mean that men who kill out of a desire to control their female intimates should receive capital punishment or that a return to paternalistic solicitude for female weakness should be a feminist goal. I simply mean that, in the late nineteenth and early twentieth centuries, there were fewer excuses for lethal violence against women than there are today.

Twentieth-century changes generally did not improve legal approaches to intimate-partner homicide. As the provocation doctrine was expanded to incorporate the individual traits and psychological impairments of the defendant, it became easier to defend jealous, controlling men based on theories of cumulative (and almost completely irrational) rage. Furthermore, increased reliance on psychological defense strategies, now bolstered by BWS evidence, stigmatized the female defendants it was intended to help without distinguishing appropriately between the various levels of innocence or guilt these women displayed.

Part II has three modest aims. First, it describes a nineteenth- and early twentieth-century trend toward convicting male defendants of murder for killing female intimates. Second, it provides examples of cases from the same time period in which women successfully raised self-defense claims or were at least treated sympathetically due to their fear of physical victimization by the deceased. Finally, Part II explains why the expansion of the provocation doctrine through more individualized consideration of the defendant's circumstances, including his volitional impairment, and the repudiation of the cooling-time limit made it easier for jealous, angry men to obtain mitigation.

B. THE LIMITS OF MITIGATION FOR MEN

There have always been gender asymmetries in the identity of murderers. Across centuries and geographic boundaries, males outnumber

⁴⁰ See Ramsey, *supra* note 16, at 124-25.

females as both perpetrators and victims of homicide.⁴¹ In modern Australia, for example, men commit seven out of eight killings.⁴² Yet, in the nineteenth and early twentieth centuries, intolerance of many types of provocation claims became a mark of civility.⁴³ The fate of many men who killed their wives or girlfriends was thus transformed from a choice between verdicts, including manslaughter or acquittal, to a choice between gradations of punishment for murder.⁴⁴ Data that legal historians have culled in the United States, Britain, and Australia suggest this to be true across the English-speaking world,⁴⁵ with the possible exception of the American South.⁴⁶ Although male dominance over women permeated the legal history of countries founded in the Anglo tradition, such dominance was not uncomplicated. It involved the policing of men by other men, including the punishment of those who transgressed by killing their spouses. This punishment was understood to be a moral imperative, not simply a means of preserving male power. Indeed, the denunciation of male brutality toward women seems to have become widespread due to a complex confluence of religious ideals, notions of respectability, and the

⁴¹ See *id.* at 142 n.212 (collecting studies that show such a gender imbalance in homicide offending); see also PROVOCATION IN SENTENCING, *supra* note 10, at 111 app. 2 (noting that, in Australia, homicides are overwhelmingly committed by men).

⁴² Jenny Morgan, *Who Kills Whom and Why: Looking Beyond the Legal Categories 7* (Victorian Law Reform Commission Occasional Paper, 2002).

⁴³ See MARTIN J. WIENER, MEN OF BLOOD: VIOLENCE, MANLINESS AND CRIMINAL JUSTICE IN VICTORIAN ENGLAND 199-200, 239 (2004); Ramsey, *supra* note 16, at 141-56; see also Carolyn Strange, *Masculinities, Intimate Femicide, and the Death Penalty in Australia, 1890-1920*, 43 BRIT. J. CRIMINOLOGY 310, 334 (2003) (“[J]udges’ sentencing statements and newspaper editorials periodically clarified not only the illegality of lethal violence but the cultural illegitimacy of claiming jealousy and wounded masculine pride to justify femicide.”).

⁴⁴ See WIENER, *supra* note 43, at 222 (making this observation about British cases); Ramsey, *supra* note 16, at 156 (noting that the main difference between the fate of male intimate-murder defendants in New York and Colorado between 1880 and 1920 was that, in New York, they tended to be executed, rather than receive life sentences); Strange, *supra* note 43, at 318 (stating that complaints about their victims’ behavior “did not save men from conviction in the[] 64 capital cases [that she studied], but it did save capitally convicted husbands and lovers from the gallows”). For further discussion of Australian cases, see *infra* notes 53-55, 65-67, 71-72 and accompanying text.

⁴⁵ See *infra* notes 43-72 and accompanying text.

⁴⁶ For example, Texas courts “regularly excused homicides committed well outside the time frame of the adultery—that is to say, *in flagrante delicto* was no longer a factor for manslaughter.” JOHN PETTEGREW, BRUTES IN SUITS: MALE SENSIBILITY IN AMERICA, 1890-1920 299 (2007). However, many of these cases involved men who killed the wife’s paramour, rather than being intimate-partner homicides. See *id.* at 298-302 (discussing not only the heat-of-passion defense, but also a Texas “paramour statute” that treated a man’s killing of his wife’s lover as justifiable homicide and that courts liberally construed to justify killings based on circumstantial evidence, rather than actual witnessing of adultery).

indignation of liberal thinkers like John Stuart Mill and Harriet Taylor at the maltreatment of wives.⁴⁷

Martin Wiener has identified a trend in England “begun in the eighteenth century but only coming to fruition in the nineteenth” of seeing women as “more moral and more vulnerable than hitherto, while men were being described as being more dangerous, more than ever in need of external disciplines and, most of all, of *self*-discipline.”⁴⁸ Thanks to the important position of women in the spiritual household, such trends may have started even earlier in colonial America, where Puritan influence led to the criminalization of domestic violence in the seventeenth century.⁴⁹ By the mid-1800s, “[k]indly treatment of one’s wife . . . became an important qualification for full citizenship” in both countries.⁵⁰

Conditions for white women in Australia during the era in which New South Wales, Tasmania, and Western Australia served as penal colonies were worse than elsewhere in the English-speaking world. Feminist scholar Anne Summers asserts that “[f]rom 1788 until the 1840s almost *all* women [in Australia] were categorized as whores,” and historians concur that the sexual commodification of female convicts constituted a prevalent aspect of social relations in the penal colonies.⁵¹ The “damned whore” taint also extended to some non-convict, immigrant women who arrived in Victoria, South Australia, and other parts of the continent.⁵² However, even in colonial Australia, men were prosecuted, convicted, and punished for

⁴⁷ See WIENER, *supra* note 43, at 151-62 (describing such influences in nineteenth-century England); Ramsey, *supra* note 16, at 124-25, 148-49 (discussing Victorian ideals of respectable manhood, including that of the Christian Achiever in the United States).

⁴⁸ WIENER, *supra* note 43, at 3 (emphasis in original).

⁴⁹ See ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 4 (1987). *But cf.* MARY BETH NORTON, *FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* 78 (1996) (contending that spousal abuse prosecutions in colonial America “did not necessarily stem from the belief that a husband was wrong to use force against his wife, although that was what the Massachusetts statute stated. Rather, the state and the community stepped in to mediate marital disputes when one or both parties seemed to have lost sight of their appropriate roles—when wives failed to submit to their husbands’ rule, when husbands ceased to govern wisely”).

⁵⁰ WIENER, *supra* note 43, at 161; see Ramsey, *supra* note 16, at 124-25 (discussing nineteenth-century ideals of manliness in the United States); *cf.* Strange, *supra* note 43, at 311 (noting that judges’ sentencing statements, internal legal memoranda, and news articles “periodically expressed masculine disapproval of husbands’ misused marital authority” in New South Wales).

⁵¹ ANNE SUMMERS, *DAMNED WHORES AND GOD’S POLICE* 267, 313-16 (1994); see also JUDITH A. ALLEN, *SEX & SECRETS: CRIMES INVOLVING AUSTRALIAN WOMEN SINCE 1880* 4-5 (1990); PAULA J. BYRNE, *CRIMINAL LAW AND COLONIAL SUBJECT: NEW SOUTH WALES 1810-1830* 39, 50, 287 (1993).

⁵² SUMMERS, *supra* note 51, at 323.

murdering their female intimates. Indeed, out of a sample of twenty-five intimate homicide cases in New South Wales between 1824 and 1840, twenty-one of which involved male defendants, eleven men were convicted of murder, five were convicted of manslaughter, and another five were acquitted.⁵³ The case of Matthew Miller, a constable tried for murdering his wife, provides an apt example. Miller admitted that he strangled his wife out of jealousy because he suspected her of having a paramour. Yet, despite citing her infidelity to explain his violence and pleading temporary insanity, he was convicted of murder and sentenced to death.⁵⁴ In another case, William Bowles was executed for the fatal stabbing of his estranged spouse after the couple separated and the deceased told Bowles she wanted nothing further to do with him.⁵⁵

The first opportunity to show leniency toward male killers after arrest was the charging decision; yet men who killed their wives or girlfriends in the nineteenth and early twentieth centuries most often faced trial for murder. Indeed, magistrates and prosecutors were reluctant to accept pleas to manslaughter in such cases.⁵⁶ At trial, defendants faced doctrinal constraints when seeking mitigation based on the deceased's allegedly provoking behavior. Mere words, suspicion of adultery, wifely drunkenness, and neglect of household duties fell outside the traditional heat-of-passion categories for much of the nineteenth century,⁵⁷ and judges

⁵³ See Appendix *infra*. This data was compiled using DIVISION OF LAW, MACQUARIE UNIV., DECISIONS OF THE SUPERIOR COURTS OF NEW SOUTH WALES, 1788-1899, available at <http://www.law.mq.edu.au/scnsw> (last visited Nov. 9, 2009).

⁵⁴ Miller's sentence was later commuted to transportation for life. R. v. Miller (N.S.W.S. Ct. Cas. 1828), available at http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r_v_miller_1828.htm.

⁵⁵ R. v. Bowles (N.S.W.S. Ct. Cas. 1835), available at http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_bowles_1835.htm.

⁵⁶ See Carolyn B. Ramsey, *The Discretionary Power of Public Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1365-66 (2002); see also WIENER, *supra* note 43, at 188 (noting that magistrates became more likely to charge male defendants with murder in wife-killing cases, even when the man had used no weapon and been burdened with a drunkard spouse).

⁵⁷ See WIENER, *supra* note 43, at 178-79, 192 (describing the limits of the provocation doctrine in nineteenth-century England); Ramsey, *Intimate Homicide*, *supra* note 16, at 144-52 (describing the narrow application of the provocation defense to male defendants' cases in the western and northeastern United States during the late 1800s and early 1900s). In Australia, insults and female insubordination may have been deemed more provoking than in the United States. See G.D. WOODS, A HISTORY OF CRIMINAL LAW IN NEW SOUTH WALES: THE COLONIAL PERIOD, 1788-1900 347 (2002) (noting that a legislative act in 1883 expanded legally adequate provocation to include "grossly insulting language, or gestures, on the part of the deceased"). *But cf.* WILLIAM HATTAM WILKINSON, FREDERICK BUSHBY WILKINSON & JOHN HUBERT PLUNKETT, THE AUSTRALIAN MAGISTRATE 255 (6th ed. 1894) (stating that, even after this statutory change, words or gestures were only recognized as provoking "in

strictly enforced the cooling-time limit as well. Although the provocation doctrine had begun to be reinterpreted as a concession to human frailty,⁵⁸ its limits derived from early-modern foundations, steeped in Aristotelian philosophy, that saw anger as “driven on by the desire of honour yet amenable to the rule of reason.”⁵⁹ A hybrid doctrine that contained elements of both justification and excuse had emerged, but in the 1800s courts still held defendants to objective criteria rooted in the normative

certain exceptional cases”) (citing 46 Vic., No. 17, § 370). Some American courts also began to send verbal provocation cases to the jury in the second half of the nineteenth century. *See* *Maier v. People*, 10 Mich. 212 (1862) (stating that the sufficiency of the provocation generally should be a jury question). However, others still held mere words insufficient as a matter of law. *See, e.g., People v. Turley*, 50 Cal. 469, 470 (1862) (affirming the denial of a heat-of-passion instruction for a defendant who claimed to have been provoked by “words of reproach only”); *see also* CHARLES FAIRALL, *CRIMINAL LAW AND PROCEDURE OF CALIFORNIA INCLUDING THE PENAL CODE OF CALIFORNIA* 276 (1906) (stating that “words of reproach, however grievous,” did not constitute sufficient provocation in California).

When wifely provocation was at issue, juries, magistrates, and prosecutors seem to have felt the most sympathy for men whose spouses were intemperate. My research suggests that, in both the United States and Australia, beating cases involving alcoholic victims were sometimes charged as manslaughter or reduced to this lesser offense in the guilt phase. *See, e.g., Coversheet and Deposition of Charles Mackin, surgeon, Queen v. Balmer*, Case 12, Unit 245 (1862), Criminal Trial Briefs, VPRS 30/P/O, Public Record Office Victoria (PROV) (on file with author) (showing that a habitual wife-abuser was only charged with and convicted of manslaughter for fatally beating his intemperate spouse); Untitled, ARGUS (Melbourne, Austl.), Dec. 18, 1862, at 5 (on file with author) (reporting that a jury found Nathaniel Gardiner guilty of manslaughter, not murder, for killing his drunken wife when she spoke impudently to him); *Wife Murder*, ARGUS, Dec. 19, 1862, at 7 (on file with author) (further noting that the victim in the *Gardiner* case failed to cook her husband’s dinner); *see also* Ramsey, *supra* note 16, at 115-16 (discussing American manslaughter cases in which men fatally beat their drunken wives); *cf.* WIENER, *supra* note 43, at 192 (“Even if judges thought a beating death of a drunken wife were indeed murder, as was increasingly happening from the 1860s, juries were reluctant to agree.”).

⁵⁸ For example, by 1872, voluntary manslaughter was formally designated an “excusable” homicide in California. THE PENAL CODE OF CALIFORNIA 54, ¶ 195 (1872); *see also* FAIRALL, *supra* note 57, at 276 (“It is only out of regard for human frailty that the law will extenuate murder to manslaughter.”). This gradual evolution of the doctrine had begun in Australia by the end of the nineteenth century as well. *See* WILKINSON, WILKINSON & PLUNKETT, *supra* note 57, at 148 (stating that provoked killings were not excusable, but that “the law pays regard to human frailty as not to put a hasty and a deliberate act on the same footing with regard to guilt”).

⁵⁹ HORDER, *supra* note 35, at 43. Early modern “judges and commentators gave the element of excuse little by way of attention compared with the element of justification for action in anger.” *Id.* at 85. The defendant was not completely exonerated, however, because he had overreacted by killing the provoker. The manslaughter conviction reflected a judgment that he had inflicted too much (disproportionate) retribution. *See id.* at 52. Horder notes that, in the nineteenth century, the original justifying categories remained largely intact, even as provocation began to be recast as loss of self-control. *See id.* at 87.

assumption that “a reasonable man should exercise patience and forbearance” in the face of most kinds of abuse.⁶⁰

Even the most strongly gendered category of legally provoking victim behavior—sudden discovery of one’s wife in the act of adultery—was limited to that scenario. Thus, despite the nineteenth-century obsession with female chastity, appellate courts affirmed murder convictions of men who killed their allegedly unfaithful wives after a time lapse or upon mere suspicion of adultery.⁶¹ The gradual shift toward seeing provocation as loss of self-control did not preclude courts in the past from concluding that “[a] man may deliberate, may premeditate and intend to kill . . . and to a large extent be controlled by passion at the time.”⁶² Such jealous husbands received first-degree murder convictions and sometimes even the death penalty. Indeed, as Adrian Howe notes, “more than fifty years ago an English judge pronounced Othello guilty of murder. In his eyes, there was nothing morally ambiguous about the slaughter of his wife, even if Iago had been telling the truth.”⁶³

Outside the iconic category of witnessed infidelity, the criminal law of the late nineteenth and early twentieth centuries refused to recognize a woman’s attempt to leave a man as legally adequate provocation. Thus, in New York in 1896, a male defendant was convicted of capital murder for following his wife to a neighboring house and fatally shooting her when she separated from him and threatened to seek a divorce.⁶⁴ Such convictions and punishments were common in late nineteenth-century New York and elsewhere in the United States. The case of Sidney Solomon in New South Wales, Australia, provides another compelling example. Solomon beat, choked, and punched his wife during her pregnancy. After the couple

⁶⁰ FAIRALL, *supra* note 57, at 276 (explaining why “words of reproach” were not sufficient provocation in California).

⁶¹ *See, e.g.,* *People v. Arnold*, 48 P. 803, 803-04 (Cal. 1897) (“While ‘the sight of adultery committed by his wife’ may be . . . sufficient provocation to the husband which will justify that ‘heat of passion’ which is sufficient to reduce murder to manslaughter, the knowledge of such fact must be based on something more tangible than mere surmise, and the knowledge must be so recent as to preclude the idea of cooling time or premeditation.”). A similar legal situation prevailed in Victorian England. *See* WIENER, *supra* note 43, at 230 (“Mere jealousy was not to be allowed as mitigation for taking life, and indeed was harshly condemned, especially so in the later years of the [nineteenth] century, when such cases almost always produced murder verdicts, and nearly all of these convicts were left to hang.”).

⁶² *People v. Jones*, 2 N.E. 49, 52 (N.Y. 1885) (affirming a first-degree murder conviction of a defendant for fatally shooting his first wife).

⁶³ Adrian Howe, *Provocation in Crisis—Law’s Passion at the Crossroads? New Directions for Feminist Strategists*, 21 AUSTL. FEMINIST L.J. 53, 67-68 (2004).

⁶⁴ *See* *People v. Youngs*, 45 N.E. 460, 460-61 (N.Y. 1896) (noting that the facts of this case, in which the defendant claimed insanity, also did not show any provocation).

separated, Solomon came to his in-laws' house, asking for twenty pounds. His father-in-law reminded him of a bond to keep the peace that he had posted and threw him off the property. Solomon left, accompanied by his wife, but shot her to death in the street. A jury convicted him of capital murder in 1930, although his sentence was subsequently commuted to penal servitude for life.⁶⁵

Courts and juries also treated the lethal rage of spurned suitors with severity; in fact, unmarried men had even less success claiming provocation than cuckolded or abandoned husbands did.⁶⁶ As Carolyn Strange remarks about nineteenth-century Australia, “[i]n a period when informal heterosexual unions were still frowned upon in respectable circles, and when marriage was the key marker of adult status for men and women, unmarried men had greater difficulty than husbands did when it came to convincing respectable men that their femicidal violence was understandable.”⁶⁷ Similarly, in the United States, both the formal law and social mores “condemned vengeful conduct by rejected suitors as ‘cowardly and unmanly.’”⁶⁸

The sentencing of men convicted of intimate murder varied. In some jurisdictions, such as the American state of New York, the capital punishment of wife-killers constituted a remarkably high percentage of total executions.⁶⁹ Wiener contends that, in England, “the later nineteenth century saw an increase in the level of punishment for wife-killing, particularly as compared with other killings” and notes that hangings of

⁶⁵ See Clerk of the Peace, Register of Cases Heard Before the Central Criminal Court, 1923-1930, 19/13210, at 499 (Sidney Solomon, 1930), State Record Office New South Wales (“SRNSW”) (on file with author) (recording the conviction); Coversheet, *Rex v. Solomon*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7321 (1930, Central), SRNSW (on file with author) (same); *Solomon Case: Sentence Commuted*, SYDNEY MORNING HERALD, May 28, 1930, at 13 (on file with author) (reporting that Solomon’s death sentence was commuted to imprisonment for life). For information on the couple’s separation and the victim’s pregnancy, see Deposition of Bernard Montgomery Garland, Coroner’s Inquest, at 14-15, *Rex v. Solomon*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7321 (1930, Central), SRNSW (on file with author). For information about the events immediately preceding the victim’s death, see Deposition of Phyllis Maude Garland, Coroner’s Inquest at 11, 13, *Rex v. Solomon*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7321 (1930, Central), SRNSW (on file with author). Sidney Solomon’s case, as well as those of other Australian wife-killers, will be analyzed in greater detail in my forthcoming legal history of public responses to intimate-partner violence in Australia and the American West.

⁶⁶ See, e.g., Ramsey, *supra* note 16, at 151-52 (discussing the case of Martin Foy, who was executed in New York in 1893 for the stalking murder of his former paramour).

⁶⁷ Strange, *supra* note 43, at 324.

⁶⁸ Ramsey, *supra* note 16, at 152.

⁶⁹ See *id.* at 156, 158 tbl.4.

Englishmen who murdered their spouses were on the rise in the 1890s.⁷⁰ In Australia, male prisoners were more likely to serve prison terms for killing their wives or girlfriends than to hang for it. Yet such outcomes often resulted from the commutation of death sentences for murder, rather than from jury leniency or legal doctrines favoring men.⁷¹ Moreover, some male prisoners in Victoria and other Australian jurisdictions went to the gallows for killing female intimates in the late nineteenth and early twentieth centuries.⁷²

C. THE DEFENSE OF WOMEN WHO KILLED MALE INTIMATES

The legal treatment of intimate homicide in the past occurred in a system that precluded women's full citizenship. Females were presumed physically and emotionally weak, barred from the sphere of business and politics, and deemed in need of protection from more powerful, worldly men.⁷³ The law of coverture rendered wives unequal, subordinate, and dependent throughout much of the nineteenth century.⁷⁴

⁷⁰ WIENER, *supra* note 43, at 164; *see id.* at 210.

⁷¹ *See* Strange, *supra* note 43, at 310-11, 315.

⁷² For an example of a capital intimate-murder case that resulted in execution, see Register of Decisions on Capital Sentences, 1851-1889 (John McDonald, 1860), VPRS 7583/P0001/1, PROV (on file with author) (recording McDonald's execution); *see also* Untitled, ARGUS (Austl.), Sept. 4, 1860 at 4 (on file with author) ("The man McDonald lately convicted of the murder of his wife, under circumstances of peculiar atrocity, at Ironbark Gully, Bendigo, was executed yesterday morning . . ."). For an example of gubernatorial clemency toward a wife-killer from the same time period, see Register of Decisions on Capital Sentences, 1851-1889, VPRS 7583/P0001/1 (William Smith, 1860), PROV (on file with author) (noting commutation of death sentence to imprisonment for life with hard labor and three years in irons); *see also* Deposition of Dr. William Tarrant Merson, Coroner's Inquest, Queen v. Smith, Case 3-339-31, Unit 136 (1860), Criminal Trial Briefs, VPRS 30/P/0, PROV (on file with author) (stating that deceased had a broken neck and that she had also been whipped and kicked with nailed boots). The case of John McDonald, as well as those of other Australian wife-killers, will be analyzed in greater detail in my forthcoming legal history of public responses to intimate-partner violence in Australia and the American West. The relatively comprehensive empirical data available for New South Wales indicates that, despite the mandatory death penalty for murder, less than 10% of sixty-four intimate femicide and attempted femicide convictions between 1890 and 1920 resulted in executions. *See* Strange, *supra* note 43, at 315. Thus, gubernatorial clemency based on provocation claims was common in Australian wife-murder cases, but any domestic discount that existed "did not amount to *carte blanche* for men to kill women." *Id.* at 311.

⁷³ *See* Ramsey, *supra* note 16, at 126.

⁷⁴ *See* HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 121 (2000); *see also* BLACKSTONE, *supra* note 15, at 430-32 (explaining the concept of coverture); Hilary Golder and Diane Kirkby, *Marriage and Divorce Before the Family Law Act 1975*, in SEX, POWER, AND JUSTICE, *supra* note 14, at 156 (discussing the implications of coverture in nineteenth-century Australia); Elizabeth Cady Stanton, *Address to the Legislature of the State of New York* (1854), in 1 HISTORY OF WOMAN SUFFRAGE, 1848-1861 595-99, 602-05 (Elizabeth

Such inequality did not mean that women were disproportionately convicted of murder, however. Rather, by the early nineteenth century, a diminution of “powerful fears and horror earlier evoked by female killers, in contrast to the hardening attitudes toward violent men” was evident in the criminal courts.⁷⁵ Data from such American states as New York, Colorado, and Illinois suggest that juries acquitted women or convicted them of manslaughter much more often than murder.⁷⁶ In England, decisions not to prosecute defensive husband-killings or to commute death sentences in such cases increased. Wife-killers in the last third of the nineteenth century were “slightly more likely to be found guilty” and “much more likely to be hanged” than husband-killers.⁷⁷ Although the available empirical evidence indicates higher conviction rates for women charged with killing their male intimates in Australia than in England or the United States, just under half of all female murder defendants were acquitted in a Sydney suburb in the late nineteenth century.⁷⁸ When Australian women turned to deadly weapons instead of poison, which was associated with premeditated killings, they enjoyed greater success in raising provocation defenses.⁷⁹

Exculpation or mitigation for accused women took two forms, which were sometimes intertwined: the justification of a wronged woman’s lethal act or the sympathetic acceptance of an insanity theory.⁸⁰ Insanity determinations even led to the dismissal of the case before trial if the woman was deemed completely delusional.⁸¹ In contrast, wronged

Cady Stanton, Susan B. Anthony & Matilda Joslyn Grange eds., reprint ed. 1985) (describing women’s legal, political, and social disabilities in the mid-nineteenth-century United States).

⁷⁵ WIENER, *supra* note 43, at 123; *see* Ramsey, *supra* note 16, at 105, 139-44, 176-78 (observing this contrast later in the nineteenth century).

⁷⁶ Jeffrey S. Adler, “I Loved Joe But I Had to Kill Him”: *Homicide by Women in Turn-of-the-Century Chicago*, 92. J. CRIM. L. & CRIMINOLOGY 867, 883-84 (2002) (showing that “every white woman who killed her husband [in Chicago] between August, 1905 and October, 1918 was exonerated or acquitted, totaling thirty-five consecutive cases”); Ramsey, *supra* note 16, at 121-22 tbls.1-2 (presenting data from New York County, New York, and Denver County, Colorado).

⁷⁷ WIENER, *supra* note 43, at 165-66; *see id.* at 132-33, 149 (discussing non-prosecution and clemency).

⁷⁸ ALLEN, *supra* note 51, at 41.

⁷⁹ *See id.* at 111.

⁸⁰ *See* Ramsey, *supra* note 16, at 128.

⁸¹ This occurred, for example, in the case of Sarah Elizabeth McDonald, who was charged with poisoning her husband in New South Wales in 1930. After being certified insane, McDonald was confined to the Parramatta Mental Hospital. *See* NEW SOUTH WALES POLICE GAZETTE, NRS 10958, Reel 3606, at 325, SRNSW (on file with author); *Insane Woman Poisons Husband*, SYDNEY MORNING HERALD, March 8, 1930, at 21 (on file with author).

women's cases typically involved a homicide that defense lawyers characterized as either the jilted woman's honor-killing of her unfaithful seducer or an act of self-defense against a violent spouse.⁸² Homicide scenarios considered "justifiable" in the late 1800s and early 1900s were thus remarkable for the degree of moral condemnation directed at the deceased man who drove the female defendant to kill.

In confrontational self-defense cases involving close temporal proximity between the deceased's attack and the defendant's use of lethal force, the law allowed evidence of past domestic violence to be admitted. Female defendants could thus obtain acquittal on the basis of a self-defense instruction.⁸³ For example, in New South Wales in 1910, a jury found Caroline Buckman not guilty of murder for fatally shooting her abusive husband when he ran over her on his horse and attacked her with a stick.⁸⁴

Non-confrontational cases posed greater difficulties for the defense, as they do today. Courts often told the jury not to consider past-abuse evidence if there had been no imminent attack. In Victoria in 1884, for instance, Mary Silk was convicted and sentenced to death for murdering her brutal, drunken husband, who had allegedly threatened her with a gun and committed incest with their daughter. The jury wanted to extend mercy "on account of her husband's flagrant misconduct, but so much time intervened after this misconduct and the pursuit of his wife with a gun before any

⁸² See Ramsey, *supra* note 16, at 118-21, 130 (analyzing New York cases involving female defendants who were acquitted of murder after killing their seducers); *see id.* at 125, 133-36 (discussing acquittals and lesser-included offense verdicts for women who killed physically abusive men). *But cf.* Marianne Constable, *Chicago Husband-Killing and the "New Unwritten Law"*, 124 TRIQUARTERLY 85, 88 (2006) (stating that women who killed husbands out of fear were often acquitted, whereas cases involving jealousy or betrayal "tended to be cases that led to conviction").

⁸³ See Ramsey, *supra* note 16, at 129-30 (discussing *People v. Taylor*, 69 N.E. 534 (N.Y. 1904), in which an appellate court found the exclusion of past-abuse evidence to be prejudicial error); *see also* WIENER, *supra* note 43, at 132 (discussing the self-defense acquittal of Harriet Webster in England in 1858); Constable, *supra* note 82, at 91 (stating that jury instructions and verdicts in Chicago cases as early as 1905 show that a female defendant might be exonerated if she "honestly believed she was in great danger of losing her life").

⁸⁴ See Supreme Court of Criminal Jurisdiction, Register of Criminal Indictments (1907-1919), 9/2635, Reel 1861 at 88 (on file with author) (recording acquittal); Coversheet, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (on file with author) (same). For the defendant's account of the events immediately preceding the shooting, see Deposition of Caroline Augusta Buckman, Coroner's Inquest at 55, *Rex v. Buckman*, Clerk of the Peace, Depositions and Papers of the Supreme Court and Circuit Courts, 9/7157 (1910, Armidale), SRNSW (on file with author). Caroline Buckman's case and those of other Australian husband-killers will be analyzed in greater detail in my forthcoming legal history of public responses to intimate-partner violence in Australia and the American West.

violence was inflicted by the prisoner as to preclude either being considered as any palliation at law.⁸⁵ Although the imminence requirement prevented an acquittal, the governor commuted Silk's death sentence to twenty years in prison with hard labor.⁸⁶

American and English juries often exonerated female defendants or found them guilty of the lesser offense of manslaughter when the evidence indicated they had suffered past abuse at the deceased's hands. These verdicts sometimes nullified instructions stating that brutal conduct did not justify or excuse murder.⁸⁷ Yet judges also occasionally acknowledged the relevance of past-abuse evidence to justifiable homicide in non-confrontational situations, indicating a willingness to expand the time frame to consider events that occurred prior to the lethal incident.⁸⁸

Defense attorneys sometimes blended the images of the wronged woman and the hysterical female, even when the defendant's emotions and beliefs had some moral legitimacy. Yet cases of women charged with killing their male partners in the nineteenth and early twentieth centuries nevertheless demonstrated the presence of two avenues to mitigation or acquittal. The depiction of female defendants as frail bundles of nerves might arouse sympathy, but juries were equally capable of taking the past history of the relationship into account and recognizing both the battered spouse and the violent man she killed as rational actors whose conduct should be judged by prevailing moral standards.

D. THE EXPANSION OF THE PROVOCATION DOCTRINE

In countries whose law derived from the English model, the provocation doctrine eventually underwent dramatic expansion. Changes in

⁸⁵ Report on the Case of Mary Ann Silk by Chief Justice William Stawell, March 19, 1885, *Queen v. Silk*, Unit 11 (1884), Victoria Capital Case Files, VPRS 264/P/0, PROV (on file with author). Mary Silk's case and those of other Australian husband-killers will be analyzed in greater detail in my forthcoming legal history of public responses to intimate-partner violence in Australia and the American West.

⁸⁶ See Register of Decisions on Capital Sentences, 1851-1889 (Mary Ann Silk, 1884), VPRS 7583/P0001/1, PROV (on file with author).

⁸⁷ See, e.g., WIENER, *supra* note 43, at 131-32 (describing judicial and jury sympathy for battered women who killed their abusers in Victorian England); Ramsey, *supra* note 16, at 125, 135-36 (discussing the cases of Beatrice Gordon and Carmella Fiorini, whose stories of abuse aroused jury sympathy in early twentieth-century Colorado); cf. Constable, *supra* note 81, at 89 (speculating that the "new unwritten law" in Chicago may have been "an early version of something like a battered woman's syndrome defense" in cases involving killings that "occurred during the course of one of many struggles").

⁸⁸ For example, the New York Court of Appeals found prejudicial error in a decision to exclude evidence of the deceased's past rape of the defendant, which would have contextualized the defendant's homicidal response to his refusal to marry her. See Ramsey, *supra* note 16, at 130 (discussing *People v. Barbieri*, 43 N.E. 635 (N.Y. 1896)).

the 1800s involved a greater focus on loss of self-control, as opposed to defense of honor; yet the retention of the limited, common law categories of adequate provocation preserved legal boundaries reflecting moral judgments about defendants' emotions and beliefs. By contrast, the twentieth century brought statutory and judge-made alterations that individualized the doctrine and made it much more subjective.

The new excuse-based approach seemed to point "inexorably towards the conclusion that whatever the provocation, be it serious or trivial, if it is found as a matter of empirical fact that defendants genuinely lost self-control before killing, the killing should be reduced to manslaughter."⁸⁹ Not all jurisdictions went so far, but many journeyed a good ways down this road. The modern standard in Australia will be described below.⁹⁰ In Britain and Canada, judicial decisions excused men's violent rage and jealousy in ever widening scenarios. Britain modestly extended the reasonable person test to include sex and age in the 1970s,⁹¹ but in the 2001 case of *Regina v. Smith*, the House of Lords authorized the jury to consider any "characteristic of the accused, whether temporary or permanent" that reasonably affected his ability to exercise self-control.⁹² Canadian decisions abandoned the "mere words" exclusion and allowed juries to mitigate whenever the defendant's traits or background "give the act or insult in question a special significance."⁹³

In the United States, the adoption by a substantial minority of jurisdictions of an EMED defense, based on Model Penal Code proposals, completely severed voluntary manslaughter from provocation and justifiable emotion. The Code directs the jury to decide whether the defendant killed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse," but further requires that this reasonableness analysis be done "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."⁹⁴ The Commentaries attempt to clarify that

⁸⁹ HORDER, *supra* note 35, at 95.

⁹⁰ See *infra* notes 101-19 and accompanying text.

⁹¹ Dir. of Pub. Prosecutions v. Camplin, [1978] A.C. 705 (H.L.).

⁹² R. v. Smith (Morgan), [2001] 1 A.C. 146 (H.L.). In recent years, however, the provocation defense has come under fire in Britain and, under the Coroners and Justice Act of 2009, it will be replaced with a new partial defense of "loss of control" for killings in response to fear or to a justifiable sense of being seriously wronged. Coroners and Justice Act, 2009, c. 25, Part 2, Ch. 1, §§ 54-56; see also *infra* notes 308-12 and accompanying text (discussing Britain's reforms).

⁹³ See 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, 48 (2006) [hereinafter Forell, *Gender Equality*] (discussing *R. v. Thibert* [1996] S.C.R. 37 (Can.)).

⁹⁴ MODEL PENAL CODE § 210.3(1)(b) (1962).

“idiosyncratic moral values are not part of the actor’s situation.”⁹⁵ But by instructing on EMED in cases in which a man killed his girlfriend’s lover for taunting him,⁹⁶ strangled a prostitute due to unrelated stress in his life,⁹⁷ fatally shot a former partner for dancing with another man,⁹⁸ or committed homicide for myriad other barely explicable reasons, American courts come close to affirming the defendant’s aberrant valuations.

The Model Penal Code approach repudiates the traditional cooling-time limit and indicates that the victim-as-provocateur does not need to have played a catalytic role. Indeed, no triggering event is required. A killer who brooded over his homicidal feelings, without even having a fully comprehensible desire for revenge, remains eligible for manslaughter mitigation. Such evasiveness about moral judgment puts great weight on the opinion of psychiatrists whose testimony may distract from a commonsense understanding that the killing arose from the defendant’s depraved valuations.⁹⁹ Unmoored from common law constraints, the EMED defense allows a sympathetic psychological expert to reinterpret the defendant’s history of increasingly brutal dominance over the victim as a logical progression from emotional trauma to uncontrollable violence. Of course, the jury need not believe the expert, but allowing the broad defense in the first place, without providing any fixed standard to guide jury deliberation, erodes the criminal law’s legitimacy and creates the potential for inconsistent, arbitrary results.

Expansive manslaughter mitigation thus partially excuses separation assaults and other homicides that the nineteenth-century provocation doctrine never contemplated. As we shall see, a similar change occurred in Australia, and it coincided with the “medicalization” of self-defense law.¹⁰⁰ Indeed, rather than eschewing images of female irrationality that sometimes conjured jury sympathy in the 1800s, the defense of battered women who killed their abusers has, in recent decades, relied even more heavily on psychological theories. Neither the subjectivization of the provocation doctrine nor the advent of the BWS strategy has benefitted women

⁹⁵ MODEL PENAL CODE AND COMMENTARIES § 210.3 cmt., at 62-63 (1980).

⁹⁶ *People v. Harris*, 740 N.E.2d 227, 229-31 (N.Y. 2000) (holding that the jury should have been instructed on EMED at trial of defendant for killing victim who taunted him about his girlfriend’s past and likely future infidelity).

⁹⁷ *State v. Kaddah*, 736 A.2d 902, 910-12 (Conn. 1999) (noting that an EMED instruction was properly given in this case).

⁹⁸ LEE, *supra* note 14, at 36-38.

⁹⁹ See Kahan & Nussbaum, *supra* note 6, at 325.

¹⁰⁰ See *infra* notes 121-31 and accompanying text (describing the medicalization of self-defense law, as well as such mitigating claims as diminished responsibility).

collectively in the long run, even though the latter did achieve acquittals for some horrifically abused defendants.

Abolishing or at least sharply circumscribing partial excuses for loss of self-control would help combat stereotypes of violent rage as a normal aspect of masculinity, while allowing the defense of women as rational actors whose resort to lethal force constituted a legitimate response to life-threatening abuse. Nineteenth-century moral judgment tracked nineteenth-century values; in an age before women could vote, attitudes toward female victims and defendants were unsurprisingly paternalistic. Yet, because excuses have in the end proved more illiberal than justifications, it may be time to embrace the latter, reinterpreted in light of modern equality norms.

III. INTIMATE-PARTNER HOMICIDE AND THE ABOLITION OF THE PROVOCATION DOCTRINE IN AUSTRALIA

A. HOMICIDE DEFENSES IN AUSTRALIA BEFORE THE REFORMS

Prior to the twenty-first century campaign to abolish the provocation doctrine, partial defenses to murder in Australia evolved toward an excuse-oriented focus on the overthrow of reason by emotion.¹⁰¹ The evolution of the provocation doctrine in Australia paralleled trends in the United States, Britain, and Canada. Part III.A considers the state of the pre-reform law as a prelude to discussing the recent legislative changes in Tasmania, Victoria, and Western Australia.

1. Provoking Conduct and Loss of Self-Control

The provocation doctrine in modern Australia operates as an excuse.¹⁰² According to a VLRC publication describing the pre-abolition state of the law in Victoria, “[t]he focus of the defence of provocation has . . . become the accused’s loss of self-control, rather than justifiable retribution The defence is now generally seen to be a ‘concession to human frailty,’ rather than an appropriate response to a breach of honour.”¹⁰³ The availability of manslaughter mitigation for the 2003 killing of Melbourne socialite Julie Ramage provides an example. James Ramage received an eleven-year manslaughter sentence with an eight-year non-parole period for beating and strangling his estranged wife to death after she allegedly insulted his lack of sexual prowess, admitted to having a lover, and told him

¹⁰¹ See *infra* notes 102-11 and accompanying text.

¹⁰² VICT. LAW REFORM COMM’N, DEFENCES TO HOMICIDE ISSUES PAPER 43 (2002) [hereinafter VLRC, ISSUES PAPER].

¹⁰³ *Id.*

their marriage was over.¹⁰⁴ Mental health professionals testified that Ramage had become “extremely anxious, obsessed and emotionally fraught” when his wife left him,¹⁰⁵ and the trial judge allowed the jury to find provocation based on mere words, despite lack of clarity in Australian law regarding whether mere words suffice.¹⁰⁶

Australia’s states and territories have applied the provocation doctrine in slightly different ways.¹⁰⁷ However, for more than a decade, they have been guided by a series of Australian High Court decisions, culminating in *Stingel v. Regina*, in which all members of the Court agreed upon an “ordinary person” test that freed the partial defense from specified categories of provoking conduct.¹⁰⁸ According to this two-part test, the jury can consider the characteristics of the accused in measuring the gravity of the provocation, but it is still instructed to decide whether an ordinary person would have reacted the way the accused did.¹⁰⁹ Characteristics of the accused relevant to the first part of the test include “age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history.”¹¹⁰ “Personal attributes” may encompass “mental instability or weakness.”¹¹¹ In Victoria, changes to the traditional requirements prior to the 2005 statutory reforms also involved the demise of the cooling-time limit and the recognition of cumulative effects producing a loss of self-control.¹¹²

Thus, Victoria’s common law doctrine was only slightly less subjective than the American EMED defense. Compared to the traditional view of legally adequate provocation, it greatly expanded the class of defendants who could claim mitigation. Modification of the objective standard in Australia arose, at least in part, from the well-meaning goal of making the criminal law more inclusive in a multi-cultural society. The desire to judge immigrants and aboriginal people by standards reflecting

¹⁰⁴ See Bernadette McSherry, *Men Behaving Badly: Current Issues in Provocation, Automatism, Mental Impairment and Criminal Responsibility*, 12 *PSYCHIATRY, PSYCHOL. & L.* 15, 16-17 (2005); see also PHIL CLEARY, *GETTING AWAY WITH MURDER: THE TRUE STORY OF JULIE RAMAGE’S DEATH* 28-30 (2005).

¹⁰⁵ McSherry, *supra* note 104, at 17.

¹⁰⁶ See Bernadette McSherry, *Afterword: Option for the Reform of Provocation, Automatism and Mental Impairment*, 12 *PSYCHIATRY, PSYCHOL. & L.* 44, 45 (2005) (discussing whether mere words constitute adequate provocation under Australian law).

¹⁰⁷ Forell, *Gender Equality*, *supra* note 93, at 38.

¹⁰⁸ *Stingel v. R.* (1990) 171 C.L.R. 312.

¹⁰⁹ *Masciantonio v. R.* (1995) 183 C.L.R. 58; *Stingel v. R.* (1990) 171 C.L.R. 312.

¹¹⁰ *Stingel*, 171 C.L.R. at 326; see VLRC, *DEFENCES TO HOMICIDE*, *supra* note 8, at 25.

¹¹¹ *Stingel*, 171 C.L.R. at 326; see VLRC, *DEFENCES TO HOMICIDE*, *supra* note 8, at 25.

¹¹² See VLRC, *DEFENCES TO HOMICIDE*, *supra* note 8, at 24.

their own values played a significant role,¹¹³ as did the acknowledgement that battered women might kill after a prolonged period of abuse.¹¹⁴ However, despite these good intentions, the expansion of the doctrine had negative consequences for substantive gender equality. Prior to its abolition in Victoria, the partial defense resulted in manslaughter verdicts for so-called sexual rage killers without any requirement that the defendant actually witness an adulterous act and accepted “that it is ‘provocative’ for women to leave their partners, at least when they ‘flaunt’ their new relationship.”¹¹⁵ Indeed, as the reformers persuasively argued, the provocation doctrine operated to excuse male anger and violence toward women even though, on its face, it applied equally to both sexes.¹¹⁶

Although facially neutral, an excuse-based version of the provocation defense encourages a stereotype of men as hot-blooded, impulsive, and unable to control their violent urges. This is especially troubling because an alternate construction of the facts often suggests a premeditated murder arising from the defendant’s outrage at his failure to dominate his intimate partner over a long period of time.¹¹⁷ The *Ramage* case, for example, involved evidence that the defendant engaged in many acts to cover up his crime. In the hours following Julie Ramage’s death, James Ramage buried her body in a shallow grave in the countryside, washed his car, ordered some granite countertops, and told family members that he did not know where his wife had gone.¹¹⁸ These facts, combined with excluded evidence indicating that James had physically abused Julie in the past,¹¹⁹ suggest that James could have controlled himself and that the killing was planned retaliation for Julie’s act of leaving. The social and moral message that voluntary manslaughter mitigation sends is thus inaccurate and promotes damaging stereotypes of masculinity.

¹¹³ See Simon Bronitt, *Visions of a Multicultural Criminal Law: An Australian Perspective*, in MULTICULTURAL JURISPRUDENCE: COMPARATIVE PERSPECTIVES ON MULTICULTURAL DEFENSE 121, 124-26 (A.D. Renteln & M. Forbes eds., 2009).

¹¹⁴ VLRC, DEFENCES TO HOMICIDE, *supra* note 8, at 24.

¹¹⁵ Morgan, *supra* note 42, at 39.

¹¹⁶ See VLRC, DEFENCES TO HOMICIDE, *supra* note 8, at 27.

¹¹⁷ G.R. Sullivan, *Anger and Excuse: Reassessing Provocation*, 13 OXFORD J. LEGAL STUD. 421, 427 (1993). For a comparable analysis by an American legal scholar, see Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter, Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 86-87 (1992).

¹¹⁸ See McSherry, *supra* note 104, at 17.

¹¹⁹ See *id.* at 21 n.10 (describing the evidentiary rulings); *Provocation Ruling*, GEELONG ADVERTISER (Austl.), Dec. 11, 2004, at 38 (reporting that Crown Prosecutor Julian Lecke said, “Ramage had a history of bullying his wife and had head-butted her and broken her nose on a previous occasion”).

2. Self-Protection and Pathology

While feminists in Australia and elsewhere lament the gender-biased nature of provocation, it nevertheless constitutes a common means of defending female murder defendants. Restrictions on self-defense in Australia have often forced battered women who killed their partners to rely on diminished responsibility or provocation claims.¹²⁰ Victoria has never allowed the partial defense of diminished responsibility, but four other Australian jurisdictions do.¹²¹ Where it is successful, it mitigates murder to manslaughter both for women who kill after a prolonged history of abuse and for men who contend they lost control when their female partner ended the relationship.¹²² Yet defense efforts to claim diminished responsibility using psychiatric testimony do not always succeed,¹²³ and mitigation comes at the expense of depicting the defendant as mentally abnormal.

Australian women accused of non-confrontational intimate homicides in the recent past had to rely on provocation or diminished responsibility claims. Prior to the 1987 ruling in *Zecevic v. Director of Public Prosecutions*,¹²⁴ exculpation on self-defense grounds in Victoria clearly required an imminent threat of death or bodily harm to the accused. *Zecevic* purported to eliminate the imminence requirement for all self-defense

¹²⁰ See Stubbs & Tolmie, *Battered Woman Syndrome in Australia*, *supra* note 18, at 192; see also Morgan, *supra* note 42, at 41-43 (discussing the use of the provocation doctrine to defend battered women accused of murdering their partners); Violet Roberts: *Justifiable Homicide?*, 5 LEGAL SERV. BULL. 63, 63-64 (1980) (describing Australian murder cases from the 1970s in which battered women sought to defend against murder charges by pleading diminished responsibility).

¹²¹ VLRC, ISSUES PAPER, *supra* note 102, at 83; see also VLRC, DEFENCES TO HOMICIDE, *supra* note 8, at 232-33 (noting that the diminished responsibility claim is available in the Australian Capital Territory, Queensland, New South Wales, and the Northern Territory).

¹²² VLRC, ISSUES PAPER, *supra* note 102, at 83.

¹²³ See generally Violet Roberts: *Justifiable Homicide?*, *supra* note 120 (describing the murder conviction of Violet Roberts and her son, Bruce, for the fatal shooting of Violet's violently abusive husband in 1975). A jury found both mother and son guilty of murder, even though Violet, who had repeatedly attempted suicide, claimed diminished responsibility based on depressive illness. Violet received a life sentence. Bruce admitted to pulling the trigger while Eric slept, but he only got fourteen years. See Debbie Kirkwood, *Heather Osland: Still in Prison*, 6 WOMEN AGAINST VIOLENCE 60, 62 (1999) (on file with author) (comparing the Roberts case to the similar facts of *Osland v. R.*). After sentencing, a heated campaign for the Roberts' release led to a twenty-thousand-signature petition, a half-page advertisement in the *Sydney Morning Herald*, and acts of the protest that included breaking into government ministers' offices, spray-painting the walls of the cabinet room, and throwing cream buns at politicians. *Id.*; see Violet and Bruce Roberts: *Released*, 5 LEGAL SERV. BULL. 312, 312 (1980) (on file with author) (describing civil disobedience in the campaign to secure the Roberts' release). Violet and Bruce Roberts were released from prison in October 1980 after serving about five years. See *jd.*

¹²⁴ *Zecevic v. Dir. of Pub. Prosecutions* (Vict.) (1987) 162 C.L.R. 645 (Austl.).

claims, not just those raised by abuse victims.¹²⁵ Thereafter in Victoria, imminence counted as one factor, among others, relevant to whether the accused believed it was necessary to kill in self-defense.¹²⁶ Yet, according to one scholar,

[s]ome courts . . . continued to interpret the factors of self-defence in terms of what is reasonable for the average . . . middle class white male, rather than what a battered woman might reasonably do. Accordingly, in most cases in which women have been acquitted to date, they killed immediately (as defined in seconds) after their partner assaulted them.¹²⁷

The arrival of BWS evidence in Australia in the early 1990s exacerbated the trend toward depicting murder defendants as mentally abnormal, rather than as rational actors whose behavior could be examined for moral appropriateness. Originally developed by American psychologist Lenore Walker, this syndrome theory posits an escalating three-phase cycle of violence that includes “tension-building,” an “acute battering incident,” and “loving contrition.” A woman who has experienced the cycle remains in the abusive relationship, according to Walker, because she suffers from “learned helplessness” that causes her to believe she cannot change her circumstances.¹²⁸ BWS, which is now generally considered a form of post-traumatic stress disorder,¹²⁹ does not constitute a separate defense in Australia, and part of the problem with it inheres in courts’ mishandling of its admissibility. Australian judges began admitting expert testimony on the syndrome with “little or no debate about its nature or relevance . . . [or attention] to questions about what the introduction of BWS is intended to achieve.”¹³⁰ Thus, while BWS expert testimony has increasingly been paired with social-context evidence in the United States, Australian courts construed it narrowly as a psychological explanation of female defendants’ behavior, starting “from the notion that battered women have developed different perceptions from other people.”¹³¹

BWS evidence underpinned the self-defense claims of several Australian women acquitted for killing sleeping husbands. In each of these instances, the deceased issued a verbal death threat or committed a violent

¹²⁵ *Id.* at 661, 665 (holding that for a successful self-defense claim, the defendant must have reasonably believed that lethal force was necessary, but not requiring that the threat must have been imminent); see RENATA ALEXANDER, DOMESTIC VIOLENCE IN AUSTRALIA: THE LEGAL RESPONSE 24, 26 (2002); Stubbs & Tolmie, *Falling Short*, *supra* note 1, at 733.

¹²⁶ See VLRC, DEFENCES TO HOMICIDE, *supra* note 8, at 76 (describing pre-reform self-defense law in Victoria).

¹²⁷ LESS THAN EQUAL, *supra* note 10, at 46.

¹²⁸ WALKER, *supra* note 14, at 42-63.

¹²⁹ Stark, *supra* note 38, 974.

¹³⁰ Stubbs & Tolmie, *Falling Short*, *supra* note 1, at 720-21.

¹³¹ *Id.* at 722.

assault that could be construed as an ongoing threat in close temporal proximity to the homicide.¹³² However, one of Australia's most controversial "sleeping husband" cases, *Osland v. Regina*,¹³³ demonstrated the High Court's unwillingness to provide strong authority for preemptive strikes. It also suggested the dangers of creating dichotomous images of the cold-blooded killer and the pitiable abuse victim with no satisfactory intermediate option between a murder verdict and an acquittal.

Heather Osland spent thirteen years of her life with Frank Osland, a man who was significantly taller and heavier than she.¹³⁴ During this time, Frank used violence to maintain rigid control over the household. His past acts against Heather allegedly included repeatedly punching and kicking her, holding a gun to her head, pushing her under water in the bath, pulling her hair, causing bruises where they would not show, and forcing her to have anal intercourse. He augmented this ongoing cruelty by killing the family's pet rabbits, birds, and a dog, as well as by committing numerous acts of violence against the children.¹³⁵ Efforts to obtain protection from the police were ineffectual.¹³⁶ Heather claimed that, during the days immediately preceding Frank's death, "his violence toward her was 'building up.'"¹³⁷ The deceased ordered Heather's son David out of the house, but David was afraid to leave because of the harm he predicted the deceased might inflict on his mother. Heather and David dug a hole in the countryside near Bendigo, Victoria, after becoming fearful that the deceased would react violently to their failure to purchase some household items. On the night of the homicide, the deceased inflicted verbal abuse on Heather and struck David, knocking him to the ground. In secret, Heather put sleeping tablets in the deceased's coffee to calm him, but she and her son subsequently became alarmed about what the deceased might do when he realized he had been drugged. While the deceased slept, David struck him a fatal blow with a piece of metal pipe. David and Heather then buried the deceased and acted as if he had simply disappeared.¹³⁸

¹³² *Id.* at 733-35 (discussing the unreported *Tassone* case in the Northern Territory, as well as *DPP v. Secretary*, (1996) 5 NTLR 96 (appeal)).

¹³³ *Osland v. R.* (1998) 197 C.L.R. 316.

¹³⁴ *Id.* at 388, ¶ 185 (Callinan, J.) (noting size disparity); Kirkwood, *supra* note 123, at 61 (noting the length of the Oslands' relationship).

¹³⁵ See Scutt, *supra* note 18, at 102-03; see also *Osland*, 197 C.L.R. at 388, ¶ 185 (Callinan, J.) (remarking on evidence of child abuse and Heather's testimony about being forced to engage in anal intercourse with the deceased); *Australian Story: Interview with Heather Osland*, Nov. 2, 2005, available at <http://www.abc.net.au/austory/content/2005/s1495856.htm> (describing the killing of the family dog, Adam).

¹³⁶ See Scutt, *supra* note 18, at 110.

¹³⁷ *Osland*, 197 C.L.R. at 321, ¶ 192 (Callinan, J.).

¹³⁸ *Id.* at 321, ¶ 4 (Gaudron & Gummow, JJ., dissenting).

Although supporters of Heather Osland castigated “false feminists” for daring to suggest that she was not “the best poster child” for the battered women’s cause,¹³⁹ some aspects of the case could be interpreted as signs of premeditation. In addition to the use of sedatives and the hole dug prior to the homicide, the prosecution introduced evidence that Heather had offered another son money to kill Frank and then threatened him with violence if he testified against her.¹⁴⁰ Intercepted phone conversations also tended to cast doubt on whether Frank had been violent in the later years of their marriage.¹⁴¹ Heather relied on BWS evidence and was convicted of murder, despite raising both self-defense and provocation claims. Her conviction was upheld on appeal to the High Court.¹⁴² Heather’s son, who did not claim to suffer from any syndrome, was exonerated in a second trial after a hung jury in the first one.¹⁴³ According to one source, the sentence of fourteen years and six months that Heather received ranks among the longest in decades in Australia for this type of crime.¹⁴⁴

Australians’ polarized views of the *Osland* case reflect efforts to assimilate complicated facts into a simpler narrative of what happened. Heather probably was neither an innocent, passive victim, nor a coldly calculating killer. Because her behavior did not accord with the stereotypes that the criminal law, BWS theory, or cultural values surrounding intimate-partner violence demand, her story had to be reshaped to fit a legal verdict. The murder conviction expressed (and the High Court affirmed) a distinction between “a self-defensive response to a grave danger which can only be understood in light of a history of abusive conduct and a response that simply involves a deliberate desire to exact revenge for past and potential—but unthreatened—future conduct.”¹⁴⁵

In reality, however, Heather’s behavior may have fallen between these understandings of why abuse victims kill. To the extent that she engaged in planning activity by digging the hole and using the sedatives, her conduct showed self-protectiveness, as well as anger and desperation. If she is an icon for anything, it may be a new form of mitigation that covers defensive killings in which the lethal act is deemed less justifiable than the emotions and beliefs prompting it.¹⁴⁶ Such a partial defense would have given the

¹³⁹ See Kirkwood, *supra* note 123, at 63.

¹⁴⁰ *Osland*, 197 C.L.R. at 316, ¶ 108 (McHugh, J.).

¹⁴¹ *Id.*

¹⁴² See generally *id.*

¹⁴³ See Scutt, *supra* note 18, at 116.

¹⁴⁴ See Kirkwood, *supra* note 123, at 60.

¹⁴⁵ *Osland*, 197 C.L.R. at 382, ¶ 172 (Kirby, J.).

¹⁴⁶ See *infra* note 213-23 and accompanying text (discussing excessive self-defense, defensive homicide, and imperfect self-defense doctrines). For a clarification of the

Osland jury another option besides provocation, for which there was allegedly insufficient evidence of a triggering incident,¹⁴⁷ and thus avoided an all-or-nothing choice between murder and completely exculpatory self-defense. Unfortunately, this type of middle ground was unavailable in Heather Osland's 1996 trial. Her conviction for murder in Victoria announced that her beliefs and actions qualified for neither exoneration nor mitigation, whereas James Ramage's did.¹⁴⁸ It was this situation and others like it that Victoria's reformers sought to change.

B. MODERN AUSTRALIAN ATTITUDES TOWARD INTIMATE-PARTNER VIOLENCE

Prior to the 2005 reforms, the law of homicide in Victoria fit poorly not only with the social context of intimate-partner killings, but also with community values. Modern Australian society has displayed a growing awareness "of the prevalence of domestic violence, its seriousness, and that it is a criminal offence."¹⁴⁹ This development owes much to the tireless work of feminist reformers, government advertising, and the White Ribbon Campaign, a self-funded volunteer effort by a national group of men and women from myriad businesses, workplaces, and organizations.¹⁵⁰ Such moves to educate the general public have met with backlash from men's rights groups and others calling for an acknowledgment that women also engage in intimate-partner violence and criticizing allegedly inflated crime

differences between provocation and imperfect self-defense, see note 317 and accompanying text.

¹⁴⁷ *Osland*, 197 C.L.R. at 382, ¶ 170 (Kirby, J.) (opining that the trial judge's reference to a "specific triggering incident" was correct and not properly objected to at trial). According to Justice Kirby, "[e]vidence of a long-term abusive relationship, even if accepted, did not afford a person in the position of the appellant a blank cheque to plan and execute the homicide of her abuser, protected by the law of provocation, with only a passing nod at the immediate circumstances said to have driven her to the grave step of participating in the termination of a human life." *Id.*

¹⁴⁸ The manslaughter sentence that Ramage received fell well below the statutory maximum of twenty years, although it was a comparatively severe sentence for provocation manslaughter in Victoria. See McSherry, *supra* note 104, at 17. Victoria's Sentencing Advisory Council report noted, however, that Ramage's sentence "was the second highest sentence for provocation manslaughter" during 1998-2007. PROVOCATION IN SENTENCING, *supra* note 10, at 83 & app. at 3 fig.11.

¹⁴⁹ Mandy McKenzie, *Backlash and Beyond: Shifts in Community Attitudes to Domestic Violence*, 1 DOMESTIC VIOLENCE & INCEST RESOURCE Q. 16-22 (2007) (on file with author).

¹⁵⁰ Michael Flood, *Secrets and Lies: Responding to Attacks on Domestic Violence Campaigns*, AUSTL. DOMESTIC & FAM. VIOLENCE CLEARINGHOUSE NEWSL. 3 (Univ. New South Wales), Summer 2006/2007 (describing the White Ribbon Campaign), available at http://www.austdvclearinghouse.unsw.edu.au/Other_%20publications/Flood.pdf.

statistics that place blame on men.¹⁵¹ Yet, despite some dissonance, only one in five Australians believed that a man's use of physical force against his wife was justified under any circumstances in 1988.¹⁵² And the trend away from viewing intimate-partner violence as "just a domestic" has continued to grow.

Part II of this Article showed that the Australian government punished wife-killers with prison sentences or even the death penalty in the nineteenth and early twentieth centuries.¹⁵³ The greatest change in social attitudes in our own time began with the explicitly feminist women's refuge movement of the 1970s and the law-reform efforts of the 1980s, which included the establishment of task forces in every Australian state and territory to collect material on the circumstances and experiences of domestic violence victims.¹⁵⁴ These state task forces helped spur the criminalization of spousal abuse, stalking, marital rape, and the breach of a protective order.¹⁵⁵ Their efforts also led to the modification of search-and-seizure laws to give officers greater authority to investigate domestic violence calls.¹⁵⁶ Although three Australian states now appear to be international trendsetters in abolishing provocation, the United States served as a model for many of these earlier reforms.¹⁵⁷

Battered women's advocates continue to face challenges in Australia. Shelters are overcrowded and underfunded;¹⁵⁸ the prevalence of plea bargaining and discretionary sentencing sometimes undercuts doctrinal reforms;¹⁵⁹ and the police and courts only sporadically enforce protective orders.¹⁶⁰ The Australian public has also proved reluctant to discard the widespread belief that excessive alcohol consumption causes intimate

¹⁵¹ See LESS THAN EQUAL, *supra* note 10, at 109; Flood, *supra* note 150, at 3-4; McKenzie, *supra* note 149, at 16.

¹⁵² See Jane Mugford, Stephen Mugford & Patricia Weiser Easteal, *Social Justice, Public Perceptions, and Spouse Assault in Australia*, 16 SOC. JUST. 103, 118 (1989).

¹⁵³ See *supra* text accompanying notes 65, 71-72.

¹⁵⁴ See Judith Allen, *Policing Since 1880: Some Questions of Sex*, in POLICING IN AUSTRALIA: HISTORICAL PERSPECTIVES (Mark Finnane ed., 1987) ("[T]he distinctive activity of contemporary feminists has been the establishment of women's refuges, rape crisis centres and young women's shelters, staffed by feminists, funded by the state."); Mugford et al., *supra* note 152, at 112-13 (describing the work of the domestic violence task forces).

¹⁵⁵ See LESS THAN EQUAL, *supra* note 10, at 115; Mugford et al., *supra* note 152, at 114.

¹⁵⁶ See RENATA ALEXANDER, DOMESTIC VIOLENCE IN AUSTRALIA: THE LEGAL RESPONSE 24, 33-43 (2002) (explaining changes in criminal procedure).

¹⁵⁷ See Mugford et al., *supra* note 152, at 113.

¹⁵⁸ *Id.* at 105-06.

¹⁵⁹ See ALEXANDER, *supra* note 156, at 33, 52; KILLING THE BELOVED, *supra* note 1, at 148, 173, 182.

¹⁶⁰ See LESS THAN EQUAL, *supra* note 10, at 113; KILLING THE BELOVED, *supra* note 1, at 77-78, 91.

violence.¹⁶¹ Nevertheless, an emerging consensus unsympathetic to sexual rage killings has made the expansive modern provocation doctrine the flashpoint for reform in several Australian states.

When Victoria abolished the partial defense in 2005, the move was characterized as an effort to bring the criminal law into line with community values.¹⁶² Public sentiment inflamed by the availability of heat-of-passion mitigation in the widely-reported *Ramage* case¹⁶³ coincided with independent efforts by the VLRC to rethink homicide defenses. Communal outrage at James Ramage's ability to escape a murder conviction centered on the way the defense lawyer vilified the dead victim to generate empathy for the defendant's loss of self-control.¹⁶⁴ The legal outcome may have been offensive to the public because it represented a mode of thinking about sexual rage killings that is disfavored; indeed, some evidence indicates that, at the time of the *Ramage* trial, Australian courts and juries were already "becoming more reluctant to accept the partial defense of provocation" in such cases.¹⁶⁵

¹⁶¹ See Renata Alexander, *Wife-Battering—An Australian Perspective*, 8 J. FAM. VIOLENCE 229, 244 (1993); Mugford et al., *supra* note 152, at 108.

¹⁶² See *infra* notes 162-70 and accompanying text (discussing the groundswell of community sentiment favoring the abolition of the provocation doctrine in Victoria).

¹⁶³ See *supra* notes 104-06 and accompanying text.

¹⁶⁴ See Karen Kissane, *Honour Killing in the Suburbs*, AGE (Austl.), Nov. 6, 2004, at 4-5; *Victoria to Scrap Provocation Defence to Murder*, ABC NEWS ONLINE (Austl.), Jan. 20, 2005, available at <http://www.abc.net.au/news/newsitems/200501/s1285812.htm> (noting that the abolition of the provocation defense in Victoria followed "an outcry by campaigners over an eleven-year manslaughter sentence handed to a Balwyn businessman who was cleared of murdering his wife"); see also CLEARY, *supra* note 104, at 43, 137-38, 162, 170, 176, 179 (criticizing the outcome on grounds similar to those described in the press). The case became the subject of a popular book by footballer-turned-activist Phil Cleary, whose own sister had been murdered by a former boyfriend in Melbourne and who had become a crusader against the provocation defense. See generally CLEARY, *supra* note 104 (presenting a somewhat sensational account of the *Ramage* case); Susanna Lobez, *Killer of a Quandary*, SUNDAY SUN HERALD (Austl.), Sept. 22, 2002, at 75 (noting Cleary's advocacy of the Victorian reforms and his personal connection to the provocation doctrine arising from the murder of his sister by a man who subsequently served only three and a half years in prison). Cleary noted that it was "sad that it had taken a 'society' killing [of wealthy Melbourne Julie Ramage] to strike up a debate about the 'barbaric' provocation defence strategy." Stuart Walsh & Mairza Fiamengo, *Wife Killer Gets 11 Years for Manslaughter: Call for Change*, GEELONG ADVERTISER, Dec. 10, 2004, at 4.

¹⁶⁵ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 41 & n.142; see Lobez, *supra* note 164, at 75 (reporting that, in 2002, Victoria Appeal Court Justice Norman O'Bryan rejected the appeal of a man who killed his estranged girlfriend for insulting him and declared that "the defence of provocation had outlived its usefulness"); see also Howe, *supra* note 63, at 59 ("[I]n some jurisdictions, notably Australia, appeals against murder convictions in wife-killing and homosexual advance killings are not succeeding like they used to.").

Public criticism of the *Ramage* verdict and sentence dovetailed with academic efforts to expose the social context of intimate-partner homicide and the gender bias of the criminal law. A growing body of empirical research suggests that men primarily kill in the intimate context to retain control over their partners, while women most often use lethal violence when they fear being killed or injured by a man.¹⁶⁶ Tasmania abolished the partial defense of provocation in 2003, acknowledging this feminist criticism.¹⁶⁷ When the VLRC recommended the same move as part of a comprehensive reform package, it expressly relied on a paper by law professor Jenny Morgan as well as other social scientific findings about the differing reasons that men and women kill.¹⁶⁸ The *Ramage* case did not affect the VLRC report, which was derived from established research and printed before the controversial verdict.¹⁶⁹ Nevertheless, the case likely influenced the state parliament's speedy adoption of the VLRC recommendations.

The reforms in Victoria and Tasmania in turn sparked reconsideration of homicide defenses in several other Australian states. Since Victoria enacted its reforms in 2005, controversial verdicts in intimate homicide cases have fueled public demands to abolish provocation in other parts of Australia.¹⁷⁰ Law reform commissions or ad hoc bodies in Queensland, New South Wales, and Western Australia have proposed changes to homicide defenses, but thus far all except Western Australia have stopped short of abolishing the provocation doctrine.¹⁷¹ For example, when

¹⁶⁶ See, e.g., Morgan, *supra* note 42, at 23-29 (analyzing various studies); Margo I. Wilson & Martin Daly, *Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States*, 30 CRIMINOLOGY 189, 206-09 (1992) (discussing data on the United States).

¹⁶⁷ Rebecca Bradfield, Comment, *The Demise of Provocation in Tasmania*, 27 CRIM. L.J. 322, 323 (2003) (listing the reasons Tasmania's Attorney General provided for abolishing provocation).

¹⁶⁸ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 29-30; Morgan, *supra* note 42, at 23-29. However, I will argue that the VLRC proposals went beyond trying to level the gendered playing field to reframing homicide defenses in terms of moral evaluations of conduct. See *infra* notes 180-83, 187-91 and accompanying text.

¹⁶⁹ Telephone Conversation with Jenny Morgan, Professor, Melbourne Law School, Mar. 24, 2008; see also CLEARY, *supra* note 104, at 190 (noting that the VLRC Final Report had already been printed when the jury delivered its verdict in the *Ramage* case).

¹⁷⁰ See, e.g., *Defence Can Blame Victim for a Crime*, COURIER-MAIL (Austl.), July 6, 2007, at 26 (reporting that the unsuccessful campaign to abolish provocation in Queensland "was driven by the mother of 16-year-old Taryn Hunt, who was brutally clubbed to death with a steering wheel lock by her former boyfriend, 30-year-old Damian Karl Sebo"); Emmaline Stigwood, *Sebo Acquittal Sparks Calls for Law Reform*, GOLD COAST BULL., July 4, 2007, at 12 (making a similar report).

¹⁷¹ See LAW REFORM COMM'N OF W. AUSTRAL., REVIEW OF THE LAW OF HOMICIDE FINAL REPORT 329 (2007) [hereinafter REVIEW OF THE LAW OF HOMICIDE] (recommending the

Queensland reassessed its defenses to murder in 2008,¹⁷² the Queensland Law Reform Commission proposed recasting, rather than abolishing, the provocation defense.¹⁷³ By contrast, that same year, Western Australia replaced provocation manslaughter with the new crime of “unlawful assault causing death,” acknowledging its debt to the VLRC, and also revamped its self-defense provisions.¹⁷⁴

C. MOVING AWAY FROM PARTIAL EXCUSES: A CRITICAL ANALYSIS OF VICTORIA’S HOMICIDE LAW REFORM PACKAGE

The precursor to Victoria’s reforms—the abolition of provocation in Tasmania in 2003—proceeded on relatively impoverished theoretical and policy foundations. The two most important rationales seem to have been, first, that the repeal of Tasmania’s mandatory death sentence for murder made heat-of-passion mitigation in the guilt phase unnecessary and, second, that the partial defense tacitly endorsed male violence prompted by a man’s

abolition of the provocation defense and changes to self-defense law), *available at* <http://www.lrc.justice.wa.gov.au/097-FR.html>; LENNY ROTH, N.S.W. PARLIAMENT, PROVOCATION AND SELF-DEFENCE IN INTIMATE PARTNER AND HOMOPHOBIC HOMICIDES 12 (N.S.W. Parliamentary Libr. Res. Serv. Briefing Paper No. 3/07, 2007) [hereinafter NSW BRIEFING PAPER] (stating that, in 1997, the NSW Law Reform Commission recommended retaining but reformulating the provocation defense), *available at* [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/2283257FD5435499CA2572C30009E286/\\$File/provocation&INDEX%20FINAL.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/2283257FD5435499CA2572C30009E286/$File/provocation&INDEX%20FINAL.pdf). For journalistic discussion of these reform proposals, see, for example, Amanda Banks, *New Defence Planned for Battered Wives*, AUSTRALIAN, May 16, 2006, at 7 (noting that the Western Australian Law Reform Commission proposed abolishing provocation and introducing a separate defense for battered women). *But cf.* *Call for Calm on Murder Law*, COURIER MAIL (Austl.), July 7, 2007, at 12 (“[Queensland] Attorney-General Kerry Shine has warned against any ‘knee-jerk reaction’ to abolish the defence of provocation following a controversial manslaughter case.”).

¹⁷² See generally QUEENSL. LAW REFORM COMM’N, A REVIEW OF THE EXCUSE OF ACCIDENT AND THE DEFENSE OF PROVOCATION (No. 64, 2008) [hereinafter QLRC, A REVIEW] (reviewing the law of provocation and making reform proposals), *available at* <http://www.qlrc.qld.gov.au/reports/R%2064.pdf>.

¹⁷³ *Id.* at 474.

¹⁷⁴ Criminal Law Amendment (Homicide) Act, 2008, §§ 8, 12 (W. Austl. Num. Acts No. 29/2008). The superseding provision allows for criminal liability even for unforeseeable deaths caused by the defendant’s assault. *Id.* § 12. However, it is unclear that this substitution will prevent angry men who formerly could have raised successful provocation claims from being convicted of lesser crimes than murder. For the influence of the VLRC final report on reforms in Western Australia, see, for example, REVIEW OF THE LAW OF HOMICIDE, *supra* note 171, at 276, 280. Changes in self-defense law, including the introduction of the mitigating doctrine of excessive self-defense in Western Australia, will be discussed *infra* notes 201-23 and accompanying text.

inability to control his spouse.¹⁷⁵ Tasmanian Director of Public Prosecutions Tim Ellis further described the provocation doctrine as inconsistent “with the expectations of a civilised society.”¹⁷⁶ However, abolition in Tasmania occurred without being explained or theorized in a law-reform report, and perhaps most importantly, it constituted a stand-alone measure that struck from the law a partial defense upon which female as well as male defendants had relied. No evidentiary changes were introduced to make it easier for battered women charged with murder to convince the jury that they had acted in self-defense, and no substitute for provocation was enacted. For some Australian feminists, Tasmania’s surgical strike raised a grave concern that eliminating the provocation doctrine would actually “worsen the legal position of battered women who kill.”¹⁷⁷ Nevertheless, the Tasmanian Parliament voted unanimously for the measure.¹⁷⁸

In contrast, the reform package enacted in Victoria emerged from a long deliberation process in which numerous individuals and groups enjoyed input and was underpinned by a detailed report that explained the theoretical and policy grounds for interconnected changes to homicide defenses. The reforms are often described as embodying a substantive equality position designed to remediate perceived gender imbalances in the impact of the law,¹⁷⁹ and indeed, these objectives suffused the report. But scrutiny of the VLRC recommendations discloses an additional theoretical foundation—chiefly, a moral objection to the existing doctrine’s failure “to distinguish sufficiently between values and beliefs the law should and should not tolerate.”¹⁸⁰

The report proposed, as a general matter, that partial excuses be taken into account at sentencing, not in the guilt phase.¹⁸¹ Rather than mitigating the severity of the conviction based on the defendant’s irrationality or poor impulse-control, the revised law should assess whether the defendant killed

¹⁷⁵ Bradfield, *supra* note 167, at 324. Reformers in Victoria similarly noted that the death penalty in that state was abolished in 1975. PROVOCATION IN SENTENCING, *supra* note 10, at 7.

¹⁷⁶ Ellen Whinnett, *Murder Law to Be Changed*, MERCURY (Hobart, Austl.), Sept. 5, 2002, at 9.

¹⁷⁷ Bradfield, *supra* note 167, at 324.

¹⁷⁸ Forell, *Gender Equality*, *supra* note 93, at 57.

¹⁷⁹ *Id.* at 28, 56; Reg Graycar & Jenny Morgan, *Feminist Legal Theory and Understandings of Equality: One Step Forward or Two Steps Back?*, 28 T. JEFFERSON L. REV. 399, 407 (2006) (discussing the VLRC report).

¹⁸⁰ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 34.

¹⁸¹ *See id.* at xxvii.

for morally appropriate reasons.¹⁸² The VLRC thus drew a moral and legal line in the guilt phase between killings based on impermissible emotions like a desire for sexual revenge and those arising, to a large degree, from self-protection. The emphasis on moral judgment and the disfavoring of partial excuses represent two of the most important contributions of the Commission's work; yet, as I will argue below, the proposals sometimes strayed from this position in places they ought to have stuck to it.¹⁸³

1. Shifting Provocation to the Sentencing Phase

The abolition of provocation as a partial defense to murder constituted the centerpiece of Victoria's reforms; the state parliament implemented this VLRC proposal in the Crimes (Homicide) Act of 2005.¹⁸⁴ The VLRC grounded its recommendation in social scientific evidence that men commit 75% of intimate-partner homicides in Australia each year and that many of these men allege provocation.¹⁸⁵ While women accused of murder in Victoria could successfully raise the partial defense under pre-reform law, those who did so typically killed in response to fear-inducing sexual or physical assaults by a domestic partner, rather than loss of self-control stemming from a partner leaving, threatening to leave, or starting a new sexual relationship with another person.¹⁸⁶ The VLRC critique of this situation provided a moral assessment of the differing scenarios in which men and women generally claim to have been provoked: "These two circumstances, it is suggested, should not be seen as comparable The Commission believes the problems with the defense go beyond gender bias."¹⁸⁷

First, the VLRC evaluated loss of self-control as a partial excuse and concluded that, short of a completely exculpatory mental impairment, "we should expect people to control their impulses [no matter] what provocation is offered."¹⁸⁸ Loss of self-control fails to "provide a sufficient reason, moral or legal, to distinguish [provoked] killers from cold-blooded

¹⁸² The executive summary of the VLRC report announced that "in the twenty-first-century, the Victorian community has a right to expect people will control their behaviour, even when angry or emotionally upset." *Id.* at xxi.

¹⁸³ See *infra* text accompanying notes 210-12, 218-23, 232-37.

¹⁸⁴ Crimes (Homicide) Act, 2005, § 3b (Vict. Acts No. 77/2005).

¹⁸⁵ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at xxv (citing empirical research suggesting that female defendants in New South Wales fare better than male defendants when claiming provocation).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 27.

killers.”¹⁸⁹ The Commission described this as “one of the most compelling reasons for abolishing the [provocation] defence.”¹⁹⁰ Second, the VLRC declined to authorize victim-blaming in the context of infidelity, separation, or divorce, which it characterized as an exercise of “personal rights to leave a relationship or start a new [one].”¹⁹¹

Abolishing provocation in the guilt phase does not necessarily mean eliminating it completely. Rather, the VLRC final report recommended that it be considered, along with other factors, at sentencing.¹⁹² Of course, shifting consideration of provocation claims from trial to sentencing creates the possibility that defendants will simply receive leniency at a different stage. This occurred in the American state of Texas, which in 1993 abolished voluntary manslaughter as a separate offense and deferred consideration of passion claims until sentencing.¹⁹³ However, in Victoria, a report under the aegis of the Sentencing Advisory Council (SAC)—an independent statutory body composed of criminal lawyers, victims’ advocates, academics, and others with experience in the criminal justice system—attempted to foreclose such a scenario by proposing standards for limiting provocation-based leniency in punishment determinations.¹⁹⁴ The publication of these recommendations followed the enactment of changes to homicide defenses. Attorney-General Rob Hulls described the 2008 SAC

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 56.

¹⁹² *Id.* at xxvii. This move included a reallocation of burdens. When provocation was taken into account in the guilt phase, the prosecutor bore the burden of showing that the defendant did not act in the heat of passion, whereas in the sentencing phase, the prisoner must show that he or she was provoked. *See* PROVOCATION IN SENTENCING, *supra* note 10, at 26.

¹⁹³ TEX. PENAL CODE ANN. § 19.02(d) (2003); *see* 43 TEX. PRAC., CRIM. PRAC. AND PROC. § 31.95 (2d. ed., 2008); David Crump, “Murder, Pennsylvania Style”: *Comparing Traditional Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W. VA. L. REV. 257, 316-17 (2007). A Texas defendant bears the burden of proving by a preponderance of the evidence that he “caused the death under the immediate influence of sudden passion arising from an adequate cause,” and, if he succeeds, his offense is reduced to a second-degree felony carrying a maximum sentence of twenty years. TEX. PENAL CODE ANN. §§ 12.32-33, 19.02(d) (2003). Yet, in reality, intimate murderers who commit separation assaults in Texas may only serve a tiny fraction of that range. In 1998, for example, Jimmy Watkins returned to the family home in Fort Worth and fatally shot his estranged wife and injured her boyfriend. The jury convicted him of murder but recommended a probationary sentence because Watkins acted in the sudden heat of passion. A judge then sentenced the prisoner to a \$10,000 fine and ten years’ probation, only four months of which were to be served in custody. LEE, *supra* note 14, at 42-43.

¹⁹⁴ PROVOCATION IN SENTENCING, *supra* note 10, at 93. One of the report’s authors, Professor and SAC Chair Arie Freiberg, clarified in an email that, while the report was discussed generally by the Council, it was not formally proposed or adopted by it.

report, *Provocation in Sentencing*, authored by Felicity Stewart and Arie Freiberg, as “an important resource when courts [begin] the task of sentencing of offenders convicted of murder rather than manslaughter under the new law.”¹⁹⁵ However, because few cases have come before the courts yet, the impact of these recommendations remains unclear.

Provocation in Sentencing endorsed the VLRC’s general approach of examining the reasons the accused killed and making “judgments about the values and views that drove the accused’s decision to act.”¹⁹⁶ According to the SAC report, provocation should be seen as a justifying doctrine, not as an excuse for loss of self-control, even at sentencing: “[T]he crucial question is whether the provocation gave the offender a *justifiable* sense of being wronged.”¹⁹⁷ Thus, a provocation claim at sentencing should only mitigate punishment if the defendant had a valid moral basis for feeling outraged. Some of the old provocation categories, such as assault on a close relative, would qualify, and some newer ones like fury over a racial slur might also meet the test.¹⁹⁸ However, according to the SAC report, outrage at an intimate partner’s decision to end the relationship could *not* be justified because each partner should be able to make an autonomous choice to leave. Even if this behavior causes emotional pain, trying to obstruct it and regain control over the straying spouse is never morally appropriate.¹⁹⁹ The SAC report thus insisted that moral judgments be underpinned by an equality norm; women should be as free as men to terminate a relationship and not be punished for attempting to do so by men’s greater tendency toward lethal violence.²⁰⁰

2. Expanding the Doctrine of Self-Defense

The expansion of self-defense constituted a necessary corollary to the abolition of provocation. Prior to the reforms, Victoria was the only

¹⁹⁵ Geoff Wilkinson, *No Let Off for Wife Killers: Report Urges Judges to Ignore Provocation*, HERALD SUN (Austl.), Feb. 7, 2008, at 23.

¹⁹⁶ PROVOCATION IN SENTENCING, *supra* note 10, at 93.

¹⁹⁷ *Id.* at 94 (emphasis added).

¹⁹⁸ The SAC report recommended:

Conduct of the victim which consists of a single racial taunt, while it is to be deplored, may not be sufficient in itself to lessen the culpability of an offender However, the context of the comment, including whether it included threatening undertones or occurred against a background of discrimination, is relevant to whether the offenders aggrievement is justified and, along with the degree of disproportionality between the comment and the offence, is relevant to whether—and to what degree—the offender’s culpability should be reduced.

Id. at 73.

¹⁹⁹ *Id.*

²⁰⁰ See *supra* notes 41-42, 185 and accompanying text (discussing gender imbalance in the perpetration of intimate-partner homicides).

Australian state that relied on common law principles of self-defense, rather than having a statutory provision, so codification was a threshold goal.²⁰¹ Then, rather than introducing a separate defense for battered women who kill their abusers, the VLRC report recommended two steps—reforming self-defense law to make it more inclusive of women’s experiences and adopting a partial defense of excessive self-defense to provide mitigation for defendants who honestly but unreasonably believed in the necessity of lethal action. In either case, the defendant’s conduct would likely be fear-based, though the existence of anger would not negate the claim unless it constituted a “premeditated desire for revenge.”²⁰²

Perhaps the most significant feature of this self-defense proposal was its assertion that “[t]here may be circumstances in which the accused’s belief in the need to take action is reasonably held where the danger is not immediate, but is inevitable.”²⁰³ In other words, action in self-defense might be necessary when the defendant believed it was “only a matter of time” before the deceased inflicted death or serious injury and the defendant lacked an alternate means of self-protection.²⁰⁴ Another notable aspect of the VLRC proposal involved proportionality, which the pre-reform law in Victoria did not expressly require. The VLRC declined to impose a strict proportionality element due to common size-and-strength disparities between aggressors and those they attack and the fact that women may use a weapon or choose a non-confrontational moment to strike their abusers in compensation for such disparities.²⁰⁵

In short, the VLRC recommendations essentially proposed codifying preemptive strikes as potentially reasonable, depending on the circumstances, in cases where the deceased posed an ongoing, unlawful threat of death or serious injury to the accused. This recommendation proved influential. The self-defense provision enacted statutorily in Victoria in 2005 tracked the VLRC proposal by omitting any requirements of proportionality or imminence,²⁰⁶ and the 2008 homicide amendments in

²⁰¹ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at xxviii.

²⁰² *Id.* at 91.

²⁰³ *Id.* at 80.

²⁰⁴ *Id.*

²⁰⁵ *See id.* at 83-84.

²⁰⁶ Crimes (Homicide) Act, 2005, § 6 (9AC) (Vict. Acts No. 77/2005). Several scholars have presented convincing arguments against an imminence requirement. *See* Burke, *supra* note 18, at 274, 282-83, 297-98; Richard Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 410 (1993) (“[I]n appropriate cases the imminence requirement can be eliminated without undermining the basic fabric of the self-defense laws.”). Since this Article concentrates on partial defenses, it will not dwell on an aspect of total exculpation that others have skillfully covered. However, the elimination of the proportionality requirement is potentially more troubling. How could a violent response

Western Australia expressly allowed self-defense acquittals of defendants who used deadly force to defend themselves or another person “from a harmful act, including a harmful act that is *not* imminent.”²⁰⁷

Past abuse often demonstrates the inappropriateness of the traditional self-defense elements of imminence and strict proportionality for assessing reasonableness. For this reason, Victoria also adopted evidentiary provisions in family violence cases to clarify what evidence is relevant to the question of whether the defendant had a reasonable belief in the necessity of her actions.²⁰⁸ In Victoria, this evidence now encompasses relationship history, including past violence and social, cultural, and economic factors affecting the defendant, as well as expert testimony on the psychological impact and social context of domestic violence.²⁰⁹

However, Victoria did not go far enough toward envisioning a system in which abuse victims can be defended without psychological experts. Because BWS evidence will still be used under the reformed law, the risk remains that judges, expert witnesses, and defense attorneys will continue to pathologize and stereotype the accused. The BWS theory casts defendants as dysfunctional and excludes a range of female experience, including that of aboriginal and other minority women whom researchers believe are more likely than white women to fight back against violent partners and whose behavior thus does not fit the paradigm of learned

to an assault or threat be disproportionate and yet still be necessary? There are several scenarios in which this paradox is easy to resolve. For example, a woman presumably could shoot an attacker with a gun, even if he were unarmed, if he tried to strangle her. The strict proportionality of a bare-hands killing would not be required under these circumstances, especially given a likely disparity in size and strength. She could also use deadly force to ward off a rape or kidnapping. See MODEL PENAL CODE § 3.04(2)(b) (1962) (providing that deadly force can be used to protect against rape or kidnapping); Douglas Husak, *Partial Defenses*, 11 CAN. J.L. & JURISPRUDENCE 167, 184 (1998) (“[M]ost jurisdictions allow a defendant to use deadly force . . . to protect himself against death, serious bodily harm, kidnapping or forcible sexual intercourse.”). But could she shoot her attacker if he punched her with his fist? Under traditional self-defense principles, an individual could not kill in response to a mere punch, and she certainly could not do so if the would-be attacker only threatened to punch her in the future. The answer for a battered woman should be identical, unless her experience of domestic violence has taught her that the next blow will be lethal or unless the relationship in which she is trapped can be analogized to a hostage situation. Cf. Mahoney, *supra* note 1, at 92 (suggesting that courts might have a different perspective on cases of battered women who kill during non-confrontational moments if they saw such defendants in “the paradigm of hostages resisting their captors”). This makes the admissibility of past-abuse evidence crucial.

²⁰⁷ Criminal Law Amendment (Homicide) Act, 2008, § 8 (W. Austl. Num. Acts No. 29/2008) (emphasis added).

²⁰⁸ Crimes (Homicide) Act, 2005, § 6(9AH) (Vict. Acts No. 77/2005).

²⁰⁹ *Id.*

helplessness.²¹⁰ By contrast, factors including prior violence and threats; unsuccessful attempts to seek help from friends, family, the police, and other government agencies; the lack of a safe place to go; and financial constraints can all be framed as traditionally admissible evidence.²¹¹ Indeed, such information has been introduced to defend abused women since the nineteenth century.²¹² Even if an expert witness is employed, such testimony should address the social framework, rather than the pathological aspects of BWS.

While revamping self-defense constitutes an important component of feminist homicide law reform, Victoria failed to reclaim this exculpatory doctrine as a justification for battered women charged with murder by ridding it of the excuse-inflected baggage of BWS. Thus, the state parliament may have opened the door to allegations that it abolished mitigation for men who lose control, while expanding psychological excuses for women.

3. *A New Partial Defense for Self-Protective Killings*

The adoption of a new mitigating doctrine, short of total exculpation, constituted the second half of the VLRC's proposed reform of self-defense. The Commission recommended that Victoria reintroduce excessive self-defense "as a 'halfway house' for cases where self-defense is not successful, but where manslaughter is the more appropriate outcome" than murder.²¹³ Although the Commission envisioned excessive self-defense as a safety net in family violence cases, it was not to be limited to intimate-partner homicides, but would also extend to other scenarios in which the defendant used "a level of force that is grossly excessive or otherwise

²¹⁰ *Osland v. R.* (1998) 197 C.L.R. 316, 372-73, ¶ 161 (Kirby, J.) (contending that BWS "is based largely on the experiences of Caucasian women of a particular social background. Their 'passive' responses may be different than those of women with different economic or ethnic backgrounds"); *Note on Hickey: The Problems with a Psychological Approach to Domestic Violence*, 15 SYDNEY L. REV. 365 (1993) (arguing the BWS does not fit the experiences of Aboriginals in Australia); see also HILLARY POTTER, *BATTLE CRIES: BLACK WOMEN AND INTIMATE PARTNER VIOLENCE* 115-38 (2008) (presenting qualitative sociological findings, based on interviews with abuse survivors, about how black women physically fight back against intimate-partner violence).

²¹¹ Joan H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 OHIO ST. J. CRIM. L. 555, 566 (2007).

²¹² See *supra* notes 83-84, 88 and accompanying text.

²¹³ VLRC, *DEFENCES TO HOMICIDE*, *supra* note 3, at 94. Previously, in 1987, the *Zecevic* case had eliminated excessive self-defense claims in Victoria. *Zecevic v. Dir. of Pub. Prosecutions (Vict.)* (1987) 162 C.L.R. 645, 664 (Wilson, Dawson & Toohey, JJ.) (criticizing excessive self-defense for being too complicated).

unreasonable.”²¹⁴ Practically speaking, the Commission hoped the existence of a trial outcome between a murder conviction and an acquittal might encourage more defendants to go to trial, rather than to plead guilty to charges that did not really fit the circumstances in which they killed.²¹⁵

In the end, the Parliament of Victoria enacted a new crime called “defensive homicide” that bears the same penalty as manslaughter—no statutory minimum sentence and a maximum of twenty years in prison.²¹⁶ The difference from excessive self-defense seems to be mostly expressive. Under the provision the parliament enacted, the conviction literally incorporates the concept of “defense,” which lessens the stigma to those who honestly sought to protect themselves or their families. Defensive homicide may also be broader than excessive self-defense. Under the excessive self-defense statute recently enacted in Western Australia, for example, a defendant will be convicted of manslaughter if her act would be treated as self-defense “but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be.”²¹⁷ The focus in Western Australia therefore rests on the excessiveness of the response, rather than on the defendant’s unreasonable perception that she was being threatened or attacked. Manslaughter mitigation on these grounds may apply to a smaller group of cases than under Victoria’s new law.

Will defensive homicide operate as a partial justification or a partial excuse in Victoria? The VLRC report described its proposed mitigating claim as the latter and conceded some inconsistency with its overall preference for leaving such matters for sentencing.²¹⁸ Yet these partial

²¹⁴ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 101. The concept of a grossly excessive level of force hints that a minimal proportionality requirement has been smuggled into self-defense, thus satisfying a concern that I raised above. *See supra* note 206.

²¹⁵ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at xxix.

²¹⁶ Crimes (Homicide) Act, 2005, § 6(9AD) (Vict. Acts No. 77/2005).

²¹⁷ Criminal Law Amendment (Homicide) Act, 2008, § 8 (W. Austl. Num. Acts No. 29/2008).

²¹⁸ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 101. Marcia Neave, the chairperson of the VLRC at the time the final report was drafted, described the provision of a partial excuse as an exception to the “guiding principle in the report . . . that differences in degrees of culpability generally should be dealt with through the sentencing process.” Marcia Neave, *Homicide Sentences: Taking Culpability into Account*, 86 REFORM 33 (2005) (on file with author). Imperfect or excessive self-defense doctrines are often depicted as excuses in the academic literature, as well. *See, e.g.*, Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 336 (1998) (indicating that imperfect self-defense claims by defendants who honestly but unreasonably believed they needed to use deadly force operate as partial excuses); *cf.* George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 576-78

defenses could instead be characterized as partial *justifications* based on fear of unlawful violence. The latter rationale would preserve the focus on whether the defendant's valuation embodied an appropriate moral judgment. The distinction between acts and beliefs that Cynthia Lee proposes is helpful here. As Lee argues, even though a defendant's *belief* in the need to use force may be reasonable, her "*conduct* may not be reasonable either because the force used was not proportionate to the harm threatened or because other, less drastic, alternatives were available."²¹⁹ The reasonable emotion or belief only partially legitimates the defendant's act.

Creating a partial defense for self-protective homicides has much to recommend it. It is preferable to misguided efforts to retain expansive versions of the provocation or EMED doctrines to defend battered women who kill their abusers,²²⁰ for such efforts simply create a broader and more permissive safe haven for angry men than nineteenth-century doctrines ever did.²²¹ It also has the potential to provide mitigation to defendants who formerly would have claimed provocation in scenarios other than sexual rage killings. For example, a defendant who committed homicide when faced with a non-lethal attack by an aggressor other than an intimate partner, or who witnessed a family member being victimized by such an attack, might have killed in honest but objectively unreasonable defense of

(1996) (arguing that a battered woman who kills her sleeping abuser can be excused, but not justified, because she acted on an instinct of self-preservation).

²¹⁹ Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 221 (1998) (emphasis added); see also LEE, *supra* note 14, at 269-73; Kahan & Nussbaum, *supra* note 6, at 288 (making a distinction between "having the emotion and acting in accordance with it"). Explaining Victoria's defensive homicide provision in this manner is more difficult, though, because it also seems to mitigate claims based on unreasonable beliefs and emotions.

²²⁰ According the VLRC final report, "In submissions and during consultations, particular concern was expressed about the likely consequences of removing provocation as a safety net for women who kill violent partners, but who are unable to successfully argue self-defence There was some support for the abolition of provocation to be delayed until self-defence could be shown to offer women who kill in response to violence a true defence." VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 38-39; see Howe, *supra* note 63, at 54 (noting that some feminist groups in Britain urged the British Law Commission to reform the provocation doctrine, rather than abolish it, because there was no other safety net for battered women).

²²¹ See *supra* notes 43-72 and accompanying text (describing strict limits on provocation mitigation for men in the late nineteenth and early twentieth centuries). Zealous defense attorneys will likely seek to cast the homicidal acts of enraged male clients as "defensive homicide," and such moves may be successful, but the new defense still limits the circumstances eligible for mitigation by requiring an honest belief that deadly force was necessary.

herself or a close relative.²²² Finally, a defensive homicide law allows for lesser convictions and sentences under appropriate circumstances without treating either women or men as if their actions arise from a mental condition.²²³

4. *Other Partial Defenses to Murder*

When considering other partial defenses to murder, lawmakers in Victoria displayed inconsistency in their commitment to curtailing excuse-based doctrines. The decision not to introduce a diminished responsibility defense in Victoria provides evidence that the Commission and the state parliament, in the main, sought to eschew excuses based on irrationality or loss of self-control.²²⁴ However, the VLRC's characterization of excessive self-defense as a partial excuse was not the only instance of deviation from its core message. The adoption of other homicide defenses, such as duress, paired with continued reliance on BWS evidence, weakened the reformers' bid to articulate a coherent theory of criminal responsibility.

i. Diminished Responsibility

"Diminished responsibility," also known as "partial responsibility," is a doctrine used in some European countries and four Australian states that entitles the defendant to a reduction in the severity of his sentence, even though the prosecutor has proved all elements of the crime. In Britain and Australia, the defense reduces murder to manslaughter. In contrast, in the United States, a different doctrine called "diminished capacity" operates to negate the required mens rea.²²⁵ The diminished or partial responsibility

²²² The SAC report reached a similar conclusion, stating:

As a result of the abolition of the partial defence [of provocation], it would be expected that offenders found guilty of murder under the new law would generally receive more severe sentences than those previously found guilty of provocation manslaughter. However, not all people who might previously have been found guilty of provocation manslaughter will necessarily be convicted of murder under the new law. Some may instead be acquitted after successfully raising self-defence; others may be found guilty of defensive homicide or unlawful and dangerous act manslaughter . . .

PROVOCATION IN SENTENCING, *supra* note 10, at 31.

²²³ See VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 102.

²²⁴ *Id.* at 232 ("The Commission's view and final recommendations in relation to diminished responsibility have been influenced by its views about partial excuses generally—that is, that there must be compelling reasons for making them available at all . . .").

²²⁵ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 393-94 (4th ed. 2006); SANFORD KADISH, STEPHEN SCHULHOFER & CAROL STEIKER, CRIMINAL LAW AND ITS PROCESSES 910 (8th ed. 2007).

defense remains controversial in the United States and has only been adopted in a few states.²²⁶

Diminished responsibility can be faulted on the grounds that it will lead to specious claims and that it fails to hold defendants who are not legally insane fully accountable for their actions. Moreover, it raises the specter of increased public danger if it reduces general and specific deterrence.²²⁷ Because it tends to arouse intense popular opposition, it may also have a corrosive effect on societal respect for the criminal law.²²⁸

Beyond this litany of familiar crime-control objections, adding diminished responsibility to Victoria's homicide law would have negated many of the other reforms the VLRC persuaded the state parliament to adopt. Chiefly, it would have given jealous, controlling spouses a mitigating claim even after the provocation doctrine was eliminated.²²⁹ It also might have become the default for juries reluctant to exculpate battered women who killed their abusers, thus perpetuating disease theories of family violence. As reformers in Western Australia noted in their comparable critique of this partial defense, "the focus on the psychology of the victim of domestic violence who kills can obscure the true reason the victim killed the deceased: the history of domestic violence."²³⁰ Rejecting the diminished responsibility defense thus constituted a wise step away from labeling female defendants as mentally impaired.²³¹

²²⁶ DRESSLER, *supra* note 225, at 394, 399. California abolished the defense in the 1980s, after it was successfully used to defend Dan White against charges that he murdered San Francisco Mayor George Moscone and Supervisor Harvey Milk. *See generally* People v. Saille, 820 P.2d 588 (Cal. 1991) (providing a thorough discussion of the history of the doctrine in California); *see also* WILSON, *supra* note 11, at 125-28 (discussing Dan White's successful diminished responsibility claim); Carolyn B. Ramsey, *California's Sexually Violent Predator Act: The Role of Psychiatrists, Courts, and Medical Determinations in Confining Sex Offenders*, 26 HASTINGS CONST. L.Q. 469, 497 (1999) (noting the abolition of diminished capacity or diminished responsibility mitigation in California). Dr. Martin Blinder, who provided expert testimony about White's depression and junk-food addiction, also appeared for the defense in *People v. Berry*, a California wife-killing case in which Blinder blamed the deceased's suicidal tendencies for her strangulation at the hands of her jealous husband. *See* People v. Berry, 556 P.2d 777, 780 (Cal. 1976).

²²⁷ *See* Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 851 (1977).

²²⁸ *See supra* note 226 (discussing the legal fallout from successful diminished responsibility claim that Dan White raised in California in the 1980s).

²²⁹ VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 242.

²³⁰ REVIEW OF THE LAW OF HOMICIDE, *supra* note 171, at 283.

²³¹ The unavailability of a diminished responsibility claim in Victoria is even less likely to result in unfair punishment than it is in states that have inflexible punishment regimes. Because Victoria does not impose mandatory minimum sentences, judges may devise appropriate outcomes, including hospitalization, for individuals whose mental deficiencies arguably reduce their culpability. VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 242.

ii. Duress

The VLRC also succeeded in convincing the Parliament of Victoria to adopt duress and necessity as defenses to murder and manslaughter in Victoria²³²—a move inconsistent with its general emphasis on eliminating partial excuses from the guilt phase. Citing a South Australian case, *Regina v. Runjanjic and Kontinnen*, the Commission recommended allowing the jury to hear BWS evidence on a duress claim.²³³ It thus revealed its reluctance to abandon the language of excuse or cut ties with psychological interpretations. Indeed, some Australian scholars associate *Runjanjic and Kontinnen*, the first case in which BWS was admitted in an Australian trial, with impoverished constructions of the theory that almost exclusively emphasize abnormal mental state at the expense of social context.²³⁴

The duress test seems to have been conceived as an objective one, centered on a reasonable choice between evils, rather than as a sympathetic concession to irrationality. BWS evidence presumably would go to the reasonableness of the defendant's choice.²³⁵ Yet duress poses issues that are inherently more troubling than either perfect or excessive self-defense because it applies to the killing of innocent third parties. It is not limited to sympathetic scenarios of battered women who failed to protect minor children from death or sexual abuse, but also extends to active crimes. Its applicability to battered women's cases in the absence of an imminence requirement thus means that defendants might claim duress as a defense to multiple crimes that occurred over years of ongoing domestic violence.²³⁶

The VLRC never veered closer to “whatever works” pragmatism than it did in its willingness to excuse women who facilitate their batterers' crimes and to allow BWS testimony to accomplish that end.²³⁷ The moral

²³² Crimes (Homicide) Act, 2005, § 6(9AG) (Duress) (Vict. Acts No. 77/2005). The majority of American jurisdictions do not recognize the defense of duress in cases of criminal homicide. See Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1488 (1999). Only the Model Penal Code and a small number of jurisdictions permit this theory to excuse all crimes. See *id.* at 1488 (citing MODEL PENAL CODE § 2.09(1)). While a full discussion of duress lies beyond the scope of this paper, which primarily focuses on the provocation doctrine, I would not favor a dramatic expansion of the duress defense in the United States.

²³³ See VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 121, 123-24 (citing R. v. Runjanjic & Kontinnen (1991) 53 A. Crim. R. 362).

²³⁴ See Stubbs & Tolmie, *Falling Short*, *supra* note 1, at 722-23.

²³⁵ See VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 123.

²³⁶ See Burke, *supra* note 18, at 311-13.

²³⁷ Astoundingly, the VLRC also indicated support for the continued operation of the archaic marital coercion defense in Victoria. See VLRC, DEFENCES TO HOMICIDE, *supra* note 3, at 122. Although it declined to make any formal recommendations as to this doctrine, which does not apply to murder in Victoria, it gratuitously opined:

gulf between killing a brutal abuser and victimizing a third party may simply be too wide to bridge. Falling back on the BWS approach in its zeal to include every possible defense for battered women accused of criminal homicide, the Commission failed to adhere consistently to a moral stance.

5. *Some Concluding Thoughts on Victoria's Homicide Law Reforms*

Victoria's homicide law reforms could have been reconciled in a manner that not only achieved substantive gender equality, but also consistently made moral judgments about a defendant's acts *and* valuations that distinguished less wrongful homicides from more wrongful ones based on the defendant's reasons for killing. Victoria's failure to steer the latter course without swerving leaves its reform package vulnerable to the criticism that it excuses women, while abolishing mitigation in the guilt phase for the types of homicides that men more often commit—in other words, that it turns the tables without achieving justice. The changes to murder defenses in Victoria were carefully conceived and have much to recommend them. However, they would have provided a more coherent agenda with broader applicability to other jurisdictions if they had uniformly demanded that murder defendants be treated as responsible moral agents in cases falling short of insanity.

Taking a consistently evaluative approach would have made more visible the connection between Victoria's reforms and the purposes of the criminal law. For example, if a murder conviction sends the message that it is wrongful to deny your spouse the autonomous choice to leave the marriage, at least three goals can be served. First, the condemnatory message itself fulfills the criminal law's expressive function. Second, consistent expression of moral condemnation may stigmatize this type of killing and thus have a deterrent effect on potential offenders who internalize the norm. Lastly, the conviction sends a strong cue about desert. If we believe the sexual rage killer is more deserving of punishment than

Retention of the defence [for other crimes] may be justified because of the high rate of violence by men against their partners and the difficulties which women experience in seeking effective protection against such violence. The Commission acknowledges that some women who are subjected to psychological and physical abuse may be forced to commit crimes by their husbands, although we note that it is anomalous that the defence currently applies only to married women and not to women in de facto relationships.

Id. (footnote omitted).

Anne Coughlin has thoroughly documented how in the nineteenth-century United States, the marital coercion defense was associated with theories of married women's total submission to their husbands' will, as well as with their feeble-mindedness. *See* Coughlin, *supra* note 18, at 28-42. The VLRC's embrace of this defense hints at an instrumental desire to achieve the acquittal of battered women at any cost, even at the expense of stereotyping women as childlike and dysfunctional. This is a troubling passage.

the defendant who honestly but unreasonably killed in self-defense, we must follow the courage of our convictions in treating sexual rage as an inappropriate valuation and acknowledging that fear caused by spousal battering is an appropriate one.

IV. MORAL JUDGMENT, PARTIAL DEFENSES TO MURDER, AND THE PROSPECTS FOR REFORM IN THE UNITED STATES

This Part considers whether Victoria's reform package should be adopted in American states and concludes that several steps ought to be taken with regard to partial defenses. First, statutory EMED defenses based on the Model Penal Code should be repealed. The second step depends on the willingness of state legislatures to revise their sentencing regimes. Victoria's reforms exemplify the greater creativity that can be brought to improving substantive law when guided discretion is possible in sentencing. American sentencing law is currently in flux. Some states have repealed mandatory minimums and lowered maximum penalties for certain crimes due to budgetary concerns and other factors.²³⁸ Enhanced ability to individualize sentences for murder would make possible the complete abolition of the common law provocation doctrine in the guilt phase. By contrast, if American states retain their harsh sentencing structures, the common law provocation doctrine will have to be curtailed, rather than abolished completely. Constraints on its availability could take the form of either refashioned categories of adequate provocation or categorical exclusions of certain types of defense claims, such as those based on a spouse's infidelity, separation, or desire for a divorce. This Part contends that, because it is difficult to anticipate every conceivable wrong that might lead a defendant to feel morally appropriate anger, it is preferable to list the things that *cannot* constitute the basis of a provocation claim. Finally, widespread adoption of an imperfect self-defense doctrine without any requirement of an immediate threat would provide an important safety net for defendants who claim to have killed to protect themselves, but whom juries are unwilling to exonerate completely.

A. THE UNITED STATES AND AUSTRALIA: A COMPARISON OF THE MODERN SOCIAL AND LEGAL CONTEXT

²³⁸ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285-90 (2005).

Although American women may commit intimate-partner homicides more frequently than their Australian counterparts,²³⁹ recent data demonstrate that both fatal and non-fatal intimate-partner violence in the United States primarily involves female victims and male perpetrators.²⁴⁰ According to U.S. Department of Justice surveys, American men are three times more likely than American women to kill their spouses or intimate partners.²⁴¹ Moreover, women in the United States, as in Australia, usually commit intimate-partner homicides “after years of suffering physical violence, after they have exhausted all available sources of assistance, when they feel trapped, and because they fear for their own lives.” In contrast, American “[m]en often hunt down and kill spouses who have left them.”²⁴²

While some husband-killers are vilified at trial,²⁴³ modern American cases, like their historical counterparts,²⁴⁴ tell a complicated and somewhat surprising story. According to a recent study, rage killers are more likely to be convicted of murder than to receive manslaughter mitigation, whereas prosecutors and juries tend to accept the EMED claims of defendants who assert that they committed homicide out of fear.²⁴⁵ Anecdotal evidence indicates that the female defendants who have attracted the least sympathy from juries and the media engaged in conduct that resembled a separation assault by a jealous male.²⁴⁶ Such examples might suggest that calls to

²³⁹ See Morgan, *supra* note 42, at 2 n.5 (citing Wilson & Daly, *supra* 166, at 190 (“In the United States, ‘the number of women who kill their husbands relative to the numbers of men who kill their wives . . . is exceptionally high.’”)).

²⁴⁰ See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1993-2001 (2003).

²⁴¹ *Id.*

²⁴² Wilson & Daly, *supra* note 166, at 206.

²⁴³ See, e.g., LEE, *supra* note 14, at 49-50 (arguing that Betty Broderick, a Southern California woman who killed her ex-husband and his new wife, failed to fit the image of the Reasonable Woman because, after the divorce, she gained weight, stalked her former spouse, damaged his property, and left vulgar messages on his answering machine).

²⁴⁴ See *supra* Part II.

²⁴⁵ Stuart M. Kirschner, Thomas R. Litwack & Gary J. Galperin, *The Defense of Extreme Emotional Disturbance: A Qualitative Analysis of Cases in New York County*, 10 PSYCHOL. PUB. POL’Y & L. 102, 102, 127 (2004).

²⁴⁶ One such case that produced a media frenzy involved the so-called “Mercedes Murderer,” Clara Harris, who ran over her adulterous husband three times with her luxury car while his teenage daughter sat, horrified, in the front seat. See *Prosecution Witnesses Recall Wife Running Over Husband*, CNN.COM, Feb. 12, 2003, <http://www.cnn.com/2003/LAW/02/11/harris.trial/>; see also LEE, *supra* note 14, at 46-50 (discussing the case of Betty Broderick, who committed a lethal separation assault on her former spouse and his new wife). Both Broderick and Harris were convicted of murder. See *id.* at 49 (noting that Broderick was convicted of second-degree murder); Nick Madigan, *Jury Gives 20-Year Term in Murder of Husband*, N.Y. TIMES, Feb. 15, 2003, at A15 (reporting that a jury convicted Harris of first-degree murder).

abolish or amend the provocation doctrine and the EMED defense are premature and that the impact of these laws on men's and women's cases is not, in fact, unfair. Conversely, they could be interpreted as a sign that some individual actors in the criminal justice system have a truer compass than does the current law—that is, they apply expansive doctrines narrowly with an eye to the moral difference between jealous rage and frustration, on the one hand, and fear of physical victimization, on the other.

Some positive legal change has already occurred in the United States. As discussed below, a few American jurisdictions, most notably Maryland and Minnesota, have revised their laws to constrain the ability of domestic abusers and sexual rage killers to escape murder convictions.²⁴⁷ In addition to these changes, some states have laws that parallel specific aspects of Victoria's reform package. For example, a substantial minority of American jurisdictions allow imperfect self-defense claims to reduce murder to manslaughter in a manner similar to Victoria's new defensive homicide provision.²⁴⁸ Feminists in the United States have also taken the lead in identifying less stigmatic means of explaining a battered woman's constrained or non-existent choices than the BWS theory provides.²⁴⁹

Nevertheless, the laws in some American states still make BWS evidence a necessary evil to get an imperfect self-defense theory, not to mention completely exculpatory claims, before a jury.²⁵⁰ Reforming defenses to murder thus constitutes a prerequisite to eschewing stereotypes of irrationality when representing battered women who killed their abusers, as well as to ridding homicide law of its morally erroneous excuses for men.

B. ABOLISHING THE EXTREME MENTAL OR EMOTIONAL DISTURBANCE APPROACH

The repeal of EMED statutes is an important place to start. The chief dangers of the Model Penal Code approach described earlier in this Article are its extreme individualization of the "reasonable person" test and its

²⁴⁷ See *infra* notes 283-84 and accompanying text.

²⁴⁸ See Reid Griffith Fontaine, *Reactive Cognition, Reactive Emotion: Toward a More Psychologically-Informed Understanding of Reactive Homicide*, 14 PSYCHOL. PUB. POL'Y & L. 243, 259 (2008).

²⁴⁹ Indeed, as early as 1996, a study undertaken under the federal Violence against Women Act, recommended a social-context approach. It described the breadth of empirical knowledge about "battering and its effects" and discussed the limitations of the BWS theory. U.S. DEP'T OF JUSTICE AND U.S. DEP'T HEALTH & HUM. SERVS., 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 vii, xii-xiii (1996).

²⁵⁰ See, e.g., *infra* notes 283-84 and accompanying text (discussing imperfect self-defense doctrine in Maryland).

willingness to abandon or cloak moral assessments in favor of sympathy for a defendant's purported volitional impairment.²⁵¹ Defendants who claim EMED are not legally insane, and they do not argue that their disturbed emotions negated their intent to kill. They are intentional homicides that should result in verdicts expressing a high level of condemnation. Mitigation on the basis of fine psychological gradations that cannot be reliably determined risks providing a normatively undesirable excuse for the very defendants this Article contends should *not* be excused—stressed or depressed men driven to kill by rage at their inability to control women.²⁵²

Although this Article primarily focuses on culpability, utilitarian concerns are also relevant. Assuming for the sake of argument that an emotionally disturbed defendant cannot be specifically deterred due to a volitional impairment, denouncing his act as murder may prevent others from raising spurious psychological claims. Furthermore, while the Model Penal Code approach seeks a halfway house for disturbed individuals who cannot obtain insanity acquittals, it does not ensure that their reduced prison sentences will be paired with any therapeutic regimen to help them manage their violent emotions upon release. Thus, a variety of utilitarian concerns for society's safety, including deterrence and incapacitation, can be paired with arguments about blameworthiness to advocate the repeal of the EMED defense.

The Model Penal Code's approach to manslaughter mitigation has had limited influence in the United States. Relatively few states that adopted other Code provisions enacted the EMED defense, and "a substantial number of the ones that did reverted to the common law formulation after only a short time."²⁵³ However, more than a dozen states currently have manslaughter laws that partly track Model Penal Code recommendations.²⁵⁴

²⁵¹ See *supra* notes 94-99 and accompanying text.

²⁵² But see Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 301 (2003) (arguing that conditions like "great stress" should reduce culpability) [hereinafter Morse, *Diminished Rationality*]. Morse formerly opposed both heat-of-passion and partial responsibility defenses because he believed that even people with mental health problems could refrain from killing. See generally Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984) [hereinafter Morse, *Undiminished Confusion*]. For further discussion of Morse's opposition to the provocation defense, see Morse, *Diminished Rationality, supra*, at 290, and *infra* note 269 and accompanying text.

²⁵³ Kahan & Nussbaum, *supra* note 6, at 323.

²⁵⁴ One prominent criminal law casebook asserts that five states "adopted the Model Penal Code provocation proposals almost whole (Arizona, Arkansas, Connecticut, Kentucky, and New York)" and that "[a]bout a dozen other states adopted some of the Code's features, usually the 'extreme emotional disturbance' formulation, but adopted it with significant alterations." KADISH ET AL., *supra* note 225, at 405. In contrast, Lee contends that "at least

Others have judicially expanded versions of the common law provocation defense. The empirical evidence that Victoria Nourse compiled clearly shows that, in reform jurisdictions, judges give more manslaughter instructions in separation-murder cases than in common law states.²⁵⁵ Many of these killings arise, not from witnessed acts of adultery, but from the victim's choice to leave her partner, file for divorce, get a restraining order, or decline a request for a date. The law permits the defendant's claim of control over a spouse, lover, or even the object of his unrequited sexual obsession to extend far beyond the termination of all social and legal connection. During the period Nourse studied, men who stalked and killed women because they remarried, moved out, or simply declined to become romantically involved routinely succeeded in getting their emotional disturbance defenses before a jury.²⁵⁶ Heterosexual intimate partnerships are not the only gendered situations in which the EMED approach acknowledges intense emotions bordering on depravity as potential objects of a jury's compassion. For example, heterosexual men have asked juries to believe they acted under provocation or EMED when they killed gay men for making non-violent sexual overtures to them.²⁵⁷

What the jury does with such claims may be a different matter. Although Nourse did not analyze verdicts, at least one study has shown that between 1988 and 1997 in New York County, a jurisdiction that follows the Model Penal Code approach, juries and prosecutors made distinctions favoring defendants who "killed or tried to kill in response to physical victimization or understandable fear [thereof]" at the hands of the deceased, but proved "unreceptive to claims of EED [the New York version of EMED] when the defendant's prevailing emotion at the time of the crime was anger unmitigated by a reasonable . . . fear of physical harm."²⁵⁸ Thus, contrary to some feminist predictions,²⁵⁹ increased jury discretion does not seem to have resulted in rampant sexism in verdicts mitigating murder to voluntary manslaughter. The New York study's authors conclude that the concerns of EED critics are "considerably exaggerated" and that, in fact, the

twenty states have adopted the Model Penal Code approach to provocation" and provides a helpful list in a footnote. LEE, *supra* note 14, at 33 & n.66.

²⁵⁵ See Nourse, *supra* note 17, at 1347-50 & tbls.A & B.

²⁵⁶ See *id.* at 1352-66.

²⁵⁷ Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 500 (2008) [hereinafter Lee, *Gay Panic*].

²⁵⁸ Kirschner et al., *supra* note 245, at 130.

²⁵⁹ See, e.g., Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 669 (2001) (expressing concern that the EMED doctrine will allow jurors to give voice to their own prejudices).

defense may be most compassionate toward battered women who kill their abusers.²⁶⁰

Three objections to this conclusion must be noted, however. First, the authors do not actually demonstrate that the defense works well for female defendants, as a very small number of subjects in their study were female.²⁶¹ Second, the New York data does not allow meaningful analysis of “gay panic” claims, which have resulted in manslaughter mitigation in several cases.²⁶² Third, “successful” outcomes for murder defendants, as measured by manslaughter verdicts and acquittals, tell only a partial story—the story of the jury’s compassion for one type of defendant over another. They do not tell us that the law on the books is fair or expressive of appropriate judgments about which beliefs and actions reflect blameworthiness or dangerousness. “[T]he decision to send the case to a jury itself has legal meaning,” as Nourse contends.²⁶³ When an EMED instruction communicates to a jury that anger over an intimate-partner’s departure reduces murder to manslaughter, “it partially, but clearly, punishes the act of leaving” the relationship.²⁶⁴ Thus, it sends a bad moral message, and it reduces deterrence, too, by showing leniency to rage killers whom little or no empirical evidence suggests are less likely to recidivate than others who commit homicide.²⁶⁵ Furthermore, even if some juries interpret the elements of EMED more narrowly than the instructions

²⁶⁰ Kirschner et al., *supra* note 245, at 126, 129. I have found anecdotal evidence that defense lawyers sometimes advise male clients to plead guilty to murder in exchange for a reduced sentence, rather than to claim EMED, in separation assault cases and that these decisions have been held not to constitute ineffective assistance of counsel because juries may be unlikely to accept EMED claims and may even recommend a death sentence on separation-assault facts. *See, e.g., Vaughn v. Commonwealth*, 258 S.W.3d 435, 440 (Ky. Ct. App. 2008) (holding that defense counsel was not ineffective in pursuing a guilty plea, rather than raising an EMED defense, where the defendant shot his estranged wife in front of eyewitnesses after she ended their relationship and obtained an emergency protective order against him); *Perez v. Warden*, No. CV000597510, 2001 WL 1468643, at *8 (Conn. Super. Ct. Nov. 2, 2001) (holding that defense counsel did not perform ineffectively by recommending that a physically abusive, alcoholic husband who killed his unfaithful wife enter a guilty plea, rather than proceeding to trial with an EMED claim).

²⁶¹ Only two cases involved female defendants, both of whom pled guilty to manslaughter without a jury determination of whether self-defense or any other claim might have exculpated them completely. *See* Kirschner et al., *supra* note 245, at 108.

²⁶² *See* Lee, *Gay Panic*, *supra* note 257, at 500; *cf.* NSW BRIEFING PAPER, *supra* note 171, at 11-12 (discussing *Green*, in which a man who killed in response to a non-violent homosexual advance was found guilty of manslaughter after the Australian High Court overturned his murder conviction).

²⁶³ Nourse, *supra* note 17, at 1357.

²⁶⁴ *Id.* at 1355, 1357.

²⁶⁵ Dressler, *Why Keep the Provocation Defense?*, *supra* note 31, at 965.

encourage,²⁶⁶ the potential for ambiguous and arbitrary application of the partial defense bolsters the case for its abolition.

A few feminist scholars—most notably, Nourse and Donna Coker—have mounted criticisms of expansive, modern approaches to loss of self-control.²⁶⁷ Yet, for other feminists, the parallels between the longer time frames and psychiatric experts needed to show EMED and those used to raise self-defense claims based on BWS have led to a pragmatic reluctance to attack EMED too strenuously. In the end, though, it is a mistake to concede any commonality between a man who slays his partner because he cannot control her sexuality (or her other non-violent behavior) and a woman who kills her husband because he threatens her with death. Legislatures ought to insist on a moral distinction between the two and repeal the EMED statutes. As described below,²⁶⁸ widespread adoption of imperfect self-defense mitigation—or defensive homicide, as Victoria’s law now describes it—would provide a back-up option more appropriately tailored to self-protective killings than EMED.

C. THE FATE OF THE PROVOCATION DOCTRINE

1. *Is Abolition Feasible in the United States?*

A few American scholars have urged complete abolition of the heat-of-passion defense, including its narrower common law incarnations. For example, Stephen Morse makes the compelling argument that

[r]easonable people do not kill no matter how much they are provoked, and even enraged people generally retain the capacity to control homicidal or any other kind of aggressive or antisocial desires. We cheapen both life and our conception of responsibility by maintaining the provocation/passion mitigation As virtually every human being knows because we all have been enraged, it is easy not to kill, even when one is enraged.²⁶⁹

The abolition argument has also been made from a feminist perspective in the United States. Emily Miller contends, for instance, that “[b]ecause what is reasonable cannot be determined without reference to value systems biased in favor of men, the only true egalitarian approach is abolition.”²⁷⁰ But the abolitionist position has not gained ground in the United States the way it has in Australia. Although Texas shifted consideration of “sudden

²⁶⁶ See, e.g., *People v. Ross*, 826 N.Y.S.2d 769, 772 (N.Y. App. Div. 2006) (“[A]nger and jealousy do not entitle a defendant to an extreme emotional disturbance charge.”)

²⁶⁷ See Coker, *supra* note 117, at 78, 82, 86-87, 91-92, 120; Nourse, *supra* note 17, at 1337, 1352-58, 1365-66.

²⁶⁸ See *infra* notes 317-33 and accompanying text.

²⁶⁹ Morse, *Undiminished Confusion*, *supra* note 252, at 33-34 (footnote omitted).

²⁷⁰ Miller, *supra* note 259, at 693.

heat of passion” from the guilt phase to the penalty phase, it did so without attacking the gendered impact of designating separation or infidelity as legally provoking.²⁷¹ Moreover, no ripple effect ensued from the Texas reform.

The drastic reduction of judicial authority over criminal sentencing in the 1980s and 1990s partially accounts for the abolition argument’s lack of success in the United States. During this time period, mandatory minimum sentencing laws, life-without-parole penalties, repeat offender provisions, and strict guidelines regimes proliferated at the state level, and the majority of states abolished or limited parole.²⁷² Eliminating a mitigating doctrine like the heat-of-passion defense in this environment would have subjected a larger class of murder defendants to draconian and virtually automatic penalties. Recently, the innocence movement, budgetary concerns, and other factors have created a climate more favorable to sentencing reform. Both the number of executions and support for the death penalty have declined, and more than half of American states have taken strides to make sentencing less harsh and more individualized.²⁷³ The time thus may be ripe for a comprehensive overhaul of our approach to murder cases that includes the reform of defenses, as well as changes to the way we sentence and punish those convicted of murder or manslaughter.

Yet, unlike Victoria and Tasmania, which can defer consideration of provocation arguments to a flexible sentencing phase, many jurisdictions, including Britain and some Australian and American states, still allow minimal discretion in sentencing.²⁷⁴ In Western Australia, the provocation defense was abolished even though the presumptive penalty for murder was life imprisonment. However, Western Australia paired reform of the substantive law with at least one change in its sentencing regime; it now allows a penalty reduction for circumstances in which a life term would be unjust.²⁷⁵ By contrast, in jurisdictions where discretionary leniency in sentencing is proscribed, a murder verdict dictates much more than the stigma of conviction.

²⁷¹ See *supra* note 271 and accompanying text (discussing the legislative change in Texas).

²⁷² See James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 360-61 (2009).

²⁷³ See *id.* at 369-70 & n.199; Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 267 n.214 (2007).

²⁷⁴ Jeremy Horder qualified his call for abolition in Britain with the caveat that such a move would only be possible “should the mandatory life sentence for murder ever be abolished.” HORDER, *supra* note 35, at 197. See also Forell, *supra* note 38, at 43 (discussing the impact of mandatory minimum sentencing on the reform of murder defenses).

²⁷⁵ CRIM. CODE 1913 (W. Austl.), § 279(4).

Some commentators might not find this harsh result troubling, especially in cases of defendants whose homicidal acts arose from sexual jealousy. Indeed, the SAC report in Victoria recommended excluding such claims from mitigation at sentencing.²⁷⁶ But the provocation doctrine has never been solely about adultery or the termination of intimate relationships. Rather, the partial defense traditionally embodied other claims besides the iconic allegation of victim infidelity—including claims based on the accused witnessing the deceased assault a family member or experiencing a violent attack by the deceased himself.²⁷⁷ While anecdotal evidence yields glimpses of popular outrage over lenient sentences for men who slew their adulterous wives,²⁷⁸ totally abolishing the provocation doctrine in the United States, without concurrent changes to our draconian sentencing structure, would deprive other provoked defendants of a chance for mitigation.²⁷⁹

For these and other reasons, American scholars have largely confined themselves to modifying the “reasonable person” test²⁸⁰ or to discussing how a jury should be instructed to counter potential prejudices.²⁸¹ We need

²⁷⁶ See *supra* notes 194-200 and accompanying text (discussing the SAC report’s recommendations).

²⁷⁷ See, e.g., *Girouard v. State*, 583 A.2d 718 (Md. 1991) (describing the traditional common law categories of legally adequate provocation).

²⁷⁸ See Kahan & Nussbaum, *supra* note 6, at 346.

²⁷⁹ See Forell, *supra* note 38, at 43.

²⁸⁰ For instance, Caroline Forell and Donna Matthews propose a “reasonable woman” standard that would result in the categorical exclusion of any alleged provocation “short of actual or imminent serious bodily harm.” FORELL & MATTHEWS, *supra* note 14, at 172. This creative proposal can be faulted for assuming all women see reasonableness the same way. Although I accept empirical evidence that women most often kill in self-defense, whereas men kill out of a desire to exert control, my argument does not ultimately depend on essentialist generalizations about women’s emotions or beliefs. It is more useful to describe the moral content the law should embody and the norms it should announce than to characterize these aspirations as masculine or feminine. My approach celebrates and reinforces changes in societal attitudes, such as emerging intolerance for sexual rage killings, without suggesting that the only “good guys” are the ones who think like women. Homicide law should respect non-violent acts of autonomy in an intimate relationship, rather than display empathy for one partner’s brutal desire to dominate the other; it should express compassion and even approval for defensive conduct in response to physical victimization. In short, I agree with much that Forell and Matthews advocate, including their claims that “reasonable women want and demand respect, personal autonomy, agency, and bodily integrity” and that behavior violating these aspects of humanity should be illegal and punishable. *Id.* at xix. However, in the final analysis, I believe the “reasonable woman” standard is marred by its tendency to stereotype and essentialize female experience.

²⁸¹ For example, Cynthia Lee advocates jury instructions that insert a proportionality requirement by explaining that the defendant’s act, as well as his emotion, must be normatively reasonable. LEE, *supra* note 14, at 268. She also proposes helping jurors

to go farther than this to correct the unequal and morally mistaken impact of the expansive modern provocation defense. Ideally, this Article will spark a conversation about the need for comprehensive reform of both substantive law and sentencing in murder cases. Yet, because American sentencing regimes are now in flux, it offers a proposal that will work even if mandatory minimums and other constraints remain on the books in some states.

2. *Refashioning the Categories of Adequate (or Inadequate) Provocation*

Alternatives to abolishing the heat-of-passion doctrine include the retention of the reasonable person standard paired with either the reform of the traditional common law categories of adequate provocation or the preclusion as a matter of law of certain types of claims. This Article favors the latter.

i. Newfangled Categories

Refashioning the categories of adequate provocation might mean a return to the nineteenth-century five—extreme assault and battery upon the defendant, mutual combat, the defendant’s illegal arrest, and injury or serious abuse of a close relative—minus the sudden discovery of a spouse’s adultery.²⁸² Alternatively, it might necessitate envisioning entirely new types of victim behavior that could conceivably spark legitimate feelings of anger or fear. Whichever categories one chooses, though, this approach has the same flaw that prompted the Model Penal Code reforms—namely, its inflexibility. The EMED defense can be faulted for replacing righteous rage with pathology and rigid categories with the potential for nearly boundless excuses. Nevertheless, the Model Penal Code’s drafters had a valid point about rigidity. Eschewing the Code’s focus on loss of self-control in favor of moral evaluation provides no method of foreseeing every wrong that could lead a defendant to feel morally appropriate rage or fear. A reductive list of provoking conduct thus constrains the provocation doctrine without offering much assurance that the chosen categories are either principled or sufficiently inclusive.

ii. Categorical Exclusions

Several American states have instead opted for categorical exclusions, which I believe to be a superior approach. For instance, Maryland’s

recognize their own biases by asking them to switch certain attributes of the victim and defendant, including their sex and race. *Id.* at 252-53.

²⁸² See, e.g., *Girouard*, 583 A.2d at 718 (describing traditional limits to legally adequate provocation).

criminal code now provides that “the discovery of one’s spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery.”²⁸³ Minnesota bars a defendant from claiming that a child crying constitutes provocation.²⁸⁴ In a similar vein, several commentators have urged legislatures to enact laws, or judges to make rulings, that exclude “gay panic” defenses from manslaughter mitigation.²⁸⁵

The existence of mandatory life terms and other constraints on sentencing discretion in some states makes it unfeasible to condemn all provoked killings as murder in these jurisdictions but still allow for some individualization in punishment. Hence, this Article proposes a solution that will work with or without sentencing reform. Instead of abolishing the heat-of-passion defense, American states should statutorily exclude narrowly drawn classes of victim behavior from legally adequate provocation on the grounds that killing in these contexts can never be partially justified.²⁸⁶ My goal is not to draft a model statute, but simply to propose that killings based on antiquated social values and those that deny equality between people should be ineligible for manslaughter mitigation.

Although this Article leaves the details of a legislative solution to the states, categorical exclusions from the standard of legally adequate provocation might encompass such behavior as:

²⁸³ MD. CODE ANN., CRIM. LAW § 2-207(b) (LexisNexis 2002).

²⁸⁴ MINN. STAT. ANN. § 609.20(1) (West 2009).

²⁸⁵ See, e.g., Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 662 (2001) (“[S]tate legislatures should move to explicitly and statutorily prohibit the homosexual-advance defense as a part of their hate crimes legislation.”); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 176-77 (1992) (“[W]hen a defendant raises the homosexual-advance defense, judges should consider the growing normative acceptance and understanding of homosexuality . . . and find as a matter of law that a homosexual advance is insufficient provocation.”). For examples of proposed and enacted legislative preclusions in Australia, see *infra* note 298 and accompanying text (discussing amendments to the provocation defense in the Australian Capital Territory) and NSW BRIEFING PAPER, *supra* note 171, at 16 (noting that, in 1998, the exclusion of non-violent homosexual advances from the law of provocation was recommended in New South Wales). But see Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 763 (1995) (“[I]f critics wish to attack the provocation defense, they should do it from a feminist, not a sexual orientation, perspective.”).

²⁸⁶ For further discussion of the provocation defense as a partial justification, see *infra* Part IV.C.3.

(1) a decision by the victim to terminate or decline to begin a romantic or sexual relationship with the defendant or to have sex with another person;

(2) a non-violent homosexual advance by the victim toward the defendant;

(3) any behavior by a child, except for an aggressive act that posed a risk of death or serious bodily injury to the defendant or another;

(4) and mere words.

Precluding these types of defense claims would constrain the provocation doctrine within bounds sufficiently flexible to accommodate jury consideration of many individual cases, while still exempting from mitigation lethal acts arising from indefensible judgments about the victim's autonomy, freedom to speak, or youthful misconduct.

Scholars and legislators will likely quibble with these suggested preclusions. For example, some might find the infidelity-or-separation exclusion unpalatable, despite the commonplace nature of adultery and divorce in American society. Marriages consecrated in religious settings are viewed as sacred; even secular unions often involve vows of fidelity and permanence. However, being angry or distraught over the disintegration of a marriage is not the same as violently denying your spouse's autonomy to make a choice, even a hurtful choice. The criminal law has no proper role in assigning fault for divorce, separation, or adultery—especially given potential ambiguity about whether a spouse wrongfully breached her vows or whether she was driven into another relationship to escape a cruel and violent marriage. The criminal law should not use its expressive power to say that the emotions and actions of dominance in an intimate relationship make the perpetrator of a lethal separation assault less culpable than a murderer.²⁸⁷

Barring provocation claims arising from infidelity and separation—scenarios in which men disproportionately use lethal violence to control and punish their spouses—is necessary if categorical exclusions are to be guided by equality principles. A similar approach has been adopted in Maryland²⁸⁸ and most recently in Britain.²⁸⁹ It has also been proposed in

²⁸⁷ Mahoney, *supra* note 1, at 65 (defining a “separation assault” as an “attack on the woman’s body and volition in which her partner seeks to prevent her from leaving, retaliate for separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship.”).

²⁸⁸ See *supra* note 283 and accompanying text.

²⁸⁹ The Coroners and Justice Act 2009 that recently became law in the United Kingdom asserts that sexual infidelity cannot constitute the sole basis for feeling “seriously wronged” for the purposes of a partial defense of “loss of control.” See Coroners and Justice Act, 2009, c. 25, Part 2, Ch. 1, § 55(6)(c). While this change was under consideration as a bill,

Queensland, Australia, where a law reform commission recommended barring provocation claims based on “the deceased’s exercise of choice about a[n] [intimate] relationship” except in “circumstances of an extreme and exceptional character.”²⁹⁰

The “mere words” exclusion is perhaps the hardest to reconcile with substantive equality theory. Indeed, reformers in Victoria indicated that a racial slur might be sufficiently wrongful to constitute legal provocation for sentencing purposes.²⁹¹ However, they made this determination in the context of provocation’s total elimination as a mitigating doctrine in the guilt phase. A killer who acts on the basis of a racial slur is still deemed a murderer in Victoria. By contrast, if the heat-of-passion defense is retained as an avenue to manslaughter mitigation, I would favor categorically excluding claims of purely verbal provocation, even if based on race, ethnicity, religion, gender, or sexual orientation, unless the allegedly provoking words constituted a threat or were paired with a physical assault. In “mere words” cases, the equality-denying potential of speech bumps up against another concern that should inform legislative exclusions—that of freeing the provocation doctrine from the troubling implications of using violence to defend honor.²⁹² Words can enforce the subordination of certain groups and show deplorable prejudice, but the violent, private policing of hate speech should not be condoned, lest we adopt the pernicious methods of nineteenth-century honor culture to attack the hierarchical inequities that honor culture perpetuated.²⁹³

the British government stated that, in a mixed-motive case, “where sexual infidelity is one part in a set of circumstances which led to the defendant losing control, the defense should succeed or fail on the basis of those circumstances disregarding the element of sexual infidelity.” MINISTRY OF JUSTICE, MURDER, MANSLAUGHTER AND INFANTICIDE: PROPOSALS FOR REFORM OF THE LAW (SUMMARY OF RESPONSES AND GOVERNMENT POSITION) (2009), available at <http://www.justice.gov.uk/consultations/docs/murder-review-response.pdf>. For more information on reforms in the United Kingdom, see *infra* notes 308-12 and accompanying text.

²⁹⁰ For the recommendation of the Queensland Law Reform Commission (QLRC), see QLRC, A REVIEW, *supra* note 172, at 481. The QLRC proposal seems to give the judge, not the legislature, gate-keeping responsibility, however.

²⁹¹ See *supra* note 198 and accompanying text.

²⁹² In the nineteenth century, provocation claims were not only available to men who caught their wives in the act of adultery (a classic transgression of honor), but also, as the doctrine expanded in some jurisdictions, to killers provoked solely by verbal insults. See *supra* note 57 and accompanying text. Perhaps more surprisingly, women could defend their honor by slaying men who jilted them, and when they did so, they often received total exculpation, rather than being convicted of manslaughter. See *supra* note 82 and accompanying text.

²⁹³ See Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. L. ISSUES (forthcoming 2009) (describing

iii. Responding to Criticisms of the “Categorical Exclusion” Model

Even the basic concept of categorical exclusions is not without its flaws. Legislative choices about what *cannot* meet the standard as a matter of law arguably still confront the task of imagining “the myriad ways in which an encounter preceding an allegedly provoked killing may take place.”²⁹⁴ Since a legislature must work on the basis of hypothetical examples, its *ex ante* determinations may not fit the facts of actual cases. Hence, some commentators oppose giving the legislature line-drawing authority in this area.²⁹⁵ Statutory exceptions to the provocation defense need not be sweeping, however. For instance, an exception that bars provocation claims based solely on an intimate partner’s infidelity or decision to terminate a relationship with the defendant, seek a divorce, or obtain a restraining order would not preclude a killer’s partial defense to murdering his adulterous wife if she had also physically abused their children.

An actual homicide for which manslaughter mitigation was extended further demonstrates the “categorical exclusion” model’s ability to account for case-specific facts. In this deadly incident, the male defendant, whom a camp counselor had repeatedly sodomized when he was a child, killed a man who made sexual advances toward in him in a park.²⁹⁶ A legislative ban on provocation claims arising from non-violent homosexual overtures would not have prevented this killer from raising a mitigating argument because he also claimed “he thought that he saw the victim reach into his pocket for a weapon.”²⁹⁷ Such a narrow preclusion of gay panic claims would harmonize with the approach taken in several Australian jurisdictions, including the Australian Capital Territory, whose amended law provides that “a non-violent sexual advance . . . toward the accused is not sufficient, *by itself*” to reduce murder to manslaughter.²⁹⁸

A second objection to the “categorical exclusion” model centers on a preference for juries. For example, Cynthia Lee disfavors both legislative restrictions and decisions by a potentially prejudiced judge affecting which provocation issues reach the jury.²⁹⁹ Her criticism of legislative solutions

how the violent honor culture of the nineteenth-century South was used to subordinate blacks and others who insulted white men).

²⁹⁴ Lee, *Gay Panic*, *supra* note 257, at 550.

²⁹⁵ See, e.g., *id.*

²⁹⁶ Kirschner et al., *supra* note 245, at 118.

²⁹⁷ *Id.*

²⁹⁸ NSW BRIEFING PAPER, *supra* note 171, at 23 (citing Crimes Act, 1900 (ACT), § 13, as amended by the Sexuality Discrimination Legislation Amendment Act, 2004 (ACT)) (emphasis added).

²⁹⁹ *Id.*

presumes that juries are freer from bias than legislatures are because constitutionally mandated rules of jury composition ensure broad community representation and because most juries operate unanimously, rather than following a majority vote.³⁰⁰ I respectfully disagree with her analysis here. This Article occasionally cites jury verdicts as indicators of prevalent social values; yet it does not view jury behavior in murder cases as a transparent window on what types of homicides the law should or should not punish and with what degree of severity. While the law should track communal values sufficiently to maintain legitimacy, it should also play a leadership role in shaping social norms and educating the public about what is morally wrongful. Legislatures and judges (and to a certain extent, legal academics) take responsibility for this educative aspect of lawmaking. Although the latter two display the most pretensions to enlightenment, it is the former—the legislature—that has the greater potential to counter minoritarian bias. Moreover, while a jury’s decision to accept or reject a particular version of the provocation defense may have an irreparable and largely invisible impact in individual cases, legislative enactments are not only highly public; they can also be repealed.

Multicultural concerns constitute a third possible objection to the “categorical exclusion” model. In Victoria and Tasmania, cultural background is now taken into account in determining punishment, rather than guilt, in murder cases. This shift in authority from jury to judge has not been universally applauded because it shunts the discussion of what is considered provoking in the defendant’s culture to a less visible and less democratic forum.³⁰¹ In American states, my proposed legislative exclusions might clash with some cultural practices even though they would be established democratically. For example, immigrant and aboriginal defendants sometimes proffer evidence that, due to their beliefs and customs, they could not restrain themselves from committing homicide upon learning of a spouse’s adultery or even her intent to seek a divorce.³⁰² A statutory bar to provocation mitigation in cases of infidelity or separation arguably would discriminate against the cultural values of these minorities.

The tension between acknowledging cultural difference and appropriately condemning violence against women troubles many feminists, including myself.³⁰³ Yet, from a formal equality perspective, concerns about the unequal treatment of minority defendants would be

³⁰⁰ See Lee, *Gay Panic*, *supra* note 257, at 553-54.

³⁰¹ See, e.g., Bronitt, *supra* note 113, at 126 (raising such concerns).

³⁰² See LEE, *supra* note 14, at 113-17.

³⁰³ See Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 38-39 (1995) (noting that this tension has produced debate).

lessened if neither minorities nor members of the dominant culture could raise a provocation defense based on infidelity or separation. Even under the substantive equality approach this Article advocates, neither the white nor the minority defendant should be allowed to shelter under an anachronistic and sexist category. Whether the judgment that a wife's transgression excused her murder derives from a dominant or minority claim, it erroneously assumes a static value system unchanged by women's international bid for equality over the last century. Euro-Americans and Euro-Australians have grown more accepting of a wife's right to leave a marital relationship. Patriarchal beliefs have also become outmoded or at least subject to challenge in the homelands of many immigrant and indigenous defendants of color.³⁰⁴ In short, cultural defense theories should not be allowed to bolster residual misogyny in the face of progressive social change.

A fourth anticipated criticism of the "categorical exclusion" approach is the practical concern that, if the exclusions do not track areas of virtual unanimity in social values, jury nullification will result. Legislatures that fail to pair reform of the partial defense with changes in harsh sentencing laws might encounter a variation on the "sticky norms" problem.³⁰⁵ Despite the relatively progressive social values revealed by studies of jury verdicts, residual beliefs that adultery, for example, sometimes warrants a violent response might lead to acquittal by fact-finders or even down-charging by prosecutors reluctant to leave defendants with no avenue to mercy. Categorical exclusions thus might backfire by forcing juries to acquit the very defendants whom many feminists believe should be labeled as murderers.

This is a salient criticism and one that is not easy to answer. However, when legislatures have reformed the provocation doctrine in the recent past, such changes have been responsive to public criticism of leniency toward defendants perceived to lack any valid justification for killing their victims. For example, furor over the 1994 case of Keith Peacock, who received a sentence of just eighteen months in a work-release program for shooting his unfaithful wife, prompted Maryland's legislative exclusion of adultery from

³⁰⁴ See LEE, *supra* note 14, at 103, 105. By contrast, if a fact situation were not governed by a categorical exclusion (if it were a killing in response to extreme assault and battery, for example), cultural evidence could be admissible at the judge's discretion.

³⁰⁵ Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000) ("[A sticky norms] problem occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm."). In contrast, according to Kahan, "[w]hen the law embodies a relatively mild degree of condemnation, the desire of most decisionmakers to discharge their civic duties will override their reluctance to enforce a law that attacks a widespread social norm." *Id.*

the concept of legally adequate provocation.³⁰⁶ And, as this Article described above,³⁰⁷ the enactment of Victoria's reform package coincided with widespread disapproval of mitigation in the *Ramage* case. Legislatures should not redraft defenses to murder every time citizens become incensed over news coverage of a criminal case; however, if public preferences harmonize with legislative changes, such changes are less likely to be nullified in the jury room.

3. *Provocation as Partial Justification*

Constrained within newly tightened boundaries, a provocation claim should operate as a partial justification. The approach suggested in this Article does not assert that the killing itself was justified, but rather that it was prompted by a legitimate, morally defensible valuation that comported with evolving social norms and substantive equality principles. If the reintroduction of justifiable emotion is combined with a cooling-time limit and a required loss of self-control, the reformed doctrine might arguably be described as a hybrid that retains an element of excuse: the defendant's sudden emotion, although justified, overpowered his ability to desist from an unlawful killing. Deliberate revenge should not be tolerated, and lawmakers may wish to require a "hot blood" element to exclude such cases from manslaughter mitigation. Nevertheless, the emphasis should fall on whether the defendant's emotions and beliefs can be justified, not primarily on his alleged loss of self-control.

Bringing back justification reverses the widely accepted, modern understanding of the provocation doctrine by reasserting a normative component; yet it has some advocates, including reformist lawmakers in the United Kingdom. The British Parliament recently enacted a law³⁰⁸ that abolishes the common law provocation doctrine and adopts and clarifies the British Law Commission's 2004 recommendation of a hybrid defense emphasizing the defendant's "*justifiable* sense of being seriously wronged," as well as allowing for mitigation when the accused acted "in response to a fear of serious violence."³⁰⁹ Scholars criticized the British Law Commission for failing to consider gender asymmetries and for leaving the

³⁰⁶ Kahan & Nussbaum, *supra* note 6, at 346 (discussing the impact of the Peacock case). For a discussion of the legislative change in Maryland excluding infidelity from legally adequate provocation, see *supra* note 283 and accompanying text.

³⁰⁷ See *supra* notes 162-65 and accompanying text.

³⁰⁸ Coroners and Justice Act, 2009, c. 25, Part 2, Ch. 1, § 54-56.

³⁰⁹ Graeme Coss, *Provocative Reforms: A Comparative Critique*, 30 CRIM. L.J. 138, 139 (2006) (emphasis added).

door open to trivially provoked men.³¹⁰ Responding to such concerns, the Coroners and Justice Act of 2009 contains a provision establishing the insufficiency of sexual infidelity as a basis for feeling “seriously wronged.” Under the reformed law, infidelity is not to be construed as a qualifying trigger.³¹¹ Unfortunately, the Coroners and Justice Act retains the possibility that mere words—things “done or *said* (or both)”—might rise to that level.³¹² Despite their shortcomings, however, the British reforms wisely seek to make the provocation defense unavailable to individuals whose outrage is idiosyncratic and morally indefensible under contemporary standards.

American legal scholar Susan Rozelle recently offered another perspective on provocation-as-partial-justification. She argues that the doctrine should be applied narrowly to cases where the law supports some level of violent response to the victim’s conduct. Her proposal differs from imperfect self-defense in that it covers situations in which the accused had a lawful right to employ some level of force, regardless of whether he sincerely feared death or serious harm from the victim. The fact that the force used was excessive makes her proposal a partial defense.³¹³

Rozelle and I agree that the provocation doctrine retained remnants of justification long after the tide toward excusing passion killers swept away the official honor-killing rationale. Indeed, as she notes, even the Model Penal Code’s quasi-objective prong reveals a minimal concern not to extend mitigation to defendants whose beliefs and emotions lie beyond what society is capable of understanding.³¹⁴ Yet, while I agree with some of Rozelle’s premises, she and I part company in our approach to reform. She

³¹⁰ See *id.* at 139-43 (complaining that the British Law Commission indicated “there may be cases” in which mere words “could legitimately make the other party feel severely wronged”); Howe, *supra* note 63, at 55-56 (criticizing the British Law Commission proposals for finding that sexual taunts might constitute adequate provocation).

³¹¹ Coroners and Justice Act, 2009, c. 25, Part 2, Ch. 1, § 55(6)(c). The act also applies “if D’s loss of self-control was attributable to D’s fear of serious violence from V against D or another person.” *Id.* § 55(3).

³¹² *Id.* § 55(4) (emphasis added).

³¹³ Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 229-33 (2005). Rozelle’s proposal is in many respects superior to Nourse’s warranted excuse, which restricts voluntary manslaughter mitigation to cases in which the deceased behaved in an illegal manner, see Nourse, *Passion’s Progress*, *supra* note 17, at 1390-93, but fails to recognize that adultery remains a criminal offense under some state codes. See Dressler, *Why Keep the Provocation Defense?*, *supra* note 31, at 981.

³¹⁴ Rozelle, *supra* note 313, at 209. However, I disagree with Rozelle’s contention that the EMED defense requires society to agree that “the defendant somehow was wronged or aggrieved.” *Id.* Code-influenced statutes typically contain no elements related to provoking conduct or triggering events; the touchstone is mental trauma, not justifiable rage. See, e.g., *State v. Elliot*, 411 A.2d 3 (Conn. 1979).

merely redefines the boundaries of the old common law categories. In contrast, I believe it would be preferable to create a few exceptions to the provocation doctrine for completely unjustifiable valuations, as lawmakers in the United Kingdom and some American states have done, than to return to a narrow typology of qualifying behavior. The end result might look fairly similar, based on a shared assumption that legal provocation generally should involve physical harm. However, unlike Rozelle's,³¹⁵ my proposal does not completely negate the possibility that some nonphysical injury might qualify.

D. IMPERFECT SELF-DEFENSE

One of the chief contributions of the reforms in Victoria and Western Australia was the insight that homicide defenses ought to be revamped in a comprehensive manner—the reform package, rather than the surgical strike. In this spirit, American reformers should not abolish the EMED approach or radically limit the provocation doctrine without addressing the need for changes in perfect and imperfect self-defense. I generally support the rational actor model of perfect self-defense that Alafair Burke has proposed, the two key components of which are the repudiation of the imminence requirement and the criticism of BWS evidence.³¹⁶ Because this Article focuses on mitigation, rather than exculpation, however, I will turn to the topic of imperfect self-defense with the caveat that reforms in these related areas should be undertaken together.

If American states retain the heat-of-passion defense in a form that includes fear as well as rage, one might question why the widespread adoption of imperfect self-defense should be necessary. The answer is that the two partial defenses are distinct; they serve different purposes and involve different levels of objective analysis. The provocation doctrine requires heightened emotion—a rubric that today includes fear and terror, as well as rage, in most jurisdictions. Yet, whereas fear might arise from some non-lethal provocations, a defendant claiming imperfect self-defense must have believed that deadly force was *necessary* for self-protection or the protection of others in the face of *mortal* danger.³¹⁷ Furthermore, unlike the passion killer, a defendant who receives mitigation under an imperfect self-defense theory should not be required to have killed immediately after

³¹⁵ Rozelle tends to conflate imperfect self-defense and provocation by arguing that “act justification” would only exist under her revised provocation doctrine if the facts fit the imperfect self-defense paradigm. Rozelle, *supra* note 313, at 229.

³¹⁶ See Burke, *supra* note 18, at 218-19.

³¹⁷ Cf. Swann v. United States, 648 A.2d 928, 932 (D.C. Cir. 1994) (making a similar distinction).

being harmed or threatened. In other words, the latter theory should not have a cooling-time limitation.

Although a substantial minority of American states currently recognize imperfect self-defense, the majority do not.³¹⁸ As the Supreme Court of Washington explained, “[n]arrow statutory definitions of manslaughter have made adoption of imperfect self-defense difficult in some states.”³¹⁹ In states that already recognize the mitigating doctrine, three versions exist. The first applies to defendants who initiated a confrontation by using non-lethal violence. The second version, which is similar to Western Australia’s new law, covers individuals who use excessive force against an aggressor. Finally, like the Parliament of Victoria, some American legislatures and courts have acknowledged the partial defense in cases where the accused honestly but unreasonably believed that the victim posed a threat of death or serious bodily injury.³²⁰ Several American states that adopted the first two variations insist that the defendant’s belief in the necessity of using force to defend herself must have been both honest *and* reasonable.³²¹

Finally, some courts impose additional limits that affect battered women’s defense cases. For example, in Maryland, imperfect self-defense claims without supporting BWS evidence are ineligible for manslaughter mitigation when the facts involve a non-confrontational killing.³²² In *State v. Peterson*, the appellate court described a trial judge’s decision not to give an imperfect self-defense instruction as “correct” in a case involving a woman who “endured twenty-seven years of extreme physical and

³¹⁸ See Fontaine, *supra* note 248, at 259; see also *State v. Hughes*, 721 P.2d 902, 910 (Wash. 1986) (declining to adopt imperfect self-defense in Washington); Note, *Battered by Men, Bruised by Injustice: The Plight of Women Who Fight Back and the Need for a Battered Women Defense in West Virginia*, 110 W. VA. L. REV. 1139, 1186-87 n.298 (2008) (noting the lack of an imperfect self-defense doctrine in West Virginia).

³¹⁹ *Hughes*, 721 P.2d at 909. If the manslaughter statute restricts the actor’s mental state to recklessness or criminal negligence, an intentional homicide committed in a flawed effort to save oneself cannot qualify. *Id.* Legislative changes to manslaughter definitions thus constitute a prerequisite to the adoption of imperfect self-defense in such jurisdictions.

³²⁰ See *State v. Faulkner*, 483 A.2d 759, 763 (Md. 1984). For a discussion of Victoria’s adoption of a defensive homicide provision, see *supra* note 24 and accompanying text.

³²¹ See, e.g., *State v. Wilson*, 285 S.E.2d 804, 807-08 (N.C. 1982) (quoting *State v. Norris*, 279 S.E.2d 570, 572-73 (N.C. 1981)); *State v. Kell*, 61 P.3d 1019, 1029 (Utah 2002). Wisconsin imposes a three-part test that allows the defendant’s conviction for imperfect self-defense manslaughter “if the jury finds: (1) the defendant had a reasonable belief that he was preventing or terminating an unlawful interference with his person; AND (2) the defendant had an actual, but unreasonable belief that force was necessary to prevent or terminate the unlawful interference; OR (3) the defendant had a reasonable belief that force was necessary to prevent or terminate the unlawful interference but the defendant’s actual belief regarding the amount of force necessary was unreasonable.” *State v. Camacho*, 501 N.W.2d 380, 383 (Wis. 1993).

³²² *State v. Peterson*, 857 A.3d 1132, 1154 (Md. Ct. Spec. App. 2004).

psychological abuse” by her husband and then shot him while he watched television.³²³ Despite Maryland’s adoption of the “honest but unreasonable belief” approach,³²⁴ imminence and necessity still seem to be required. The defendant’s unreasonableness may inhere only in the excessiveness of the force used: “[T]he imperfect self-defense instruction should not be given unless the evidence generates the issue of whether, under the circumstances, the defendant was entitled to take *some* action against the victim.”³²⁵ Barbara Peterson, who was sentenced to life in prison for murder, obtained postconviction relief only because the court deemed her attorney’s failure to present expert testimony on BWS “ineffective assistance of counsel” in violation of the Sixth Amendment.³²⁶

Peterson is the kind of case that battered women’s advocates cite to show the continuing need for syndrome evidence;³²⁷ yet the real problem lies in the retention of the imminence requirement. While the imminence requirement may distort the analysis of perfect self-defense, it surely has no place when the outcome sought is only mitigation, not exoneration. Critics of the “reasonable belief” approach to imperfect self-defense argue that the culpability of a defendant who sincerely thought she faced a threat of inevitable death or serious harm from the man she shot cannot be equated with the culpability of “one who intentionally murders another without such

³²³ *Id.* at 1145, 1154. This proceeding involved the state’s unsuccessful appeal of a new trial order based on ineffective assistance of counsel. *Id.* at 1135.

³²⁴ *Faulkner*, 483 A.2d at 768-69.

³²⁵ *Peterson v. State*, 643 A.2d 520, 522 (Md. Ct. Spec. App. 1994). Barbara Ann Peterson subsequently was granted a new trial due to ineffective assistance of counsel, but this statement of Maryland law remains undisturbed.

³²⁶ *Peterson*, 857 A.2d at 1154.

³²⁷ The Maryland courts’ insistence on BWS evidence to show the honesty of a defendant’s belief rejected the power of past-abuse facts to tell the story unaided by testimony on “learned helplessness”—a form of post-traumatic stress disorder that may poorly fit the defendant’s situation. To bolster the unsuccessful insanity claim that was actually raised at Barbara Ann Peterson’s trial, a psychiatrist testified that Barbara suffered bi-polar and dissociative disorders. The judges demanded a BWS theory to support her imperfect self-defense argument, and nowhere in any of the opinions was an image of the defendant as a rational moral actor allowed to emerge. Barbara Ann Peterson may have had mental problems; her children described her as a “moody and mercurial” religious fanatic who claimed to see ghosts and experience extra-sensory perception. *Id.* at 1138 (quoting the defense psychiatrist’s testimony about statements the defendant’s children had made). But like many other battered women, she had temporarily left her marital home and sought court protection from her husband’s brutality so many times that one judge told her not to come back for a year. *Id.* In her mind, she had reached the end of her options. Yet, the courts’ focus on her supposed psychosis deflected attention from the ills that most demand a cure—the failure to prevent intimate-partner homicide by providing a social and legal safety net for battered women and the continued existence of homicide doctrines that apportion blame and excuse in undesirable ways.

a belief [T]here is or . . . there ought to be, a difference in punishment between these two types of people.”³²⁸ This statement is generally sound, but we must refine which aspects of the defendant’s belief can be unreasonable. If the defendant reasonably feared her violent husband, but was wrong about when he would attack or with how much brutality, she should get an imperfect self-defense instruction. There, her beliefs and emotions contained a modicum of reasonableness, even if her lethal act did not. Contra *Peterson*, I believe that this showing could be made through the lens of social framework and past-abuse evidence without the need for a psychological expert. However, if the defendant’s fear was completely delusional, and she could not present any evidence that her husband had ever inflicted serious physical harm on her or threatened her with such injury, she should not get the instruction. The latter type of claim sounds closer to diminished responsibility, which I have already rejected.³²⁹

This Article has expressed approval for an intermediate option between the extremes of murder liability and acquittal. I have argued that imperfect self-defense is a more appropriate backup claim than provocation for battered women who killed their abusers because it explicitly acknowledges not only their fear, but also their honest belief in the necessity of using lethal force. However, to shift partial defenses to murder away from excuses for unjustifiable valuations, we ought to demand a modicum of reasonableness and moral appropriateness in the defendant’s emotion or belief, even in cases of imperfect self-defense. This is important because imperfect self-defense potentially applies to fact situations far removed from those of sympathetic battered women.

For example, in Utah, a white supremacist prisoner fatally stabbed a fellow inmate, who was black, when the latter was in handcuffs and unable to protect himself. The defendant-appellant, Troy Kell, claimed the trial court should have given a jury instruction on imperfect self-defense manslaughter because he had overheard the victim making threats.³³⁰ Whether this case should have gone to a jury is a close call. Some Utah Supreme Court justices voted to affirm the denial of the lesser-included-offense instruction; others wanted to hold that it was harmless error due to lack of corroborating evidence.³³¹ Regardless, the case provides a compelling reminder that feminist criminal law reform affects not only broader concerns about the position of women in society, but also the moral

³²⁸ *State v. Camacho*, 501 N.W.2d 380, 390 (Wis. 1993) (Bablitch, J., dissenting) (going against an opinion holding that, in Wisconsin, imperfect self-defense requires a reasonable belief in the necessity of lethal force).

³²⁹ See *supra* notes 225-31 and accompanying text.

³³⁰ *State v. Kell*, 61 P.3d 1019, 1025, 1029 (Utah 2002).

³³¹ *Id.* at 1029 n.5.

coherence (or incoherence) of homicide law in cases unconnected to intimate-partner killings. If we demand a minimum amount of rationality and moral judgment from Kell, as the Utah Supreme Court did, we should ask the same of women who killed their intimate partners.

The partial defense I propose would be limited to homicides arising from self-protection or protection of others and would exclude completely delusional behavior. Vera Bergelson has explained imperfect self-defense as a partial justification:

If you try to kill me, you violate your duty to me, and thus lose moral parity with me. That loss of moral parity reduces your right to inviolability and allows me to disregard it *to the extent necessary to protect my right to life*. That is a case of complete justification. Overstepping these boundaries in cases of imperfect self-defense (either by exceeding the level of force reasonably necessary for the defense or by not following other requirements of a valid exercise of self-defense) . . . results only in partial justification of the perpetrator.³³²

This understanding of imperfect self-defense reinforces the moral distinction between killing a person whom one perceives to pose a lethal threat and ending the life of someone who has caused only emotional wounds, frustration, or even no harm at all. It also frees the doctrine from its associations with pathology and dysfunction, which restores the criminal law's interests in assessing personal accountability.

V. CONCLUSION

The reform of homicide law only addresses the problem of intimate-partner violence where other solutions have failed. For this reason, it is a depressing enterprise. As a society, we need to develop a social safety net so women can leave violent relationships and remain safe from retaliation.³³³ We should also emphasize anger management and other values of non-violence, so that there is less need for condemnatory convictions and long prison terms to reinforce the message that becoming enraged at one's partner, or anyone else, generally provides no license to batter or kill, except in cases of justifiable, defensive acts. Indeed, criminal law solutions may not offer the best approach to intimate-partner violence before it escalates to homicide. That said, intimate-partner violence exists

³³² Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 472-73 (2005).

³³³ Empirical evidence suggests a strong link between the increased availability of resources for battered women and a decline in intimate-partner homicides perpetrated by females. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE U.S., 1976-2005, <http://bjs.ojp.usdoj.gov/content/homicide/intimates.cfm> (last visited Feb. 17, 2010) (showing a 75% decline in the number of men killed by female intimates since 1976).

on a continuum from non-lethal bullying and relatively minor physical assaults to fatal shootings, stabbings, and other killings.³³⁴ The objection that the heavy hand of the criminal justice system creates problems at one end of this continuum³³⁵ does not refute the need to reform homicide law so that it makes appropriate judgments at the other end.

Within the past few years, three Australian states—Tasmania, Victoria, and, most recently, Western Australia—took bold strides to transform defenses to murder to redress gender bias. The common thread in their divergent approaches was the abolition of provocation as a mitigating doctrine in the guilt phase. The reform effort on which this Article has focused—the comprehensive package adopted in Victoria—also sought to locate its restructuring in a bid for greater moral coherence in homicide law. Victoria’s reformers rejected the provocation doctrine both because it justifies unjustifiable acts of anger and dominance and because it excuses and stereotypes men as collectively prone to lethal rage. The VLRC also made a frustratingly inconsistent attempt to emphasize relationship history and social-context evidence, in lieu of the BWS theory, and hence to depict battered women as rational moral actors engaged in justifiable responses to physical victimization.

While the reforms in Victoria should inspire American lawmakers to overhaul their own system, such changes must be preceded by a more complete understanding of what ails murder defenses and how they have come to be even more indulgent of male violence and less connected to social norms than they were in the nineteenth and early twentieth centuries. In countries whose law derives from the English model, the history of exculpation and mitigation in murder cases has been one of a gradual default to psychological excuses. Female defendants’ cases have long involved a strand of compassion for the supposed irrationality of the so-called weaker sex; yet, in the nineteenth and even the early twentieth centuries, the law of provocation and self-defense was still tied to moral condemnation of violence against women. As paternalistic solicitude for women faded and psychological interpretations of human behavior came into vogue, the criminal law’s emphasis on excusing irrationality became more pronounced. The narrative of the wronged woman was almost completely eclipsed by the narrative of the female defendant as helpless,

³³⁴ Much has been written about how these apparently diverse types of conduct are connected in patterns of coercive control. For an early version of the “coercive control” thesis, see Stark, *supra* note 39, at 976.

³³⁵ See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 825-26 (2007) (suggesting that “feminists stop advocating for and supporting criminalization” of domestic violence because, in Gruber’s view, punitive prosecutorial approaches deny the agency of female victims and discriminate against racial minorities).

frenzied, and incapable of assessing her options, which is now embodied in diminished responsibility, insanity, and BWS-based self-defense claims. Similarly, the narrow doctrine of provocation has expanded dramatically to include myriad subjective traits of the accused, and in the United States, a substantial minority of jurisdictions have completely abandoned the traditional emphasis on killings triggered by wrongful victim behavior.

Scholars began criticizing “abuse excuses” toward the end of the last century, but they often did so in anti-feminist ways, and most importantly, few recognized that the expansive, modern provocation and EMED doctrines were among the worst culprits. This Article has reframed the critique of partial excuses for murder to acknowledge the gendered patterns of why men and women kill. In undertaking this project, I have drawn heavily on the thoughtful and creative efforts of Australian reformers. In the final analysis, however, I do not recommend that American states adopt a carbon copy of Victoria’s reforms. First, both the proposed and adopted legislative changes in Victoria were inconsistent in their commitment to emphasizing equality-based principles of moral wrongfulness, as opposed to expanding psychologically based partial excuses. Second, while this Article will be most successful if it prompts discussion of how murder defenses and penalties can be simultaneously reformed, the unsettled state of American sentencing law makes it advisable to draft a proposal that has the potential to succeed whether or not the recent countertrend toward greater sentencing discretion continues.

This Article recommends three changes to partial defenses to murder in the United States that would anchor manslaughter mitigation to moral evaluation of the defendant’s reasons for killing: the repeal of statutes influenced by the Model Penal Code’s extreme emotional disturbance defense, the curtailment of the provocation doctrine through legislative preclusions, and the widespread adoption of imperfect self-defense as a mitigating claim in cases where the defendant’s fear of physical victimization at the hands of the person she killed was more reasonable and justifiable than her homicidal act. My recommendations would help ensure that the criminal law provides substantively equal treatment to women, as victims and defendants in murder cases, while reasserting their capacity for rational conduct and insisting that both sexes be held accountable for morally wrongful homicides.

APPENDIX

INTIMATE-PARTNER MURDER CASES IN COLONIAL NEW SOUTH WALES, 1824-1840

25 intimate murder cases sampled

4 female defendants: 2 acquitted, 2 convicted of manslaughter

21 male defendants: 11 convicted of murder, 5 convicted of manslaughter, 5 acquitted

Defendant Name	Year	D's Sex	V's Sex	Charge	Verdict	Sentence
Bradney	1824	F	M	Petty treason murder*	Acquitted	
Minton	1824	F	M	Aid/abet murder (petty treason)	Acquitted	
Bates	1825	M	F	Murder	Guilty	Executed
Bennett	1825	M	F	Murder	Acquitted	
Chapman	1825	M	F	Murder	Manslaughter	2 years
Claig	1825	M	F	Murder	Acquitted	
Butler	1826	M	F	Murder	Guilty	Death
Radley	1826	F	M	Petty treason murder	Manslaughter	Unclear
Hartland	1828	M	F	Murder	Manslaughter	2 months
Miller	1828	M	F	Murder	Guilty	Death (commuted to transportation for life)
Hughes	1829	M	F	Murder	Manslaughter	6 months
Venables	1829	M	F	Murder	Manslaughter	Transportation for 7 years
Byrne	1833	M	F	Murder	Guilty	Executed
Dickenson	1833	M	F	Murder	Acquitted	
Farrel	1834	M	F	Murder	Acquitted	
McCormack	1834	M	F	Murder	Guilty	Executed
Smith	1834	F	M	Murder	Manslaughter	Transportation for 7 years
Bowles	1835	M	F	Murder	Guilty	Executed
James	1836	M	F	Murder	Guilty	Death (later freed)

* Petty treason murder was “the murder of a husband by a wife, or a master by servant, or of a religious superior by one owing obedience.” If a woman were convicted of this crime, the court would order her to be burned to death. Petty treason was abolished in England by the Offences Against the Person Act, 9 Geo. IV, c. 31. When New South Wales officially adopted English law in July 1828, the offense of petty treason was abolished there, too. G.D. WOODS, *A HISTORY OF CRIMINAL LAW IN NEW SOUTH WALES: THE COLONIAL PERIOD, 1788-1900* 121-22 (2002).

Defendant Name	Year	D's Sex	V's Sex	Charge	Verdict	Sentence
Crowley	1838	M	F	Murder	Acquitted	
Holden	1838	M	F	Murder	Guilty	Death (commuted to transportation for life)
Long Jack (aboriginal)	1838	M	F	Murder	Guilty	Death (may have been commuted)
Finnie	1839	M	F	Murder	Guilty	Unclear
McGee	1839	M	F	Murder	Guilty	Executed
Glennie	1840	M	F	Murder	Manslaughter	Transportation for life