

# REASONABLE RAGE: THE PROBLEM WITH STEREOTYPES IN PROVOCATION CASES

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## INTRODUCTION

There is nothing reasonable about killing out of anger. Rage—not reason—is the controlling emotion and the corresponding thought process in such a killing. Nevertheless, criminal jurisprudence in the United States has carved out a niche for a killer’s passions, under the guise of “reasonableness,” and rage is the primary passion recognized by the law to alter a conviction. The doctrine of provocation is the avenue by which rage is legitimated. A court may accept those passions, sympathize with a defendant’s rage, and reduce a conviction from murder to voluntary manslaughter.

Voluntary manslaughter is certainly no small conviction.<sup>1</sup> It requires that:

- (1) The provocation to which the actor responds must have been adequate;
- (2) The killing must have occurred while the actor was in the “heat of passion”;
- (3) The actor must have lost self-control, and his loss of self-control must have been reasonable, such that a reasonable person in the actor’s situation would likewise have lost control and killed; and
- (4) The defense afforded to an actor who satisfies the conditions identified in (1) through (3) is a partial defense. It mitigates murder to manslaughter, but does not provide a full or complete defense.<sup>2</sup>

There are several theories of how provocation works, but the elements listed above remain constant. The underlying question is “whether the

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1. See Stephen P. Garvey, *Passion’s Puzzle*, 90 IOWA L. REV. 1677, 1737 (2005) (explaining how voluntary manslaughter recognizes the horror of the crime, without the intent that a jury finds to be absent).

2. *Id.* at 1687 (citations omitted). The Model Penal Code (“MPC”) melds provocation with diminished capacity to form the defense of Extreme Mental and Emotional Disturbance (“EMED”). Under EMED, murder is mitigated to manslaughter if the killing took place “under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” *Id.* at 1689 (citation omitted). Under diminished capacity, no provocation is needed. Diminished capacity refers to psychological abnormalities in actors of violence and the “reasonable” standard does not apply. *Id.* at 1738–39.

actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."<sup>3</sup> It is a lesser offense than murder because it lacks murder's element of intent. The distinction between the presence and lack of intent perpetuates false stereotypes and unjustly blames victims for offenders' actions. There should be no legal distinction between intentional murder and a voluntary, "provoked" killing.

Scholars presume that it is possible for a human being to become so enraged as to lose all control of one's actions.<sup>4</sup> The scholar Stephen Garvey<sup>5</sup> has analyzed the main theories of provocation, identified problems in each theory, and attempted to correct inconsistencies.<sup>6</sup> Under Garvey's notion of provocation, the actor's rage or desire is theoretically so great that the actor cannot control it, and "no matter how hard he tries or were to try, such control cannot reasonably be expected of him."<sup>7</sup> But do such reactions really occur? And whether or not it is possible to lose control in that way, can a jury reasonably recognize provocation as a factor in any defendant's case?

I argue that the claimed "loss of control" is not an actual loss of control and that citizens (and juries) nevertheless recognize it because of stereotypes ingrained in our culture. I further argue that it is impossible for a jury to ascertain whether loss of control is a possibility and, if so, whether loss of control actually occurred. Such knowledge is unattainable

3. *Id.* at 1690 (citation omitted).

4. Even scholars who claim that individuals are responsible for their emotions recognize a loss of control. Some assert:

[P]anic and rage may be remarkable in the limited rationality of the judgments in question as well as the intensity of the response. But we nevertheless *make* these judgments and as such the emotion falls within the realm of the voluntary, even *if we cannot act or feel other than we do*.

EIMEAR SPAIN, *THE ROLE OF EMOTIONS IN CRIMINAL LAW DEFENCES: DURESS, NECESSITY, AND LESSER EVILS* 267 (2011) (quoting ROBERT C. SOLOMON, *NOT PASSION'S SLAVE: EMOTIONS AND CHOICE* 214 (2003)).

5. Stephen Garvey is a leading scholar advocating to preserve the provocation doctrine.

6. Garvey describes provocation as:

The heat of passion (anger) arising from the provocation constitutes, generates, or intensifies a desire to kill strong or intense enough to be completely but temporarily beyond the actor's ability to control it. . . . The desire acts on its own, so to speak, without any intervening act of will, causing the fatal movement of the actor's body.

Garvey, *supra* note 1, at 1701 (citation omitted).

7. *Id.* (footnote omitted). Garvey also acknowledges provocation's possible shortcomings of producing false negatives and positives in court. He asserts that because a jury may be convinced that a defendant's rage was reasonable when it may not be, the doctrine has the potential to give "false positives" in the courtroom. *Id.* at 1735. Since a jury is prevented by the doctrine from finding provocation in the absence of "adequate provocation," then the doctrine also has the potential problem of resulting in a "false negative" when a defendant might in fact have acted outside his full capacity for control. *Id.* at 1736.

because the personal experiences of each juror inhibit their ability to empathize with the defendant to the point of actually believing that one can become so enraged as to lose control.

The stereotypes that can change murder convictions to “voluntary manslaughter” originate from the same perceptions of anger and entitlement that surround domestic violence and sexual assault. These stereotypes live in our imaginations, and in the imagination of each juror. When juries sympathize with defendants, their learned stereotypes, which formed their conceptions of human capacities, come into play.

This paper will critically examine the plausibility of loss of control by demonstrating inconsistencies in the provocation doctrine and the detrimental effect that learned stereotypes have on juror decision-making. Part I presents a historical overview of the provocation defense beginning with its English common law roots.<sup>8</sup> Part II delves into the provocation doctrine’s elements with greater specificity, examining some of the predominant theories of provocation and their inconsistencies—many of which scholars have brought to light but have reconciled in a less than satisfactory manner.<sup>9</sup> Part III explores recent studies in cognitive science and philosophy that present serious doubt that a human being’s rage ever results in the loss of control over one’s actions.<sup>10</sup> Part IV addresses specific problems with provocation’s “reasonable person” standard. Part V demonstrates how the same stereotypes upon which the provocation

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8. The difference in the origins compared with the current use of the doctrine indicate an inconsistency that should reasonably produce doubt as to whether the “loss of control” claim is at all plausible. As Part I explains, the original “excuses” for murder were finding one’s wife in the act of adultery or seeing someone raping one’s son. Neither of these provided a mere excuse because of an out-of-control rage. Rather, killing in those instances was an honorable response. Done out of honor, such killing derived from the duties of a “real man” and was praised. It was not an involuntary impulse.

9. For the sake of consistency and logic, if it is in fact possible to lose control over one’s actions, and the loss-of-control defense seeks to lower the culpability of those who kill while under the control of their rage and not their own logical conclusions, then the provocation that led to a defendant’s actions should not need to be “adequate.” It would be fair to include in the provocation doctrine any individuals who did not have full control over their actions. There is stark inconsistency in the doctrine of provocation as a “loss of control” defense when compared to the law’s treatment of heinous crimes that might seem more likely to be the result of “loss of control,” but the justification is not considered to be “reasonable.” The fact that provocation requires reasonable justification demonstrates that actions to which the provocation led are more likely to result from a feeling of justification and entitlement to punish the victim. This analysis includes some discussion of the victim blaming inherent in the requirement for “adequate provocation.”

10. See Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994). Psychology Professor Stephen Morse analyzes the inner-workings of what we call the “loss of control” element, which reveals that the core of the doctrine is more along the lines of “cutting a break” for a defendant who had been under stress, not a serious recognition of the absence of choice.

doctrine is founded have been disproved in other contexts.<sup>11</sup> These analyses culminate in Part VI to explain how a jury's lack of sympathy for a defendant who claims loss of control precludes a jury from rightly finding provocation's existence in any particular case.<sup>12</sup>

### I. THE HISTORY OF CRIMES OF PASSION

In the origins of provocation, a man was not liable for murder if he: (1) found his wife in the act of adultery, or (2) found someone bugging his son (forcible sodomy). Though these circumstances were considered "excuses," the actor's honor was ultimately at stake.<sup>13</sup> In the seventeenth century (and earlier) in England, a man of "natural honor" was expected to respond violently to an offender, without reluctance or hesitation. He was completely justified in responding violently to the provocation with anger.<sup>14</sup> Such response was the fulfillment of a duty, not an accident. The anger expressed by a man of honor, then, was not supposed to result in a "loss of control." Rather, his anger was expected to result in violence to fit the provocation, which was the offense against him. The violence was thus deemed to be rational and appropriate by the culture and the actor.<sup>15</sup> If, however, the violent response was slightly out of proportion to the provocation, then the actor was convicted of manslaughter.<sup>16</sup> If the violence was grossly excessive compared with the provocative act, then the killing was murder.<sup>17</sup> If an actor was provoked, then, but responded in

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11. In particular, loss of control is often claimed by domestic violence perpetrators when they beat their wives or girlfriends. Although it is possible for a wife or girlfriend to be the perpetrator of domestic abuse, and such cases are all the more serious for their infrequency, for purposes of this paper, I will treat domestic abuse mainly as men's action against women. The majority of domestic violence cases do present a male perpetrator and a female victim.

12. The fact that the law provides the possibility of recognizing an out-of-control response prompts the jury to activate and apply its learned social stereotypes, in spite of the disconnect between what the standard they apply to themselves and those they know and that which they apply to an unknown defendant.

13. Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 970 (2002) [hereinafter Dressler, *Reflections*].

14. *Id.*

15. *Id.* Joshua Dressler summarizes that, "[t]he hot-blooded response of the man of honor was not an out-of-control response to an affront, but was a morally justified hot-blooded and controlled rational retaliation in proportion to the nature and degree of provocation involved." *Id.* (emphasis omitted).

16. *Id.*

17. *Id.* In some ways, this is similar to the current provocation doctrine. Current law does not allow for retaliation, but only for self-defense. The difference would be any recognition of what is grossly disproportionate and what is slightly excessive. The important thing to note with this historical insight, however, is that the violent action was not considered to be accidental or the result of lost control; it was a rational result of the justifiable anger.

unreasonable outrage, then even if the provocation was justified, the act was murder. The law did not allow room for “out of control” responses.

Today, at common law, provocation that results in a “loss of control” by the actor transforms a murder conviction into voluntary manslaughter. Provocation is present when an individual kills in the “heat of passion” resulting from adequate provocation that led to a reasonable loss of self-control.<sup>18</sup> The Model Penal Code (“MPC”) distinguishes murder from voluntary manslaughter by level of intent. For voluntary manslaughter, the MPC requires that the offender lack the substantial capacity to conform his conduct to the law’s requirements.<sup>19</sup>

Within the provocation doctrine, there is an objective and a subjective component. The objective element is that a jury should consider the “reasonableness of the provoking event regardless of whether it fit any sort of predetermined category of provocations.”<sup>20</sup> Subjectively, reasonableness is determined “from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”<sup>21</sup> Considering an abuser’s circumstances “as he believes them to be” would take into account an abuser’s feeling of entitlement that may seem to justify an otherwise unreasonable outrage. So at first glance, the MPC seems to use an objective standard, but the definition of “reasonableness” is subjective. That subjectivity allows more juror discretion than ever before.<sup>22</sup> Increased juror discretion can lead to the perpetuation of harmful stereotypes of a man’s incapacity for control. More objective standards, on the other hand, could help effect change and reduce the influence of cultural expectations and stereotypes.

Our current understanding of provocation, and its application to jilted or controlling men, is grounded in cultural principles dating back to the

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18. Garvey, *supra* note 1, at 1687.

19. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962). The Model Penal Code has also expanded the doctrine to include “extreme mental or emotional disturbance.” MODEL PENAL CODE § 210.03.

20. Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 202 (2005).

21. *Id.* (citation omitted).

22. Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 669 (2001). This heightened jury discretion is sometimes viewed as positive. The average juror will be able to relate to the common understanding of what is “reasonable” provocation. However, as this paper will later address, the average juror may also have biases and stereotypes which contribute to the failure to justly punish a defendant, so giving a jury more discretion could perpetuate stereotypes that hinder the pursuit of justice (both for the accused and for the victim).

start of the twentieth century.<sup>23</sup> Those cultural principles have continued to grow and hinder justice for women in even more ways. At early common law, a man was found guilty of murder when he discovered the infidelity of his fiancé but not upon discovering the infidelity of his wife. A fiancé had not yet become the “property of the offender” until marriage.<sup>24</sup>

Today, however, jilted fiancés and boyfriends can also successfully claim provocation. Current law does not distinguish between a wife, fiancée, or girlfriend. “Reasonableness” has come to include these relationships in which men feel a sense of entitlement and property in their girlfriend or spouse.<sup>25</sup>

There is significant scholarly debate on how the doctrine of provocation works and how it is to be interpreted. Several scholars, particularly feminist scholars, have advocated for an abolition or modification of the doctrine. Some seek its abolition because it creates undesirable outcomes.<sup>26</sup> For this and other reasons, the Victoria Law Reform Commission recommended an abolition of the provocation defense.<sup>27</sup> Other scholars oppose abolition but have proposed alterations to

23. In *Douglas v. Florida*, 652 So. 2d 887 (Fla. Dist. Ct. App. 1995), the defendant claimed loss of control resulting from provocation. In its analysis, the court referred to cases detailing the provocation defense from 1912 and 1916—before women even had the right to vote. *Id.* at 889–90.

24. Miller, *supra* note 22, at 673. In 1982, Joshua Dressler noted this discrepancy between treatment of unfaithful spouses or lovers, and his response was that, “[i]t is implausible to believe that when an actor observes his or her loved one in an act of sexual disloyalty, that actor will suffer from less anger simply because the disloyal partner is not the actor’s spouse.” Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 440 (1982). I instead side with the feminist scholars who observe the undertones of “property rights” in the different treatment between spouses and lovers, and I would therefore argue that property, not level of anger was the source of the different treatment.

25. It is interesting that in an age where women are no longer viewed as property in a legal sense, men’s feelings of entitlement have spread to non-marital romantic relationships. Violence against women continues to be a problem in our culture. The particular issue of entitlement and how it relates to the provocation doctrine is explained in greater detail in Parts V and VI of this paper.

26. Many male defendants claim provocation because their wife or girlfriend committed adultery or ended their relationship. The prevalence of intimate partner homicides is of particular import to feminist scholarship and to the continuing concern relating to domestic violence. See generally Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L.J. 1331 (1997).

27. SPAIN, *supra* note 4, at 71. The Victoria Law Reform Commission is an independent, government-funded organization that develops, reviews, and recommends reforms for Victoria, Australia’s state laws. The functions of the Victoria Law Reform Commission are: (1) to make law reform recommendations on matters referred to it by the Attorney-General; (2) to make recommendations on minor legal issues of general community concern; (3) to suggest to the Attorney-General that he or she refer a law reform issue to the Commission; (4) to educate the community on areas of law relevant to the Commission’s work; and (5) to monitor and coordinate law reform activity in Victoria. More information is available at VICTORIA LAW REFORM COMMISSION, <http://www.lawreform.vic.gov.au/> (last visited May 10, 2014).

the doctrine to improve its results, or to at least make its philosophical underpinnings more palatable.<sup>28</sup>

## II. INCONSISTENCY WITHIN THE DOCTRINE

Scholars differ widely in their interpretations of the provocation doctrine. Stephen Garvey has laid out the main tenets of each theory and explained some of the difficulties with each of them. The main contrasting theories are: (1) provocation as a partial *excuse*, and (2) provocation as a partial *justification*.<sup>29</sup> The partial excuse theory focuses on the partial incapacity of the defendant to control his actions at the time of the crime. His actions are excused to the extent that he could not control them. The partial justification theory focuses on the adequacy of the provocations. The defendant's rage was inflamed because of a serious wrong committed against him.<sup>30</sup>

A jury considers the provocation doctrine as a combination of partial excuse and partial justification. The so-called loss of control must follow "adequate" provocation to justify the defendant's violent response. This combination of justification and excuse is what complicates the doctrine. To require "adequate" provocation indicates that the doctrine is not just about a loss of control. The requirements of the doctrine would prevent anyone from claiming provocation where the event would not have angered most people to the point of violence. The "adequately" provoked actor's failure to exercise self-control is reasonable, while the "inadequately" provoked actor's failure is unreasonable.<sup>31</sup>

Further complications arise when scholars contemplate how much discretion juries should enjoy. Joshua Dressler, an advocate of the provocation doctrine, points out that the constitutional framers incorporated the Sixth Amendment's right to trial by jury to capture a jury's "common-sense" judgment and sympathy.<sup>32</sup> A jury is better qualified than a lawyer or judge to determine whether the community accepts the defendant's expression of anger as reasonable.<sup>33</sup>

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28. See generally Garvey, *supra* note 1 (analyzing the elements of provocation and presenting a nuanced way of viewing the doctrine's effectiveness); Nourse, *supra* note 24 (proposing that the doctrine should be limited when the provocation would have resulted in a prison sentence in our society); Dressler, *Reflections*, *supra* note 14 (defending the doctrine against feminist arguments and arguing against Nourse's proposals).

29. Garvey, *supra* note 1, at 1691.

30. *Id.* at 1691–92.

31. *Id.* at 1709.

32. Dressler, *Reflections*, *supra* note 14, at 980.

33. *Id.* at 981.

Scholar Victoria Nourse, on the other hand, advocates that the law recognize “adequate” provocation only when the provocation itself was a crime that could result in a prison sentence.<sup>34</sup> Nourse argues that officially recognized provocations should be the standard, not what the average jury would find angering. She argues that the law is contradictory when it “refuses to embrace a sense of outrage which is necessary to the law’s rationalization of its *own use of violence*.”<sup>35</sup> When the law does not jail adulterers, there is an opposite contradiction: we then ask why private parties may enforce a sense of outrage that society does not embrace in the form of legislation.<sup>36</sup> Altering the standard in this way may bar many, if not most, provocation claims in cases of intimate partner homicide.<sup>37</sup>

Dressler’s response is that provocation does not necessarily declare the defendant’s anger “justifiable” in the sense that society approves of his actions.<sup>38</sup> Rather, we excuse his actions out of sympathy. The law makes a concession for ordinary human frailty.<sup>39</sup> The question is whether “the provocative event might cause an ordinary person . . . to become enraged or otherwise emotionally overcome.”<sup>40</sup> More than that, though, the “heat of passion” requirement assesses an offender’s relative values as well. Scholars Dan Kahan and Martha Nussbaum point out:

If a man dispassionately killed his wife’s paramour . . . we would suspect that his beliefs about what is important are skewed: the absence of anger would show us that he invests too little value in fidelity; his acts of killing without anger would show us that he invests too little value in others’ lives.<sup>41</sup>

A key component of provocation, then, is whether the provocation would have caused a “reasonable” person to become emotionally overcome.<sup>42</sup> Nourse’s main concern is that factoring in the “reasonable

34. Nourse, *supra* note 26, at 1395. Nourse emphasizes the frequency of intimate partner homicide, which is most often exercised against women who end relationships or commit infidelity.

35. *Id.* at 1396.

36. *Id.* at 1396–97.

37. *Id.* at 1396. “It would not be enough for a defendant to claim that a divorce or a protective order or moving out caused her rage.” *Id.*

38. Dressler, *Reflections*, *supra* note 14, at 972.

39. *Id.* at 973.

40. *Id.* at 973 (citation omitted).

41. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 316 (1996) (footnote omitted).

42. To be clear, the only emotion recognized by the provocation doctrine is anger. That limitation is also an indication of inconsistencies related to the doctrine. “A major challenge for the law is to formulate a compelling reason why it facilitates either partial or complete exculpation on the basis of some emotions such as anger but not others such as fear.” SPAIN, *supra* note 4, at 66. One

outrage” of one whose spouse ends their relationship “asks us to share in the idea that [a spouse’s] leaving merits outrage, a claim that finds no reflection in the law’s mirror.”<sup>43</sup> “Adequate” provocation would be that which citizens agree (through the legislative process) warrants “outrage” sufficient to overcome the defendant emotionally. Dressler, on the other hand, would leave what is “reasonable” in the hands of the jury. A jury is prompted to view the world from the eyes of the defendant, not necessarily what they would actually expect from themselves or their spouses under similar circumstances. This key discretion in the hands of the jury perpetuates the stereotypes about defendants and victims that may reside in the mind (perhaps the subconscious) of each member. These stereotypes persist in our culture even after legislative bodies have officially removed them from the law. It is often desirable to allow juries to be guided by cultural norms, but when those norms perpetuate inaccurate stereotypes and gender biases that ultimately deny victims justice, it is more desirable to reduce the risk that juries will be governed by those stereotypes. For example, adultery was once widely punishable as a crime. Though it is no longer recognized as a criminal act, adultery is presumed to present a moral outrage in the majority of citizens today.

If one claims to lose control and become “overwhelmed” by one’s emotions, adequate provocation must be sufficient to “justify” the ensuing violence. Though this does not necessarily pull the rug from under the provocation doctrine, the presence of the “justified” requirement shows an inconsistent and illogical aspect to the doctrine. It is implausible that only what a jury decides was an “adequate” provocation (or provocation period) can produce overwhelming emotions in the defendant.<sup>44</sup> Excused behavior is generally recognized as that which is not motivated by a sense of justice, but rather came about with no prior exercise of judgment. That absence of prior judgment makes it unreasonable.<sup>45</sup>

As part of his theory of the provocation doctrine (called the “akrasia theory”), Garvey posits that the reason for the “adequate” provocation

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explanation may be taken from Garvey’s stance on “adequate provocation.” The narrowing of admissible provocation emotions to anger, like the narrowing of admissible provocation to that which is “adequate,” serves an evidentiary purpose if nothing else. Loss of control after experiencing an emotion other than rage is less likely to be found reasonable, so it is not presented as an option for a reasonable jury to find loss of control as a result of such an emotion. *See* Garvey, *supra* note 1. And like perceptions of “adequate” provocation, perceptions of extreme emotions and their consequences are grounded in stereotypes.

43. Nourse, *supra* note 26, at 1392.

44. Kahan & Nussbaum, *supra* note 41, at 306.

45. MARKUS DIRK DUBBER, *THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT* 131 (2006).

requirement is that a “loss of control” claim is more believable if the actor had a provocation that would induce great anger in the majority of people.<sup>46</sup> If that is the case, then the legislature’s adoption of the “adequate” element in provocation is an evidentiary matter. The “adequate” requirement is a filter through which the jury examines proof that a killer did or did not possess the requisite “malicious” intent to be convicted of murder. If this is the rationale behind the “adequate” requirement, then the requirement commandeers the jury’s fact-finding duty. Regardless of what the jury believes about the defendant’s volition at the time of the killing, before provocation can reduce the conviction to manslaughter, the jury must find that the provocation was “adequate” and reasonable.

Here lies the difficulty of “false negatives,” which may come about if we accept loss-of-control claims. Assuming the jury has the discretion to determine what is “reasonable,” it would be more consistent to permit the jury to decide whether a defendant lost control without requiring “adequate” provocation as a means of vetting out the loss of control claims. The requirement for “adequacy” interferes with the jury’s fact-finding duty.

The provocation defense is inconsistent with the way in which criminal law often addresses “heinous” crimes, which may sometimes arise from an “inadequate” trigger that provokes the criminal actor. A successful provocation claim requires that the trigger or provocation that led to the criminal act be reasonably justified. So the loss of control must follow from a provocation that would reasonably cause rage in the average reasonable person. Only then may a judge or jury conclude that the act occurred outside the control of the actor.

In contrast, if an offender’s actions are prompted by a seemingly minor provocation, which an average person may not find enraging, the heinous act is declared “savage” and completely unjustified,<sup>47</sup> and the actor is labeled a “monster.” For example, in October of 2012, Elizabeth Escalona of Dallas, Texas, was sentenced to ninety-nine years in prison for severely

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46. Garvey, *supra* note 1, at 1733. Under Garvey’s akrasia theory, a provocation is adequate if social norms would permit a non-lethal violent response, or at least some form of overt response. The problem remains that “social norms” rule the day, and a jury’s conception of “social norms” is largely determined by stereotypes and their subconscious notions of what is appropriate. Social norms permitting a violent response to something that is not otherwise punishable still allows juries to be influenced. *Id.*

47. Molly Hennessy-Fiske, *Texas Mom Gets 99 Years for Beating, Super-gluing Girl’s Hands*, L.A. TIMES, Oct. 12, 2012, <http://articles.latimes.com/2012/oct/12/nation/la-na-nn-mother-sentencing-hands-glued-20121012>.

beating her two-year-old daughter.<sup>48</sup> This beating occurred after the child made a mistake during potty training. Presiding Judge Mitchell stated at the sentencing, “On September 7, 2011, you savagely beat your child to the edge of death. For this you must be punished.”<sup>49</sup> During the trial, the prosecutor portrayed Elizabeth Escalona as a “monster” and sought a long prison sentence.<sup>50</sup>

There is a significant discrepancy between the positions of giving a harsh punishment when provocation seems inadequate and lessening an offense when the provocation is deemed “adequate.” Elizabeth Escalona’s extreme actions still had a triggering factor, however, and seem more likely to have resulted from a loss of control *because* of the abnormality of her behavior. Is it reasonable, then, to exclude these individuals from the provocation defense when their acts might too have resulted from a loss of control?

As Kahan and Nussbaum observe in their analysis of the “mechanistic conception” of emotions:

[We have a sense] that emotions are external to the self, forces that do something to “us” without being (or at least without clearly being) parts of what we think of as ourselves. Anger, for example, can seem to come boiling up from nowhere, in ways of which “we” strongly disapprove.<sup>51</sup>

If voluntary manslaughter is a lesser crime than murder on the premise that the actor loses control and acts in a way that he or she would “strongly disapprove,” then the same claim should apply to those who appear overcome with rage for less understandable reasons yet who might also

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48. *Id.* This was not a murder case, as the child did not die from the beating. *See id.* The main point of discussing the case is to demonstrate a situation where loss of control might have occurred, but the provocation was so inadequate that the prosecutor and the judge in the case used language such as “savagely” and “monster.” The provocation doctrine prevents such labeling of defendants who had what we deem to be “adequate” provocation.

49. *Mom Gets 99 Years in Prison for Beating Tot, Gluing Hands*, ASSOCIATED PRESS, Oct. 12, 2012, [http://www.yourhoustonnews.com/courier/news/mom-gets-years-in-prison-for-beating-tot-gluing-hands/article\\_e756b08d-b37a-569c-8b46-966925c2a0a6.html](http://www.yourhoustonnews.com/courier/news/mom-gets-years-in-prison-for-beating-tot-gluing-hands/article_e756b08d-b37a-569c-8b46-966925c2a0a6.html).

50. *Id.* The prosecutor stated, “[y]ou can give [the defendant’s children] peace, so that when they’re sitting around the dinner table at Thanksgiving with their big family, they’re not worried that their mother is going to come walking through the door.” *Id.* The defense argued that Elizabeth Escalona was a “train wreck” before the attack. *Id.* She came from a broken home, suffered abuse in her life, then became involved with illegal drugs and associated with gang members. She gave birth to her first child at the age of fourteen. In answering her own question, “[w]hat is justice for [the child victim],” the defense stated, “[g]iving Elizabeth the opportunity to be a better mother, giving her the opportunity to get counseling services, will be justice for [her child].” *Id.*

51. Kahan & Nussbaum, *supra* note 41, at 280.

strongly disapprove of their actions. Who is to say that Elizabeth Escalona did not “strongly disapprove” of her own conduct when she became angry?

While we punish harshly for crimes we think are outrageous, the legal system is not so outraged by the number of women killed because they terminated a relationship. Domestic violence is still commonplace, and it rarely shocks.<sup>52</sup> So while juries may sympathize with the outraged jilted boyfriend who murders his ex-girlfriend, they generally seem less concerned that he murdered her for jilting him. Dressler acknowledges that the provocation claim does not absolve an individual of culpability; he only says that the actor should be *less* culpable than one who intentionally murders.<sup>53</sup> But if the standard takes into account the actor’s delusions—which are within the actor’s control—then there would be no justification for distinguishing between the two offenses in the first place.

### III. IMPLAUSIBILITY OF “LOST CONTROL”

As we have seen, there are two aspects to the provocation defense: loss of control and adequate provocation. The crux of the defense is the loss-of-control claim, at least for most supporting scholars.<sup>54</sup> “Adequate provocation” is widely interpreted and subject to scrutiny.<sup>55</sup> One should therefore examine whether a human being is physically and mentally *capable* of becoming so enraged that he or she loses control and would be capable of killing without desiring to do so. However, psychological and philosophical research do not support the possibility of such a loss of control. If loss of control is impossible, then when a jury does find provocation, the finding is always a false positive for loss of control.

52. The media does not frequently draw attention to it. Articles about murders often slyly reference that a man murdered his “estranged” wife or girlfriend. Abused women are at the highest risk of death or severe injury within a year after they leave the abusive relationship. See Darrell Payne & Linda Wermeling, *Domestic Violence and the Female Victim: The Real Reason Women Stay!*, 3 J. MULTICULTURAL, GENDER, & MINORITY STUD. 1, 3 (2009), available at <http://www.scientificjournals.org/journals2009/articles/1420.pdf>

53. Dressler, *Reflections*, *supra* note 14, at 978–79.

54. Even Dressler, a proponent of the provocation doctrine, admits that if “adequate provocation” was predominant and the only function of the doctrine was to serve as a partial justification, then he would instead support its abolition. *Id.* at 970.

55. Some advocates seek to establish a more objective standard for “adequate provocation.” See generally Nourse, *supra* note 26.

Professor Stephen J. Morse<sup>56</sup> discusses “loss of control” claims from a psychological and philosophical point of view. When an “internally coerced agent” is under emotional stress, making decisions may be difficult, but decisions to act remain under the actor’s control, even under the most difficult situations.<sup>57</sup> Morse recognizes that “irrationality is the basis for excusing if threatening circumstances arising from internal circumstances prevent the agent from thinking rationally.”<sup>58</sup> He concludes, in part, that “there is no defect in the will or volition, even if a person has intense, irrational desires that cause great dysphoria.”<sup>59</sup>

In assessing the core of loss-of-control claims, Morse recognizes and asserts that the impulses at issue (in “irresistible impulse” claims) are desires. Anger creates an intense desire to punish an individual who has committed some wrong against the actor, and the actor may feel a need to satisfy the impulse to use violence.<sup>60</sup> Denying that impulse creates a dysphoria that can perhaps only be eliminated by acting on the impulse at that moment.

The American Psychiatric Association defines “compulsive behavior” as “purposeful,” “intentional,” and “designed to neutralize or to prevent discomfort or some dreaded event or situation . . . .”<sup>61</sup> Morse observes that “[o]ut-of-control’ action is not necessarily unintentional action.”<sup>62</sup> We simply equate a “hard choice” with “no choice,”<sup>63</sup> perhaps because we seek to recognize human frailty and attempt to make room for it in the law. The agent did still choose to yield to the desire to act in whatever manner the impulse directed. One retains the choice between acting out of the impulse to relieve the dysphoria and not acting in a violent way while suffering through the dysphoria. While Morse does recognize that a nonculpably ignorant or irrational agent may not be aware that a choice is possible, that conception hinges on the defendant being ignorant or irrational. In that sense, loss of control is more plausible if it comes as a result of a mental deficiency.

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56. Professor Morse is the Ferdinand Wakeman Hubbell Professor of Law at the University of Pennsylvania Law School and Professor of Psychology and Law in Psychiatry at the University of Pennsylvania School of Medicine.

57. Morse, *supra* note 10, at 1623.

58. *Id.* at 1624.

59. *Id.* at 1625.

60. Morse, *supra* note 10, at 1600.

61. *Id.* at 1603 (citation omitted).

62. *Id.* at 1595 (emphasis removed).

63. *Id.* at 1604.

According to Kahan and Nussbaum's explanation of the "mechanistic conception" of emotion, "[e]motions feel like things that sweep over us, or sweep us away, or invade us, often without our consent or control—and this intuitive idea is well preserved in the view that they really are impulses or drives that go their own way without embodying reasons or beliefs."<sup>64</sup> We have a sense that emotions are "external to the self, forces that do something to 'us' without being . . . parts of what we think of as ourselves."<sup>65</sup> Anger, for example, "can seem to come boiling up from nowhere, in ways of which 'we' strongly disapprove."<sup>66</sup> Kahan and Nussbaum conclude, "for if we think of [our emotions] as drives or forces similar to currents of an ocean, we can imagine these natural forces as extremely strong without being troubled by questions about how our own thoughts could have such force."<sup>67</sup>

But it is the contrasting conception of emotion that dominates philosophy and psychology.<sup>68</sup> This "evaluative conception" focuses on the fact that emotions involve evaluative thought. There is a distinction between feeling an emotion and acting on that emotion.<sup>69</sup> As Aristotle claims, "changes in belief yields changes in emotions."<sup>70</sup> The "provoking" event does not automatically cause the actor to kill or fly into a rage. The event is processed in the actor's belief system before the actor feels an emotion connected with the event. There is a middle step between the emotion and the act itself, which makes this relationship an evaluative process.

Reid Griffith Fontaine, a professor in the Department of Psychology at the University of Arizona, has illuminated the scientific basis for the defense: Provocation Interpretational Bias ("PIB"). PIB means that an actor is biased toward interpreting social situations as provocative, or as threatening and hostile.<sup>71</sup> Fontaine cites a multi-experiment investigation,

64. Kahan & Nussbaum, *supra* note 41, at 279–80 (footnote omitted).

65. *Id.* at 280.

66. *Id.*

67. *Id.*

68. *Id.* at 286–87.

69. *Id.* at 288.

70. *Id.* at 282 (discussing Aristotle's conception of the relations between emotions and beliefs); see also ARISTOTELIS, *ARS RHETORICA* 1382a, at 86–88 (Rudolfus Kassel ed., 1976).

71. Reid Griffith Fontaine, *Reactive Cognition, Reactive Emotion: Toward a More Psychologically-Informed Understanding of Reactive Homicide*, 14 *PSYCHOL., PUB. POL'Y, & L.* 243, 250 (2008). PIB can range in seriousness, from actors who are only slightly more likely to perceive hostility in ambiguous situations to actors who attribute hostility in situations where the "provocateur's" conduct was clearly benign. *Id.*

conducted in 2005 by Jack von Honk, which found that trait anger<sup>72</sup> is automatically processed and is “positively associated with being biased toward attending to angry faces.”<sup>73</sup> Fontaine suggests that this automatic process may contribute to an actor’s tendency to rashly perceive hostile situations during social situations.<sup>74</sup> Fontaine admits that PIB is not an official mental disorder, yet he describes it as a “real, scientifically substantiated, nonculpable mental disturbance that diminishes rationality . . . .”<sup>75</sup> PIB has also been associated with several mental disorders.<sup>76</sup>

Elizabeth Escalona might certainly have suffered from a severe case of PIB. Defense counsel’s description of her life suggests that her life experiences would make her an excellent candidate for PIB (and for a loss-of-control defense).<sup>77</sup> If she had an extreme case of PIB, even a benign or ambiguous occurrence might seem to her like a major threat that would lead to a violent reaction.

The main problem with viewing PIB as a scientifically substantiated reason for maintaining the provocation doctrine is that PIB fails to address the impulsive act of a defendant as “out of control.” Fontaine asserts that PIB should provide a valid excuse in provocation cases, because he assumes that quickened anger results in quickened action to exercise violence after that anger. PIB, however, relates to the generation of the anger without provocation. Thus, we are still left with a gap between the anger and the violent action.

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72. Trait anger is defined as “the disposition to perceive a wide range of situations as annoying or frustrating, and the tendency to respond to such situations with more frequent elevations in state anger.” RAYMOND DIGIUSEPPE & RAYMOND CHIP TAFRATE, *UNDERSTANDING ANGER DISORDERS* 25 (2010).

73. Fontaine, *supra* note 72, at 249 (citation omitted); see also Jack van Honk et al., *Attentional Biases for Angry Faces: Relationships to Trait Anger and Anxiety*, 15 *COGNITION & EMOTION* 279, 279–97 (2001).

74. Fontaine, *supra* note 72, at 250.

75. *Id.* at 256.

76. Specifically, “individuals with borderline personality disorder (BPD) are . . . more sensitive to minor [provocations],” and some scholars have labeled BPD as a type of PTSD. *Id.* at 256–57.

77. Elizabeth Escalona did severely beat her child, and for a trivial reason at best. But why do we recognize “justified” (“reasonable”) outrage stemming from the discovery of one’s spouse in the act of adultery, yet ignore the frustrations of child-rearing? Our selective recognition of “reasonable rage” appears to perpetuate sex stereotypes that expect women to be nurturing and understanding of children’s mistakes. Other stereotypes dictate that we expect a jilted husband to be wrathful. I suggest that prosecutors ask jurors what they can see themselves doing in the defendant’s situation. I doubt they would actually envision themselves killing their spouse whom they find committing adultery. Provocation involves a great deal of jury discretion, and jurors’ decisions will be based on what they think and believe about themselves and their own capabilities. Imagining oneself as a juror and knowing the elements of the provocation doctrine is vital.

Aristotle contemplates “loss of control” in terms of voluntary versus involuntary actions:

On some actions praise indeed is not bestowed, but pardon is, when one does a wrongful act under pressure which overstrains human nature and which no one could withstand. But some acts, perhaps, we cannot be forced to do, but ought rather to face death after the most fearful sufferings . . . .<sup>78</sup>

Has the common law decided that one “cannot be forced to” murder? Aristotle’s comment points out the problem of societal praise of those who perform “good” acts and society’s reluctance to find one responsible for “evil” acts.<sup>79</sup> Finding “loss of control” in provocation is all the more controverted, then, by the fact that the presence of “adequate justification” demands an evaluation of circumstances of which we may approve and therefore term “good” (e.g., anger at infidelity). There is an evil act of murder, over which the actor claims to have no control, but society also believes that it stems from “good” anger arising from “adequate” provocation. It is inconsistent to permit a claim to “loss of control” while at the same time recognizing “adequate” provocation.

Aristotle further states:

[A]cts done in the spur of the moment we describe as voluntary, but not as chosen. . . . [T]he incontinent man acts with appetite, but not with choice; while the continent man on the contrary acts with choice, but not with appetite. . . . Still less is it anger; for acts due to anger are thought to be less than any others objects of choice.<sup>80</sup>

Aristotle attributes a lack of choice to the actions of an “incontinent” man, but not to a “reasonable” one, and for the incontinent Aristotle prescribes mercy and pity.<sup>81</sup> The actor is said to lack self-control, and his incontinence is not necessarily limited to the particular act of which he is accused. Adopting Aristotle’s philosophical position, it would be more reasonable to allow a defendant to claim incontinence, or some form of mental disability, rather than provocation.

78. ARISTOTLE, *THE NICOMACHEAN ETHICS* 49 (David Ross trans., Oxford Univ. Press 1998).

79. *Id.* at 52. Similarly, Assistant Professor Susan Rozelle points out that “[t]reating criminal behavior as a sickness over which we have no control deprives us of the peculiarly human satisfactions that derive from a sense of achievement.” Rozelle, *supra* note 20, at 220 (internal marks omitted).

80. ARISTOTLE, *supra* note 79, at 53.

81. *Id.* at 49.

## IV. THE REASONABLE MAN

In January of 1979, Randall Dixon beat his fiancé to death after she danced with another man at a party celebrating their engagement. The jury returned a verdict of manslaughter. The judge decided that a reasonable jury could conceivably find that, “if a woman danced with another man at her engagement party . . . her behavior was a reasonable excuse for the anger that prompted him to kill her by beating her from that evening through five o’clock the following morning, and it merits a reduction in sentence.”<sup>82</sup>

The provocation doctrine denies victims the “negative liberty” to further one’s abilities, lawfully live one’s life, form relationships, and work without hindrance from other individuals (specifically, aggressors and offenders).<sup>83</sup> Instead, the doctrine recognizes that certain acts can “reasonably” lead to outrage and violent responses. Therefore, an assessment that an offender has been provoked means, to a certain extent, that the person instigating the provocation should have known that such instigating actions could provoke the violent reaction. When “justifiable provocation” is a partial defense for murder, the structure of the law results in victim blaming and fails to hold an offender responsible for his actions.<sup>84</sup> The fact-finder adopts a definition of “reasonableness” that a jury would not apply to their own lives. Reasonableness in provocation excludes the rule of law and permits rage to rule. Our behavioral expectations are not based on what we would expect of ourselves, or on what we would expect from others, but upon what we perceive as reality.<sup>85</sup> That perception of reality and “fairness” is largely determined by the

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82. Rozelle, *supra* note 20, at 202 (citing *Dixon v. State*, 597 S.W.2d 77, 78 (Ark. 1980)).

83. Alon Harel, *The Triadic Relational Structure of Responsibility: A Defence*, in *CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 103, 114 (Rowan Cruft et al. eds., 2011).

84. A proponent might say “V assumed the risk of D’s murderous response when V provoked D.” See LARRY ALEXANDER, KIMBERLY KESSLER FERZAN & STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 163–64 (2009). Imprudence does not equate justification. Still, the provocation doctrine addresses imprudence in the form of “weakness of will” or “loss of control” which is learned, not irresistibly practiced.

85. This position is contrary to Rawls’ theory that reasonable persons are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others. ROBERTO ALEJANDRO, *THE LIMITS OF RAWLSIAN JUSTICE* 76 (1998) (quoting JOHN RAWLS, *POLITICAL LIBERALISM* 50 (1993)). The reasonable thus embodies a basic morality that is a precondition of social life. *Id.*

jury's imagination and stereotypical perceptions of the defendant who has killed.

The reasonable person standard as applied to the provocation defense produces a warped vision of the offender's reasonableness. The doctrine of provocation has moved from considering whether a reasonable defendant would have intended or foreseen his actions, to asking, "What would it have been reasonable to expect *this* defendant to intend, foresee, and know?"<sup>86</sup> The doctrine has not yet considered "[w]hat it is reasonable to ask of this defendant."<sup>87</sup> Cultural factors often dictate the reasonableness of the defendant's perceptions and our assessment of whether he had a fair opportunity to conform his actions to the law.<sup>88</sup>

Only some provocations justify the use of the provocation defense.<sup>89</sup> The provocation must be one that would enrage a reasonable person and produce a situation in which the reasonable person would be expected to lose control and act in anger.<sup>90</sup> The doctrine is inapplicable where the provocation is insufficient to cause a reasonable person to lose control. Markus Dubber writes that:

The reference to reasonable *firmness* thus should not be confused with the general reference to reasonableness, or reasonable persons, in the case of justification defenses, or of negligence offenses. In the case of an excuse such as duress, the onlooker is to imagine himself in the actor's position and to assess whether a person of reasonable firmness would have been able to act differently under the circumstances, even though it is undeniable that a reasonable person—that is, a person acting on an effective sense of justice—would in fact have behaved differently. . . . [T]he defense instead turns on the question whether that failure was unavoidable—and therefore excusable, though not justifiable—given the triggering event . . . .<sup>91</sup>

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86. Nicola Lacey, *Community, Culture, and Criminalization*, in *CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 303 (Rowan Cruft et al. eds., 2011). Lacey's summary of the reasonable person standard should be linked to the "triad of responsibility" as outlined by Alon Harel. See Harel, *supra* note 84, at 104–05. Responsibility is a component of liability. *Id.* at 104.

87. Lacey, *supra* note 87, at 303.

88. *Id.*

89. ALEXANDER ET AL., *supra* note 85, at 165.

90. Dressler, *Reflections*, *supra* note 14, at 987.

91. DUBBER, *supra* note 45, at 131.

The concept of shared human fallibility is what makes the excuse, not the ability to choose, the just course.<sup>92</sup> The ordinary, reasonable person can control his actions and prevent himself from killing another, even in the face of “legally adequate” provocation.<sup>93</sup>

An act is “voluntary” when it was subject to moral assessment. Kahan and Nussbaum’s evaluative conception assumes this condition is satisfied if conduct can be comprehensibly explained in terms of the actor’s beliefs. It may be impossible to comprehend all aspects of a “voluntary” act.<sup>94</sup> This assumption underlies the approach taken by the MPC. Loss of control under provocation is a type of “impaired rationality” excuse.<sup>95</sup> But it is doubtful that anyone can distinguish between an impulse that is truly “irresistible” and one that is simply “not resisted.”<sup>96</sup> Common law murder analyses do not even require evidence of premeditation. “No time is too short . . . for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it.”<sup>97</sup> Who can say that “heat of passion” crimes are not quickly contrived murders?

## V. UNCOVERING STEREOTYPES

An angry person must generally believe that someone has deliberately wronged him “in a more than trivial way.”<sup>98</sup> For such anger to exist, let alone take control, it sometimes accompanies remnants of controlling female sexuality within our culture. When a woman chooses to end a relationship or engages in infidelity, society accepts that a man feels jilted and believes that he has been severely wronged.<sup>99</sup> But not every man believes that he is entitled to exclusive access to the woman he has chosen,

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92. *Id.* Dubber writes:

In this direct role-taking exercise, onlookers are to ensure that they “not impose[] on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise.

*Id.* (citations omitted). Furthermore, in the role-taking exercise, “matters of temperament are irrelevant.” *Id.*

93. Rozelle, *supra* note 20, at 232–33.

94. Kahan & Nussbaum, *supra* note 41, at 341.

95. ALEXANDER ET AL., *supra* note 85, at 155.

96. *Id.* at 157.

97. Kahan & Nussbaum, *supra* note 41, at 324 (quoting *Commonwealth v. Drum*, 58 Pa. 9, 16 (1868) (emphasis omitted)).

98. *Id.* at 283 (citing ARISTOTELIS, *ARS RHETORICA* 1385b-1386b, at 119–23 (Rudolfus Kassel ed., 1976)).

99. *See supra* Parts I and II.

even if she has ended (or perhaps never began) the relationship.<sup>100</sup> Fewer still claim an irresistible urge to kill her as punishment. The law does not infringe on freedom of thought in society, but we generally expect people to conform their actions to the requirements of the law.<sup>101</sup>

The loss-of-control defense is not confined to murder trials. Such claims are also made by men who abuse their wives or girlfriends. It is not uncommon to blame the women who are abused and to think that they must have done something to provoke their abuser. The notion that anger causes one to lose control and act violently is markedly dominated by intimate partner relationships in day-to-day circumstances. Feelings of entitlement define the cycle of violence in domestic abuse situations, and those same feelings may be present in murders where provocation is claimed as well. If loss of control is found to be absent in cases of domestic abuse, then the finding supports the claim that it is also absent in provocation claims (particularly for men who kill their partners).

Lundy Bancroft, a therapist who specializes in counseling abusive men, sheds light on a major flaw in the claim that an abuser “lost control.” Bancroft asks clients who claim loss of control why they did not do something worse in their abuse. For example, Bancroft might say:

You called her a fucking whore, you grabbed the phone out of her hand and whipped it across the room, and then you gave her a shove and she fell down. There she was at your feet, where it would have been easy to kick her in the head. . . . What stopped you?<sup>102</sup>

The most frequent response he receives is, “Jesus, I wouldn’t do *that*. I would never do something like that to her.”<sup>103</sup> Clients would always give him a reason; the response was almost never “I don’t know.”<sup>104</sup> Bancroft’s experience with abusers has led him to conclude, “[a]n abuser almost never does anything that he himself considers morally unacceptable.”<sup>105</sup>

100. Susan Rozelle points out that 40% of married women and 50% of married men admit to having extramarital sex, and approximately 98–130 murders or non-negligent manslaughters involve some kind of “romantic triangle.” Rozelle, *supra* note 20, at 221. The statistics indicate that the “odds are good that many people have discovered their spouses to be committing adultery and yet refrained from killing them.” *Id.* at 221–22 (citation omitted). Likewise, for bar fights, the number of fights compared with the number of provoked killings associated with them also indicates that “most people manage to avoid killing their attackers when confronted with non-deadly force, as well.” *Id.* at 222.

101. Kahan & Nussbaum, *supra* note 41, at 288–310.

102. LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 34 (2002).

103. *Id.*

104. Bancroft received this response only twice in his fifteen years of counseling (as of 2002). *Id.*

105. *Id.* at 34–35. When a man is on an “abusive rampage,” his mind is processing a myriad of questions, including, “[a]m I doing anything that I myself consider too cruel, gross, or violent?” *Id.*

Despite a loss-of-control claim, abusers' moral judgment was still present and prevented them from engaging in actions that would have been consistent with the claim that they were "out of control." Men who abuse (or kill) do so when they feel entitled. An abuser's sense of honor, for instance, may feel violated if a woman's sexuality (perceived as their property) is taken from him, and that loss of honor fosters intense anger and dysphoria. This mentality is further demonstrated through past and present laws governing rape, which in some jurisdictions still make allowances for "property" rights of husbands.<sup>106</sup>

As some scholars describe, society teaches women to expect men to behave like animals to a certain extent.<sup>107</sup> This expectation invariably leads to victim blaming for crimes such as rape. Male aggression is considered a natural and expected response to attractive or provocatively-dressed females. Knowing this, women often exercise caution not to engender lust, or anger based on unfulfilled lust. Saying "no" to sex or ending a relationship can be seen as a "challenge to manhood."<sup>108</sup> Ending a relationship combines anger from not receiving sex—to which some abusers feel entitled—with the man's perceived "property" rights as a husband, fiancé, or boyfriend. Voluntary manslaughter and "provocation" likewise continue to perpetuate a violent subordination of women by men.<sup>109</sup>

Victims and aggressors are not the only individuals who have these warped perceptions. Society will generally chide a woman who has not taken the "proper precautions" for her negligence in allowing the man's anger to take place. The perception of men as ferocious animals is widespread, and courts have even alluded to it in handing down rape judgments.<sup>110</sup> It is therefore difficult to distinguish between "justified" violence and that which takes place after "provocation." The two often go

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106. See Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 364 (1993) for a discussion of men's entitlement to sexual control.

107. *Id.* at 379–80. "One does not go into the lion's cage and expect not to be eaten." *Id.* at 379 (quoting Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217, 227–28 (1989)). When a woman does not take the "adequate precautions," she is rebuked for recklessness, in a way, and blamed for whatever harm came to her. *Id.*

108. *Id.* at 380

109. Miller, *supra* note 22, at 668.

110. For example, in *In re John Z*, a rape case, the defense argued:

By essence of the act of sexual intercourse, a male's primal urge to reproduce is aroused. It is therefore unreasonable for a female and the law to expect a male to cease having sexual intercourse immediately upon her withdrawal of consent. It is only natural, fair and just that a male be given a reasonable amount of time in which to quell his primal urge . . . .

60 P.3d 183, 187 (Cal. 2003).

hand-in-hand. Legal systems around the world use honor and passion to justify violence.<sup>111</sup> Their rhetoric demonstrates a recognition that perceptions of honor lead to men acting like animals. One Jordanian man, jailed after killing his sister who had been raped, stated, “[i]f we lose [honor], we have no life, we become swine . . . . We’re no better than animals.”<sup>112</sup>

In the Southern United States in the early twentieth century, the perceived honor of a perpetrator affected a criminal case’s outcome. This was particularly true as that character related to a victim’s sexual behavior.<sup>113</sup> Today, violence is often allegedly “provoked” when women fail to fulfill stereotypes. This failure includes transgressing sexual boundaries, thereby implicitly dishonoring their significant others.<sup>114</sup> Abusive men today “claim to be provoked by their perception of the woman’s inadequacy as a home-maker/cook, by her ‘failure’ to respond sexually or to behave in a deferential manner . . . or because they believe her to be—or believe she *desires* to be—sexually unfaithful.”<sup>115</sup> It is suspicious that perceptions of honor link so closely to what the law recognizes as “adequate” provocation (e.g., adultery), and juries’ perceptions most likely influence their findings.

## VI. JURIES’ INABILITY TO REASONABLY FIND PROVOCATION

A jury is comprised of voting citizens in a community and typically reflects the demographics of the community. As such, it is highly unlikely that any individual on a jury has killed someone and then claimed provocation.<sup>116</sup> Jurors therefore cannot directly and adequately empathize<sup>117</sup> with a defendant who claims to have lost control and killed someone out of rage. While a juror may reasonably empathize with the

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111. Johanna Bond, *Honor as Property*, 23 COLUM. J. GENDER & L. 202, 213 (2012).

112. *Id.* at 215 (internal quote marks omitted).

113. *Id.* at 213. This provoking sexual behavior would naturally include adultery or any other behavior deviating from accepted norms.

114. *Id.* at 214.

115. *Id.* at 214–15 (quoting Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L & WOMEN’S STUD. 71, 97 (1992)).

116. If any juror had, that juror would most likely be in prison serving for voluntary manslaughter or murder, or simply be excluded from serving on a jury.

117. Empathy is “the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another of either the past or present without having the feelings, thoughts, and experience fully communicated . . . .” MERRIAM-WEBSTER, *available at* <http://www.m-w.com/dictionary/empathy>.

feeling of anger, hurt, or sadness, he or she could not empathize with the rage that prompts a killing.<sup>118</sup>

The main question in assessing a provocation claim is “whether the actor’s loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen.”<sup>119</sup> Having most likely experienced anger, hurt, and sadness, the average juror might be able to sympathize<sup>120</sup> with a defendant’s general emotions after being provoked. But still, no juror has shared the defendant’s murderous reaction to the given provocation.

How then can a jury decide that a provoked individual “reasonably” lost control when he killed if those on the jury have never lost control and killed another? Only by the stereotypes ingrained in our culture.<sup>121</sup> Jurors may not agree or see themselves behaving as the defendant did, but prevailing stereotypes leave room for the anger of jealous or insulted male jurors who are “entitled” to their “property.” Jurors’ imaginations are driven by those stereotypes that prompt them to believe that they *should* sympathize with the defendant. An inquiry into reasonableness is, after all, “an exercise in imaginative role taking . . . .”<sup>122</sup> Justice requires, however, that judges and juries “apply the same standard to the defendant that they would apply to themselves . . . .”<sup>123</sup>

If a jury applied to their own lives notions of reasonable reactions to “adequate” provocations, then these stereotypes might loosen their stronghold on jurors’ imaginations. If any one of them was asked whether he or she could imagine killing his or her spouse out of rage (for any

118. Many jury members might have experienced insults from others that prompted an amount of rage, perhaps even violence. If a jury member has experienced the anger of finding his or her spouse in the act of adultery, or feeling jilted by a girlfriend or boyfriend, then he or she is in an advantageous position for the defendant and would be more likely to understand the level of anger that the defendant might have felt.

119. Garvey, *supra* note 1, at 1690 (citation omitted).

120. Sympathy is “an affinity, association, or relationship between persons or things wherein whatever affects one similarly affects the other,” or “an inclination to think or feel alike.” MERRIAM-WEBSTER, available at <http://www.m-w.com/dictionary/sympathy>.

121. See *supra* Part V.

122. DUBBER, *supra* note 45, at 128. Dubber also states:

The onlooker’s normative judgment of the defendant’s choice or nonchoice under these circumstances turns on her ability and willingness to draw on her sense of justice in two respects, by recognizing the defendant as a fellow person with a capacity for a sense of justice and by then placing herself imaginatively in the defendant’s position as best she can given the information available to her in order to determine whether the defendant exercised that capacity (in the case of justification), or couldn’t fairly have been expected to exercise it (in the case of an excuse).

*Id.* at 132–33.

123. *Id.* at 132.

reason), the answer would unlikely be in the affirmative. Likewise, if one asked jurors whether they would expect their respective spouses to kill them if the spouse found them in the act of adultery, even fewer positive answers would abound.<sup>124</sup>

Thus, the application of the provocation defense hinges on what the average juror *believes* is a sufficient provocation. Unfortunately, this cannot be expected to produce just results. While the doctrine intends to represent the experiences of the jury, the outcome actually depends on what the jury believes could reasonably be the case for the defendant. This analysis does not necessarily involve jurors putting themselves in the place of the defendant or the victim. One may lose control and lack the element of “choice” at a slight provocation to which jury members could not imagine themselves responding in kind. In those instances, the jury is more likely to consider the actor a “monster” and refrain from exercising the pity or mercy of which Aristotle spoke.<sup>125</sup>

Does a jury expect a reasonable man whose ex-girlfriend starts seeing another man to become enraged and kill her? Surely not. Yet by considering the mentality of the offender, the provocation defense partially justifies such actions. The mentality of the offender includes any delusions the perpetrator had prior to the act. His obsession with the victim is also taken into account and serves to provide a “reasonable justification” for his actions. But for Elizabeth Escalona, her years of hardship offered inadequate justification for her to demonstrate outrage toward her child.

This juxtaposition is problematic because it hinges on whether a reasonable jury can relate to the actions of the defendant (or whether a reasonable jury believes that the defendant’s actions were expectedly reasonable). Even if women on a jury cannot imagine themselves murdering an adulterous partner, they may still find such a response from a man to be “reasonable.”

Before the provocation defense was legally recognized or presented in jury instructions, there were times when a jury would deny a murder conviction outright and would completely excuse the killing on the basis of self-defense. In such instances, the jury believed that the requisite intent to murder was absent and that the defendant had lost control over his actions. This occurred during the medieval era. In such cases, “juries felt so strongly that a defendant should not be charged with felonious homicide . . . when the killing occurred out of provoked rage that they

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124. Asking such questions and prompting members of a jury to consider their actual expectations in their own relationships might indeed help reason to prevail over stereotypes.

125. See ARISTOTLE, *supra* note 79, at 53.

creatively reworked the history of the incident so that the defendant's crime may be entirely excused."<sup>126</sup>

On one level, this evidence of juries' insistence on excusing a crime may indicate the strength with which they believed the defendant to be out of control at the time of the murder. However, sexist stereotypes would be the cause of such jury decisions. The stereotypes of male entitlement and honor, and of women as property were even more prominent and pervasive in medieval times than they are now. Furthermore, the medieval jury was comprised of a "select group of local men who were believed to have knowledge of the defendant and the alleged crime."<sup>127</sup> Imagine an all-male jury, the members of which were all acquainted with the defendant. Their strong belief that a fellow citizen was not guilty of murder is not very convincing when it comes to the question of whether a person can actually lose control over his actions to the point of killing someone.

#### CONCLUSION

The doctrine of provocation—besides being fraught with inconsistency and imbalanced application—hinges on patriarchal stereotypes, which should be extracted from the legal system as thoroughly as possible. The doctrine lacks a strong basis in scientific evidence, and its continued use in criminal jurisprudence is proof that female equality has yet to be achieved. Our culture unfortunately continues to tolerate violence resulting from men's anger, frequently because it assumes men's anger as a fact of life—one which should be expected and which may foreseeably result in violence, if a man is provoked.

Although fact-finders must consider the actions of a "reasonable person" in a murder case, the infrequency with which "loss of control" is actually claimed indicates that "reasonable people" would not lose control and kill a person who has (even greatly) wronged them. Defenders of the doctrine claim that it makes room for normal "human frailty," yet no juror is likely to identify with a defendant who killed as a result of an anger-induced partial incapacity.

Furthermore, the arbitrary division between "adequate" and "inadequate" provocation encourages the stereotypical expectation that particular provocations "reasonably" lead to the exercise of violence. The doctrine is not simply a separate alternative to finding murder for lack of the requisite "intent"; the cause of the defendant's rage must be

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126. Fontaine, *supra* note 72, at 244.

127. *Id.*

“reasonable” to the jury. Supporters of the doctrine often refer to it as a partial excuse because of the partial incapacity that takes place. The doctrine is both a partial excuse and a partial justification, however, because the requirement of adequate provocation suggests that the victim should have somehow expected the agent to become enraged. The arbitrary division between provoked individuals and those whom we label “monsters” demonstrates a critical weakness in the doctrine.

If the provocation doctrine is to be abolished, there is a potential problem that we must address. Given the history of provocation and the fact that a large segment of the population probably agrees with Garvey’s assessment, juries will likely attempt to accommodate “ordinary human frailty.” As the medieval jury would often warp the facts to allow for the claim of self-defense when a murder was committed in the “heat of passion,” today’s jury might have difficulty finding a defendant guilty of murder if they believe that the defendant was sufficiently provoked and lacked the necessary intent.<sup>128</sup> At common law the crime of murder requires a mens rea of “malice aforethought.”<sup>129</sup> Likewise, the Model Penal Code states that “criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.”<sup>130</sup>

Complications may also arise if the provocation doctrine is eliminated without modifying the elements of murder. A jury might not wish to find malice aforethought if the only alternative to a murder conviction is an acquittal. Juries in those cases might be more inclined to acquit the defendant rather than find him guilty of murder. Further research is needed to present a proposal for jury instructions that clearly define intent so that it includes heat of passion crimes.

Such a goal might be difficult, but these are difficulties worth overcoming. The eradication of the provocation defense will allow criminal jurisprudence to extricate itself from flawed cultural stereotypes.

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128. This risk might not be significant, given the broad strokes with which the judiciary insists that premeditation needs no particular time frame. Furthermore, there is evidence that juries and courts across the nation have rejected the notion of adultery as provocation (one of the main historical claims), so the attitudes of juries may be shifting regardless of whether provocation is eliminated as a claim. See Rozelle, *supra* note 20, at 204. Nevertheless, stereotypes may still induce juries to continue recognizing a lack of intent in loss-of-control claims.

129. WILLIAM J. STUNTZ & JOSEPH L. HOFFMANN, *DEFINING CRIMES* 621 (2011).

130. MODEL PENAL CODE § 210.2.