

ALL MURDERS ARE ILLEGAL, BUT SOME ARE MORE ILLEGAL THAN
OTHERS:

A FEMINIST ANALYSIS OF THE COMMON LAW DOCTRINE OF
PROVOCATION

By

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ABSTRACT

There exists a robust body of scholarship addressing the common law doctrine of provocation and its use in justifying and excusing murders predicated on female sexuality, but the field has largely been abandoned during the past decade. This thesis proposes a return to the question and a reopening of the debate. It begins by reviewing and updating the literature on the historical development of the doctrine and the philosophical assumptions about reason and emotion that underlie it. It then moves into a comparative analysis of reform efforts in the United States, England and Wales, and Australia and policymakers' failure to effectively shift the doctrine's gendered implications. It ends with a discussion of provocation's potential to serve as an entrance into a larger research agenda about gender and law and to inform the complicated task of feminist law reform. The doctrine of provocation is not merely an extreme example of a legal loophole but rather an indication of a deeper tendency in the common law, built as it is on the foundation of precedent and tradition, to represent the interests of (white) men at the expense of others. As such, provocation remains a fertile site for research on gender and law.

INTRODUCTION

IN 1341, an Englishman named Robert Bousserman discovered his wife at home with her lover, John Doughty. Bousserman attacked Doughty with a hatchet, killing him.¹

In 1980, an American man named Russell Dixon beat his fiancée in a fit of rage after she danced with another man. She died in the hospital twelve days later.²

In 2004, an Australian man named James Ramage had a conversation with his estranged wife wherein she implied that sex with her new boyfriend was superior to the sex she had experienced in their marriage. He strangled her to death.³

In each of these cases, the defendant was either acquitted or found guilty of manslaughter. None faced the penalty for murder.

The doctrine of provocation linking these three cases is rooted in a tradition nearly as old as the common law category of murder itself. The common law has long included an accommodation for men who are “induced” to kill by a partner’s infidelity, and though this accommodation has morphed in both the range of its application and the logic of its justification over the centuries, it remains true in most common law jurisdictions that men who kill a female

⁺ Adapted from George Orwell, *Animal Farm* (New York: Signet Classic, 1996), 133.

¹ *Bousserman's Case* (1341) J.I. 2. 211, m.1d/i, trans. in Thomas A. Green, “Societal Concepts of Criminal Liability for Homicide in Mediaeval England,” *Speculum* 47, no. 4 (1972), 680.

² *Dixon v. State* (AR 1980) 597 S.W.2d 77.

³ *R v. Ramage* (2004) VSC 508.

intimate partner face far fewer criminal penalties than men who kill a stranger in every stage of prosecution—from the time charges are brought until the point at which they are sentenced.⁴

The critique of this fact of law has been the subject of decades of research and reform efforts⁵ and is part of a broader feminist legal discourse on the pitfalls of what Hudson terms “white man’s justice”⁶ and Fitz-Gibbon and Pickering summarize as “the ideal of the rational man as the subject/object of law.”⁷ Consider, for example, the story of Kiranjit Ahluwalia in contrast with the stories of the three men—Bousserman, Dixon, and Ramage—discussed above.

Ahluwalia, an Indian immigrant living in England, had an arranged marriage with a man who repeatedly raped and beat her. She had tried to run away once before, but her husband found her, and she returned home. One night in 1989, after he threatened her with a hot iron, Ahluwalia doused her husband in petrol and caustic soda as he slept and lit him on fire. A judge ruled that Ahluwalia was not eligible to raise a provocation defense, and she was found guilty of murder.⁸ While Ahluwalia’s case was later overturned on appeal due to inadequate counsel, the appellate court upheld the judge’s decision to deny Ahluwalia a provocation defense.⁹

Although the idiom within which provocation claims must be expressed has shifted over the course of history, the defense has always protected men’s right to kill female partners for their particularly “provocative” behavior. The provocation defense is designed to respond to and protect male expressions of anger. Women, on the other hand, have historically found their forms of provoked anger incompatible with existing legal categories. Women who kill an intimate partner after a history of abuse have to shove their story, often unsuccessfully, into an ill-fitting legal category.¹⁰ Women who try instead to leave an abusive partner and end up dead find that their partners are protected by the very law that failed to protect them.

Thus the history of the provocation defense—of the shifts in both the black letter of the law and in the philosophical understanding of reason, emotion, justification, and excuse that underlie the law—is fundamental to an understanding of the ways in which law protects and validates certain forms of aggression at the expense of others. What makes a murder a murder and a manslaughter a manslaughter?

This thesis will explore the gendered answers to this question, review failed efforts in three common law countries to reform the application of provocation, and propose avenues for

⁴ See Myrna Dawson, “Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decision Making over Time,” *Law & Society Review* 38, no. 1 (2004), 105-138; Myrna Dawson, “Intimacy and Violence: Exploring the Role of Victim-Defendant Relationship in Criminal Law,” *Journal of Criminal Law and Criminology* 96, no. 4 (2006), 1417-1450; Elizabeth Rapaport, “Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-*Furman* Era,” *Southern Methodist University Law Review* 49, no. 5 (1996), 1507-1548.

⁵ See Susan S. M. Edwards, “‘Provoking Her Own Demise’: From Common Assault to Homicide,” in Jalna Hanmer and Mary Maynard, eds., *Women, Violence and Social Control* (London: Macmillan Press, 1987), 152-168; Jenny Morgan, “Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them,” *Melbourne University Law Review* 21, no. 1 (1997), 237-276; Danielle Tyson, *Sex, Culpability, and the Defence of Provocation* (New York: Routledge, 2013).

⁶ Barbara Hudson, “Beyond White Man’s Justice: Race, Gender, and Justice in Late Modernity,” *Theoretical Criminology* 10, no. 1 (2006), 29.

⁷ Kate Fitz-Gibbon and Sharon Pickering, “Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond,” *British Journal of Criminology* 52, no. 1 (2012), 160.

⁸ *R v. Ahluwalia* (1992) 4 All ER 889.

⁹ *R v. Ahluwalia* (1993) 96 Cr App R 133.

¹⁰ Kate Fitz-Gibbon, “Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control,” *Journal of Law and Society* 40, no. 2 (2013), 291.

the scholarly community to apply lessons from provocation to broader research agendas about law and its gendered foundations.

PART I
The Many Faces of Provocation

*Week by week and month by month, women are kicked, beaten, jumped on until they are crushed, chopped, stabbed, seamed with vitriol, bitten, eviscerated with red-hot pokers and deliberately set on fire—and this sort of outrage, if the woman dies, is called ‘manslaughter’: if she lives it is a common assault.*¹¹

THE direction of the historical progression of the doctrine of provocation can best be described as “steadily inward.”¹² What began as an honor code rooted in feudal English categories of social relationship gradually transformed into an ideology of excuse based in modern psychology and the details of a defendant’s state of mind. What is today a very fluid and subjective legal category began as a rigid alternative to the mandatory death penalty for murder in medieval England.

Homicide came in three flavors at the time: felonious, justifiable, and excusable. A verdict of justifiable homicide was reserved for cases in which the defendant murdered an outlaw or fleeing thief, and it resulted in immediate acquittal. Excusable homicides led to an official recommendation for a royal pardon, and they occurred in two forms: excusable accident—what today might be called gross negligence but at the time implied no fault—and self-defense, defined extremely narrowly. A verdict of self-defense required that the defendant had retreated as far as possible and only made the deadly strike “from fear and instinctively.”¹³ What was important in the evaluation of self-defense, as with excusable accident, was the presence (or lack thereof) of “corrupt intention,”¹⁴ and only a defendant who had made every possible effort to avoid killing could claim this purity of intention. A felonious homicide was anything else, and it resulted in the death penalty.¹⁵

The case of Robert Bousserman mentioned above did not meet these rather stringent parameters, and yet his crime was labeled an excusable homicide, and he was recommended for a royal pardon. While the coroner in *Bousserman’s Case* concluded that Bousserman had attacked his victim with a hatchet while Doughty was helpless in bed, the jury instead concluded that Doughty had snuck into Bousserman’s house in the dead of night, removed Bousserman’s wife from his bed, and attacked Bousserman with a knife while blocking his exit when Bousserman awoke.¹⁶ Horder points to several cases like Bousserman’s, before the formal institutionalization of provocation, wherein sympathetic juries used their power of fact-finding to avoid implicating their peers of felonious homicide in situations where they were considerably provoked.¹⁷ These early cases of *de facto* provocation disguised by juries as self-defense are

¹¹ Mrs. Fenwick Miller in a letter to the *Daily News*, 1888, in Jeremy Horder, *Provocation and Responsibility* (New York: Oxford University Press, 1992), 186.

¹² Victoria Nourse, “Passion’s Progress: Modern Law Reform and the Provocation Defense,” *The Yale Law Journal* 106, no. 5 (1997), 1384.

¹³ *Fleta* 2. 60 in Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (Chicago: University of Chicago Press, 1985), 71.

¹⁴ *Ibid.*

¹⁵ Horder, *Provocation*, 6.

¹⁶ Thomas A. Green, “Societal Concepts of Criminal Liability for Homicide in Mediaeval England.” *Speculum* 47, no. 4 (1972), 680.

¹⁷ Horder, *Provocation*, 9.

important because they demonstrate the deep-rootedness of the common law distaste for prosecuting men provoked by adultery.

More important, though, is the institutionalization of the adultery exception to murder a century after *Bousserman's Case*. A series of attempts by the government to crack down on crime—including eliminating automatic royal pardons and restricting the so-called “benefit of the clergy,” which prevented the crown from executing churchmen—occurred over the course of the fifteenth and sixteenth centuries. The details of these parliamentary actions and church-and-state infighting are largely irrelevant for our purposes,¹⁸ but one of these parliamentary actions led to the creation of a new legal category of non-capital murder, culminating in 1453 with *Salisbury's Case*, which Horder describes as “the first fully reported manslaughter verdict.”¹⁹

This new category of “chance-medley manslaughter” modified the focus on intent as the central factor distinguishing felony murder from excusable murder—instead, what mattered was premeditation, something considered absent as a matter-of-fact in murders committed in hot blood after a gross provocation. Thus, in *Salisbury's Case*, when John Vane Salisbury killed a man whom he stumbled upon in combat with a relative of his, Richard Salisbury, he was convicted of manslaughter and spared death. The case, Horder argues:

confirm[ed] as a matter of law what had been the case in earlier times as a matter of fact; namely, that seeing a master or kinsman being attacked was the kind of provocation that would understandably lead to a hot-blooded chance medley and the killing of the attacker by the servant or kinsman. In such circumstances, excusable homicide was thought to be the just and proper result. The emergence of chance-medley manslaughter [...] made this result capable of recognition in law, whereas at a previous time smuggling the case in under the banner of self-defence had had to be the means by which this result was achieved by the jury.²⁰

The reference Horder makes here to “the kind of provocation” that would lead to a manslaughter verdict is key—the formally-established provocation defense came to allow only four specific “heads” of provocation to be presented in court, directly mirroring the kinds of provocation that had led to jury nullification in the pre-manslaughter era of *Bousserman's Case*.²¹

This limiting of chance-medley manslaughter to four forms of provocation in the early common law is among the most contested aspects of the doctrine's history. The historical logic of the development of the four heads of provocation is central to the debates about whether the provocation defense presents a “justification” or an “excuse,” whether murders committed within its parameters represent “honor crimes” or “crimes of passion,” and how the common law views and should view the relationship between reason and emotion. This will be further discussed in Part II. Suffice it for now to say that the presence of adultery was established as an indicator of excusable homicide as a matter of law.²²

By 1707, this practice of the lower courts had been confirmed and legitimized by the High Court of Justice of England and Wales. In denying John Mawgridge the right to mount a provocation defense because the provocation in question was insufficient, Lord Chief Justice

¹⁸ See Horder, *Provocation*, 13.

¹⁹ *Ibid.*, 13.

²⁰ *Ibid.*, 14-15.

²¹ *Ibid.*, 24.

²² Horder, *Provocation*, 19 n. 66; *Manning's Case* (1617) 1 Vent. 158.

John Holt elaborated upon the four types of provocation the Court would find to be sufficient for a verdict of manslaughter.²³ In addition to grossly insulting assault, assault of a relative or master, and injustice directed at another Englishman (especially false imprisonment), witnessing adultery was established as an adequate provocation for manslaughter. After all, Holt wrote, “jealousy is the rage of the man, and adultery is the highest invasion of property.”²⁴ When a man finds his wife in bed with another man and kills one or both of them, it would be an injustice to label the act murder, the Chief Justice argued.

In fact, Holt expressed concern in the *Mawgridge* decision only with charging men in such a situation with any crime at all. Killing a thief as he fled the scene of the crime was neither murder nor manslaughter, and Holt saw adultery and theft as roughly analogous. “If a thief comes to rob another, it is lawful to kill him,” he wrote in *Mawgridge*. “And if a man comes to rob a man’s posterity and his family, yet to kill him is manslaughter.”²⁵ Killing an adulterer was understandable—justified, even, by the equally horrible act which precipitated the murder.

The common law adopted Holt’s framework of four forms of provocation which categorically led to a manslaughter provocation, and these four categories dominated the next three centuries of jurisprudence on the matter even as Holt’s justificatory rationale was gradually abandoned. Where the decision in *Mawgridge* was particularly concerned with whether the actions of the deceased were sufficiently provocative, 18th and 19th-century developments in the doctrine of provocation began to emphasize instead the defendant’s state of mind at the time of murder.

An 1837 case involving a father who killed the man accused of abusing his son is particularly demonstrative.²⁶ Rather than arguing that the assault of a relative would lead to understandable and justifiable anger, as would have been the norm a century prior, the lawyer in *Fisher* argued that his client has suffered a loss of self-control. “The more a father brooded over a case like this, the more likely he would be to be goaded into desperation and madness,” leading him to kill the victim, but without the malice and forethought that would make it murder.²⁷ *Fisher*’s offense, his lawyer argued, “[a]t least [...] is reducible to the offence* of manslaughter, if reason had not had time to resume her seat.”²⁸ The court concurred. An Ohio court similarly ruled in 1859 that the basis of the common law doctrine of provocation lay in the need to mitigate murders that “proceed [not] from a bad or corrupt heart, [but] rather from the infirmity of passion to which even good men are subject,” effectively branding the idea of a “crime of passion” that continues to dominate contemporary discourse on provocation.²⁹

The movement toward discussing provocation in terms of “loss of control,” “passion,” and “heated blood” also produced the (in)famous reasonable man theory (“ordinary person” in England). To prevent the loss of control theory of provocation from, well, spiraling out of control, judges asserted that the provocation which triggers a manslaughter must be such that a reasonable man would be driven out of his mind—thus the contemporary paradigm of a defendant who “snapped,” “cracked,” or “exploded” in anger, waking to his senses only to discover a knife in his hand and a body at his feet, with little to no recollection of what

²³ *R. v. Mawgridge* (1707) Kel. J. 119, 84 E.R. 1007.

²⁴ *Ibid.*, 137.

²⁵ *Ibid.*

²⁶ *R v. Fisher* (1837) 8 C. & P. 182.

²⁷ *Ibid.*, 183

²⁸ *Ibid.*

²⁹ *State v. Cook* (OH 1859) 3 Dec. Reprint 142, 144.

* Given the multinational nature of this thesis, British spellings have been retained when directly quoted.

transpired. Particularly “unbalanced” people who were driven to kill by a slight insult, on the other hand, were not to be protected by the provocation doctrine.

This is why the categories of sufficient provocation remained—at least for a time. The original four heads were repurposed as situations in which the “legal presumption [was] that the defendant was in fact carried to revenge by the irresistible impulse of ungovernable passion.”³⁰ A man who witnessed his wife committing adultery was reasonably assumed to have been driven temporarily insane; anything short of this, and it was expected that he was capable of maintaining control of his emotions.

The four-category ideal of provocation was soon rendered obsolete, though, by the twin developments of loss of control and the reasonable man. In the United States, it was established by 1862 that a man need not directly witness the provocation to reasonably lose control,³¹ and by 1901, the need to limit, even broadly, a claim of provocation to the four categories had been eliminated.³² The U.S. courts based their decision on the belief that juries, “coming from the various classes and occupations of society, and conversant with the practical affairs of life” can more adequately fact-find on the issue of a defendant’s emotions than judges and their established categories.³³ In England, where the precedent was stronger of requiring a claim of provocation to be tied to one of the original four categories, this development was not fully cemented in law until the 1957 modification of the statute under the *Homicide Act*, which established that “the question whether the provocation was enough to make a reasonable man do as he did shall be left to the determination by the jury.”³⁴ Importantly, even as the jury was given the responsibility of evaluating each individual situation rather than relying on established forms of provocation, infidelity continued to be a near-absolute excuse for murdering women.

There were other distinctions in the development of provocation between various common law jurisdictions—England never developed a category of second-degree murder, for example, amplifying the importance of manslaughter as the only available recourse for those hoping to avoid the mandatory death penalty or life sentence;³⁵ American law allowed provocation defenses to be raised in cases of assault as well as murder,³⁶ and a few scattered jurisdictions structured provocation as a full excuse leading to acquittal rather than a partial excuse leading to manslaughter.³⁷ But for the most part, the doctrine of provocation in the United States, England and Wales, and Australia shared a similar character and history up until the late twentieth-century, at which point reform efforts created serious and intriguing divergences.

We will discuss these reform efforts shortly, but first, we turn from this history of the letter of the law of provocation to an analysis of the logic of the law.

³⁰ Horder, *Provocation*, 89.

³¹ *Maher v. People* (1862) 22 Ill. 10, Mich. 212.

³² *State v. Yanz* (1901) 74 Conn. 177.

³³ *Maher v. People*.

³⁴ Joshua Dressler, “Rethinking Heat of Passion: A Defense in Search of a Rationale,” *Journal of Criminal Law and Criminology* 73, no. 2 (1982), 429.

³⁵ Fitz-Gibbon, “Replacing Provocation,” 303.

³⁶ Nourse, “Passion’s Progress,” 1334, n. 18.

³⁷ Lama Abu-Odeh, “Comparatively Speaking: The ‘Honor’ of the ‘East’ and the ‘Passion’ of the ‘West,’” *Utah Law Review* 1997, no. 2 (1997), 299.

PART II

Reasonable Men, Dead Women

*Retaliation is related to nature and instinct, not to law. Law, by definition, cannot obey the same rules as nature. If murder is in the nature of man, the law is not intended to imitate or reproduce that nature. It is intended to correct it.*³⁸

MUCH of the scholarship on the doctrine of provocation has historically focused on either explaining the legal logic that underpins it, because there is no clear answer to this dilemma,³⁹ or arguing about its classification as excusing either crimes of passion or crimes of honor, because it can reasonably be understood as either and both.⁴⁰ In saying, “I was provoked,” does a defendant say, “I lost my head in a moment of passion, and I need to be excused”? Or does he say, “My victim’s grossly provocative actions were an attack on my honor, and I was justified in my response”?

Simplistically, most scholars have arrived at an understanding of early common law provocation as a justificatory defense for crimes of honor, and later loss-of-self-control variations of provocation as an excusatory defense for crimes of passion. Like most dichotomized categories, however, this distinction-between disguises the equivalent or larger distinctions-within. Furthermore, this dichotomy between “old” and “new” provocation elides the historical processes that formed the contemporary loss of self-control defense from the medieval categories of excuse. The common law, by definition, builds on itself and carries the detritus of the past into the future. Lawyers and judges uphold rulings based on precedent but justify them in their contemporary idioms. This section investigates that push and pull.

In the very earliest period of provocation, when there was no formal legal category of manslaughter but juries occasionally acted to protect their peers from being implicated in certain categories of homicide, Horder argues that this construction of murder was the consequence of overtly Christian ideas within English law. Anger, as one of the seven deadly sins, was not considered a mitigating factor but an implicating one, because it reflected intent, and intent indicated murder. All murder was inexcusable felony murder except for accidental or defensive homicide, wherein one killed with great reluctance and after much effort to avoid doing so, thus preserving the integrity of one’s intent.⁴¹ It is to the Enlightenment and its revival of Aristotelian ideas about virtue that Horder attributes the creation of formal provocation.

In the Aristotelian theory of virtue, virtuous men do not simply avoid doing sinful things, such as acting in anger. A virtuous man is expected to show anger when it is merited, but the key is to do so in proportion and to express the mean emotion at the appropriate time. In *The Nicomachean Ethics*, Aristotle wrote, “But to have these feelings at the right times on the right grounds towards the right people for the right motive and in the right way is to feel them to an intermediate, that is to the best, degree; and that is the mark of virtue.”⁴²

Thus, a man who discovers his wife *in flagrante delicto* should angrily resort to violence to defend his honor and enact revenge. This reaction is not only excused but expected. If he gets

³⁸ Albert Camus, “Reflections on the Guillotine,” in *Resistance, Rebellion, and Death* (New York: Vintage International, 1995), 198.

³⁹ Nourse, “Passion’s Progress,” 1341: “No theory has ever convinced a majority of scholars.”

⁴⁰ See Abu-Odeh.

⁴¹ Horder, *Provocation*, 7-8.

⁴² Aristotle, *The Nicomachean Ethics*, trans. J.A.K. Thomson (England: Penguin Books, 1953), 41.

carried away and murders someone, he has exceeded the mean and deserves punishment, but this punishment ought to be less than that accorded someone who kills someone for no honorable reason at all and is therefore completely devoid of virtue.⁴³ And Horder is not alone in reading this moral undergirding into the law of provocation at the time. Kahan and Nussbaum argue something similar, writing:

The common law authorities reduced the punishment of the man who killed his wife's paramour not because killing was the morally appropriate thing to do, but because the husband's appropriate anger distinguished him, morally, from others who kill without appropriate passions.⁴⁴

This conception of appropriate and inappropriate anger, Horder asserts, explains the early absence “of the modern notion of ‘loss of self-control’ to express the experience of feeling and action in anger. The early modern law knew of no such notion, because it was founded on a quite different conception of anger.” He terms this early modern conception “anger as outrage,”⁴⁵ and demonstrates how this construction of anger led judges to evaluate claims of manslaughter “in terms of the sufficiency of the provocation that preceded them.”⁴⁶ In 1600, for example, after a man struck and killed another in a moment of anger following a rude gesture or comment of some sort, the court ruled that “such a slight provocation was not sufficient ground to pretence for a quarrel” and therefore “it is murder.”⁴⁷ The four heads of provocation, then, were the four instances in which violent outrage was recognized and legally endorsed.

It is telling that these categories were so narrow. A grossly insulting assault was ruled provocative enough, but a mere boxing of the ears was not. Infidelity by or with a man’s wife was grounds for manslaughter, but infidelity by or with that same man’s fiancée or girlfriend was not,⁴⁸ “because that man’s rage expressed a valuation of honor and dignity that could not properly be equated with that of the cuckold.”⁴⁹ This suggests that early provocation established a system of defining and excusing literal honor crimes—that it did not merely suggest the rough bounds within which one might be induced to kill, but actually endorsed these murders.⁵⁰

This formulation of justifiable anger gave way in the 18th and 19th centuries to a discourse of loss of control. The legal question transitioned from, “Was this response a proportional, appropriate, justified, measured expression of outrage” to “Was this response frenzied, and does it reflect a lack of malice?” Where murder before was an eminently reasonable reaction to certain provocations, now a person had to demonstrate that an otherwise reasonable man would be driven to become unreasonable by the provocation in question. But even in the midst of this shift, the four categories survived, at least for a time. This seems puzzling. Kahan and Nussbaum, for example, question the idea that the heads of provocation “were merely generalizations about the kinds of offenses that typically destroy volition” because these “manifestly underinclusive”

⁴³ Horder, *Provocation*, 56.

⁴⁴ Dan M. Kahan and Martha C. Nussbaum, “Two Conceptions of Emotion in Criminal Law,” *Columbia Law Review* 96, no. 2 (1996), 314.

⁴⁵ Horder, *Provocation*, 42.

⁴⁶ *Ibid.*, 31.

⁴⁷ *Watts v. Brains* (1600) Cro. Eliz. 778.

⁴⁸ Kahan and Nussbaum, 308.

⁴⁹ *Ibid.*, 314.

⁵⁰ Horder, *Provocation*, 27.

categories survived into the loss of control iterations of the provocation defense.⁵¹ If the role of the law was to evaluate whether a person had been driven out of his mind with rage, “[i]t seems implausible [...] to think that nineteenth-century decision makers would have viewed rage as a surprising or abnormal reaction to the infidelity of a man's fiancée,” and yet judges continued to rule that the foundation for a provocation defense could only be established by the infidelity of one's wife.⁵²

The law held, though, that a person had to prove not just that they had been driven out of their mind by the provocation but that any reasonable person would have lost his self-control in the same situation. The law, an English judge wrote in 1837, “considers man to be a rational being, and requires that he should exercise a reasonable control over his passions,”⁵³ until and unless he is provoked to lose control of those passions.

Here we have our first sense of the ways in which provocation retained certain aspects of its character even as the language surrounding it gave way to historical tides. Many (perhaps most) murders can be described as being precipitated by a provocation and committed in hot blood without premeditation, fulfilling the basic definition of manslaughter. The categories became a way of drawing a distinction between excusable and inexcusable violence, and even as the categories gave way under the pressure to evaluate a defendant's individual circumstances, the line on which that distinction between excusable and inexcusable violence was drawn—“reasonable” loss of control—tread the same territory as the old, honorable line.⁵⁴

In the difficult and contradictory space created by the twin requirements that one “lose control” while still maintaining a “reasonable” reaction to the offense in question, the law developed the concept of the reasonable man, an abstraction intended to carry the weight of society's standards about appropriate conduct. This straddling of the line, this splitting the difference between “I lost control” and “my response was reasonable,” is one of the murkier aspects of the law. It gave rise to the roiling debates, into this century, about the internal logic of the provocation doctrine. After all, Nourse asks:

[W]hy [do] we need both emotion and judgment to explain this defense[?] If, as partial justification theories would have it, the defendant is seen as less culpable because the victim has done something ‘wrong,’ then why do we need emotion at all? On the other hand, if our theories of partial excuse are correct, and the defendant is less culpable because of affect alone, why do we need to judge his emotions or his acts? Of course, if we take these positions to their extreme—if the defense is conceived as all justification or all excuse—then we commit ourselves to some rather unsavory positions, to sanctioning deliberate acts of revenge or murderous responses to petty emotional slights.⁵⁵

The reasonable man theory, then, is intended to balance between these two extremes, but it does not contain an explicit explanation of the precarious relationship between emotion and judgment that Nourse speaks of, nor does it offer guidance on which emotions and which judgments should weigh heavier in the evaluation of both.

⁵¹ Kahan and Nussbaum, 308.

⁵² Ibid.

⁵³ *R v. Kirkham* (1837) 8 C. & P. 115.

⁵⁴ Horder, *Provocation*, 19.

⁵⁵ Nourse, “Passion's Progress,” 1397-1398.

Still, the reasonable man has some characteristics that we can identify. Most significantly, despite the 21st-century use of the term “reasonable person,” the reasonable man is a man. Many feminist critiques of the provocation defense, for example, focus on the kinds of anger that the defense recognizes and rewards. Gender bias is inherent in provocation, these scholars argue, because of the construction of the loss of control requirement, in that:

[I]t reflect[s] a typically male reaction to provocation, but one which women were very unlikely to display. When men are provoked they become angry and lash out in the heat of the moment, but [...] women instinctively recognise that they cannot afford to react in the same way. They have to exercise self-control, and battered women, for example, choose to give vent to their reaction by attacking him at a later time when their abuser is off guard.⁵⁶

By defining the contours of provocation in terms of typical male expressions of anger that women have been socially conditioned not to display, the law effectively excludes women from its protections. And in mandating that women seeking the law’s protections act on their anger in such a straightforward, immediate manner, it pushes them into unsafe situations. A reasonable loss of control, worthy of the mitigatory evaluation of the law, is a masculine loss of control. It is for this reason that so many feminist reformers argued that women’s fear and anger were not understood “within the gendered normative understandings of the law” and pushed for some of the reforms we will discuss in Part III.⁵⁷

Furthermore, the reasonable man is in a relationship with his provocateur. The definition of the “reasonable man,” whether specific to the defendant or more generally constructed within the larger social context, has shifted over the course of the twentieth-century. What hasn’t changed is the systematic application of provocation defenses to cases involving the murder of female intimate partners and the use of the word “reasonable” in the tools juries utilize in these judgments. In the common law, juries and judges have consistently found, it is reasonable to kill one’s wife. In fact, eliminating, at least on the face of the law, the four heads of provocation has simply broadened the avenues by which men have been able to seek the law’s mercy for murders predicated on the actions of women.

Consider, for example, the case of David Eugene Matthews, who murdered his estranged wife and her mother for, among other things, filing a warrant accusing him of sexually abusing his six-year-old stepdaughter. He was permitted to raise a provocation defense at trial, arguing that he had acted under extreme emotional disturbance.⁵⁸ Or consider Robert Rodebaugh, who killed a man for dating a woman whose relationship with Rodebaugh had ended more than a year previously,⁵⁹ or Kamal Fardan, who stabbed and strangled a woman for withdrawing an offer to have sex with him.⁶⁰ Both Rodebaugh and Fardan were permitted to raise a provocation defense at trial based on the expansive contemporary doctrine of extreme emotional disturbance, which will be discussed further in Part III.

⁵⁶ Barry Mitchell, “Loss of Self-Control under the Coroners and Justice Act 2009: Oh no!” in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives*, ed. Alan Reed and Michael Bohlander (Burlington, VT: Ashgate Publishing Company, 2011), 42.

⁵⁷ Fitz-Gibbon, “Replacing Provocation,” 292.

⁵⁸ *Matthews v. Commonwealth* (KY 1985) 709 S.W.2d 414, 418.

⁵⁹ *Rodebaugh v. State* (DE 1990) 586 A.2d 1203.

⁶⁰ *People v. Fardan* (NY 1993) 628 N.E.2d 41.

Provocation, it is clear, is not confined to the immediate impassioned murder of wives caught in a moment of infidelity, as our cultural imaginary of “crimes of passion” would suggest and as the medieval law of provocation once held as a matter of fact. Today, men are able to claim provocation in a court of law against women who have left them or against those, like family members or police officers, who help women leave.⁶¹ The notion of a relationship, though, remains indispensable to the definition of these cases as provocation. There is no rational reason why rejection by platonic friends should be considered less painful or provocative, and yet courts have continually rejected such claims.⁶² Couch an argument for provocation in the intimacy of the relationship, though, and juries and judges are consistently more amenable to deeming the defendant’s actions reasonable. The law has “folded [‘relationship’] into the concept of a ‘rational’ emotion, transforming judgments about the relationship into judgments of affect.”⁶³ Having a sexual or romantic attachment to the victim or provocateur is a necessary first step in constructing a provocation defense to a crime of passion. It would seem that, more than a loss of one’s reasoning faculties, “‘loss of control’ [means that] the proprietary man has lost control of his women.”⁶⁴

Finally, in addition to being a man who is (ostensibly) in a relationship, we can see, the reasonable man in modern provocation is also an honorable man—despite, again, the common scholarly interpretation that old provocation is a justification for crimes of honor while new provocation is an excuse for crimes of passion. By validating cases in which men claim some emotional, passionate connection to a relationship that ended three years ago, as in the case of Jose Rivera⁶⁵—or that never truly began, like Fardan’s—the law is not so much excusing a crime committed in a fit of passion as it is endorsing a certain notion of male entitlement. It allows defendants to claim an emotional attachment that their victim has actively repudiated. It “reflects, and thus perpetuates, ideas about men, women, and their relationships that society long ago abandoned.”⁶⁶

If we accept Horder’s idea of medieval “anger as outrage,” it is difficult not to see that same conception of anger in today’s law,⁶⁷ which consistently excuses men for the murder of their ex-partners while playing lip-service to the idea that they were driven out of their minds by jealousy. Yule points out the obvious contradiction in this:

If you consider the divorce rate throughout the jurisdictions, can it be said that an ordinary person could lose control and kill because their former partner has commenced another relationship? If this were so, then there would surely be far more murders than there actually are.⁶⁸

⁶¹ Nourse, “Passion’s Progress,” 1335.

⁶² *State v. Russo* (HI 1987) 734 P.2d 156, 160; *Cecil v. Commonwealth* (KY 1994) 888 S.W.2d 669, 671; *Frazier v. State* (AR 1992) 828 S.W.2d 838.

⁶³ Nourse, “Passion’s Progress,” 1376.

⁶⁴ Graeme Coss, “Provocative Reforms: A Comparative Critique,” *Criminal Law Journal* 30, no. 3 (2006), 143.

⁶⁵ *State v. Rivera* (CT 1992) 612 A.2d 749. The defendant was permitted to raise a provocation defense based on extreme emotional disturbance.

⁶⁶ Nourse, “Passion’s Progress,” 1332.

⁶⁷ Horder, *Provocation*, 67: “The reference in the Homicide Act 1957 s. 3 to ‘loss of self-control’ has never in practice prevented judges and juries from interpreting this phrase to include outrage.”

⁶⁸ Jennifer M. Yule, “Current Issues with Regards to the Defences of Provocation and Self-Defence in the Criminal Law Context,” *Australasian Law Teachers Association Conference Paper*, Perth, Australia, (2007): 6.

The idea underlying such judgments is not so much that a reasonable man would lose his self-control in a similar situation, because many reasonable men everyday endure similar inequities and retain their reason. Rather, the implication is that a reasonable man should be excused if he does commit violence in such a situation. The question is not which situations can cause a defendant to lose his self-control; it is “[w]hich losses of self-control merit the law’s compassion?”⁶⁹

Thus the law of provocation, despite its contemporary iterations claiming a neutral measure of loss of self-control rather than the old, honor-laden categories, is not value-free. As Nourse points out, “no matter how insistent the rhetoric of subjectivity, decisions applying this defense express judgments about when defendants ‘should’ exercise self-control.”⁷⁰ The difference between old and new provocation is not that one excuses the murder of certain women and the other doesn’t—the difference is that new provocation pretends not to excuse those murders while still supporting the mechanism by which juries continue to do so. Loss of control provocation “simply evades, rather than answers, the lurking normative questions. Arguing that juries ‘should decide’ tells us nothing about which cases ‘should’ go to juries. [...] Nor does it tell us much about how juries are to make their normative decisions.”⁷¹ And when presented with the difficult, somewhat nonsensical mandate to “put themselves in the defendant’s position, to adopt his or her perspective and, yet, at the same time, to be ‘reasonable,’”⁷² juries frequently fall back on what “feels right.” Nourse argues that this, in effect, makes modern provocation more dangerous for women, despite traditional provocation’s explicit category of excuse for the murder of unfaithful wives, because juries do not evaluate:

claims of passion by ‘quickened heartbeats’ or ‘shallow breathing,’ but by judgments about the equities of relationships, judgments disguised—and therefore rendered more powerful and resistant to change—by a jurisprudence pretending to make no judgments at all.⁷³

We see, then, that a primary claim of loss of control provocation—that it is merely a nod to the frailty of human emotion and not intended to pass judgment or endorse certain forms of violence—is, at best, complicated, and more likely, flatly false. Modern provocation has removed medieval language about provocative, unfaithful wives, but it has done nothing to remove the factual assessment that violence provoked by female sexuality ought to be punished less severely.

So if new provocation is just as much about “crimes of honor” as old provocation, what of our traditional conception of crimes of passion? The law of provocation, in addition to substantiating specific ideas about (male) reason and honor, also endorses a certain conception of emotion.

Kahan and Nussbaum identified two main theses about the role of emotion in modern provocation—what they refer to as the “mechanistic” conceptions of emotion. On the one hand, “individuals who kill in heat of passion upon adequate provocation are both less deterrable and

⁶⁹ Nourse, “Passion’s Progress,” 1334.

⁷⁰ *Ibid.*, 1398.

⁷¹ *Ibid.*, 1372.

⁷² *Ibid.*

⁷³ *Ibid.*, 1334.

less dangerous than those who kill without provocation or with only minor provocation.”⁷⁴ The law imagines a law-abiding and moral citizen, confronted with a specific situation which drives him to commit an otherwise unthinkable crime. He deserves to be punished, and the victim deserves retribution, but his risk of committing a second offense is low. The jury is asked to be merciful, largely based on an assumption that “there but for the grace of God go I.” On the other hand, “emotion mitigates not because it expresses a morally appropriate evaluation of the actor’s situation, but because it impairs her volition.”⁷⁵ If a defendant simply couldn’t help himself, was rendered temporarily incapable of making a morally-informed decision, then punishing him to the same extent as a willfully-vicious criminal is unjust.

Kahan and Nussbaum reject both of these justifications for the doctrine as overly simplistic, asking whether “the law [can] possibly identify which impassioned offenders should be regarded as dangerous without taking contentious positions on whether their emotions are appropriate or inappropriate to their situation.”⁷⁶ The contemporary theory of provocation assumes “that emotion obscures reason” and that the motivating “extreme emotion” of those who kill their abusers and those who kill their ex-wives are morally equivalent—that is to say, morally neutral.⁷⁷ At the same time, it asserts that men are “capable of self-control when confronted with an open till but not when confronted with a wife in adultery.”⁷⁸ Murder tends to be impulsive, but in distinguishing between the murder of one’s wife and the murder of, say, a gas station attendant, we establish categories of situations that make people “really” upset versus those that cause irrational, immoral anger. We’ve come full circle and arrived back at a theory of provocation that implicitly underwrites the murder by men of women with whom they currently are, once were, or desire to be sexually involved.

Nourse’s paper and Kahan and Nussbaum’s both contend that the law would be made better and more coherent by endorsing a view of emotion and reason that is not either/or but both/and—where emotions are expressions of rational “cognitive appraisals” that “can themselves be morally evaluated” rather than an indication that rationality has left the room.⁷⁹ As Nourse points out, most modern psychological research, feminist or otherwise, has concluded that “emotion is not the enemy of reason but, instead, its embodiment.”⁸⁰ In other words, it seems necessary to endorse a view of emotion that could help collapse the gendered dichotomies of reason/anger and honor/passion that underpin the law in its current form.

These debates—about whether it is possible to allow loopholes in the law that don’t endorse its violation, about the consistency of the conclusion that “reasonable men” kill their intimate partners, about whether emotion is the opposite of reason or informs it—continue to rage, in both scholarly circles and in the “real world” of law reform. I turn next to the application of these questions to the practical problem of reforming and enforcing the law.

⁷⁴ Kahan and Nussbaum, 306.

⁷⁵ Kahan and Nussbaum, 306.

⁷⁶ *Ibid.*, 273.

⁷⁷ Nourse, “Passion’s Progress,” 1390.

⁷⁸ *Ibid.*, 1369.

⁷⁹ Kahan and Nussbaum, 273.

⁸⁰ Nourse, “Passion’s Progress,” 1390.

PART III
Divergences: American, English, and Australian Reforms

*Never confuse movement with action.*⁸¹

THERE is a fair amount of scholarly consensus around the idea that the doctrine of provocation is imperfect. There has been less consensus around whether and how to reform it. Some have called for the abolition of the partial defense of provocation altogether,⁸² while others, like Nourse, argue convincingly that abolition would be an insufficient strategy to prevent the continuing excusal of murders of women—the history of provocation, from its earliest pre-legal manifestations to its contemporary survival in the face of its own contradictions, suggests that provocation removed from the fact-finding phase of a trial would simply insert itself elsewhere, perhaps in the sentencing stage.⁸³ How, then, “to reform [provocation’s] availability and applicability,”⁸⁴ to reduce its use as a tool to justify violence against women, while still maintaining “the law’s compassion for sincere emotion”?⁸⁵

The earliest substantial reforms to provocation occurred in the United States with the *Model Penal Code*, the final draft of which was released by the American Law Institute in 1962 and which served as the basis of state criminal code reforms throughout the 1960s, 70s, and 80s. Unlike the 21st-century reforms in England and Australia that I will discuss shortly, the *Model Penal Code* was not an explicitly feminist reform. Its intent was to “liberalize” the law by, first of all, codifying what had until that point largely been an inconsistent amalgam of statutes and case law and, more importantly, shifting the focus of the law from retribution to deterrence and treatment.

The *Model Penal Code* suggested language defining manslaughter as:

a homicide which would otherwise be murder [but] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.⁸⁶

According to Kahan and Nussbaum, this shift from measuring provoked conduct against the actions of a reasonable man, which “requires the jury to assess the gravity of the provocation against the background of contemporary community norms,” to an evaluation of reasonableness from the viewpoint of a person in the actor’s situation “was intended to introduce a ‘larger element of subjectivity’ into the doctrine.”⁸⁷ Indeed, Abu-Odeh classified the *Code*’s articulation

⁸¹ A.E. Hotchner, *Papa Hemingway: A Personal Memoir* (New York: Random House, 1966): 26.

⁸² See Coss; Celia Wells, “Provocation: The Case for Abolition,” in Andrew Ashworth and Barry Mitchell, *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000), 85-106; Adrian Howe, “Provoking Polemic: Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition,” *Feminist Legal Studies* 10, no. 1 (2002), 39-64.

⁸³ Nourse, “Passion’s Progress,” 1403.

⁸⁴ Fitz-Gibbon and Pickering, 162.

⁸⁵ Nourse, “Passion’s Progress,” 1336.

⁸⁶ *Model Penal Code* (1980) § 210.3(1)(b).

⁸⁷ Kahan and Nussbaum, 321.

of extreme emotional disturbance (EED) as “the most extreme instance in the United States legal system of a historical progression towards ‘subjectifying’ the test.”⁸⁸

At first glance, this individualization of the test of “reasonableness” would seem to be a productive undermining of the problematic construction of the law around an imaginary “reasonable man.” Opening up “reason” to be measured against a jury’s capacity for compassion rather than a medieval-era community norm that adultery is grounds for murder ought to be a positive step forward. And yet, as we saw in Part II, the EED form of provocation has only supported the proliferation of claims for the rationality of murdering women, including some crimes that were doctrinally (though not always practically) excluded from consideration under old provocation. Nourse, for example, in a comprehensive review of provocation defenses reaching juries in the United States between 1980 and 1995, found that 26 percent of these cases in *Model Penal Code* jurisdictions dealt with departure or separation.⁸⁹ In the other jurisdictions sampled, no case was permitted to reach a jury alleging that the victim’s departure from the relationship had provoked her murder.⁹⁰ This led Nourse to conclude that the EED turn in provocation “protects something more than emotional disturbance; it protects particular reasons for emotional disturbance.”⁹¹ From a feminist standpoint, it seems we can declare the American reforms to provocation a failure.

English and Welsh law has developed a certain level of specificity in the reasonable man—he can be imagined to share in the defendant’s gender, age, or factors that might make the provocation more or less offensive, for instance—but has never gone as far as American EED in allowing the subjectification of the reasonable man. English juries can’t consider specific things about the defendant that might uniquely affect their self-control.⁹²

England and Wales’s 2010 *Coroners and Justice Act*, which shifted the affirmative defense of provocation to the “loss of control partial defence,” maintained this definition of the reasonable man as someone of the defendant’s age and sex who possesses “a normal degree of tolerance and self-restraint.”⁹³ The shift came in the addition of fear of violence as an acceptable provocation and the removal of the qualified “sudden” from the requirement that provocation trigger a defendant’s loss of control, both of which were intended to bring “battered women” under the protection of the law.⁹⁴ The Law Commission appointed to write the reform also recommended that England and Wales adopt a three-tiered system of homicide, creating a category of second-degree murder that doesn’t carry the mandatory life sentence of first-degree murder and placing provocation within this second tier rather than relegating it to manslaughter. Parliament, however, did not adopt this recommendation.⁹⁵ Instead, it simply chose “to exclude situations of sexual infidelity from constituting a qualifying trigger” for the new defense.⁹⁶

Importantly, this exclusion did not stick. In 2010, in accordance with the new law, Jon-Jacques Clinton was denied the right to present a provocation defense in his trial for the murder of his estranged wife. Clinton claimed that his wife admitted to five different affairs, and in

⁸⁸ Abu-Odeh, 290.

⁸⁹ Nourse, “Passion’s Progress,” 1352.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, 1368.

⁹² Jeremy Horder, “Provocation’s Characteristic Difficulties: *R v. Humphreys* [1994] 4 All E.R. 1008.,” *International Journal of Discrimination and the Law* 1, no. 3 (1995): 289-90.

⁹³ *Coroners and Justice Act* (2010) s. 54.

⁹⁴ Fitz-Gibbon, “Replacing Provocation,” 289.

⁹⁵ *Ibid.*, 303.

⁹⁶ *Ibid.*, 288.

response he strangled her with a belt and rope and beat her with a wooden baton until she died, at which point he sent photos of her nude body to one of her lovers.⁹⁷ In 2012, the Court of Appeals overturned his conviction, ruling that “where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger” was present, then the infidelity may be presented in court despite the ban.⁹⁸

Horder argues that the British reforms failed, in this aspect and in others, because:

the English higher courts have treated the change in the substantive law as a purely ‘technical’ one, relevant only to the legal grounds on which murder may or may not be reduced to manslaughter. They have not regarded the change as entailing or demanding a more general shift in moral thinking concerning the relative seriousness of murders committed in response to sexual infidelity-related evidence.⁹⁹

Again we see that the norm of excusing male violence against female partners or former partners is so strong that it reasserts itself even in the face of intentions to combat it.

Over half of the population of Australia lives in the two states of Victoria and New South Wales, and it is the provocation reform efforts of these two states that I turn to now.

Victoria abolished provocation in 2005, its Attorney-General declaring, “Gone are the days when prehistoric assumptions about honour and violence—about male and female behaviour—should be allowed to hold traction in our legal system.”¹⁰⁰ At the same time, though, Victoria introduced the *Crimes (Homicide) Act* of 2005, instating a defensive homicide option that would split the difference on the “all or nothing” nature of self-defense cases—again intended to create a legal outlet for the cases of “battered women.”¹⁰¹ Like the English law, though, the Victorian reform was quickly undermined in court when Luke Middendorp, in one of the first fifteen cases under the new provision, was able to secure a defensive homicide conviction in the stabbing death of his ex-girlfriend, whom he had previously been charged with abusing.¹⁰² As one judge in Victoria argued, with or without an explicit provocation doctrine, “[j]uries will still acquit of murder if they think there is serious provocation. They’ll use some other concept.”¹⁰³ Such seems to have been the case in Middendorp.

New South Wales adopted the *Crimes Amendment (Provocation) Bill* in 2014 to transition the existing provocation doctrine to one of “gross provocation,” continuing the reform tradition of eliminating “sudden and temporary” from the loss of control requirement and disallowing certain categories of situations from being deemed “provocative” by the court. The update to the law, the parliamentary committee wrote in its recommendations, is intended to reflect the fact that:

Most people experience events throughout their lives that might be described as ‘provocative’ [...]. The Committee therefore considers that the partial defense of

⁹⁷ *R v. Clinton (Jon-Jacques)* (2012) EWCA Crim. 2.

⁹⁸ *R v. Clinton, R v. Parker, R v. Evans* (2012) EWCA Crim. 2.

⁹⁹ Jeremy Horder, “When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing,” *Cambridge Law Journal* 74, no. 2 (2015): 309.

¹⁰⁰ Fitz-Gibbon and Pickering, 164.

¹⁰¹ *Crimes (Homicide) Act* (2005) s. 9AD.

¹⁰² *R v. Middendorp* (2010) VSC 202.

¹⁰³ Fitz-Gibbon and Pickering, 170.

provocation should be limited to [...] circumstances that are more extreme than ordinary life events.¹⁰⁴

The law has not been in effect long enough to know whether it will also experience a Clinton or Middendorp moment, but New South Wales's decision to tread old ground and make only minor tweaks does not lend one to starry predictions. After all, "[o]ld norms do not die; they are resurrected in empty spaces, deliberate ambiguities, and new rhetorics."¹⁰⁵ What is needed to prevent violence against women under provocation is not an elimination of the scaffolding through which these norms are directed, but a new building and new residents entirely. The law of provocation does not need "the removal of [...] qualifying phrase[s]," Mitchell writes. "What is necessary is a radical rethink."¹⁰⁶

What shape can we imagine this radical rethink taking? The English Law Commission's recommendation of a reordering of homicide law into three tiers actually touches on something important about inconsistencies in the fabric of criminal law, a problem of which provocation is only a small part but one that stands in the way of many reform efforts. As Nourse argues:

Real "reform" of the passion defense must not only reconstruct the defense, but also address the position of manslaughter within a particular jurisdiction's law of murder. It is not enough to redraft the passion defense; such an effort might cause major distortions in murder law.¹⁰⁷

The law surrounding murder used to be a "unified concept" wherein provocation "both negat[ed] a finding of malice murder and, at the same time, yield[ed] a manslaughter verdict."¹⁰⁸ Since then, the moral questions surrounding murder—from malice to intent, from purpose to premeditation—have been redefined so many times that manslaughter is no longer the contraindication of murder. Especially with the position afforded to emotion in EED, which does not necessarily imply a lack of intent to kill, only a lack of responsibility, contemporary juries are not presented with a dead body and simple set of dichotomized indications to help them decide whether the death is the result of "murder" or "manslaughter." Then again, the simplicity implied by such early dichotomies was always a false front that disguised the complexities of human motivation and enabled miscarriages of justice. What is a feminist to do?

Most of the scholars who have addressed this problem from a feminist perspective have arrived at the understanding that the judgments of the law be brought out of the shadows. Dressler, for example, argues that it may "be necessary to draft a law that says, in effect: a homicide which would otherwise be murder is manslaughter if the victim committed an injustice or wrongdoing for which he deserved to be the subject of a severe, but not homicidal, response by another."¹⁰⁹ Kahan and Nussbaum similarly state that "[t]he law is more likely to be just [...]"

¹⁰⁴ Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (New York: Palgrave Macmillan, 2014), 168.

¹⁰⁵ Victoria Nourse, "The 'Normal' Successes and Failures of Feminism and the Criminal Law," *Chicago-Kent Law Review* 75, no. 3 (2000): 952.

¹⁰⁶ Mitchell, 50.

¹⁰⁷ Nourse, "Passion's Progress," 1403.

¹⁰⁸ *Ibid.*, 1404.

¹⁰⁹ Dressler, 459.

when decision makers are forced to take responsibility for their appraisals of wrongdoers' emotions, and when the public is allowed to see for itself the appraisals."¹¹⁰

Nourse makes the most cogent and forceful recommendation along these lines. The law of provocation, she argues, was only ever meant to excuse the murder of someone engaged in illegal activity—consider the original justifications of attacking a relative, unlawfully holding an Englishman prisoner, or committing adultery. This emphasis on violent actions based on “a belief in a ‘wrong’ that is no different from the law’s own,” and expressing “‘outrage’ that is ‘understandable,’” has been one of the many folds to develop in the fabric of homicide law over time.¹¹¹ Nourse recommends a statutory definition of provocation as “warranted excuse,” relying still on the defendant’s own perception and eliminating still the requirement that the defendant’s response be immediate, but constraining “reason” to “reason that mirrors the law’s own sense of retribution.”¹¹² This development would predicate a new logic of the law, one in which:

We punish those who stand in emotional judgment not because of their character or their self-control, but because they have replaced the state as the normative arbiter of violence, and when we partially excuse, we excuse [...] when coherence demands it, when the defendant appeals to the very emotions to which the state appeals to rationalize its own use of violence.¹¹³

The law of provocation as it stands, as we saw in Part II, has no consistently-agreed-upon logic. It has no consistent confines, with “cases classified as manslaughter in one jurisdiction [being] just as easily defined as murder in another,” even within the same country.¹¹⁴ And when we fight about this logic and these confines to the law, we aren’t merely arguing about the way that society’s attitudes manifest themselves in law. We are holding an argument about what those attitudes ought to be and who ought to shape them. Criminal codes are the site of this same argument—which actions should society punish, and how should they be punished? Nourse’s proposal to link these two discussions, forcing us to assume responsibility for the judgments of what isn’t punished as much as for what is, makes as much sense as anything in criminal law ever can.

¹¹⁰ Kahan and Nussbaum, 274.

¹¹¹ Nourse, “Passion’s Progress,” 1338.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, 1341.

PART IV Horizons of Analysis

*Out on the edge you see all kinds of things you can't see from the center.*¹¹⁵

AS we have seen, from the standpoint of applied theory—turning these critical feminist insights on the injustices enabled by the provocation doctrine into real and substantive legal reform—much remains to be done. Furthermore, despite the existing body of work on the historical and theoretical origins of the provocation doctrine, our understanding of the law’s relationship to honor, emotion, reason, and gender—and the developments in intellectual history that have enabled the shifting valuations of the balance between these ideas—remains incomplete.

Nonetheless, the feminist research on provocation has also opened several productive lines of inquiry on the edges of criminal law or in fields wholly unrelated, and these horizons are worth exploring even as the central questions remain unresolved. This section will briefly explore a few of these horizons of inquiry that I find most promising: the “gay panic” defense, sexual harassment law, hate crimes law, so-called “honor crimes,” and international law.

We begin with the gay panic defense, itself a gender-related application of provocation—or the related affirmative defenses of insanity, diminished capacity, and self-defense. The argument that a (homo)sexual advance triggered a violent backlash in the defendant winds its way into courtrooms in many forms, and when it does, the criticism from both pop-cultural¹¹⁶ and scholarly forums tends to be severe.¹¹⁷

The potential for enlightening dialogue between the gay panic and the crime of passion varieties of provocation comes in two places. There is, on the one hand, work like Cynthia Lee’s 2008 article arguing that, problematic and disgusting as the defense can be when argued in open court, reform efforts to ban gay panic are misplaced because they do nothing to eliminate the ways in which gay panic can be inserted under the surface, implicitly, where it may in fact be more effective in targeting jury bias.¹¹⁸ This builds on the lessons of the provocation reforms discussed in Part III, wherein changing the black letter of the common law often had a negligible effect on ingrained cultural ideas about justice. The possibility might exist, then, for a kind of comparative brainstorming about broader changes to the criminal code intended to protect people whose genders and sexualities were written out of the protection of the law.

On the other hand, some jurisdictions that have failed to combat the more spurious forms of anti-woman provocation have managed to eliminate the anti-gay kind. Even as New South Wales’ Parliament, for example, declined to write a statutory exception to its new “extreme provocation” defense for infidelity or departure by a romantic partner, it included language explicitly preventing the defense from being raised to “respond to a non-violent sexual advance by the victim.”¹¹⁹ Similarly, certain jurisdictions in the United States are bound by higher court rulings that provocation cannot be raised in situations of nonviolent sexual advances, something

¹¹⁵ Kurt Vonnegut, *Player Piano* (New York: Dell Publishing, 1952), 73.

¹¹⁶ See Ellen Degeneres, “A Tragedy That Should Never Have Happened,” *Ellen DeGeneres Show* (29 February 2008, Burbank: NBC Studios), opening segment video.

¹¹⁷ See Joseph R. Williams, “‘I Don’t Like Gays, Okay?’ Use of the ‘Gay Panic’ Murder Defense in Modern American Courtrooms: The Ultimate Miscarriage of Justice,” *Albany Law Review* 78, no. 3 (2015): 1129-1169.

¹¹⁸ Cynthia Lee, “The Gay Panic Defense,” *University of California, Davis Law Review* 42, no. 2 (2008): 477.

¹¹⁹ Fitz-Gibbon, *Homicide Law Reform*, 169.

Kahan and Nussbaum argue demonstrates that the law is, in fact, capable of “criticiz[ing] rather than endors[ing] the evaluation [...] implicit in the defendant’s rage.”¹²⁰ The questions opened up here are obvious. What has made efforts to eliminate gay panic so much more successful than those to regulate the murder of women? Is it simply a consequence of the long history of justifying murders triggered by infidelity and the relatively recent phenomenon of gay panic? Or is there another reason, something deeply-embedded in the law that makes killing women seem reasonable even as other attitudes about justice are undergoing a profound shift?

These questions bring us to the second research frontier I have identified: sexual harassment law, which in the United States uses as the basis of claims analysis the semantic corollary of the reasonable man—the reasonable woman. What is the relationship between the reasonable man, constructed in provocation to measure violence committed in anger, and the reasonable woman, constructed in sexual harassment to measure offensiveness?

For one thing, the reasonable woman standard emerges directly out of the Supreme Court’s refusal to apply strict scrutiny to gender under the 14th Amendment, maintaining that when gender discrimination is based on “reasonable” factors¹²¹ that “serve important governmental objectives,”¹²² such gender distinctions are constitutional. It is only because of this allowance of rational sex discrimination that the legal standard for sexual harassment is able to be “not whether some abstract person would find it objectionable but whether a woman would find it so.”¹²³

The reasonable woman, then, emerges out of an assumption of difference, while the reasonable man is the assumed neutral subject of the law. And yet the assumption of difference in sexual harassment law is used at the same time to assert the sameness and equality of women—to assert that women should not be driven from the workplace by sexual harassment but rather allowed an equal opportunity to work. This push and pull between sameness and difference, equal protection as treating the genders alike and as treating them differently (as in protections for pregnant workers), has driven much of the feminist debate on the reasonable woman.

A particularly important development on this front has been a 2014 paper by Smith and Kimmel on the ways in which the sameness/difference problem necessitated by the treatment of sex under intermediate scrutiny has led to “the legal recognition of multiple femininities” while reinforcing the unitary assumptions of the masculine subject of law.¹²⁴ As Smith and Kimmel point out:

In all these cases men serve as the unexamined norm against which women are measured. Where women have sought access, they are to be treated no differently from how men are treated. Where women have sought to acknowledge the specificity of their experiences, they are to be treated differently from how men are treated. But how are men to be treated? What are men like in the first place?¹²⁵

¹²⁰ 310.

¹²¹ *Reed v. Reed* (SCOTUS 1971) Administrator 404 U.S. 71.

¹²² *Craig v. Boren* (SCOTUS 1976) 429 U.S. 190.

¹²³ Tyson Smith and Michael Kimmel, “The Hidden Discourse of Masculinity in Gender Discrimination Law,” *Signs* 30, no. 3 (2005), 1828.

¹²⁴ *Ibid.*, 1829

¹²⁵ *Ibid.*

These are clearly relevant questions. But in going on to assert that the specificity of female experience recognized by the reasonable woman allows for fewer stereotypes about femininity to survive in the fabric of the law, compared to masculinity, Smith and Kimmel's argument could be enriched by the inclusion of lessons learned from the scholarship on provocation—namely the ways in which the greater subjectivity and specificity recognized under the EED-turn in provocation actually allowed traditional masculinist ideals to flourish. Clearly there is room for provocation scholarship, especially the conflict over the ideal level of specificity or generality in the law, to overlap with research on sexual harassment in illuminating and interesting ways.

Whether specific to an individual or socially-defined, at the heart of the doctrine of provocation lies the idea that there exist certain forms of intent that ought to mitigate our judgment of a given crime. Hate crimes law, as the codification of the idea that there exist certain forms of intent that aggravate our judgment of a crime, occupies the same continuum. This continuum is the location for a great many research possibilities on the normative and structural implications of this evaluation of intent and responsibility, as well as the effective deterrence provided by naming certain categories of violence as less acceptable than others.¹²⁶

There is also the question of the inclusion of gender in hate crimes law, addressed most cogently in a 2011 book by Hodge. Gender is listed as a protected category in nearly all hate crimes legislation, and yet its application in court is notably, bizarrely rare. After all, male violence against women specifically because they are women is everywhere, yet “very rarely are acts of such violence considered gender-bias crimes.”¹²⁷ Where are the hate crimes charges attached to indictments for rape? And, for that matter, where are the hate crimes charges for men who kill female intimate partners? Important parallels seem to arise here between gendered hate crimes and gendered provocation in that both raise the prospect that gendered violence is expected and accepted by law.

This sense that the doctrine of provocation justifies violence that is considered “normal” is what led me in Part I to characterize it as a system of defining and excusing honor crimes. Colloquially, in Western discourse, the term “honor crime” is usually applied to violence committed by brown men against brown women in response to sexual crimes that make less sense to the Western imaginary—so not the extramarital sex of a wife or partner, but the nonmarital sex of a daughter or sister. These crimes are often constructed in Western thought as especially heinous, or at least worse than any form of violence against women that is native to the European and North American context. For example, the decision to modify the classification of provocation in England and Wales by removing the requirement that loss of control be “sudden” rather than eliminating the loss of control requirement altogether, discussed in Part III, was precipitated explicitly by a desire to prevent the legalization of these “honour killings,” even though this choice continued the effective legalization of wife killings.¹²⁸

As demonstrated by Abu-Odeh's 1997 article on the issue, though, the Western category of “crimes of passion” and the Eastern category of “crimes of honor” form a distinction without a difference,¹²⁹ and the cross-pollination of research into the two phenomena can be fruitful, particularly for intersectional and multicultural feminist discourse investigating the role of

¹²⁶ See James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford: Oxford University Press, 2000).

¹²⁷ Jessica P. Hodge, *Gendered Hate: Exploring Gender in Hate Crime Law* (Lebanon, New Hampshire: Northeastern University Press, 2011): 94.

¹²⁸ Fitz-Gibbon, “Replacing Provocation,” 287.

¹²⁹ Abu-Odeh, 305.

“culture,” specifically defined, compared to the role of “patriarchy,” more broadly defined, in constructing these crimes and their excuses.¹³⁰ The question has arisen especially in jurisdictions where juries are asked to evaluate the “reasonableness” of the provocation with a high degree of specificity to the defendant’s own perspective—what does it mean to be a brown reasonable man? To what degree should “Western” jurisdictions respect and affirm “foreign” ideas about reasonable violence when those ideas inform crimes committed within their own territory?¹³¹ These questions have opened new lines of inquiry into the ways in which the reasonable man doctrine underpinning provocation is gendered *and* raced and acts across transnational boundaries.

Zooming even further out, we reach the level of international law, where research on the sometimes-spotty reform attempts to direct resources to the combatting of gender-based and sexual violence,¹³² and on the problematique of private/public distinctions that marginalize women’s abuse,¹³³ have a clear relationship to the central questions of gendered provocation research. Some of the most innovative and interesting research applying the lessons of provocation to international law, though, is occurring on the international law on the use of force.

In Heathcote’s 2012 book on the subject, she makes ample use of what she terms the “domestic analogy.” Just as domestic law was written by and for men in a way that allowed them to commit the otherwise-inexcusable crime of murder in situations that they deemed sufficiently provocative—and modern “liberalizing” reforms have only resulted in an expansion of that right—so too has international law, written by and for large, powerful states, allowed those states to commit the otherwise-forbidden aggression of foreign invasion, and “liberalizing” threads in international law (on, for example, the use of force for humanitarian intervention) have succeeded in expanding this right of large states further.¹³⁴ Heathcote’s work to deconstruct the masculinized subject of law—international and domestic—has obvious potential impacts for the doctrine of provocation and the reform attempts to rewrite its masculinized subject.

We can see that the questions proposed by a feminist analysis of the doctrine of provocation are by no means unique to that aspect of law—every discipline of law relies on gendered dichotomies of reason and emotion, the individual and the community, that can and should be analyzed in comparison and in conjunction with each other. This effort to expand the inquiry is not meant to detract from the “central” questions of provocation, which are still very much an unfinished discussion, but to enrich them with a wider understanding of the gendered context of law.

¹³⁰ Rupa Reddy, “Gender, Culture and the Law: Approaches to ‘Honour Crimes’ in the UK,” *Feminist Legal Studies* 16, no. 3 (2008): 306.

¹³¹ Will Kymlicka, Claes Lernestedt, and Matt Matravers, eds., *Criminal Law and Cultural Diversity* (Oxford: Oxford University Press, 2014): 104.

¹³² See Christine Chinkin, Shelley Wright, and Hilary Charlesworth, “Feminist Approaches to International Law: Reflections from Another Century,” in Doris Buss and Ambreena Manji, eds., *International Law: Modern Feminist Approaches* (Oxford: Hart Publishing, 2005), 17-47.

¹³³ See Bonita Myersfield, *Domestic Violence and International Law* (Oxford: Hart Publishing, 2010); Charlotte Bunch, “Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights,” *Human Rights Quarterly* 12, no. 4 (1990), 486-498.

¹³⁴ Gina Heathcote, *The Law on the Use of Force: A Feminist Analysis* (New York: Routledge, 2012): 13-14.

CONCLUSION

IN this thesis, I have sought to explore the gendered implications of the common law doctrine of provocation—the development of its varieties, the debates over its logical underpinnings, and the most recent attempts to reform it—and the potential for these explorations to interact with other research questions on gender and law. I have examined the evolution of the law from a form of jury nullification to the codification of “four heads” of provocation to a subjective measure of whether a defendant was reasonably provoked to lose control. I have analyzed the ideological assumptions about reason and emotion that explicitly and implicitly accompanied each material turn in the law, and I have argued that the law masquerades as neutral while actively justifying the murder of women. I have discussed the failure of unique reform efforts in three common law countries, and I have drawn attention in the last part to the potential for new research horizons to further illuminate our understanding of the central issues sketched out in the first three parts.

In the course of this exploration, it has become clear that “there exists no convincing interpretation of reasonable provocation,”¹³⁵ and yet the debate continues, the reform efforts multiply, and the defense survives. Perhaps this is because provocation speaks to something deep within us—a feeling of fairness, a sense of compassion, maybe even the niggling recognition that it protects our own lurking impulsiveness and drive to act in anger. Whatever it is, even before the black letter of the law made room for provocation defenses, juries excused those they did not feel right punishing, and now that a black letter of provocation law *does* exist, these “cases are probably [still] decided more according to human instinct than law.”¹³⁶ The problem, of course, is that these human instincts have been gendered, and therefore so, too, are our laws. The task of unwinding begins with a commitment to understanding how gender was braided into the law at its formation and how it has shifted and resettled since. This paper has been an effort on that front.

¹³⁵ Mark Kelman, “Interpretive Construction in the Substantive Criminal Law,” *Stanford Law Review* 33, no. 4 (1981), 636.

¹³⁶ David M. Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999), 272.

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