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Fear-Based Provocation

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ARTICLES

FEAR-BASED PROVOCATION

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

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

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This Article offers three major contributions to challenge existing view of provocation: first, it considers psychological research that found that fear, similarly to anger, may also significantly interfere with individuals' decision making processes by disturbing rational judgment, therefore sometimes leading to lethal aggression. Second, drawing on this research, this Article argues that provocation doctrine should be reconstructed to also include a fear-based prong. Third, recognizing fear-based provocation calls for rejecting the loss of control paradigm that currently dominates judges' and jurors' perception of the defense. In its place, this Article advocates focusing on the fearful defendant's fear of violence threatened by the deceased that caused a significant impairment in the defendant's thought processes, resulting in obscured judgment and reasoning. The reconstructed defense would also include an objective component, under which, the defendant would have to prove that a person of ordinary disposition would also experience such emotion and respond rashly without exercising reason and judgment.

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INTRODUCTION

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

Presumed to be the main emotion to trigger provocation, anger also plays a key role in the rationale that undergirds the contemporary understanding of the defense—that is the notion of loss of self-control. This notion rests on acknowledging that the defendant experienced a sudden intense passionate emotion that resulted in undermined

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

capacity to control aggressive behavior.[5] The defendant's impairment in his or her ability to exercise control may warrant mitigated charges.[6]

Theorizing provocation as an anger-based defense aligns with the responses of defendants who "lost it" or "snapped," "lashing out" in sudden rage. The paradigmatic example of provocation envisions an ordinary male perpetrator who suddenly becomes enraged at his unfaithful or departing wife, resulting in his loss of control and in killing her before having a chance to regain control.[7] The image of provocation as male-centric, anger-based defense looms large in the public's imagination, thus shaping juries' decisions about whether defendants' responses warrant sympathy and compassion. This perception of anger-based provocation plays a critical role not only in the theoretical underpinning of the defense, but also in constructing its elements; in many jurisdictions, for provocation to be adequate, the defendant must have reacted aggressively immediately following a sudden triggering event, before any lapse of time allowing the opportunity to cool off and regain self-control.[8]

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

The circumstances underlying fear-based provocation cases vary, generally falling under two categories. The first encompasses defendants who fell prey to prolonged physical abuse, including not only those battered by their intimate partners and children battered by their

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5. *Id.*

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

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

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

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

parents, but also abused people outside the domestic violence context, such as those who were harassed by the deceased. Take, for example, a case where a seventeen-year-old youth shot and killed two brothers who had continuously harassed, stalked, and threatened him with a shotgun in the year preceding the shootings.[10] The second category consists of defendants who acted in response to fear of physical harm threatened by the deceased in typical male-on-male confrontations. For example, some cases involve drug deals gone sour or disputes over money, resulting in defendants' shooting and killing the deceased.[11]

In these circumstances, defendants typically claim self-defense, arguing that they reasonably feared for their lives. Yet the underlying circumstances often cast doubt on whether these killings satisfy the elements of self-defense. To be acquitted of homicide on self-defense grounds, the defendant must not be the initial aggressor and must have reasonably believed that the use of deadly force was *necessary* to protect against the aggressor's *imminent* use of deadly force.[12] In situations where the deceased was not presenting any imminent risk of death or serious bodily injury to the defendant, where use of deadly force was unnecessary because a safe retreat was possible, or where the defendant knowingly entered threatening circumstances, defendants would likely fail to meet the elements of self-defense.[13] In circumstances falling short of a right to self-defense, defendants' main grounds for mitigating murder charges to manslaughter charges rest on a provocation claim.[14] Yet relying on the provocation defense raises a

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

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

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

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

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

separate set of obstacles when defendants kill out of fear rather than out of anger.[15]

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

Fear and its implications, however, remain under-theorized in scholarly accounts of the provocation defense. Despite the fact that the provocation defense may sometimes be the only viable grounds for mitigating murder to manslaughter, existing law often does not offer a doctrinal basis for doing so, especially in situations where defendants acted not out of anger, but out of fear, and in circumstances falling

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

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

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

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

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

short of self-defense.[20] This lacuna is hardly surprising as the law often categorizes behaviors into binary classifications, treating them under separate doctrines.[21] Existing doctrines thus compartmentalize the emotions of anger and fear into their respective domains: while provocation is predicated on anger, self-defense rests on fear.

This apparent theoretical dichotomy between anger and fear also carries practical implications. In many jurisdictions, courts conceive of self-defense and provocation as mutually exclusive claims.[22] Viewing anger as solely triggering provocation, whereas treating fear as solely triggering self-defense, courts often refuse to instruct the jury on voluntary manslaughter in cases where defendants killed out of fear rather than out of anger.[23] But even in jurisdictions where such instructions are given, juries' prevalent assumptions concerning the anger-based view of provocation undermine the likelihood that they would accept the defense's theory that the defendant was adequately provoked due to fear.[24] In addition, defendants who raise a fear-based provocation defense are likely to face significant hurdles, mostly due to the cooling off and suddenness requirements.[25] Existing provocation doctrine thus sometimes

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

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

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

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

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

25. *See* Pillsbury, *supra* note 16, at 166–67 (suggesting that current provocation law presents significant obstacles for victims of domestic abuse who kill their intimate partners following a "cooling off period"). It should be stressed, however, that this problem is not necessarily unique only to provocation claims which are based on fear. In jurisdictions that require "sudden" provocation, courts may also deny anger-based

proves too narrow, failing to offer a doctrinal basis for mitigation to defendants who reacted aggressively out of fear in response to the deceased's threatening violence. Cases involving defendants who kill due to genuine fear of violence, albeit falling short of self-defense, therefore call for developing a theoretical basis for recognizing such fear as an alternative basis for triggering the provocation defense.

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

In order to recognize fear-based provocation as a defense, judges and jurors must abandon their current focus on loss of control. Existing perception of anger-based provocation as grounded on a loss of control rationale has obscured the fact that the defense's elements are incompatible with some of the common reactions of fearful people, and most notably the fact that fear impairs thought processes, obscuring defendants' judgment and reasoning. Moreover, provocation's persistent requirements of a cooling off period and a sudden triggering incident prove especially problematic for fearful killers. Perpetrators may respond violently only after a lapse of time between the event or events that triggered the fear and the killing. Furthermore, fearful killers sometimes act in response to the cumulative effect of several provoking incidents, rather than a single provocative event. This Article advocates for a more expansive framework for provocation, which not only recognizes fear as triggering the defense, but also takes into account the psychological

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provocation claims based on the theory that there was no evidence showing a sudden triggering incident. *See, e.g.*, State v. Newell, No. 2004CA00027, 2004 WL 2676336, at *3 (Ohio Ct. App. 2004) (refusing to admit evidence of past incidents where the deceased physically abused the defendant on the grounds that the incidents were too distant in time from the shooting, and therefore the defendant had plenty of time to cool off).

26. *See infra* Part III.A.

findings about how fear affects perpetrators' actions and incorporates them into the defense's case.

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

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

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

emotional response against that of an ordinary person of average disposition and self-restraint. It addresses potential criticism of expansion of provocation to include fear and concludes with a test case, demonstrating how the proposed fear-based provocation would apply in a case where the defendant's conduct fell short of self-defense.

I. PROVOCATION AS AN ANGER-BASED DEFENSE

While states treat the provocation defense differently, the vast majority of jurisdictions adopted some version of the defense, which recognizes that emotions often affect defendants' criminal behavior.[28] The provocation defense acknowledges the role that intense emotions play in triggering aggressive acts by mitigating murder to voluntary manslaughter if the defendant was acting under the influence of a sudden heat of passion resulting from adequate provocation.[29] Commentators portray the defense as a concession to "the frailty of human nature," expressing compassion towards defendants who killed while experiencing intense passionate emotions as a result of the deceased's wrongdoing.[30]

American jurisdictions today significantly vary in the formulations adopted for the provocation defense, making it difficult to draw accurate generalizations about the specific requirements necessary to prevail on the defense.[31] However, broadly speaking, most jurisdictions adhere to the core elements of common law provocation—the heat of passion defense—whereas only twelve jurisdictions adopted some version of the Model Penal Code's (MPC's) alternative defense—extreme emotional disturbance (EED).[32] These defenses are outlined briefly below.

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

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

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

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

32. *See* Paul H. Robinson, *Murder Mitigation in the Fifty-Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis*, 47 TEX. TECH L. REV. 19, 24 (2014) (noting that the other forty jurisdictions currently use the modern test for provocation).

A. Provocation's Heat of Passion

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

Courts gradually abandoned this narrow position after they acknowledged that the rigid categories were too constraining.[38] In their place, courts began leaving the jury to decide what constituted adequate provocation and instructing them that the question should be measured against the reasonable man standard.[39]

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

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

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

36. *Id.* at 51.

37. *Id.* at 48.

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

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

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

The objective reasonableness inquiry measures the defendant's reaction against that of an ordinary person, with normal temperament and capacity for self-control.[43] An objective requirement for adequate provocation appears to reject a subjective approach; however, such objective inquiry is inherently subjectivized to incorporate some of the defendant's personal characteristics, such as physical traits like weight, height, and age.[44] This position may give a defendant a jury instruction on voluntary manslaughter in a variety of circumstances.[45] Most jurisdictions, however, exclude the defense in cases involving words alone, without the

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"[t]he modern approach to provocation appears to establish general equality by giving men and women equal access to the defense").

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

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

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

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

44. *Id.* at 534.

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

deceased's additional provocative action, no matter how offensive or insulting these words might have been to the specific defendant.[46]

In addition, courts and commentators distinguish between two types of reasonableness. "Act reasonableness" refers to assessing the reasonableness of the defendant's act of killing, essentially asking whether a hypothetical reasonable person in the defendant's shoes would have similarly killed, whereas "emotion reasonableness" refers to evaluating whether the defendant's extreme passionate emotion was reasonable under the circumstances, essentially asking whether a reasonable person would be likely to act rashly after experiencing such intense emotion.[47] While in some jurisdictions, juries are instructed to assess a defendant's "act reasonableness," in others, juries are instructed to evaluate "emotion reasonableness."[48]

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

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

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

B. Extreme Emotional Disturbance

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

EMED provides that a person who would otherwise be guilty of murder might be convicted of the lesser offense of manslaughter if that person killed the deceased while suffering from an "extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."[49] However, most jurisdictions that amended their statutes after the MPC's defense adopted only the EED prong, thus rejecting the mental disturbance prong on the theory that defenses pertaining to defendants' mental abnormalities ought to be separately treated under the insanity defense framework.[50]

Courts r that satisfying the subjective component of EED requires a wholly subjective jury "determination that the . . . defendant did in fact act under [EED], [and] that the claimed explanation as to the cause of [the] action is not contrived or sham."[51] Courts stress, however, the additional objective component of the defense by clarifying that there has to be a "reasonable explanation or excuse for [the] emotional disturbance," rather than an excuse or explanation for the killing itself.[52] Courts further note that even though the reasonableness of the explanation or excuse is "determined from the viewpoint of a person in the [actor's] situation under the circumstances as the [actor] believed them to be," the essence of the inquiry remains objective.[53]

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

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

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

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

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

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

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

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

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

56. *Id.*

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

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

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

C. Provocation's Critique

The perception of the enraged man who killed his wife upon witnessing her sexual unfaithfulness, continues to dominate the widespread image of the provocation defense. This popular account has resulted in extensive criticism launched against the defense.[60] The provocation defense has been subject to what Professor Dressler calls a massive scholarly "attack,"[61] igniting numerous debates and filling voluminous law review articles.[62]

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

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

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

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

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

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

defense, refusing to extend it to also recognize defendant's fear of violence as a triggering incident for provocation.

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

Professor Victoria Nourse has launched powerful arguments against the expansive scope of the provocation doctrine.[68] Based on extensive empirical research, Nourse concluded that the doctrine disadvantages women because it unjustifiably gives men who killed their departing wives in an emotional outburst of jealous rage self-described as a "heat of passion response," a jury instruction on voluntary manslaughter.[69] By recognizing provocation, Nourse continued, the law encourages abused women to remain in abusive relationships because their acts of departure supply controlling men with a possible basis for the law's compassion.[70]

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

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

66. *Id.*

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

68. *See generally id.* at 1331–32.

69. *Id.* at 1332–33.

70. *Id.* at 1334.

71. *Id.* at 1333, 1369–70.

72. *Id.* at 1394.

able to rely on provocation if they responded to an unlawful act that the law independently punishes.[73]

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

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

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

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

75. *See id.* at 287.

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

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

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

II. PROVOCATION'S ADDITIONAL STAKEHOLDERS

In order to fully capture provocation's impact on different groups of marginalized defendants, courts and commentators must look beyond anger and gender. In a provocative article, which is not only the latest major contribution to the academic discussion of the provocation defense but also one of the few exceptions to the scholarly attack on the defense, Professor Aya Gruber defends the doctrine by offering counterarguments to the main claims that have been launched against it.[79] Gruber contends that narrowing provocation to exclude men who killed their spouses from its scope might also affect different classes of defendants, including women.[80] While she concedes that provocation might be successfully used by violent male killers, she recognizes this possible outcome as a cost of having such a defense.[81] She further argues that contrary to prevalent assumptions, empirical evidence undermines, rather than supports, the assertion that provocation's primary function is to under-punish men who murder women.[82] Moreover,

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

79. *See* Gruber, *supra* note 64, at 313–14.

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

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

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

she asserts that such evidence also undermines the assumption that provocation necessarily disproportionally burdens women by discriminating against them because female defendants are more successful at claiming provocation compared to male defendants.[83] Gruber stresses that since women often endure male violence, but other times are perpetrators of violence against their abusive spouses, it is "futil[e] . . . to make a generalist discrimination case against provocation" because sometimes provocation law favors a man, but other times it favors a woman.[84] Gruber also urges to look beyond the gender-based aspects of provocation by acknowledging that it potentially provides a basis for mitigation and mercy to marginalized defendants in a regime of overly punitive policies and mass incarceration.[85]

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

A. Fearful Killers

The image of the angry male killer not only pervades legal scholarship, with its emphasis on the gendered-based implications of the provocation defense, but it also dominates jurors' perception of

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83. *Id.* at 313–16.

84. *Id.* at 319.

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

provocation.[86] Case law, however, suggests that this prevalent narrative is not only partial but also inaccurate, as defendants request a jury instruction on voluntary manslaughter in a myriad of circumstances, not only in cases involving angry male defendants who kill their departing spouses.[87] Recognizing a host of circumstances that might give rise to the provocation defense, including when female defendants kill their abusive intimate partners, offers counterarguments to the feminist critique that the defense necessarily harms women and mostly benefits violent men.

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

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

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

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

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

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

fully understand why some abused defendants' fear of their abusers led them to use lethal violence even when there was no imminent threat of harm present at the time of the killing.

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

1. Abused people who kill their abusers

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

a. Intimate partner battering and battered children

After enduring long-term periods of physical, emotional, and psychological abuse, abused people sometimes kill their abusive intimate partners.[92] Studies have long found that the rate of women who kill is lower compared to men,[93] but when they do so, they often

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

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

93. Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27, 34 (2006); *see also* ELIZABETH SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 470 (3d ed. 2013) (noting that today relatively few women actually kill their abusers and the number of males killed by their female intimate partners has declined 75%

kill abusive male partners in response to repeated physical abuse.[94] While initially, the law focused exclusively on women as victims of intimate partner battering, societal perceptions have shifted to recognize that even though victims of domestic violence are still predominantly women, some men may also be victims of such abuse.[95]

Case law demonstrates that victims of domestic violence sometimes kill their abusive partners out of fear of future violence, convinced that their lives are endangered.[96] Defendants who have suffered domestic abuse typically raise a self-defense claim when they are prosecuted for homicide, arguing that they subjectively believed that the deceased threatened them with deadly force.[97]

Beginning in the mid–1980s, following Dr. Lenore Walker's landmark psychological research, courts began to allow parties to introduce into evidence testimonies of physically abused women regarding their subjective perception of the immanency and necessity of using deadly force against their abusive partners.[98] Walker coined the term "battered woman's syndrome" to explain why many physically abused women do not leave their abusive partners despite the continuous cycle of battering.[99] Walker's research identified a cluster of features that characterize abused women's responses to battering, including deep concern that leaving their partners might result in more battering and

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from 1976–2005). This decline is attributed to "access to shelters and other resources, increased police intervention, more aggressive prosecutions and the availability of civil restraining orders," which give abuse victims more options than resorting to homicide. *Id.*

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

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

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

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

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

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

becoming trapped by their own fear, which plagues them, leaving them prey to a psychological paralysis that hinders their ability to break free or seek help.[100] Courts have accepted this line of research for the purpose of understanding the key role that subjective fear of future abuse plays in shaping the typical response of battered women.[101]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

112. *See* Nourse, *supra* note 62, at 1236–38 (discussing self-defense's imminence requirement and finding that, in cases involving battered women, courts confuse the

Given the difficulties of establishing self-defense's elements where abused people kill their abusive partners out of fear of future violence but in non-confrontational circumstances, the provocation defense often remains the only doctrinal basis for potentially mitigating murder charges to voluntary manslaughter charges.[113] Yet, establishing the provocation defense presents its own challenges because existing provocation's elements are mostly unfit to capture the typical responses of abused people who feared physical violence at the hands of their abusers. Defendants who suffered from intimate partner battering are especially likely to face significant obstacles in meeting provocation's elements mostly due to the cooling off requirement, which precludes the defense from a defendant who had ample opportunity to regain control following the deceased's last act of violence.[114] Further, provocation's requirement that the provoking incident be "sudden" also poses difficulties for these abused defendants because many jurisdictions do not recognize the cumulative effect of a series of triggering events that slowly build up over a prolonged period of time.[115]

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proper question of the imminence of the threat with the improper question of why the defendant remained in an abusive relationship, thus creating a retreat rule).

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

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

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

The recent Ohio decision in *State v. Goff*[116] illustrates the shortcomings of the use of the provocation defense by a defendant who killed her abusive husband out of fear of physical harm but in circumstances that fell short of self-defense.[117] This case concerns the rocky marriage of Megan and William, who first developed a sexual relationship when Megan was fifteen-years-old and William was forty-years-old.[118] When Megan was nineteen-years-old they married and had two children, but their marital relationship gradually deteriorated.[119] Megan claimed that William was not only emotionally abusive, but that he had also threatened to kill both her and their children on multiple occasions.[120] Once William kicked their son in the stomach, Megan left the marital residence with their children, moved to a domestic violence shelter, and filed charges against William for domestic abuse.[121] In several phone conversations, William repeatedly told Megan that he would kill her and their children.[122] Megan testified that one night, after another phone conversation with William in which he again told her that he would kill her and their children, she believed he would follow through with his threats.[123] The next day, motivated by her intent to try to persuade William to kill her instead of the children, Megan drove to William's house, armed with two guns.[124] Upon entering the house, Megan testified that she felt trapped in the house after William blocked the exit.[125] He then told her that her mother "was going to have a birthday present and it was going to be two dead grand kids and a dead daughter."[126] In response, Megan fatally shot William.[127]

Megan was charged with aggravated murder.[128] At her trial, Megan testified that she shot William in self-defense and that she suffered

116. No. 11CA20, 2013 WL 139545 (Ohio Ct. App. Jan. 7, 2013).
117. *Id.* at *3.
118. *Id.* at *1.
119. *Id.* at *1–2.
120. *Id.* at *1.
121. *Id.* (noting that as a result of Megan's complaint, police recovered sixty-three guns from the marital residence).
122. *Id.* at *2.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at *3.

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

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

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

130. *Id.*

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

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

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

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

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

136. *Id.* at *9–11 (emphasis added) (quoting State v. Rhodes, 590 N.E.2d 261, 261 (Ohio 1992)). Interestingly, in 1974, the Ohio legislature adopted the MPC's EED

the claim that the defendant feared her husband; yet fear is not a sufficient basis for instructing the jury on voluntary manslaughter.[137] The court further held that evidence that defendant feared that her husband would kill her and their children only supported a self-defense jury instruction.[138] The court clarified that "[w]hile self-defense requires a showing of fear, voluntary manslaughter requires a showing of rage, with emotions of anger, hatred, jealously, and/or furious resentment."[139] Furthermore, since the evidence established that the defendant acted out of fear, rather than out of anger, the court found that the trial court was correct in refusing to instruct the jury on voluntary manslaughter.[140]

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

Ohio law, however, provides no doctrinal basis for allowing juries to partially excuse defendants like Megan. To begin with, based on the facts leading to the shooting, Megan did not act in self-defense because at the moment of the shooting, William was not presenting any *imminent* threat to kill her or their non-present children. Moreover, nothing suggests that William carried a gun at the time when Megan arrived at the house, armed with the two guns.[142] Conceding that

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defense, which does not require any triggering incident. *See* LEWIS R. KATZ, ET AL., BALDWIN'S OHIO PRACTICE CRIMINAL LAW § 95:11 (3d ed. 2017). However, in 1982, the Ohio legislature reversed course by re-adopting the common law's provocation defense, incorporating anew the "sudden fit of rage" notion. *Id.*

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

138. *Id.*

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

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

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

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

Megan's case does not warrant acquittal based on a self-defense claim, the key question becomes: is the murder conviction warranted, or should she be convicted instead of voluntary manslaughter?

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

Abused partners are not the only abused people who kill their abusers, as adolescent children may also kill an abusive parent after enduring continuous physical abuse.[144] Child abuse is the primary cause of parent killing (parricide), typically involving boys killing their fathers.[145] After courts acknowledged that nothing supports limiting the effects of domestic abuse only to battered intimate partners, the term "battered children syndrome" was coined.[146] Arguably, the rationale for recognizing the plight of the battered child who resorts to parricide is even more powerful than that of the battered intimate partner; the latter are adults, with easier access to authorities and shelters, whereas battered adolescents, whose brains are not fully developed, are more vulnerable to the impact of continuous domestic

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

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

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

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

abuse as they are emotionally and economically dependent on the abusive parent and unable to escape the abusive environment.[147]

The recent case of Bresha Meadows serves to highlight the gap in the law between fear of future violence and adequate provocation in cases where self-defense is not viable as a complete defense to murder.[148] In 2016, fourteen-year-old Bresha Meadows shot and killed her father, Jonathan Meadows, while he was sleeping.[149] In 2011, Bresha's mother Brandi had left the deceased and filed a police report alleging that he subjected her to a pattern of continuous physical abuse.[150] Documentation pertaining to these proceedings showed that Brandi told authorities that she was afraid for her life, that the deceased was "capable of extreme violence," and that he had threatened to kill her and their three children.[151] Brandi further told authorities that the deceased physically abused her and terrorized their children, stating that, "In the 17 years of our marriage he has cut me, broke my ribs, fingers, the blood vessels in my hand, my mouth, blackened my eyes . . . If he finds us, I am 100 percent sure he will kill me and the children."[152] Similar to many people who suffer domestic abuse, Brandi returned to her abusive husband, refusing to file additional complaints with the police.[153] Other family members supported the fact that Bresha had witnessed her father physically abuse her mother for years and listened to him threatening her mother with harming her and her siblings.[154] Bresha had twice ran away from her abusive father, but she was forced

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

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

149. Melissa Jeltsen, *Bresha Meadows, Teen Who Killed Allegedly Abusive Dad, Given Second Chance*, HUFFINGTON POST: BLACK VOICES, (May 22, 2017, 4:20 PM), http://www.huffingtonpost.com/entry/bresha-meadows-sentencing-killed-father_us_5922e800e4b094cdba55b95d.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

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

to return home after the authorities said that their hands were tied without an official complaint from Bresha's mother.[155]

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

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

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

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

Fear-based provocation's stakeholders include not only victims of domestic violence but also people who kill their non-intimate tormentors

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

156. *Id.*

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

out of fear of physical violence.[158] In the typical scenario, defendants have been subjected to prolonged emotional and physical abuse by the deceased, including continuous physical harassment and bullying.[159] After enduring extensive periods of physical abuse resulting in being placed in constant fear of their abusers, defendants might kill their abusers out of fear of infliction of future violence.[160] Notably, in these situations, both the abused defendants and the deceased abusers are predominantly men.[161]

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

In *Ketcham v. State*,[163] the deceased and two others were driving a car when they spotted the defendant riding his bicycle.[164] The deceased began chasing the defendant, first by car, then on foot.[165] The defendant was able to flee and retrieve a gun, only to locate the deceased and kill him.[166] The evidence at trial established that the

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

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

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

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

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

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

164. *Id.* at 1174–75.

165. *Id.* at 1175.

166. *Id.*

deceased had previously bullied the defendant and that "[the defendant] was 'tired of being harassed,' 'chas[ed]' and 'pick[ed] on.'"[167] The evidence further established that the defendant deliberately went out looking for the deceased because he was sick of the deceased trying to beat him up.[168] The state charged the defendant with murder, but the trial court instructed the jury on murder and voluntary manslaughter, which is defined under Indiana law to include intentional killings resulting from "*sudden heat*."[169] The defendant was convicted of voluntary manslaughter and on appeal sought a jury instruction on involuntary manslaughter, claiming that he only wanted to scare the deceased by battering him.[170] The Indiana Court of Appeals affirmed the voluntary manslaughter conviction, holding that the evidence did not support the conclusion that defendant only intended to injure the deceased.[171] While the defendant prevailed based on a voluntary manslaughter jury instruction, the instruction was hinged on an anger-based, rather than on a fear-based view of provocation.[172] The court's language implied that the defendant was overwhelmed by anger because he was tired of being harassed and bullied by the deceased.[173] Notably, the court made no reference to the fact that defendant also feared the deceased.[174]

Yet, in arguably similar circumstances, where the evidence does not clearly establish defendants' anger-based response, but rather one that is triggered mostly by fear, defendants might not receive such jury instructions, especially in jurisdictions that define provocation in terms of "a sudden fit of rage."[175] Moreover, research suggests that the emotions of anger and fear often operate jointly, resulting in impairment in defendants' reasoning and judgment.[176] These situations raise a concern that similarly situated defendants who kill out of fear might be

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

168. *Id.* at 1178, 1181.

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

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

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

172. *Id.* at 1175 (citing § 35-42-1-3(a)(2)(b)).

173. *Id.*

174. *Id.*

175. *See supra* Part II.A.1 for discussion of provocation under Ohio law; *see infra* Part II.A.2 for discussion of Georgia law.

176. *See infra* Part III.A (discussing psychological research suggesting that anger and fear are often difficult to distinguish, sometimes jointly triggering provocation); *see also* Pillsbury, *supra* note 16, at 147–48 n.13 (observing that "having a reason to fear will also provide a reason to rage").

treated differently by different courts, with some receiving a jury instruction on voluntary manslaughter, while others will not.

The above concern becomes especially apparent in circumstances where defendants' responses appear to be motivated mostly by fear of serious physical harm inflicted by the deceased, rather than by anger. In some cases, where defendants cannot establish self-defense, they often have no defense, other than provocation, to allow the jury to consider reducing murder to manslaughter. For example, in *Osby v. State*,[177] a seventeen-year-old African American youth killed two unarmed African American men who were, at the time of the shooting, being held back by the defendant's friends.[178] The defendant confessed to killing both decedents but argued that he acted in self-defense.[179] He claimed that during the year that preceded the shootings, the two men had repeatedly harassed him for payment of a gambling debt, including threatening him and members of his family with violence, and that on at least one occasion, the two men had stalked and threatened him with shotguns.[180] The defendant argued that he believed that the only way for him to avoid death or serious bodily injury at their hands was for him to kill them first.[181] To buttress his self-defense claim, the defendant wanted to introduce a psychologist's expert testimony concerning the defendant's fearful state of mind at the time he committed the homicides.[182] The psychologist would have testified that at the time of the shooting, the defendant had some symptoms of post-traumatic stress disorder (PTSD), although he could not make a diagnosis of PTSD.[183] While the trial court instructed the jury on self-defense, it refused to admit the psychologist's testimony, and the jury rejected Osby's self-defense claim and convicted him of the two murders.[184]

Osby appealed, claiming that the expert testimony should have been introduced into evidence and that he acted in self-defense.[185] The Texas Court of Appeals affirmed the murder convictions, holding that the expert testimony was properly excluded[186] and that the evidence did

177. 939 S.W.2d 787 (Tex. App. 1997).
178. *Id.* at 788–89; Lori Montgomery, *'Urban Survival' Rules at Issue in Trial*, WASH. POST (Oct. 26, 1994), https://www.washingtonpost.com/archive/politics/1994/10/26/urban-survival-rules-at-issue-in-trial/d1a78564-773e-45a9-a406-a5aa3b0a0b9f.
179. *Osby*, 939 S.W.2d at 787–88.
180. *Id.* at 788.
181. *Id.* at 788–89.
182. *Id.* at 789.
183. *Id.*
184. *Id.* at 787, 789.
185. *Id.* at 789, 791.
186. *Id.* at 791.

not establish self-defense because Texas law requires a reasonable person in the defendant's situation to retreat and the defendant failed to do so.[187] The court stressed that the deceased were both unarmed and restrained by the defendant's friends at the time of the shooting, establishing a path for retreat, which precludes self-defense.[188]

2. Male-on-male physically threatening encounters

Another category of defendants who might seek a voluntary manslaughter jury instruction on the theory that their fear of the deceased provoked them to kill encompasses male-on-male, physically threatening encounters. These situations may occur in a variety of social settings and a host of human interactions such as drunken bar arguments.[189] Other cases where defendants claim that they killed out of fear involve gang fights between two rival groups[190] or drug deals gone sour.[191] In these encounters, perceiving a threat to their physical safety, defendants became fearful for their lives and killed in circumstances falling short of self-defense.[192]

Similarly to defendants who were harassed and bullied by the deceased in non-domestic settings, defendants in this category are also predominantly men. Empirical evidence also shows that an overwhelming majority of incarcerated killers convicted of murder are young African

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187. *Id.* at 791–93 (citing Tex. Penal Code Ann. § 9.32(a)(2)(A) (West 2007)). Attempts to rely on a theory characterized as "urban survival syndrome," defined as an intense fear or a heightened sense of danger created in urban areas, especially the fear that black people have of other black people, have never succeeded in courts. *See* Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication and Black Rage*, 74 N.C. L. REV. 731, 740 n.35 (1996).

188. *Osby*, 939 S.W.2d at 792. The provocation defense was not raised here, as Texas law does not recognize provocation as a basis for mitigating murder to manslaughter. It only recognizes anger-based provocations as a mitigating circumstance during the sentencing phase.

189. People v. Memory, 105 Cal. Rptr. 3d 353, 356 (Cal. Ct. App. 2010) (analyzing a situation where a fight broke out in the parking lot of a bar between a group of large, drunk young men and the defendants, who were members of an infamous motorcycle club, resulting in the defendants killing a member of the drunken group and injuring two others).

190. People v. Vargas, No. B252005, 2015 WL 3831469, at *1–3 (Cal. Ct. App. June 22, 2015) (detailing how the defendant, who was not a member of any gang, was shot and killed while fighting with three members of the Mara Salvatrucha gang).

191. *See, e.g.*, Blake v. State, 739 S.E.2d 319, 320–21 (Ga. 2013) (describing a defendant who shot his drug dealer because he thought that the quantity of drugs was insufficient); State v. Levett, No. C-040537, 2006 WL 1191851, at *1 (Ohio Ct. App. May 5, 2006) (involving a defendant who shot his supplier after refusing to pay him).

192. *See infra* Part II.B below for discussion of specific cases that demonstrate the problems that the provocation defense raises in male-on-male confrontations.

American men.[193] Moreover, a significant number of homicides occur following threatening male-on-male encounters where defendants faced deep fear for their lives.[194] Young African Americans are the type of defendants who are prone to be treated harshly by the heavy-handed criminal justice system, with its disparate effect on racial minorities.[195] While self-defense and provocation defenses are often criticized on the grounds that they harm racial minorities,[196] expanding the scope of the provocation defense to recognize fear-based provocation would operate to benefit racial minority defendants. The ramification of enlarging provocation law to allow defendants to claim that fear provoked them to kill is that courts would give more jury instructions on voluntary manslaughter, therefore decreasing the chances that these defendants, including many racial minorities, would be convicted of murder.[197]

Arguably, existing provocation defense already covers cases involving typical male-on-male threatening confrontation scenarios.[198] Traditional provocation law had always recognized mutual quarrel or combat and defendant's serious assault by the deceased or threat of imminent assault by the deceased as behaviors amounting to adequate provocation, therefore giving some defendants jury instructions on voluntary manslaughter.[199] Yet, some male-on-male threatening encounters fall short of a sudden physical confrontation that precedes the killing.[200]

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193. *See* Gruber, *supra* note 85, at 185 ("[T]he population of homicide defendants largely is composed of men of color.").

194. *Id.* (arguing that any change or limitation on the provocation defense will mostly affect men of color who commit non-intimate killings).

195. Voluminous scholarship is devoted to the heavy handed criminal justice system and its disparate effects on racial minorities. *See, e.g.*, Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1254–56 (2005) (noting that policies meant to increase the severity of punishment for violent crimes will disproportionally affect black offenders). Further discussion of these disparate effects exceeds the scope of this paper.

196. *See generally* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 398–400 (1996) (explaining that "racial stereotypes about either the defendant or the deceased can influence the reasonableness determination" in self-defense cases).

197. *But see* Gruber, *supra* note 85, at 185–86 (acknowledging that while reliable data is scarce, there is limited evidence that "narrowing provocation would burden defendants other than privileged sexists and homophobes").

198. *See generally* DRESSLER, *supra* note 8, at 531 (acknowledging that common law allows for claims of provocation in certain circumstances, including "an aggravated assault or battery" and "mutual combat").

199. *Id.* (listing the early common law categories for adequate provocation).

200. *See id.* at 531–32 (outlining circumstances that do not rise to the level of adequate provocation).

Defendants may further perceive risks or dangers emanating from deceased's behaviors even before a mutual quarrel ensues or, alternatively, after it has already ended.[201]

More importantly, anger-based provocation is predicated on the notion of defendants who suddenly became enraged and lost control.[202] In the absence of evidence that a defendant's killing was motivated by anger, instead demonstrating that he or she killed out of fear, many courts refuse to instruct juries on voluntary manslaughter.[203] This happens mostly in jurisdictions that perceive provocation and self-defense as mutually exclusive claims, rather than supplementary ones.[204] The section below examines cases involving defendants in typical male-on-male threatening encounters. It demonstrates the dilemma that these fearful killers face when building their defense on self-defense or provocation grounds in jurisdictions that view these defenses as conflicting, rather than cumulatively.

B. Self-Defense and Provocation as Mutually Exclusive: "Catch 22" Dilemma

Fearful killers are likely to raise both a self-defense claim and a provocation claim, making an evaluation of the interrelationship between provocation and self-defense appropriate. Granted, a defendant's first line of defense would rest on self-defense because accepting that claim results in complete acquittal, whereas a provocation claim may result in a voluntary manslaughter conviction.

The elements of self-defense include necessity, imminence, proportionality, and a requirement that the defendant is not the initial aggressor.[205] Defendants must prove that they were justified in using deadly force against another because they honestly and reasonably believed that they were in imminent or immediate danger of deadly force from the aggressor and the use of force was necessary to avoid the

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201. *See id.* at 223–25 (discussing when deadly force may be used in self-defense).

202. *See* Dressler, *supra* note 15, at 971 (explaining that the provocation defense includes a triggering event "that results in the actor feeling rage or some similar overwrought emotion").

203. *See, e.g.*, Blake v. State, 739 S.E.2d 319, 321–22 (Ga. 2013) (finding the trial court did not err in refusing to instruct the jury on voluntary manslaughter when Blake testified that he acted in self-defense and "out of fear for his life); *see also supra* Section II.A.1 (discussing abused victims and partners as defendants who kill out of fear, yet the jurisdictions do not consider fear as adequate provocation).

204. *See supra* Section 1.A.1–2 for Ohio courts' view of the defense as mutually exclusive; *see e.g.*, *Blake*, 739 S.E.2d at 321–22 (distinguishing between provocation and self-defense).

205. DRESSLER, *supra* note 8, at 223–24, 226.

danger.[206] In the cases discussed earlier, at least one of these elements could not have been established, for example, if the defendant's fear of deadly force was not objectively reasonable, if there was no imminent threat of deadly force, or if the defendant could have safely retreated.[207]

A failure to meet self-defense's requirements often leaves provocation as the only defense that may reduce murder charges to voluntary manslaughter charges.[208] Yet, the provocation doctrine is in a state of disarray, with neither consistent nor predictable outcomes.[209] While in one jurisdiction provocation would have been recognized, mitigating murder to manslaughter, similar facts in another jurisdiction would not lead to recognizing the defense, resulting in a murder conviction.[210] Defendants claiming that they preemptively attacked the deceased out of fear rather than out of mere anger, but in circumstances falling short of self-defense, are likely to face significant obstacles in establishing provocation's elements. This becomes especially problematic in jurisdictions that view self-defense and provocation as mutually exclusive rather than as supplemental claims.[211]

The Georgia Supreme Court decision in *Blake v. State*[212] exemplifies circumstances where self-defense and provocation were viewed as conflicting claims. In this case, the defendant purchased marijuana from the deceased at a bar.[213] Upon receiving the drugs, the defendant believed that the deceased had "shorted" him and a verbal argument ensued.[214] After repeatedly claiming that the amount of marijuana the deceased gave him was incorrect, the defendant demanded his money

206. *See* LEE, *supra* note 19, at 127, 134 (explaining the necessity requirement of self-defense and the problems with requiring both an honest and reasonable belief of danger).

207. *See, e.g.*, Osby v. State, 939 S.W.2d 787, 791–92 (Tex. App. 1997) (holding that a reasonable person under the same circumstances would have retreated, so the defendant's use of deadly force was not self-defense).

208. Some jurisdictions recognize a claim for imperfect self-defense if the defendant subjectively but unreasonably believed that the use of deadly force was necessary. For further discussion of imperfect self-defense claims and the relationship between this doctrine and fear-based provocation, see Part II.C.

209. *See* Nourse, *supra* note 62, at 1341–42 (noting the efforts that attorneys have made to clarify terms like "heat of passion" and "emotional distress").

210. *Id.* (noting that the "reasonable man" standard is applied differently in different jurisdictions, some states require a "sudden" passion and others allow emotion to build over time, and some jurisdictions reject claims based on "mere words" while others embrace them).

211. *See supra* subsection I.A.1–2 for Ohio courts' view of the defenses as mutually exclusive.

212. 739 S.E.2d 319 (Ga. 2013).

213. *Id.* at 320.

214. *Id.* at 320–21.

back.[215] The deceased refused, telling the defendant to "get [his] pistol" if he wanted the money.[216] At this point, the defendant pulled out a gun and shot the deceased twice, killing him.[217] The defendant was charged with murder and claimed that he shot the deceased in self-defense because he believed the deceased and his friends were armed.[218]

After Blake's self-defense claim was rejected,[219] he argued on appeal that the jury should have been instructed on voluntary manslaughter.[220] In Georgia, a defendant is entitled to a jury instruction on voluntary manslaughter if there is slight evidence that he or she kills "solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person."[221]

Applying Georgia's provocation law in *Blake*, the court stressed that the defendant testified that he acted out of fear of imminent harm and that he was not the aggressor during the incident.[222] The court also emphasized that the distinguishing characteristic between voluntary manslaughter and justifiable homicide is whether the accused was so influenced and excited that he reacted passionately rather than simply to defend himself.[223] Moreover, the court continued, although the defendant claimed that he thought the deceased was armed and was frightened by the deceased's friends, the evidence failed to meet the standard required for voluntary manslaughter conviction.[224]

Based on these factual conclusions, the court held that the trial court had not erred when it refused to instruct the jury on voluntary manslaughter.[225] The Georgia Supreme Court declined to recognize that a defendant's fear for his life may support both self-defense and a provocation defense.[226] The holding stands for the proposition that,

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215. *Id.*

216. *Id.* at 321 (alterations in original).

217. *Id.*

218. *Id.* at 321–22.

219. *See id.* at 321 (holding that there was sufficient evidence in the record that the jury could find beyond a reasonable doubt that the defendant did not shoot in self-defense).

220. *Id.*

221. *See* GA. CODE ANN. § 16-5-2 (2011).

222. *Blake*, 739 S.E.2d at 321–22 (stressing that the defendant testified that at the time of the shooting he was not angry or hostile toward the deceased).

223. *Id.* at 322 (citing Bell v. State, 629 S.E.2d 213 (Ga. 2006); Worthern v. State, 509 S.E.2d 922 (Ga. 1999); Howard v. State, 372 S.E.2d 813 (Ga. 1988)).

224. *Id.*

225. *Id.* (affirming the defendant's conviction but vacating the defendant's sentence and remanded for resentencing).

226. *Id.* at 321–22. Georgia courts have repeatedly held that neither fear that someone was going to pull a gun nor fighting prior to a homicide are types of

in jurisdictions like Georgia, provocation and self-defense are mutually exclusive claims, and if a defendant grounds his or her defense on fear and thus on a right to exercise self-defense, a jury instruction on provocation will not be given.

Taken together, these decisions sharpen the problems stemming from the judicial view of the defenses of provocation and self-defense as mutually exclusive. Under this construction, the same evidence that supports a self-defense claim cannot constitute "sudden passion," a "fit of rage," or "loss of control" as contemplated by an anger-based provocation defense.[227] As *Goff* and *Blake* illustrate, courts often insist that while self-defense requires a showing of fear, provocation requires a showing of anger, rage, or furious resentment. They reject the idea that the same evidence supporting defendants' claims that they feared for their lives may also support a voluntary manslaughter instruction based on the theory that fear triggered the killing. Under this restrictive view, in order to successfully establish provocation, defendants must prove that anger motivated the killing or that their fear of the deceased transformed into rage. Evidence of the defendant's fear, however, in itself and without accompanying anger, does not give a defendant a jury instruction on voluntary manslaughter. This judicial view conceives of anger and fear as not only undergirding conflicting defenses, but also as completely separate emotions. By compartmentalizing anger and fear into their respective defenses, these courts reject the possibility that fear may trigger both self-defense and provocation.

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provocation demanding a voluntary manslaughter charge. For a similar analysis and conclusion, see, e.g., Brown v. State, 755 S.E.2d 699, 702 (Ga. 2014); Hicks v. State, 695 S.E.2d 195, 197–98 (Ga. 2010); White v. State, 695 S.E.2d 222, 224 (Ga. 2010); Nichols v. State, 563 S.E.2d 121, 122 (Ga. 2002). Notably, in *Francis v. State*, the defendant killed his wife, claiming that she had subjected him to prolonged physical and verbal abuse. 766 S.E.2d 52, 57 (Ga. 2014). The Georgia Supreme Court held that an instruction on voluntary manslaughter was not warranted despite the fact that the deceased had committed past acts of violence against the defendant, that she had told defendant the previous evening that she was going to kill him, and that she allegedly came at him with a knife. *Id.* The court held that "several hours had passed between the wife's confrontation and the shooting." *Id.* Therefore, while the deceased's alleged brandishing of knife supported a finding that defendant acted "to repel an attack," it did not support the conclusion that he was angered and reacting passionately. *Id.* The court concluded that the evidence established that the defendant had shot his wife because "he was scared of her, and . . . not angered or impassioned when [the] killing occurred." *Id.*

227. *See also* People v. Pouncey, 471 N.W.2d 346, 350–51 (Mich. 1991) (observing that "[the defendant's] emotional state did not reach such a level that he was unable to act deliberately" and that he testified that "he was not angry at all").

The challenges facing defendants who killed out of fear but not in self-defense are not unique to jurisdictions that categorically view self-defense and provocation as mutually exclusive. Even in jurisdictions that do not view these defenses as strictly incompatible claims, fearful killers who raise provocation are likely to encounter a host of hurdles. The main obstacle is that existing provocation doctrine is predominantly theorized as an anger-based defense, suggesting that the defendant must respond in a sudden impulse of loss of control without an opportunity to cool off, as a typical, angry defendant would. These elements do not fit the typical responses of fearful killers who may outwardly appear calm and in control, acting in a calculated manner rather than out of a sudden impulse, and often after some time has passed between the provoking incident and the killing.

Furthermore, the 2015 South Carolina decision in *Cook v. State*[228] demonstrates that only angry killers whose acts externally manifested as an "uncontrollable impulse to do violence" may obtain a voluntary manslaughter jury instruction.[229] In this case, the defendant, who lived in the apartment above the deceased, claimed that the deceased had constantly insulted him by calling him a "snitch."[230] On the day of the killing, the defendant was walking with his girlfriend when he encountered the deceased.[231] The deceased made a series of threats to the defendant and used explicit and profane language aimed at the defendant and his girlfriend.[232] Later that night, the deceased again accosted the defendant and threatened to "shoot him in broad daylight."[233] The defendant claimed that the deceased's hands were in his back pocket, leading him to suspect that the deceased was about to pull out a gun and shoot him.[234] The defendant further claimed that he tried to walk away, but the deceased persisted, threatening to kill him.[235] The defendant stated that, "[T]he dude was coming up and before I knew it, I fired a shot."[236] The defendant then fired a second shot, killing the deceased.[237]

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228. 784 S.E.2d 665 (S.C. 2015).
229. *Id.* at 668 (quoting State v. Niles, 772 S.E.2d 877, 880 (S.C. 2015)).
230. *Id.* at 666.
231. *Id.*
232. *Id.*
233. *Id.* (internal quotation marks omitted).
234. *Id.*
235. *Id.* at 667.
236. *Id.* (internal quotation marks omitted).
237. *Id.*

The defendant was indicted for murder and claimed that he acted in self-defense.[238] Interestingly, in *Cook*, it was the state who requested that the court instruct the jury on voluntary manslaughter while the defendant was the one objecting to such instruction, arguably, because he believed that he could be fully acquitted on self-defense grounds.[239] The trial court instructed the jury on voluntary manslaughter. After the jury found the defendant guilty of voluntary manslaughter, he appealed.[240]

On appeal, the defendant argued that the voluntary manslaughter instruction was erroneous because he had acted out of fear rather than out of "an uncontrollable impulse to do violence."[241] Surprisingly, the court accepted the defendant's argument, concluding that the evidence suggested that Cook either acted in self-defense or with malice, but not under heat of passion.[242] The court stressed that the evidence did not establish that Cook acted in an uncontrollable manner and was "incapable of cooling off."[243] Instead, the evidence showed that he talked softly to the deceased and calmly attempted to walk away.[244] The court therefore reversed the defendant's conviction for voluntary manslaughter, resulting in the defendant's complete acquittal of any homicide and preventing a subsequent murder offense from being brought in the future.[245] The *Cook* decision stands for the proposition that defendants cannot be convicted of voluntary manslaughter if the

238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 667–68 (quoting State v. Niles, 772 S.E.2d 877, 880 (S.C. 2015)).
242. *Id.* at 668.
243. *Id.*
244. *Id.*
245. *Id.* at 669 (finding that, because of the erroneous jury instruction, "[Cook] will not have to face a jury of his peers on the charge of murder again" (alterations in original) (quoting State v. Cooley, 536 S.E.2d 666, 670 (S.C. 2000)). Under South Carolina law, to prove voluntary manslaughter, the state bears the burden of demonstrating beyond a reasonable doubt that the defendant unlawfully killed another in sudden heat of passion based on sufficient legal provocation. *See* ANDERSON, S.C. REQUESTS TO CHARGE - CRIMINAL, § 2–7 (2d ed. 2012). Conversely, in other jurisdictions, such as California, Florida, and Maine, defendants bear the burden of establishing that they acted under sudden heat of passion to reduce their murder charge to voluntary manslaughter. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 684–85 (1975) (questioning the constitutionality of a Maine statute requiring the defendant to bear the burden of proof); People v. Rios, 2 P.3d 1066, 1074 (Cal. 2000) (maintaining that the defendant has the obligation of showing evidence to raise doubt of his guilt of murder); Villella v. State, 833 So. 2d 192, 195–96 (Fla. Dist. Ct. App. 2002) (noting the importance of defendant providing evidence to support that defendant acted in the heat of passion).

evidence establishes that they killed the deceased out of fear of death but in a manner suggesting that they were acting under control rather than loss of control and irresistible impulse.[246]

Judicial refusal to recognize provocation and self-defense as cumulative rather than conflicting claims stems from an assumption that different response mechanisms underlie these distinct doctrines; self-defense assumes a cognitive-based decision, namely, a choice followed by a carefully calculated risk-assessment under which the use of deadly force was imminently necessary for defensive purposes. This view further assumes that the choice was a cold, deliberate, and reasoned decision. In contrast, provocation assumes the opposite response, namely an emotional reaction triggered by anger resulting in loss of control. Self-defense and provocation doctrines are therefore predicated on contrasting understandings of defendants' behaviors because an inability to exercise restraint is incompatible with a deliberated and reasoned decision to kill in self-defense. The thought processes and response mechanisms of fearful killers are simply inconsistent with those of angry defendants.

Given the conceptual understanding of self-defense and provocation as irreconcilable claims, defendants and their defense attorneys might find themselves in an untenable "'Catch 22' dilemma."[247] In jurisdictions that view provocation and self-defense as conflicting, rather than cumulative defenses, defendants are forced to make a strategic choice between claiming that they killed out of fear and claiming that they killed out of anger, as grounding their case on self-defense precludes them from relying on provocation. While the advantage of a successful self-defense claim is obvious since it results in complete acquittal,[248] solely relying on it is risky because of the far-reaching implications of a murder conviction if the jury is not persuaded that use of deadly force was necessary or imminent.

Alternatively, to avoid the risk of the jury rejecting a self-defense claim, defendants may choose to plead guilty to voluntary manslaughter. The problem with that strategy is that defendants

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246. *See, e.g.*, State v. Oates, 803 S.E.2d 911, 923–24 (S.C. Ct. App. 2017) (holding that a defendant's fear may warrant a voluntary manslaughter jury instruction *only* if the evidence shows that the fear "*manifest[ed] itself in an uncontrollable impulse to do violence*," but not if the defendant's fear was manifested "in a deliberate, controlled manner" (emphasis added) (quoting State v. Starnes, 668 S.E.2d 604, 609 (S.C. 2010)).

247. English Law Comm'n, Report No. 290, Partial Defences to Murder 51 (2004), http://www.lawcom.gov.uk/app/uploads/2015/03/lc290_Partial_Defences_to_Murder.pdf.

248. *See* DRESSLER, *supra* note 8, at 207, 223 (explaining that justifications result in acquittal and stating that self-defense is a justification).

forego the possibility of complete acquittal and will be convicted of voluntary manslaughter, even if the circumstances underlying their case arguably could have established the elements of self-defense. This problem is especially disconcerting given the fact that the vast majority of criminal cases resolve in guilty pleas.[249] The concern here is that some defendants may initially choose to plead out to voluntary manslaughter charges, waiving the opportunity to be acquitted on self-defense grounds. The second issue with attempting to rely on provocation in cases where defendants choose to go to trial rather than plead guilty to voluntary manslaughter is that fearful killers might face judicial reluctance to recognize fear as triggering provocation in jurisdictions that insist that only anger triggers the defense.[250]

Courts' reluctance to recognize that defendants' fear may give rise to both self-defense as well as to the provocation defense has not been subject to scholarly critique. A review of the literature reveals that commentators have yet to suggest that provocation law ought to recognize fear as an additional basis for triggering provocation. Commentators' treatment of self-defense and provocation shows that the prevalent scholarly view is that fear is the emotion underlying self-defense while anger sustains provocation.[251] For example, Professor Cynthia Lee's book *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* provides an in-depth examination of the notion of reasonableness with respect to both provocation and self-defense doctrines.[252] In two separate parts, Lee first examines "crimes of passion" under provocation defense, then considers "crimes of fear" under the doctrine of self-defense.[253] The completely isolated treatment of the emotions of anger and fear as respectively rooting the defenses of provocation and self-defense reinforces the familiar idea that provocation is an anger-based defense whereas self-defense is fear-based. This view implies that fear alone does not trigger provocation. Professor Reid Fontaine further sharpens the distinct operation of anger and fear under two separate doctrines by observing that "reactive violence is exemplified by a 'heated' emotional retaliation . . . in response to a situation that is perceived to be wrongful or threatening . . . [and] is

249. *Id.* at 230 (elaborating on general circumstances for accepting pleas).

250. *Id.* at 539 (questioning whether any "adequately provoked" killers are more justified in their killings, but recognizing that anger or other passion as the catalyst for these killings).

251. *See* LEE, *supra* note 19, at 7, 10.

252. *Id.* at 25, 131–32.

253. *See id.* at 15–124 (discussing anger); *id.* at 125–200 (discussing fear).

normally engaged out of anger toward a perceived provoker (e.g., heat of passion) or fear of a perceived threat (e.g., self-defense)."[254]

The dichotomy between anger and fear, which the scholarly view of provocation and self-defense reinforces, is hardly surprising as criminal law often breaks down behaviors into binary categories, such as guilty/not-guilty and blameworthy/non-blameworthy.[255] Here, the law perceives fear as conceptually fitting within self-defense doctrine and anger as suitable for the provocation doctrine. Such a binary dichotomy refuses to recognize that behavior that is triggered by deep fear exists on a continuum and that the same conduct that may give rise to self-defense may also establish fear-based provocation. The unwillingness to consider the implications of fear on the provocation doctrine results in refraining from further delving into the interrelationship between these two emotions, resulting in fear-based provocation remaining under-theorized.

One way to resolve defendants' dilemma of having to choose between claiming self-defense or provocation is the solution that this Article proposes below.[256] But before moving forward, the following subsection takes a brief detour to consider imperfect self-defense claims and particularly the scope and limitations of these claims. It explains why recognizing fear-based provocation offers a preferable legal doctrine in cases involving fearful killers who killed in circumstances falling short of perfect self-defense even in jurisdictions that also recognize imperfect self-defense.

C. Imperfect Self-Defense and Defendants Who Killed out of Fear

Traditionally, self-defense has been conceptualized as an "all or nothing" defense, meaning that the defendant was either justified in using deadly force and acquitted of any crime or unjustified and convicted of murder.[257] Many jurisdictions today still adhere to this

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254. *See* Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27, 31 (2009).

255. *See* Drumbl, *supra* note 91, at 218–19 (observing that criminal law envisions "finality, disjuncture and categor[ies]," viewing victims as "pure and ideal" and killers as "unadulterated and ugly").

256. *See infra* Part IV.

257. *See generally* DRESSLER, *supra* note 8, at 234 (noting that the common law rule did not recognize imperfect self-defense claims in cases of defendants' unreasonable beliefs about the necessity of using deadly force).

position, recognizing only perfect self-defense.[258] Influenced by the MPC, a growing number of jurisdictions now recognize imperfect self-defense in cases where defendants subjectively but *unreasonably* believed that the use of deadly force was necessary, resulting in a voluntary manslaughter conviction rather than in complete acquittal.[259]

Arguably, the fearful killers described in the previous sections could raise an imperfect self-defense claim if they killed in circumstances falling short of a perfect self-defense. Professor Caroline Forell, for example, argues that the doctrine of imperfect self-defense already addresses circumstances where reducing murder charges to manslaughter charges might be warranted when fearful killers react unreasonably and are unable to establish a perfect self-defense.[260] Forell's view further reinforces the chasm between anger and fear by proposing to explicitly exclude defendants' fear from the scope of the provocation defense, specifically limiting the operation of the defense only to anger-triggered homicides.[261]

A number of reasons support the conclusion that recognizing fear-based provocation provides not only a preferable defense compared to imperfect self-defense, but also an additional doctrinal basis for mitigating murder to voluntary manslaughter. To begin with, a significant number of

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258. A significant number of jurisdictions, including those following the MPC, refuse to recognize the doctrine of imperfect self-defense. *See, e.g.*, TEX. PENAL CODE ANN. § 9.32 (West 2007) (providing the elements of self-defense, while not including an imperfect self-defense claim); Patrick v. State, 104 So. 3d 1046, 1056 n.3 (Fla. 2012); People v. Reese, 815 N.W.2d 85, 87 (Mich. 2012); State v. Williams, 774 A.2d 457, 463 (N.J. 2001); State v. Goff, No. 11CA20, 2013 WL 139545, at *8 (Ohio Ct. App. Jan. 7, 2013); State v. Garcia, 883 A.2d 1131, 1139 (R.I. 2005); State v. Sams, 764 S.E.2d 511, 517 (S.C. 2014); State v. Shaw, 721 A.2d 486, 488 (Vt. 1998).

259. *See, e.g.*, People v. Blacksher, 259 P.3d 370, 421 (Cal. 2011) (finding that jury instructions for voluntary manslaughter may be given when the killing was committed under the unreasonable but good faith belief in the need to act in self-defense, since the killing is considered to be done without malice). Maryland also recognizes perfect and imperfect self-defense. *See* State v. Smullen, 844 A.2d 429, 439 (Md. 2004). Some jurisdictions allow an imperfect self-defense claim in cases where defendants were non-deadly aggressors who used deadly force when they could have retreated. *See* State v. Vigilante, 608 A.2d 425, 430 (N.J. Super. Ct. App. Div. 1992).

260. *See* Forell, *supra* note 19, at 439 (suggesting that imperfect self-defense is more appropriate and should be used when the killing was unreasonable but the defendant reasonably feared imminent bodily injury or death); *see also* Forell, *supra* note 93, at 69–70 (expressing preference for changes in self-defense laws rather than in provocation laws to address the problem of battered women who killed their domestic partners out of fear of violence, who should often be acquitted or not charged of any homicide).

261. *See* Forell, *supra* note 19, at 438–39.

jurisdictions do not recognize the doctrine of imperfect self-defense.[262] In these jurisdictions, the provocation defense remains the *only* viable defense that might reduce murder charges to manslaughter.[263] Excluding fear from the scope of the provocation defense leaves defendants in these jurisdictions with one of two possibilities: either prevailing on perfect self-defense grounds or being convicted of murder. Limiting the scope of the provocation defense strictly to anger-based claims deprives defendants whose behavior warrants mitigation, including those who suffered domestic abuse, any doctrinal basis that might have allowed reducing their murder charges to manslaughter.[264]

But even in jurisdictions that recognize imperfect self-defense, fear-based provocation remains critically important because it adds another basis for mitigation, reaching circumstances that imperfect self-defense would not cover. An imperfect self-defense claim is predicated on the theory that the defendant subjectively but unreasonably believed that use of deadly force was immediately necessary to defend against imminent danger of death or great bodily injury.[265] Imperfect self-defense thus assumes that mitigating murder to manslaughter is warranted because the defendant overreacted to a perceived threat, even if it was an objectively unreasonable and excessive reaction.[266] In many situations, however, defendants are not entitled to either self-defense or imperfect self-defense for reasons unrelated to the reasonableness of their beliefs, but mostly given their inability to establish the critically important imminent threat element.[267]

The doctrine of imperfect self-defense is unable to mitigate murder to manslaughter in cases where there was no *imminent* threat of using

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262. Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 101 (2010); *see also supra* note 258 (listing examples of jurisdictions that do not recognize imperfect self-defense doctrine).

263. *See* Pillsbury, *supra* note 16, at 147 (observing that in states that do not recognize imperfect self-defense, the provocation doctrine may be the only doctrinal basis for mitigating murder to manslaughter).

264. *See* Cynthia Lee, *Response to Professor Forell*, *in* CRIMINAL LAW CONVERSATIONS 445–46 (Paul H. Robinson et al. eds., 2009) (arguing that a victim of domestic abuse would likely not receive a jury instruction on self-defense in a jurisdiction that did not recognize a fear provocation).

265. *See* DRESSLER, *supra* note 8, at 235.

266. *Id.*

267. *See* State v. Norman, 378 S.E.2d 8, 12–13 (N.C. 1989) (stressing that the defendant, who had killed her sleeping husband, could not request a jury instruction based on either perfect or imperfect self-defense because the evidence did not demonstrate that she had reacted to an imminent threat of bodily harm or death).

deadly force by the deceased. Importantly, the imminent nature of the threat remains a critical requirement under both perfect and imperfect self-defense claims.[268] An imperfect self-defense claim is predicated on a defendant's actual belief that the deceased threatened immediate bodily harm, implying a calculated risk assessment that is grounded in a cognitive-based decision, that there is an *imminent need* to use deadly force.[269] Notably, defendants are unable to prove that the threat to use deadly force against them was imminent in circumstances involving non-confrontational killings, either because the deceased were sleeping at the time of the killing or otherwise not presenting any imminent threat.[270] For example, in *Goff*, even assuming that Ohio did recognize imperfect self-defense, nothing in the evidence suggested that the deceased presented an imminent threat to kill the defendant and/or the children who were not present at the time of the killing.[271] Thus, if defendants are unable to establish that the threat to use deadly force against them was of an imminent nature, the elements of imperfect self-defense will not be met.

Additionally, provocation and imperfect self-defense are doctrinally distinct defenses, requiring proof of completely different elements.[272] For example, imperfect self-defense requires, among other elements, imminent threat to use deadly force,[273] while provocation requires intense passion that distorted defendant's judgment.[274] In fact, to reduce murder charges to manslaughter based on provocation, the defendant is not required to prove that there was an imminent need to use deadly force.[275] Instead, the defendant must prove that the

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268. *See* Menendez v. Terhune, 422 F.3d 1012, 1028–29 (9th Cir. 2005) (noting that the defendant must show that he actually believed that the peril was imminent).

269. *See id.* at 1030 (emphasizing that the provocation defense is not available if there is a sufficient gap of time, a "cooling off period," between the provocation and the act).

270. *See* DRESSLER, *supra* note 8, at 536 (lack of imminence in non-confrontational killings).

271. No. 11CA20, 2013 WL 139545, at *1 (Ohio Ct. App. Jan. 7, 2013) (holding that Ohio law does not recognize the imperfect self-defense doctrine). For further discussion of *Goff*, see *supra* Part II.A.1.a.

272. *See* Ramsey, *supra* note 262, at 100 (noting that heat of passion and imperfect self-defense are two distinct doctrines).

273. *Id.*

274. *Id.*

275. *Id.* at 36 n.7 (explaining that some MPC states mitigate murder to manslaughter when the defendant claimed to have reacted to an extreme emotional disturbance).

deceased's behavior triggered an emotional outburst that interfered with defendant's rational thinking.[276]

The infamous trial of Lyle and Erik Menendez, who were charged and convicted of killing their parents, provides an example where a California court refused to instruct the jury on imperfect self-defense due to lack of evidence that the deceased posed an imminent peril of deadly force to the defendants.[277] In this case, the prosecution argued that the defendants killed their parents in order to obtain an early inheritance.[278] The defense's theory, however, was that the defendants killed out of fear that their parents were going to kill them, following long years of continuous physical and sexual abuse of the defendants.[279] Erik Menendez testified that, five days before the killings, he told his brother, Lyle, about the years of sexual abuse he had suffered by their father.[280] Lyle confronted their father, Jose, who subsequently yelled at Erik for disclosing the abuse to his brother.[281] At trial, Erik claimed that this argument, together with the years of abuse and threats, made him believe that his parents would kill him and his brother.[282]

The defendants' main line of defense rested on an imperfect self-defense doctrine, but the trial court refused to instruct the jury on this theory.[283] The California Court of Appeals affirmed the lower court's refusal to instruct the jury on imperfect self-defense, upholding the murder convictions.[284] The court of appeals held that the defense did not present sufficient evidence that at the moment of the killing, the defendants had an actual fear and the need to defend against *imminent* peril to life or great bodily injury.[285] The court noted that in the time between the confrontation with their father and the killings, the defendants retrieved shotguns from a car, reloaded them with better ammunition, and returned to the house before opening fire on their unarmed parents.[286] The court further stressed that Erik understood

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276. *See Fontaine*, *supra* note 254, at 29–30 (recognizing that adequate provocation entails "provocation by the victim that would be sufficient to significantly undermine the rationality of a reasonable person").

277. Menendez v. Terhune, 422 F.3d 1012, 1030 (9th Cir. 2005).

278. *Id.* at 1017.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 1023–24, 1028.

284. *Id.* at 1028–29.

285. *Id.*

286. *Id.* at 1028.

that there was no imminent peril, but rather the threat of future harm, and held that self-defense cannot be based on such prospective fear.[287] The fear that their parents had the capacity to and might, at some point, harm the defendants, continued the court, was insufficient to entitle them to imperfect self-defense jury instruction.[288]

While the provocation defense was not raised at the Menendez trial, it is plausible to surmise that had the Menendez defense relied on the theory of fear-based provocation, the jury might have been persuaded to return a voluntary manslaughter verdict. Unlike imperfect self-defense, the defense of fear-based provocation does not require proof that the defendant faced an immediate threat of physical harm.[289] Instead, it requires evidence that the defendant's thought process, reasoning, and judgment were significantly impaired as a result of fear of the deceased's inflicting physical harm.[290]

Moreover, to establish imperfect self-defense, defendants still have to prove that they subjectively believed that the deceased threatened them with use of deadly force, as opposed to non-deadly force.[291] Provoked killers do not need to prove that they believed deadly force was about to be used against them.[292] There might be circumstances where defendants persuade the jury that their judgment was impaired as a result of fear even if they fail to make the case that they feared use of *deadly* force against them, for example, if there was no evidence that the deceased possessed a weapon.

Given the conceptually distinct bases for the two defenses, a jury might reject the theory of imperfect self-defense, yet still plausibly accept the theory of provocation, as dismissing one of these theories does not necessarily result in dismissing the other.[293] Since the two defenses require proof of different elements, there might be cases in

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287. *Id.*

288. *Id. at 1030.*

289. *See, e.g.*, Ramsey, *supra* note 262, at 100.

290. *See infra* Part IV.

291. *See* Ramsey, *supra* note 262, at 100 (noting that self-defense claims can be raised only by defendants who "believed that deadly force was necessary for self-protection . . . in the face of mortal danger").

292. *See id.* (explaining that fear, which can provide the basis for a provocation defense, can be induced by non-mortal threats).

293. *Id.* at 100–01; *see also* People v. Thomas, 160 Cal. Rptr. 3d 468, 480 (Cal. Ct. App. 2013) (noting that even when facts "fit more precisely with a homicide mitigated by imperfect self-defense . . . they may also show that [the defendant] was guilty only of voluntary manslaughter because when he shot [the victim] his passion was aroused and his reason was obscured due to a sudden quarrel").

which fear-based provocation and imperfect self-defense claims overlap, but in others, they might not, as the discussion of the Menendez case suggests. This conclusion demonstrates that both of these doctrines are necessary as they provide distinct and cumulative grounds for mitigation.

Finally, from a normative perspective, fear-based provocation is preferable to imperfect self-defense. Since self-defense is predicated on the theory of justification, the implication of accepting the claim is a normative determination that the defendant's act of killing was justified.[294] An imperfect self-defense claim therefore implies that the defendant is *partially* justified, because he or she reacted unreasonably.[295] In contrast, most commentators agree that provocation rests on the theory of partial excuse, rather than on partial justification.[296] Recognizing fear-based provocation means that the law acknowledges that fearful killers ought to be partially excused, given their impaired judgment, even if the killing is not partially justified. The normative difference between the justificatory and excusatory bases is critical; the theory of partial excuse is preferable because it retains the normative conclusion that the defendant's killing is still wrong. The fearful killer is only partially excused because the law recognizes that the killer's overreaction, given the emotional state of fear of physical harm, makes the killer less morally culpable compared to an actor who did not experience such fear. Fear-based provocation is therefore more compatible with the premise that the value of the sanctity of life is superior to other values, even if the law recognizes that some defendants ought to be partially excused if they find themselves in predicaments that they subjectively, but

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294. *See* RICHARD J. BONNIE ET AL., CRIMINAL LAW 487 (4th ed. 2015) (highlighting a North Carolina Supreme Court opinion that stressed the need for an imminent threat to justify a self-defense homicide).

295. *See, e.g.*, Steffani J. Saitow, Note, *Battered Woman Syndrome: Does the "Reasonable Battered Woman" Exist?*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 329, 360–61 (1993) (considering the imperfect self-defense doctrine in the context of battered women who kill their abusers).

296. Voluminous scholarship is devoted to discussing whether provocation is an excuse or a justification. *See, e.g.*, Dressler, *supra* note 15, at 971 (asserting that provocation is a partial excuse defense); Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 475 (1988) (arguing that the extent of provocation's wrongfulness plays a role in deciding if the killer's response is excusable). *But see* Berman & Farrell, *supra* note 28, at 1034 (acknowledging that some commentators understand that provocation has both excusatory and justificatory aspects and advocating that provocation should be considered both a partial excuse and a partial justification); Kahan & Nussbaum, *supra* note 18, at 307–08 (1996) (advocating for an evaluative understanding of criminal law defenses, including provocation and self-defense, that evaluates and judges defendants' actions and reasons).

unreasonably, perceived as posing deadly threats. In light of the distinct bases, which imperfect self-defense and provocation are predicated upon, the defenses should not be viewed as mutually exclusive but instead as supplemental. Therefore, the jury should be instructed on both defenses.[297]

III. THEORIZING FEAR

Having identified the necessity for recognizing fear-based provocation, this part provides the theoretical basis for adding a fear prong to the defense by delving into some of the psychological findings that explain why such an expansion is warranted. It begins with considering the psychological research on fear, and particularly, how fear affects individuals' decision making, then moves to examine the implications of these psychological insights on the scope of fear-based provocation.

A. The Psychology of Fear

Early psychological research has focused exclusively on cognitive-based processes, emphasizing intellectual and thinking processes and ignoring the role that emotions play in influencing individuals' decision making.[298] In recent years, psychological research has increasingly grown, particularly the subfield of the effects of emotion on individuals' judgment and decision making (JDM).[299] Ample research now examines the interplay between emotion and cognition, acknowledging that they are deeply intertwined and investigating the powerful influence of their effect on actors' behavioral choices.[300]

Although psychologists identify distinct mechanisms and thought patterns associated with anger and fear, some common features underlie both; psychologists now agree that both anger and fear potently, pervasively, and predictably influence individuals' decision

297. *See infra* Part IV, for a proposal to make self-defense and fear-based provocation cumulative rather than alternative claims.

298. *See* Jennifer S. Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799, 800 (2015). The psychological literature uses the acronym "JDM" to refer to this subfield of judgment and decision making. *Id.* (highlighting the traditional focus of psychological research to contrast it with the new JDM model).

299. *Id.*

300. *See, e.g.*, Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice*, 14 COGNITION & EMOTION 473 (2000) (arguing that emotions result from a tendency to perceive new events the same way as prior events were perceived). The term "affect" in psychology refers to the experience of emotion and the interaction with stimuli.

making.[301] Decision making processes consist of "perception, understanding, reasoning, and choice," all of which are influenced by experiencing the intense emotions of anger and fear.[302] Furthermore, these emotions may constitute harmful drivers of decision making, "often produc[ing] influences that are unwanted and nonconscious."[303] They induce responses, including behavioral ones, "that enable the individual to deal quickly with encountered problems or opportunities."[304] Psychological research shows that emotions impact decision making in a way that can override otherwise sensible courses of action and that both anger and fear may significantly undermine rational decision making, obscuring reason and judgment.[305] Professor Terry Maroney observed the relationship between the psychological research and the law, noting that research establishes that emotions can sometimes have a disruptive effect and that their presence may disturb rationality.[306]

Examining how fear operates, researchers observe that individuals' decision making processes, when faced with threatening situations, include perception of the risk, appraisal of the risk, formation of relevant beliefs about the situation, and choice of a course of action.[307] These stages are all adversely affected by the experience of extreme fear, leading individuals to make irrational decisions that they would not have made but for their perception of extreme risk.[308] Psychological research also finds that fear often generates a nearly automatic response, including striking out.[309] Furthermore, research suggests that fear, and the reactions to it, are almost involuntary and difficult to "cognitively override."[310]

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301. Lerner et al., *supra* note 298, at 816.

302. *See* Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1392 (2006).

303. Lerner et al., *supra* note 298, at 816.

304. Lerner & Keltner, *supra* note 300, at 476 and accompanying notes.

305. *See* George F. Lowenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 269 (2001) (arguing that emotions can cause almost uncontrollably destructive behavior in the face of cognitive evaluation); *see also* Sherman & Hoffman, *supra* note 88, at 499 (arguing that the doctrine of self-defense assumes that emotions have an effect on decision making).

306. *See* Maroney, *supra* note 302, at 1403.

307. *See* Sherman & Hoffman, *supra* note 88, at 511 (contending that fear shares the same mental process as anger and all other emotions).

308. *Id.*

309. *See* Elizabeth A. Phelps et al., *Intact Performance on an Indirect Measure of Race Bias Following Amygdala Damage*, 41 NEUROPSYCHOLOGIA 203, 203–04 (2003) (explaining that the part of the brain responsible for fear is subject to nearly automatic responses to stimuli).

310. Maroney, *supra* note 302, at 1407.

While anger and fear share some notable common features, social psychologist Jennifer Lerner and her colleagues' research found that even though both anger and fear are negative emotions of the same valence, there are important differences in the thought processes that underlie them.[311] This research compared the operation of anger and fear, examining how these emotions shape the content of thought via appraisal tendencies.[312] Drawing on what they refer to as appraisal tendency framework, they found that anger and fear can exert opposing influences on choices and judgment.[313] In other studies that examine risk-taking, Lerner and her colleagues compared risk perceptions of angry and fearful people.[314] They found that angry people view negative events as predictably caused by, and under the control of, other individuals.[315] They also found that fearful people generally made pessimistic judgments of future events.[316] They further demonstrated that fear involves low certainty, powerlessness, and a low sense of control over the situation, which are likely to produce a perception of negative events as unpredictable and situationally determined.[317] In sum, these research findings demonstrate that fearful individuals consistently made judgments and choices that were relatively pessimistic and amplified their perception of risk in a given situation, in contrast to angry participants who were more likely to disregard risks.[318]

Since psychologists now agree that emotions serve "an adaptive coordination role" that trigger a set of behavioral responses,[319] one important implication of these research findings concerns individuals' resulting behavioral responses to fear. Psychological researcher Joseph Cesario notes that the behavioral outcomes of fear may consist of five distinct responses, including flee, freeze, hide, attack, and assess risk.[320] While lay societal perceptions often assume that fear is more likely

311. Lerner et al., *supra* note 298, at 804.

312. *Id.*

313. *Id.* at 804–05 (defining appraisal tendency framework as "a multidimensional theoretical framework for linking specific emotions to specific judgment and decision making outcomes").

314. Lerner & Keltner, *supra* note 300, at 473.

315. *Id.* at 47.

316. Lerner & Keltner, *Fear, Anger, and Risk*, 81 J. OF PERSONALITY & SOC. PSYCHOL. 146, 147 (observing that similar patterns were found in subsequent studies in which they experimentally induced participants to feel anger and fear).

317. Lerner & Keltner, *supra* note 300, at 478–79.

318. *Id.* at 480.

319. *See* Lerner et al., *supra* note 298, at 808.

320. *See* Joseph Cesario et al., *The Ecology of Automaticity: How Situational Contingencies Shape Action Semantics and Social Behavior*, 21 PSYCHOL. SCI. 1311, 1312 (2010).

to result in a flee or freeze response rather than in aggression, Cesario found that the more common responses to fear are either flight or fight.[321]

In addition, psychological research finds that the particular reaction taken in response to fear depends on multiple features stemming from the circumstances underlying the threatening situation, including the nature, size, and distance of the threat, the possibility and ease of escaping or hiding from the threat, and the clarity of the threat.[322] Other research suggests that there are also gender-based, social, and cultural aspects determining the response to fear.[323] For example, women are more likely to scream or call for help while men are more likely to physically attack in a similar circumstances.[324]

Another research finding pertains to the duration of experiencing fear. In general, researchers agree that full-blown emotions are commonly short-lived, and that fear, specifically, is often an acute, sudden, and short-lived reaction to an immediate threat.[325] While "[e]motions are initially elicited rapidly and can trigger swift action," psychological research also recognizes that once activated, "some emotions . . . can trigger more systemic thoughts."[326] Consequently, researchers now "distinguish[] between the cognitive consequences of an emotion-elicitation phase and an emotion-persistence phase."[327] Furthermore, researchers note that fear sometimes carries ongoing consequences—particularly that fear and anticipatory anxiety about a future dangerous event may linger longer in circumstances where a person has been subjected to continuous abuse for an extended period

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321. *See id.* (highlighting that responses to stimuli are affected by the form of the stimuli and the recipient's relationship to the stimulating behavior).

322. Elise J. Percy at al., *"Sticky Metaphors" and the Persistence of the Traditional Voluntary Manslaughter Doctrine*, 44 U. MICH. J.L. REFORM 383, 419 (2011).

323. *See* D. Caroline Blanchard et al., *Human Defensive Behaviors to Threat Scenarios Show Parallels to Fear- and Anxiety-Related Defense Patterns of Non-Human Mammals*, 25 NEUROSCIENCE & BIOBEHAVIORAL REVS. 761, 761 (2001) (using rats in an experiment that revealed that rats will engage in defensive-attack behavior if they are unable to flee when under threat).

324. *Id.* at 767.

325. *See* Robert W. Levenson, *Human Emotion: A Functional View*, *in* THE NATURE OF EMOTION FUNDAMENTAL QUESTIONS 123 (Paul Ekman & Richard J. Davidson eds., 1994) (maintaining that the purpose of emotions is to provide a rapid adaptation to environmental changes); *see also* George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORG. BEHAV. & HUM. DECISION PROCESSES 272, 272 (1996) (observing the powerful effect of adaptation and the fact that most individuals' emotional states return to their baseline states over time).

326. Lerner et al., *supra* note 298, at 816–17.

327. *Id.* at 817.

of time.[328] In such cases, the longevity of the psychological repercussions of past physical abuse continues to have an impact on some individuals' future perception of risk.[329] A growing body of research suggests that victims of long-term physical and emotional abuse experience a variety of symptoms long after the actual abuse has ended, including fear, anxiety, stress, and anger.[330] For example, severe past trauma and abuse that results in intense fear may cause long-term stress, negatively affecting all areas of functioning.[331] Research further shows that domestic violence victims suffer from a host of serious long-term mental health problems even after separating from abusive partners, including depression, anxiety, and PTSD.[332] Moreover, the traumatic effects of physical abuse are especially exacerbated in the case of spousal abuse due to the fact that the abused person is emotionally involved with the abuser, therefore further explaining why fear may linger on, even when the threat of harm has been completely removed.[333]

Taken together, psychological research on the effects of fear, including its possible lingering impact, suggests that while the behavioral consequences of fear are more varied and complex than those of anger, fear, similarly to anger, may also lead to aggressive, possibly lethal, behaviors.[334] Put differently, one of the irrational decisions that fearful individuals may make is an act of killing.

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328. Catherine Cerulli et al., "*What Fresh Hell Is This?" Victims of Intimate Partner Violence Describe Their Experiences of Abuse, Pain, and Depression*, 27 J. FAM. VIOLENCE 773, 778 (2012) (finding that victims of physical abuse describe psychological symptoms, including depression, anxiety, panic attacks and flashbacks lasting even beyond the abuse and after criminal prosecution of the abuser).

329. *See* ILSA EVANS, BATTLE-SCARS: LONG-TERM EFFECTS OF PRIOR DOMESTIC VIOLENCE 4 (2007) (indicating that the effects of domestic violence affect sufferers in multiple facets of their lives long after the initial trauma).

330. *Id.* at 14.

331. *Id.*

332. *See, e.g.*, Carole Warshaw et al., *Mental Health Consequences of Intimate Partner Violence*, *in* INTIMATE PARTNER VIOLENCE: A HEALTH-BASED PERSPECTIVE (Connie Mitchell & Deirdre Anglin eds., 2009); Debra Houry et al., *Intimate Partner Violence and Mental Health Symptoms in African American Female ED Patients*, 24 AM. J. OF EMERGENCY MED. 444, 445 (2006); DeJonghe ES et al., *Women Survivors of Intimate Partner Violence and Post-Traumatic Stress Disorder: Prediction and Prevention*, 54 J. OF POSTGRADUATE MED. 294, 294 (2008).

333. Evans, *supra* note 329, at 13–14.

334. *See* Cesario, *supra* note 320, at 1314 (showing that an individual could be pushed toward an automatic response of fight or flight solely depending on the location and circumstances of the stimuli).

A final point concerns the interrelationship between anger and fear. Legal doctrines typically treat anger and fear as distinct emotions.[335] Psychologists, however, disagree with the law's dichotomy, finding that from a psychological perspective, there is often an overlap between experiencing anger and fear.[336] Psychiatrists note that the legal assumption that anger and fear are distinct emotions is mistaken because the two emotions share many similarities from a medical perspective.[337] They stress that "physiologically anger and fear are virtually identical" and that "many mental states that accompany killing also incorporate psychologically both anger and fear."[338] Therefore, medical and psychological research demonstrates the failings of the legal assumption that fear and anger may be treated differently for the purpose of creating separate defense doctrines.[339]

B. Psychological Research's Implications for Fear-Based Provocation

Psychological research findings offer important insights on the scope of the provocation defense, and particularly on recognizing fear-based provocation. Understanding how fear affects a person's judgment and decision making processes explains why the prevalent perception of provocation as an anger-based defense proves unfit for accommodating the experiences of fearful killers. Since provocation's elements are incompatible with the way fear operates, even in jurisdictions that do not view provocation and self-defense as mutually exclusive, fearful killers trying to rely on provocation are often unsuccessful.

The subsections below elaborate on the three main features that defendants who kill out of fear experience: (1) fear results in interference with defendants' reasoning and judgment processes; (2) fear is often cumulative, simmering slowly over a prolonged time period; and (3) fear might linger for long periods, resulting in a failure to cool off, even with lapse of time. While these three factors are critical for

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335. *See supra* Part II.B (noting that legal scholars mostly address fear through the self-defense doctrine and anger through the lens of provocation). *But cf.* Pillsbury, *supra* note 16, at 147–48 (acknowledging that fear and anger can be difficult to disentangle and often defendants experience both).

336. *See* English Law Comm'n, *supra* note 247, at 53 (citing the British Royal College of Psychiatrists, Response to Consultation Paper No. 173, for the proposition that anger and fear are not distinct emotions). This finding, among others, led the authors to recommend that British law also recognize fear as triggering provocation defense.

337. *Id.*

338. *Id.*

339. *Id.*

recognizing fear-based provocation, they are currently not embedded in existing understanding of anger-based provocation.

1. Fear-based provocation's rationale: impaired judgment

Psychological research reveals that intense fear may result in significantly impaired thought processes, leading defendants to act out of distorted reasoning and judgment. Acknowledging that fear undermines rational judgment explains why fearful people might kill. Yet, as previously noted, the main rationale upon which anger-based provocation is predicated is the notion of loss of control.[340] This model, however, is unsuitable to capture the distinct features characterizing the typical responses of fearful killers.

One implication of the psychological finding that fear may impair rational judgment is that fear does not necessarily result in a visible response that may be characterized as loss of control. In fact, fearful killers may outwardly appear calm, cool, composed, and in control of their actions.[341] Defendants who externally exhibit visible signs of control of their emotions may lead decision makers to conclude mistakenly that these defendants killed in acts of calculated and deliberate revenge, seeking personal vendetta against the deceased individuals who wronged them. But in fact, these fearful killers might have killed as a result of significant distortion in their judgment and rational thinking. Predicating the provocation defense on the loss of control rationale therefore raises a concern regarding disparate treatment of angry and fearful killers. Angry defendants whose behavior is *externally* manifested as an impulsive act of loss of control might be treated more favorably than fearful killers whose typical response might be perceived by decision makers as the exact opposite of loss of control that is as deliberate and calculated.

Shifting provocation's focal point from loss of control towards the destruction of reasoning and judgment provides a coherent rationale for recognizing fear-based provocation.[342] Conceding that a fearful killer's thought process has been significantly distorted as a result of the deceased's threatening behavior offers normative grounds for

340. *See supra* Part I.A.

341. *See supra* Part II.A–B (demonstrating courts' emphasis on fearful defendants' appearance at the time of the killing and the external manifestation of cold, calculated, and in control reaction).

342. *Cf.* Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 297–98 (2003) (proposing a new "generic mitigating excuse" for defendants who are guilty of killing but acted, at least partially, responsible based on their lack of capacity for rationality).

mitigation. When defendants kill in response to such threats, their moral culpability is diminished compared to defendants who kill in other circumstances.[343] Put differently, when distortion in a defendant's judgment is powerful enough, it is sufficient to make the act of killing far less morally culpable than it would have been absent such distortion. Since a defendant's ability to rationally assess the situation is significantly undermined by the impact of fear, mitigating charges from murder to manslaughter is warranted.

Emphasizing the impact of fear on defendants' decision making processes is also consistent with a basic tenet of criminal law, under which the degree of criminal liability ought to be derivative and proportional to the degree of defendants' moral culpability.[344] Recognizing fear-based provocation would allow the law to reflect proper gradations of criminal culpability based on varying levels of moral blameworthiness. Reducing murder to voluntary manslaughter, rather than completely acquitting of any crime, reflects prevailing societal perceptions that killing in circumstances falling short of self-defense still warrants criminal penalty.[345] But at the same time, it acknowledges that a defendant whose cognitive and volitional capabilities were significantly impaired is not as morally culpable as one whose capabilities remained intact.

Additionally, conceding that both anger and fear may distort rational judgments should also take into consideration the fact that the psychological reality is that these emotions sometimes overlap, operating jointly.[346] Grounding a defense on decision makers' determination of whether the killer was primarily angry or primarily fearful is inherently problematic because it lacks support in psychological research. Since in some cases the same deceased's behavior that angers a defendant also establishes the defendant's fear of physical violence, legal doctrine ought to acknowledge

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343. *See generally* Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1559 (1999) (observing that moral culpability depends on "whether we intend to do wrong, know that wrong will occur, or have reason to predict that we will do wrong" and concluding that culpability depends on whether a defendant was able to reasonably assess the information to determine that his actions would be wrong).

344. *See generally* MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 192 (1997) (noting that culpability is both necessary and sufficient as a basis for criminal punishment).

345. *See supra* notes 257–258 (discussing the lack of recognition of imperfect self-defense under common law and in many jurisdictions).

346. *See supra* note 298 and accompanying text (describing psychiatrists' consensus that fear and anger often overlap).

that provocation may often be triggered by an indistinguishable combination of fear and anger. If both anger and fear may destruct defendants' rational judgment, even if such destruction is differently manifested, there is no principled basis for the law's privileging one emotion over the other. Anger and fear ought to be similarly treated, with both providing grounds for mitigation of murder charges to manslaughter.

2. The cumulative impact of fear

The provocation defense was traditionally not available to defendants who were subjected to multiple provoking acts over an extended period of time.[347] Existing provocation doctrine still envisions a raging defendant who has undertaken a spontaneous act of aggression, triggered by a single and sudden provoking event. Only a minority of jurisdictions recognize the notion of cumulative provocation, namely the additive effect of previous multiple physical abuses as adequate provocation culminating in the killing.[348] A key impediment to incorporating a fear-based trigger into existing provocation defense lies with many jurisdictions' refusal to recognize the cumulative effect of a series of triggering incidents, increasingly building up over a long period of time.[349] Since many jurisdictions define provocation as requiring a sudden and serious incident, a series of past provoking incidents in the course of prolonged abuse would not satisfy this requirement.[350] This is especially apparent when defendants kill following the deceased's threat to kill in the future, but given previous threats of a similar nature, the specific threat preceding the killing is not deemed in itself sudden and sufficiently serious.[351]

Psychological research demonstrates that particularly in cases of domestic abuse, a killing may result from a "slow burn" reaction to fear

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347. *See* Belew, *supra* note 115, at 793–96, 800–01 (noting that the accumulated fear battered women experience is not considered a "sudden" loss of control as required by traditional provocation law, but that some English courts recognize cumulative provocation where there is evidence of battering and "slow burn" response).

348. Examples of jurisdictions that recognize cumulative provocation include Pennsylvania and California. *See, e.g.*, People v. Berry, 556 P.2d 777, 780–81 (Cal. 1976) (recognizing the cumulative effect of verbal taunting as adequate provocation); Commonwealth v. Stonehouse, 555 A.2d 772, 782 (Pa. 1989) (recognizing the cumulative effect of deceased's abusive behavior as sufficient provocation).

349. *See* Pillsbury, *supra* note 16, at 166 (noting that provocation doctrine insists on a cooling off period, preventing defendants who experience multiple provoking incidents from asserting the defense).

350. *See supra* Part II.A.1 (examining instances of killing after prolonged abuse).

351. *See supra* notes 158–61 and accompanying text (discussing cases where the deceased made continuous threats towards the defendant over time).

of an abuser, accumulating over a prolonged time period of abuse.[352] Case law further illustrates that domestically battered people who were subjected to physical abuse for a long time may kill their abusers in response to many past abusive incidents.[353] In these circumstances, the killing is the culmination of slow simmering of multiple incidents, which are often part of a repetitive pattern of abuse that gradually builds up over time. Provocation law's emphasis on the suddenness of the triggering incident proves inapt in cases where defendants did not react in response to one serious sudden incident but rather in response to the cumulative effect of a series of actual or threatened violence.

3. The lingering effect of fear

The cooling off requirement presents an additional obstacle for fearful killers trying to establish the elements of the provocation defense. Since provocation doctrine requires a sudden act, the presence of a cooling off period typically negates any mitigating effect which the provocation might have had.[354] Most courts require that a relatively short interval—often only a few minutes—occur between the provocation and the killing.[355]

While many jurisdictions have relaxed the cooling off requirement, leaving the issue to the jury, the impact of this element persists as juries might reject the defense in cases where they believe that there was sufficient time for the defendant's passions to cool off.[356] Despite many

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352. *See* Martin Wasik, *Cumulative Provocation and Domestic Killing*, 1982 CRIM. L. REV. 29, 30 (1982) (on file with American University Law Review); *see also* English Law Comm'n, *supra* note 247, at 51–51 (discussing defendants who killed their abusers after being subjected to prolonged and continuous physical abuse).

353. *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167, 183 (Cal. Ct. App. 1989) (upholding a trial court jury instruction that a series of provoking events over a period of time may be sufficient to create heat of passion); *see also* EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 11 (2d ed. 1996) (demonstrating the prevalence and extreme consequences of domestic violence).

354. *See, e.g.*, People v. Fiorentino, 91 N.E. 195, 196 (N.Y. 1910) (emphasizing a charge of first degree murder will not be mitigated if the defendant acted with premeditation and deliberation after having time to cool off).

355. *See, e.g.*, Caroline A. Forell & Donna M. Matthews, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 176 (2000) (noting that while court generally adhere to the cooling off requirement, many courts stretch the cooling off time when men kill their intimates).

356. *See* People v. Millbrook, 166 Cal. Rptr. 3d 217, 231 (Ct. App. 2014) (discussing whether the defendant had sufficient time to cool off); Nourse, *supra* note 62, at 1244 (commenting that even today, there is a line conceived in time that marks the difference between murder and provoked homicide).

jurisdictions' shifting from a stringent cooling off requirement towards evaluating the lapse of time factor under reasonableness standards, provocation's temporal requirement still presents a significant hurdle for fearful killers attempting to raise the provocation defense.[357] This enduring limitation fails to take into account the psychological research findings that fear may carry lingering effects.[358]

Commentators observe that even if the temporal requirement is modified, existing emphasis on the jury's evaluation of the reasonableness of the defendant's reaction to the provoking incident remains problematic, especially for killers who are women.[359] Additionally, the cooling off requirement has proven especially problematic for people who suffered domestic abuse, often women, who endured long term terror by their abusers.[360] These abused people may first exhibit symptoms of depression and desperation and react violently only after a lapse of time between the last battering incident and the killing.[361] The problem is especially apparent when these defendants kill their abusers in non-confrontational circumstances,

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357. This proves a significant obstacle in jurisdictions that incorporate the suddenness requirement into the statutory definition of voluntary manslaughter, such as Ohio where murder is reduced to voluntary manslaughter only if defendant proves that the homicide occurred while under the influence of sudden passion or in a sudden fit of rage. *See* OHIO REV. CODE ANN. § 2903.03 (West 2013). Ohio courts refuse to give voluntary manslaughter jury instructions based on fear-based provocation, holding that past abusive incidents or previous verbal threats do not satisfy the test for reasonably sufficient provocation since there was sufficient time for cooling off. *See, e.g.*, State v. Parnell, No. 11AP-257, 2011 WL 6647293, at *7 (Ohio Ct. App. Dec. 20, 2011) (finding that the trial court did not err in refusing to instruct the jury on provocation based on the defendant's fear); State v. Adcox, No. 98CA007049, 2000 WL 422400, at *3–4 (Ohio Ct. App. Apr. 19, 2000) (holding the trial court did not err in refusing to give instruction on aggravated assault where the defendant contended that he acted in self-defense based on his assertion that he was afraid because the deceased was wielding a knife).

358. *See supra* Part III.A.

359. *See* LEE, *supra* note 19, at 46–52 (discussing prevalent assumptions regarding the reasonableness of women defendants).

360. *See* Pillsbury, *supra* note 16, at 166.

361. *See, e.g.*, CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 61 (1987); Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579, 586–90 (1990) (proposing an expansion of the self-defense doctrine for battered women who kill their abusers after enduring extreme psychological abuse); Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 181–83 (2004) (explaining that battered women may feel that they can properly protect themselves only once the abuse has stopped, such as when the abuser is asleep).

such as when the abusers were sleeping since the defendants had ample time to cool off after the most recent battering incident.[362] The current view of the provocation defense, with its deeply embedded assumption that passage of time provides defendants with sufficient time to cool off and regain back control, is inconsistent with the actual experiences of these fearful killers.

The judicial reluctance to acknowledge the lingering effects of fear is incompatible with the psychological research.[363] This research buttresses abused defendants' claims that their continuous abuse placed them in a perpetual state of terror that never dissipated, and that their reactive aggression was a response to extreme fear of future violence by the abuser.[364] This research further rebuts the myth that time heals all wounds, supporting battered defendants' perceptions of long-lasting fear. In sum, the elements of existing provocation defense demonstrate that current law is not informed by the psychological research on how fear operates and its lingering impact.

IV. THE ELEMENTS OF FEAR-BASED PROVOCATION

Recognizing that fear distorts defendants' rational judgment not only provides a framework for fear-based provocation but it also calls for reconstructing the elements of provocation to take this fear into account by determining its effect on defendants' behavior.[365] The sections

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362. *See, e.g.*, State v. Peterson, 857 A.2d 1132, 1135 (Md. Ct. Spec. App. 2004) (detailing how the defendant shot her abusive partner while he was watching television); State v. Urena, 899 A.2d 1281, 1284 (R.I. 2006) (explaining that the defendant left her house to avoid escape her abusive boyfriend, but stabbed him later that night after he followed her to her friend's house).

363. *See supra* Part III.A.

364. *See* ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL: A NEW FRAMEWORK, 120–21 (2002) (noting that battered woman's heightened sensitivity to danger from their intimate abusers may cause an apprehension of future danger, even in non-confrontational situations); *see also* SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER, 142–44 (1998) (observing that traditional provocation doctrine presents significant obstacles in cases where abused women kill their abusers not in response to immediate violence but instead, after exceeding the time limit of the cooling off period).

365. By proposing that the elements of fear-based provocation take into account cumulative fear and the lingering effect of fear, I am nowhere suggesting that the elements of anger-based provocation should not recognize the effect of cumulative anger and the fact that in some circumstances, defendants' anger may linger for a long time, without cooling off. Since this Article focuses on fear as an additional qualifying trigger for provocation, elaborating on the notions of cumulative anger and on the fact that anger, just like fear, may linger over time, exceed the scope of this paper. For now,

below consider the potential implications that the psychological insights might have on the scope of the provocation doctrine by outlining the two key prongs of fear-based provocation.

A. The Subjective Prong: Fear Resulting in Impaired Judgment

The subjective component of fear-based provocation would first require defendants to prove that they acted in response to fear of violence threatened against them by the deceased.[366] Evidence would have to establish that the impact of this fear was so powerful that it overwhelmed the defendant's thought process, resulting in substantial distortion in rational judgment and reasoning mechanisms.[367] Such evidence offers the first step in meeting the subjective prong because it recognizes that fear impairs judgment, which is the underlying rationale for fear-based provocation.

In addition, defendants would have to prove that they responded to fear of *physical* harm as opposed to other types of fear, such as fear of infliction of emotional pain, economic harm, reputational harm, perception of honor violation, or fear related to custody battles.[368] The threat of physical harm serves as a limiting mechanism that excludes from the scope of the provocation defense threats of a non-physical nature. In contrast to self-defense, however, the harm threatened does not necessarily have to be deadly harm, as long as it is serious harm of a physical nature.

While evidence that defendants' fear obscured their judgment is necessary to prove fear-based provocation, it is not sufficient. Additionally, fear-based provocation's subjective prong should encompass an additional feature that limits the scope of the defense, namely that the aggression must be in

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however, suffice it to say that I believe that anger-based provocation should also be expanded to recognize cumulative anger, and that anger also may linger over time. For a comparative perspective on adding fear as an additional prong to trigger provocation under English law, see CORONERS AND JUSTICE ACT 2009, c. 25, Part 2, Ch. 1, § 55 (Eng.).

366. The defense might also recognize that the defendant acted not only in response to threat against them but also against another individual, most notably, a family member or a close friend. This possibility calls for considering who else, beyond family members, ought to be covered here. I leave this issue for another paper.

367. *Cf.* People v. Beltran, 301 P.3d 1120, 1130 (Cal. 2013) (elaborating on the elements of California's anger-based provocation, which focus on whether the defendant experienced such intense emotional provocation that it obscured any reason or judgment).

368. *But see* People v. Wright, 196 Cal. Rptr. 3d 115, 142–44 (Cal. Ct. App. 2015) (holding that the trial court erred in refusing to instruct the jury on voluntary manslaughter based on the defendant's claim that her non-abusive boyfriend would take custody of their child, but that the error was harmless because there was sufficient evidence that the killing was deliberated and premeditated).

response to a specified threatening behavior by the deceased.[369] Arguably, tethering the defendant's reaction to the deceased's alleged wrongdoing might be conceived as problematic in a modern era that categorically rejects victim blaming strategies in criminal trials. This concern becomes even more apparent when individuals were killed and cannot respond to the defendants' portrayal of the events.[370] Contemporary understandings of provocation have partially abandoned the previous focus on identifying deceased's wrongdoing, instead shifting most of the inquiry to the defendant's loss of control.[371] Incorporating the deceased's wrongdoing into the defense thus raises some concern that it implicates notions of the deceased's fault, implying that the killing was somehow justified.

Conceding that making deceased's wrongdoing a part of the defense raises some discomfort, I posit that not only is it already embedded, but that other important considerations outweigh this concern. The requirement that the defendant react in response to the deceased's physically threatening behavior is necessary because it adds a much-needed normative component to limit the operation of fear-based provocation. It is also one of the features that distinguishes fear-based provocation from the EED defense which does not require any deceased's wrongdoing and was rejected by most jurisdictions.[372]

A host of mental problems may similarly affect an individual's behavior, resulting in homicide.[373] Specifically, an individual may suffer from impaired judgment and distortion in rational thinking due to reasons unrelated to the deceased's behavior. Grounding fear-based provocation on a defendant's fear alone, without requiring that the fear stems from the deceased's threat of violence, would result in allowing jurors to

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369. The requirement that defendant's fear stems from the deceased's threatening violence also raises the question of misdirected retaliation, namely, situations where the defendant mistakenly killed an innocent third party rather than the person who placed him or her in fear. Elaborating on whether fear-based provocation should also cover cases of misdirected retaliation exceeds the scope of this paper.

370. *See generally* Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMPLE L. REV. 645, 646–49 (2003) (discussing how self-defense and other justification defenses serve as "formal victim blaming doctrines in criminal law").

371. In addition, this shift has resulted in the prevalent view that provocation is a partial excuse rather than partial justification. For an extensive scholarly discussion on the nature of the provocation defense as an excuse or a justification, see generally Berman & Farrell, *supra* note 28, at 1045–65.

372. *See supra* Part I.B (discussing EED, which does not require that the triggering incident stem from deceased's wrongdoing).

373. People v. Casassa, 404 N.E.2d 1310, 1317 (N.Y. 1980) (holding that defendant's mental disability was peculiar to him and unworthy of mitigation).

recognize the defendant's unique personal idiosyncrasies, such as possessing an especially fearful personality, as basis for mitigation. In some cases, these idiosyncrasies may amount to personality disorders that are characterized by anxious and fearful thinking or behavior.[374] Reducing the charges based on fear-based provocation in these circumstances is unwarranted because the underlying rationale for mitigation in such cases would have been defendants' specific mental disorders rather than genuine fear of the deceased's infliction of violence. The addition of a fear prong as a basis for mitigation is not predicated on incorporating defendants' mental abnormalities into the provocation defense. Fear-based provocation excludes such cases from the scope of the defense, acknowledging that they might be separately addressed as part of a different defense, which is predicated on mental disorders.[375]

Rather than grounding a defense in defendants' emotional and mental disorders, the basis for fear-based provocation rests on a temporary distortion of rational judgment stemming from actual physical threats. Recognizing that a defendant acted in direct response to fear of the deceased's threat of violence draws a normative line between cases where the defendant might be partially excused because fear provoked the killing and those in which other reasons, unrelated to the deceased's threatening behavior, distorted rational judgment.

Finally, as psychological research suggests, fear and anger are not completely separate emotions and might operate jointly in impairing defendants' judgments.[376] In some cases, the same deceased's conduct that causes defendant's anger might also cause defendant's fear. Recognizing fear-based provocation should correspond to the psychological understanding that fear and anger are not mutually exclusive emotions and that sometimes both emotions may overlap. The fact that defendants acted out of fear for their physical safety does not necessarily mean that they were not also angry. The reconstructed

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374. Psychiatry classifies personality disorders into three categories with Cluster C personality disorders further divided into three subcategories: avoidant personality disorder, dependent personality disorder and obsessive-compulsive personality disorder. *See Personality Disorders*, MAYO CLINIC (Jun. 12, 2018, 8:26 PM) http://www.mayoclinic.org/diseases-conditions/personality-disorders/symptoms-causes/dxc-20247656.

375. I leave open here the question of under what circumstances mitigating charges for defendants with mental disorders is normatively warranted. Further elaborating on this issue exceeds the scope of this Article.

376. *See supra* notes 304–306 and accompanying text.

provocation defense ought to provide that the defendant acted in response to either anger, fear, or their combination.

B. The Objective Prong: A Person of Average Disposition Standard

Fear-based provocation's subjective prong rests on a descriptive psychological understanding of fear's negative effect on defendants' judgments. Yet, a subjective component in itself does not provide decision makers with any guidance as to which types of impaired judgments warrant mitigating murder to voluntary manslaughter. From a normative perspective, adding an objective prong to the elements of fear-based provocation is necessary to constrain the operation of the subjective prong.

The objective prong would compare a defendant's aggressive reaction to that of an ordinary person, meaning a person of average disposition, in the same situation. The ordinary person is different from a reasonable person because an act of killing is never considered reasonable absent self-defense.[377] This ordinary person possesses ordinary temperament, tolerance, and self-restraint, and is similarly situated with respect to defendant's sex, age, and circumstances.[378] By measuring a defendant's response against that of a person of average disposition, the objective prong encompasses a necessary normative component which guides juries in considering whether the defendant's fear and reaction, given the specific circumstances, warrant mitigation. This view further aligns with other defenses that criminal law recognizes, such as duress, which also include similarly normative determinations.[379]

Measuring a defendant's response to that of an ordinary person with average disposition calls for considering whether this standard should rest on evaluating the defendant's fear, or rather his or her act of

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377. *See* DRESSLER, *supra* note 8, at 532, 534 (providing several examples of how jury instructions have articulated the reasonable or ordinary person standard).

378. *See* People v. Beltran, 301 P.3d 1120, 1125 (Cal. 2013) (discussing the person of an average disposition standard); *cf.* CORONERS AND JUSTICE ACT 2009, c. 25, Part 2, Ch. 1, § 54-55 (Eng.) (providing a defense of loss of control, which abolishes traditional provocation defense and adds a fear-based prong as a "qualifying trigger" for the defense if the defendant can prove that the killing was the result of loss of self-control attributable to the defendant's fear of violence from the deceased, and requiring that a person of defendant's age and sex, with a normal degree of tolerance and self-restraint, and in the circumstances of defendant might have reacted in the same or in a similar way to defendant).

379. *See* Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 552 (2012) (discussing the normative aspect of the provocation defense).

killing.[380] Addressing this point, the California Supreme Court in *People v. Beltran*[381] reaffirmed the former approach, holding that "emotion reasonableness" remains the correct standard for evaluating whether provocation was adequate.[382] In this case, the defendant, a jealous and controlling man who had physically abused the deceased throughout their two-year intimate relationship, stabbed the deceased to death with a kitchen knife after she left him and started dating another man.[383] The defendant was charged with murder and the trial court instructed the jury on both murder and voluntary manslaughter based on provocation.[384] The court rejected the state's position that the standard is whether an average person of ordinary disposition would necessarily kill, as the defendant had.[385] Instead, it accepted the defense's position that the provocation involved must cause a person of average disposition, in the same situation and knowing the same facts, to act rashly under the influence of such intense emotion that judgment or reasoning process was obscured.[386]

The decision is likely to raise further feminist scholarly attacks on the provocation defense given the disturbing circumstances underlying the defendant's abhorrent behavior.[387] However, despite the defense-friendly jury instruction on voluntary manslaughter, in *Beltran*, the jury did not accept the defense's theory that the defendant was provoked and convicted him of second degree murder.[388] Setting aside the specific facts of *Beltran*, this Article argues that the legal standard that was adopted is warranted and ought to be incorporated into fear-based provocation's objective prong. A fearful killer's response ought to be measured against that of an ordinary person of average

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380. *See supra* Part I.A. (elaborating on Lee's distinction between "act reasonableness," which focuses on whether a reasonable person in the defendant's situation would have similarly responded by killing another person, and "emotion reasonableness," inquiring into whether the defendant's emotional outrage or passion was reasonable).

381. 301 P.3d 1120 (Cal. 2013).

382. *Id.* at 1136.

383. *Id.* at 1123–24.

384. *Id.* at 1124.

385. *Id.* at 1130–31.

386. *Id.* at 1135–36 (affirming the lower court's jury instruction).

387. *See* Gruber, *supra* note 64, at 276; *see also supra* notes 64–84 and accompanying text (discussing feminist theories).

388. People v. Beltran, No. A124392, 2013 WL 6498987, at *18 (Cal. Ct. App. Dec. 11, 2013) (showing that, on remand, the court affirmed the defendant's conviction of second degree murder).

disposition who experienced similar impairment in rational thought process, which might have led him or her to act out of disturbed judgment. A court using this framework would take into consideration objective factors like a defendant's age and gender as well as other relevant surrounding circumstances.

Rejecting a standard that requires that an ordinary person, in the defendant's situation, would necessarily kill is consistent with the key rationale for recognizing fear-based provocation, namely, the understanding that intense fear may result in significant impairment in rational thinking. Moreover, adopting a standard that requires that any ordinary person of similar disposition would necessarily react to the threat by killing, conflates the elements of self-defense and provocation. Self-defense law focuses on the reasonableness of the defendant's beliefs or reasons for the killing by requiring a determination that a reasonable person would also believe that the use of deadly force was necessary under similar circumstances and would necessarily kill the attacker. In contrast, provocation focuses on the effect of intense emotions on the defendant's judgment rather than on the reasonableness of the belief that the killing was necessary. Therefore, the standard to assess the adequacy of provocation ought to focus on the ordinary person experiencing intense emotion that similarly distorts judgment.

C. Potential Criticism of Fear-Based Provocation

The proposal to recognize fear-based provocation is likely to raise a number of objections. On one end of the spectrum, conservative scholars and proponents of "tough on crime" laws and policies are likely to reject any attempt to expand the scope of the provocation defense, arguing that the law should deter dangerous emotional outbursts leading to violent behavior.[389] A different version of such objection might suggest that the law should adhere to a position that views all legally sane defendants as autonomous individuals, who are capable of exercising free will choices.[390] The law's commitment to nonviolence as an essential societal norm should therefore preclude

389. *See generally* Dressler, *supra* note 15, at 960 (noting that "one might expect law-and-order advocates to criticize a doctrine that can permit an intentional killer to avoid conviction for murder").

390. *See* DRESSLER, *supra* note 8, at 540 (observing that some critics attack the defense on voluntariness grounds, claiming that provoked killers find it hard to control themselves, rather than actually lacking the ability to do so).

defendants from relying on arguments that demonstrate a choice to devalue the sanctity of human life.[391] Critics would also likely suggest that the proper phase for considering mitigating circumstances, such as fearful killers' prolonged physical abuse, is the sentencing phase, rather than during the initial determination of guilt.[392]

On the other end of the spectrum, liberal scholars, concerned with the over-punitive criminal justice system, might argue that expanding the basis for voluntary manslaughter convictions would result in disadvantaging defendants who could have benefited from a more flexible self-defense statute.[393] These critics might further contend that one implication of recognizing fear-based provocation is embracing a "tough on crime" agenda rather than providing an additional basis for acquittal of any homicide offense.

Another potential critique stems from concerns that recognizing fear-based provocation might embolden defense attorneys' endeavors to rely on questionable psychiatric testimony to establish various forms of "syndromes."[394] Notoriously dubbed "the abuse excuse," defense attorneys previously attempted to expand the scope of self-defense doctrine by including additional circumstances that existing laws do not recognize.[395] For example, defense attorneys have tried to introduce evidence about defendants' fear of threatening gang members in high-crime neighborhoods under a theory of "urban survival syndrome."[396]

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391. *See generally* PILLSBURY, *supra* note 364, at 145 (noting that a provoked killing is considered a crime of violence, which carries serious legal consequences).

392. *See generally* Peter Arenella, *Demystifying the Abuse Excuse: Is There One?*, 19 HARV. J.L. & PUB. POL'Y 703, 704 (1996).

393. *See* Forell, *supra* note 113, at 29 (arguing that battered women who kill their abusers should be given more opportunities to rely on self-defense by proving that the homicide was justified, rather than merely rely on the provocation defense, which only provides an imperfect form of justice).

394. *See generally* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996).

395. The term "the abuse excuse" was coined by Alan Dershowitz. *See generally* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 3 (1994) (defining "abuse excuse" as "the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation"); *see also* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 140 (1995) (asserting that the "abuse excuse" is used by defendants to gain sympathy from the decision makers).

396. Osby v. State, 939 S.W.2d 787, 792 (Tex. Ct. App. 1997); *see also* Falk, *supra* note 189, at 740–41 (examining cases using the "urban survival syndrome" defense); BONNIE ET AL., CRIMINAL LAW 492 (4th ed. 2015) (discussing attempts to establish an "urban survival syndrome" defense).

Courts have consistently rejected these claims, and scholars have characterized them as relying on "junk science."[397]

Conceding that some of these objections have merit and raise valid concerns, I argue that considering the tradeoffs between the costs of expanding provocation law and its overall benefits leads to the conclusion that the benefits outweigh the costs. Expanding the scope of provocation law to recognize a fear prong would provide defendants with a potential basis for mitigation in a host of threatening circumstances, whereas under current laws, these defendants would likely be convicted of murder because they did not act in self-defense. Commentators criticize the criminal justice system's over-punitive incarceration laws and policies, including the statutorily mandated imposition of minimum terms of imprisonment for murder convictions.[398] One notable aspect of this critique concerns the disparate effects of mass incarceration and mandatory minimum sentences on racial minorities.[399] While fully addressing this critique exceeds the scope of this Article, the underlying goal behind the call to recognize fear-based provocation is to alleviate existing problems of draconian sentencing structures, which mandate minimum sentences for murder convictions, particularly their disparate effects on racial minorities. Expanding provocation law by recognizing classes of fearful killers who might be able to persuade courts to give voluntary manslaughter jury instructions offers one step in this direction.

Furthermore, the proposal includes a built-in mechanism to address potential concerns that fear-based provocation might appeal to adherents of a "law and order" agenda by contracting the scope of self-defense doctrine. It does this by clarifying that a court should only give a voluntary manslaughter instruction as a supplemental alternative once the main line of defense, likely self-defense, is rejected. Put another way, defendants ought to rely on fear-based provocation as

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397. *See* Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk*, 40 WM. & MARY L. REV. 1, 7 (1998) (comparing expert testimony regarding battered woman's syndrome, which is recognized by members of the medical community, to testimony regarding urban survival syndrome, which is not medically recognized).

398. *See, e.g.*, Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 428 (2013) (noting that the incarceration rate in the United States is nearly seven times the rate in Western Europe); Forell, *supra* note 113, at 6–7 (noting that mandatory sentencing prevents restricting or eliminating provocation).

399. *See generally* Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1029 (2010) (observing that African Americans and Latinos have higher rates of incarceration than whites).

expansionary and additive to self-defense and imperfect self-defense claims. The proposal rejects any understandings that view fear-based provocation as either substitutionary to the supremacy of self-defense or as constraining self-defense's scope.

Regarding objections that reject recognition of additional forms of "abuse excuses" for defendants claiming prolonged physical abuse, fear-based provocation does not draw on any "syndromes," whose purpose is to pathologize defendants in the eyes of the jury by suggesting that defendants' mental disorders contributed to the killing.[400] Recognizing fear-based provocation rests on taking into account the pervasive impact of fear on defendants' judgments in a way that is divorced from the realm of mental disorders.

D. A Test Case: Applying Fear-Based Provocation

The elements of fear-based provocation necessitate consideration of a case where under current law, the defendant was convicted of murder but the proposed defense could have resulted in a jury instruction on voluntary manslaughter.

The facts of *State v. Levett*[401] illustrate the potential change that adopting fear-based provocation could make by providing defendants who killed out of fear with a doctrinal basis for mitigating murder to manslaughter in circumstances falling short of self-defense.[402] In *Levett*, the deceased supplied the seventeen-year-old defendant with drugs so that the defendant could sell them and later give money from the sale to the deceased.[403] On the day of the incident, the defendant, his friend, and his brother encountered the deceased, who demanded that the defendant pay him.[404] A physical confrontation ensued in which the deceased was the initial aggressor, and hit the defendant and his brother.[405] A witness testified that after the deceased noticed that the defendant had a gun, he tried to take refuge in her car, but the defendant shot the

400. See Anne C. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 4–5 (1994) (observing the problematic implications of attempts to rely on evidence of "battered woman's syndrome" to acquit female defendants on the theory of self-defense, and that the downside of introducing evidence of women's abnormality is portraying them as mentally deviant and inferior).

401. No. C-040537, 2006 WL 1191851 (Ohio Ct. App. May 5, 2006).

402. *Id.* at *3.

403. *Id.* at *1.

404. *Id.*

405. *Id.*

deceased through the window.[406] The defendant was indicted for murder and claimed that he acted in self-defense.[407] He testified that he believed that the deceased was going to get a gun, and that he killed him out of fear for his life.[408]

The trial court instructed the jury only on self-defense, explaining that "the defendant must prove that he was not at fault in creating the situation giving rise to the assault," that he had an honest and reasonable grounds to believe that he was in imminent danger, "that his only means of retreat from such danger was by the use of deadly force, and he had not violated any duty to retreat to avoid danger."[409] The jury rejected the defendant's self-defense claim and convicted him of murder.[410]

On appeal, the defendant argued that the trial court erred by refusing to instruct the jury on voluntary manslaughter based on the theory that he was provoked to kill out of fear that the deceased was about to retrieve a gun.[411] The court rejected this claim, holding that the evidence did not support a jury instruction on voluntary manslaughter because, under Ohio law, such instruction is given only if there is evidence that the defendant acted out of sudden passion or a fit of rage.[412] The court further held that the evidence supporting the claim of self-defense—that the defendant feared for his and his brother's safety—did not constitute sudden passion or a fit of rage as contemplated by the voluntary manslaughter statute.[413] While self-defense requires a showing of fear, the court continued, "voluntary manslaughter requires a showing of rage, with emotions of 'anger, hatred, jealousy, and/or furious resentment.'"[414] To receive a jury instruction on voluntary manslaughter, the defendant should have introduced evidence that he was provoked to kill in a state of sudden passion or fit of rage, which he failed to do.[415] Since the defendant claimed that he feared that the deceased was about to shoot him, the

406. *Id.*
407. *Id.* at *2.
408. *See id.* (explaining that the defendant testified that "[I] [t]hought he was going to take my life, that's what I was thinking: either me or him" (alteration in original)).
409. *Id.* at *3.
410. *Id.* at *1.
411. *Id.* at *4.
412. *See id.* (finding that "[f]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage" (alteration in original) (quoting State v. Mack, 694 N.E.2d 1328, 1331 (Ohio 1998)).
413. *Id.* at *4–5.
414. *Id.* at *4 (quoting State v. Perdue, 792 N.E.2d 747, 750 (Ohio Ct. App. 2003)).
415. *Id.* at *4–5.

court concluded that this evidence did not suffice to establish provocation.[416] Levett's murder conviction was therefore affirmed, and he was sentenced to eighteen years to life in prison.[417]

Levett poignantly exemplifies the way courts often view self-defense and provocation as mutually exclusive rather than supplemental doctrines. As one Ohio court stated: "[A]n instruction on voluntary manslaughter and self-defense is erroneous because the two legal theories are incompatible . . . . Voluntary manslaughter requires that the defendant be under the influence of sudden passion or a fit of rage, while self-defense requires the defendant to be in fear of his own person safety."[418]

As a thought experiment, let us hypothesize what might have happened had the proposed fear-based provocation provision applied and a jury instruction on voluntary manslaughter had been given in *Levett*. First, the defendant could have requested that the court instruct the jury on both self-defense and fear-based provocation as supplemental defenses. The defendant's first line of defense would remain self-defense, as accepting it would lead to acquittal of any homicide offense. However, if the jury rejected the self-defense claim, it would still be able to consider reducing the murder to voluntary manslaughter, based on the theory that defendant feared that the deceased was going to shoot him, and that this fear impaired his rational judgment.

In *Levett*, the evidence clearly established that the defendant's shooting fell short of self-defense since the deceased presented no imminent threat of shooting the defendant when he ran away, trying to shield himself inside the female witness's car.[419] The circumstances surrounding the incident, however, including witnesses' testimonies, indicate that the deceased not only initiated the aggression towards defendant and his brother but also stated that he was going to retrieve his gun.[420] Given this evidence, it is likely that Levett genuinely feared that the deceased was about to shoot him, and that this intense fear, stemming from the deceased's threatening behavior, overwhelmed him and distorted his judgment. It is likely, therefore that Levett could have established the subjective component of fear-based provocation.

The main hurdle that Levett would have faced had fear-based provocation been adopted would be proving the objective prong of the

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416. *Id.* at *5.
417. *Id.* at *1.
418. State v. Jefferson, 971 N.E.2d 469, 473 (Ohio Ct. App. 2012).
419. *Levett*, 2006 WL 1191851, at *1.
420. *Id.*

defense, namely, that a defendant with an ordinary temperament, tolerance and self-restraint, might have experienced similar fear that significantly impaired his judgment, causing him to act rashly without deliberation. Establishing this element hinges on introducing sufficient evidence that an ordinary seventeen-year-old youth, standing in the defendant's shoes and facing similar surrounding circumstances, would have similarly experienced significant impairment in judgment due to fear for his life that would have led him to respond aggressively—even if not necessarily to kill.

Importantly, instructing the jury on voluntary manslaughter will not necessarily result in the jury's acceptance of the defense's fear-based provocation theory. Establishing the elements of this defense is contingent on factual determinations that would be left for the jury to decide. It is plausible that even if the jury in *Levett* had been instructed on voluntary manslaughter, they would have rejected the option of mitigating murder to manslaughter, and conclude that the killing was unprovoked by either anger or fear. Granted, the jury could have reasonably concluded, based on the evidence, that Levett was motivated by desire for revenge, and therefore should not enjoy any mitigation. However, a rational jury could have also reasonably concluded that Levett killed out of deep fear for his life, therefore warranting partially excusing his act by reducing the offense to voluntary manslaughter. Providing the jury with additional basis for mitigation would not have necessarily resulted in automatically reducing Levett's murder charges. Instead, fear-based provocation would have merely expanded the options that the jury might have considered, leaving them to decide whether mitigation was warranted.

CONCLUSION

Recently, there has been an emergence of a growing body of psychological research on the effects of emotions on individuals' thought processes, judgment, and reasoning.[421] The law is increasingly following through, as it evolves to recognize the pervasive effect that intense emotions, including anger and fear, have on shaping criminal behavior.[422] This Article is yet another piece in this puzzle, as it calls

421. *See supra* Part III (discussing the psychological research on fear).

422. For scholarship on the relationship between law and the emotions, see generally Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an*

on legislatures and courts to consider the insights that might be gained from psychological research on the way fear operates.

This Article has largely focused on the effects of fear on defendants who killed those who placed them at risk of violence. Yet, another area in which individuals' emotions impact their decision making, albeit in a more implicit and nuanced way, concerns juries' choices about whether a defendant is entitled to certain defenses such as self-defense and provocation. Considering provocation's stakeholders suggests that some defendants who raise the defense are likely to be perceived by juries as sympathetic, thus warranting compassion and mercy, while others are likely to be viewed as unsympathetic and morally blameworthy killers, thus leading juries to reject their claim for mitigation.

This Article invites questioning into whether decision makers' sympathy ought to shape the scope of the provocation doctrine. People who suffer from intimate partner battering and battered children are mostly sympathetic defendants. They are often women who fit stereotypical perceptions about femininity, including weakness, helplessness, and passivity. Given the sordid nature of some of these domestic abuse cases, abused defendants are often perceived as deserving compassion and mercy. Yet, in closer cases, involving less agreeable defendants who raise diffuse claims of fear and prior abuse, prosecutorial discretion might sway towards a more heavy-handed punitive approach. After all, drug dealers, violent gang members, or drunken participants in bar brawls, all armed with guns, and not shying away from aggression, are hardly the type of defendants that prosecutors or juries are likely to sympathize with and afford leniency.[423] Arguably, many readers would balk at the idea of further enlargement of a defense that is already perceived as inherently problematic. Critics might wonder why mitigating the charges against violent, dangerous and mostly male killers, is normatively warranted.

But should emotions like sympathy and compassion shape the scope of criminal responsibility? This Article concludes that from a normative perspective, decision makers' sympathy and compassion towards certain defendants should *not* matter for the purpose of determining whether defendants who killed out of fear of violence ought to receive a jury instruction on voluntary manslaughter. Mitigating charges to a lesser

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Emerging Field, 30 LAW & HUM. BEHAV. 119 (2006); THE PASSIONS OF LAW (Susan Bandes ed., 1999).

423. *See* Gruber, *supra* note 85, at 185–87 (discussing non-intimate defendants' claims for provocation).

offense is warranted not because a defendant appears worthy of mercy but because the law ought to recognize that fear undermines rational judgment. The fact that defendants' abilities to rationally assess threats is significantly impaired when facing deep fear pertains directly to the scope of criminal liability and moral blameworthiness rather than to the sentencing phase. Recognizing fear-based provocation provides a mechanism for diminishing the effect of juries' emotions on their decision on whether a defendant should prevail on the provocation defense. It therefore provides a principled and coherent basis for mitigating murder to manslaughter that is consistent with a sliding scale approach towards defendants' moral culpability.