ARTICLES

LOSS OF SELF-CONTROL, DUAL-PROCESS THEORIES, AND PROVOCATION

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Contemporary understanding of the provocation defense views the "loss of self-control" theory as the cornerstone of this partial excuse. In considering whether to reduce murder charges to manslaughter, juries and judges rely on this theory to determine if the defendant lost self-control after experiencing intense emotional arousal and if a reasonable person would have also likely lost self-control in similar circumstances.

This Article questions this conventional wisdom by examining the various flaws embedded in provocation's loss of self-control theory. It argues that the theory is both over- and underinclusive. It is overinclusive because it provides a basis for mitigation in cases where leniency is normatively unwarranted given policy considerations. It is also underinclusive because it only accommodates the typical reactions of angry defendants who manifest sudden impulsivity. It fails to help defendants who visibly appear calm and composed because their emotional arousal was triggered by a host of other emotions beyond anger—mostly fear, desperation, and hopelessness.

This Article turns to psychological research on dual-process models to craft an alternative theory underlying the provocation defense. Drawing on these models' two modes of thinking, it contends that provoked killers' reactions may be understood as the result of emotions that shape actors' judgment and decision-making processes. The Article uses the term "impaired judgment" to refer to these situations. Acknowledging both the promises and the pitfalls of this alternate theory, the Article advances two arguments. First, it posits that the concept of impaired judgment is better suited than loss of self-control to support provocation's doctrinal framework. Second, it points to intrinsic limitations embedded in reliance on the loss of

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self-control theory, which is unable to account for provocation's normative dimension. The theory must therefore be supplemented with a value-based component that would assist juries in determining the circumstances that make provocation adequate from a normative and evaluative perspective.

INTRODUCTION

On the night of July 31, 2012, thirty-one-year-old Rebekah Mellon was sitting on a couch in the living room of her Phoenix home, smoking a cigarette and calmly watching her husband Donald Mellon taking his final breaths.[1] Surveillance cameras installed in the house showed that, for twenty-three minutes, Rebekah witnessed Donald dying as he lay on the floor after she had shot him in the head.[2] The footage showed that at the time of the shooting, Donald was talking on the phone as Rebekah obtained a handgun from a cabinet, aimed it at him, and, after a short verbal argument,

1. Richard Ruelas, *What Made This Woman Shoot Her Husband Dead?*, ARIZ. REPUBLIC (Jan. 3, 2017, 8:17 AM), https://www.azcentral.com/story/news/local/phoenix-best-reads/2017/01/03/phoenix-woman-rebekah-mellon-shoot-her-husband-dead/92732054/ [https://perma.cc/URZ3-3NUD].

2. *Id.* The defendant, Rebekah, stated that the deceased installed security cameras in the home because he wanted to watch her whereabouts at all times. Prosecutors disputed this account, saying that the deceased installed the cameras after their former house was burglarized. *Id.*

shot him.[3] It further showed that Donald was unarmed and that no physical altercation between him and Rebekah preceded the shooting.[4]

The same surveillance cameras captured not only the shooting itself and the subsequent chilling episode but also some of the events that transpired before the day of the fatal incident, including Donald's multiple physical abuses of Rebekah.[5] Rebekah claimed that during the course of seven years of marriage, she was a victim of domestic violence.[6] She said Donald would get drunk, throw her on the ground, and choke her and that the abuse had further escalated over the years.[7] Rebekah also said Donald constantly exhibited controlling behavior, and when she tried to leave him, he "shot her iPod, broke her phone, and locked her inside the home."[8] Some incidents of physical abuse were also documented in police reports.[9] Rebekah was initially charged with first-degree murder.[10] Pursuant to a plea agreement, she pleaded guilty to second-degree murder.[11] The judge accepted the plea and sentenced her to twenty years in prison.[12]

Now consider how the case would have played out had it gone to trial. The defense's theory would have likely been that the defendant had shot the deceased because she had feared that he would have killed her. Based on the deceased's prolonged physical abuse of the defendant, the defense would have likely requested that the jury be instructed on self-defense. The jury, however, would have likely rejected this claim because surveillance footage shows that, at the time of the shooting, the deceased presented no danger to the defendant and therefore her use of deadly force against the deceased was not immediately necessary.[13]

The defense attorney would have also likely requested the court to instruct the jury on manslaughter on the theory that the deceased's behavior provoked

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3. *See id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. For example, in 2011, police arrived at their residence after someone had pushed the panic button. *Id.* Mouthing the words "help me" to the police officer who interviewed her, Rebekah told him that the deceased threatened, intimidated, and physically abused her on a daily basis. *Id.* But when police informed the defendant that they had arrested the deceased on assault charges, she became upset and said, "He is gonna kill me." *Id.*
10. *See* Richard Ruelas, *Sentencing Set for Woman Who Shot Husband, Smoked While He Died*, ARIZ. REPUBLIC (Jan. 11, 2017, 12:11 PM), https://www.azcentral.com/story/news/local/phoenix-breaking/2017/01/11/rebekah-mellon-phoenix-woman-who-shot-her-husband-and-smoked-while-he-died-pleads-guilty/96450378/ [https://perma.cc/4ETY-RTWY].
11. *Id.* In a memorandum filed with the court, Mellon's defense attorney said that, if the case had gone to trial, she would have argued self-defense as she feared for her life because of the prolonged physical abuse by the deceased. *Id.*
12. Press Release, Maricopa Cty. Att'y's Office, Rebekah Mellon Pled to 2nd Degree Murder for Shooting Her Husband in 2012 (Jan. 11, 2017), https://www.maricopacounty attorney.org/CivicAlerts.aspx?AID=426 [https://perma.cc/P9LG-4QHM].
13. ARIZ. REV. STAT. ANN. § 13-404 (2020) ("A person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary . . . .").

the defendant. A provocation defense, however, would not have fared better given the circumstances underlying the shooting. In Arizona, a second-degree murder may be mitigated to manslaughter if the defendant committed the killing "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim."[14] But the statute further defines "adequate provocation" as "conduct or circumstances sufficient to deprive a reasonable person of self-control."[15] Consequently, Arizona courts require defendants to introduce evidence that the deceased's provoking behavior caused them to lose self-control.[16] The court would have likely refused to instruct the jury on manslaughter, reasoning that the footage documenting the defendant's actions demonstrated that she acted with complete self-control. Far from appearing distraught, emotionally overwrought, or hysterical, the defendant's behavior was seemingly the epitome of a woman who maintained self-control.[17] The court would have likely placed a premium on the fact that, at the time of the killing, the defendant appeared neither visibly angry nor fearful and that she had maintained her composure before, during, and after the shooting. The court would have likely stressed that the footage supported the inference that the homicide was motivated by the defendant's desire for revenge against the deceased, namely, a calculated retaliatory act following prolonged physical abuse.

Given the insurmountable difficulties in establishing a mitigating defense, the defendant's decision to plead guilty to second-degree murder, rather than risk a trial in which the jury would have been exposed to the graphic images of the shooting and its aftermath, arguably seemed like a sound defense strategy. While jurors might offer leniency to defendants whom they perceive as abuse victims who suddenly lost self-control, Rebekah Mellon seems a far cry from this case and therefore, an unlikely candidate for compassion.

Arizona is not alone in its insistence that provocation must result in the defendant's loss of self-control. Contemporary understanding of the provocation defense is mostly grounded on the theory that defendants kill

14. *Id.* § 13-1103(A)(2).

15. *Id.* § 13-1101(4).

16. *See, e.g.*, State v. Roberson, No. 2 CA–CR 2011–0224, 2012 WL 3061644, at *2–3 (Ariz. Ct. App. July 27, 2012) (rejecting the defendant's claims that he had been provoked by the deceased and holding that his defense was inconsistent with the finding that he had been provoked by the deceased such that a reasonable person in his situation would have been deprived of self-control); State v. Hernandez, No. 2 CA–CR 2009–0232, 2010 WL 3341283, at *2 (Ariz. Ct. App. Aug. 25, 2010) (The defendant had not introduced any evidence demonstrating that the deceased's actions provoked him, causing him to lose his self-control and shoot the deceased. Instead, the record showed that he acted rationally and with purpose. The court stressed that the defendant's own testimony indicated that he claimed that he was scared of the deceased, tried to get away from him, shot out of fear to defend himself, which is incompatible with a provocation claim.).

17. Courts take into consideration not only the defendant's behavior at the time of the killing but also behavior following the killing itself. *See, e.g.*, State v. Bernhardt, 372 P.3d 1161, 1174 (Kan. 2016) (citing evidence that even if, at the time of the killing, the defendant's behavior was impulsive, the defendant's behavior after the killing appeared cold and callous rather than impulsive).

after suddenly losing self-control, immediately after being provoked by the deceased.[18] Common law has long recognized that murder charges may be mitigated to voluntary manslaughter if there is evidence that the defendant acted in a sudden heat of passion, stemming from adequate provocation, without an opportunity to cool off.[19] Admittedly, traditional provocation doctrine did not make the defendant's loss of self-control an element of the defense.[20] Conceptualization of the defense, however, has significantly evolved over the years, shifting the emphasis from provocation's adequacy towards the defendant's loss of self-control.[21] Even jurisdictions that did not adopt a reformulated version of provocation, such as the defense of extreme mental and emotional disturbance (EMED), incorporated the notion of loss of self-control into one of the defense's requirements, largely by stating, legislatively or judicially, that provocation is adequate when a reasonable person would have similarly lost self-control.[22]

Today, loss of self-control is commonly perceived as the cornerstone of the modern provocation defense.[23] This concept not only captures provocation's key requirement and its underlying rationale but is also consistent with provoked killers' own narratives and with the behavioral manifestations that judges and juries expect to find in such defendants. Likewise, the image of an "out of control" perpetrator dominates both the criminal law and the public's imagination. To name just a couple examples demonstrating the ways that this vision is reinforced in popular culture, consider the popularity of true crime documentary-style series like *Snapped* and *Deadly Women*, which largely focus on female killers who killed intimate partners after allegedly losing self-control.[24]

This Article casts doubt on the criminal justice system's characterization of provocation as grounded in the loss of self-control theory by examining the various flaws in this account. Case law illustrates that the theory is not only vague and unhelpful but also confusing and misleading.[25] The concept of loss of self-control is overly broad because most crimes may fairly be characterized as resulting from control failures and most criminal defendants may plausibly be viewed as "out of control."[26] The concept is thus merely descriptive, lacking any normative component that is capable of drawing the boundary between defendants deserving of murder convictions and less culpable defendants who should be convicted of lesser crimes.[27] The concept

18. *See infra* Part I.
19. *See infra* Part I.
20. *See infra* Part I.
21. *See infra* Part I.
22. *See infra* Part I.
23. *See* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1340 (1997).
24. *See generally Deadly Women* (Discovery Channel television broadcast 2005); *Snapped* (Oxygen television broadcast 2004).
25. *See infra* Parts II.A–B.
26. *See* Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 505 (2012).
27. *Id.* at 519.

is also indiscriminate because it is unable to provide decision makers with any operational guidelines on which types of control failures warrant mitigation.

Given these shortcomings, courts' reliance on the loss of self-control theory as the basis of provocation has resulted in a defense that is both over- and underinclusive. Feminist scholars denounce the defense on the grounds that it is overinclusive to the detriment of female victims because it gives jury instructions on manslaughter for men who kill their female intimate partners attempting to terminate the relationship.[28] Emphasizing defendants' loss of self-control thus results in bringing provocation claims before juries in circumstances where mitigation is normatively unjustified.[29] But commentators' hostility towards provocation claims that are grounded in loss of self-control, especially in their perception that it harms women, impedes any doctrinal developments, including the advancement of an alternative construct that would also benefit female defendants.[30]

One of the upshots of the pervasive critique that the provocation doctrine is overinclusive is that commentators fail to recognize that the defense may also prove underinclusive in cases where overwhelming emotions other than anger, mostly fear and desperation, triggered the provocation.[31] Specifically, defendants who overreacted to the deceaseds' physical threats often do not receive jury instructions on manslaughter because their reactions do not visibly appear to result from a sudden loss of self-control.[32] In fact, fearful killers may seem to possess self-control, erroneously making the homicide look like a cold, premeditated, and deliberate act of calculated revenge rather than an impulsive loss of self-control.[33] The loss of self-control requirement thus accommodates mostly defendants who manifest behavior characterized as acting "out of control," but it is not responsive to many provoked killers, including women, who instead appear calm, composed, and in control. While mitigation might have been normatively warranted, the latter defendants are denied jury instructions on manslaughter.[34] In short, provocation's loss of self-control theory, initially lauded as a promising overhaul of an archaic defense, has collapsed, leaving the defense on shaky doctrinal grounds.

This Article proposes a remedy to the drawbacks stemming from provocation laws' reliance on loss of self-control theory by considering the alternative theory of impaired judgment to support the conceptual foundation of the defense. Professor Stephen Morse has long rejected the notion of loss of self-control, suggesting instead that the criminal law should adopt a generic excuse of partial responsibility that would be grounded in the concept

28. *See infra* Part II.A.
29. *See infra* Part II.A.
30. *See* Michal Buchhandler-Raphael, *Fear-Based Provocation*, 67 AM. U. L. REV. 1719, 1737 (2018).
31. *See infra* Part II.B.
32. *See infra* Part II.B.
33. *See infra* Part II.B.
34. *See infra* Part II.B.

of diminished rationality and applicable to all crimes.[35] But this alternative notion of diminished rationality suffers from conceptual shortcomings that make it an inadequate conceptual framework for underlying the provocation defense.[36] Here, this Article partially draws on Morse's ideas by arguing that the provocation defense indeed should *not* be grounded in the concept of loss of self-control. Yet, it disagrees with Morse's suggestion that the defense is best understood as grounded in the theory of diminished rationality. Instead, the provocation defense ought to be grounded in the notion of impaired judgment, by drawing on psychological research that conceptualizes provocation as one instance of impaired judgment.[37]

In recent years, legal scholars began delving into the implications of psychological studies on reshaping the scope of criminal responsibility, including revisiting the contours of the provocation defense.[38] For example, commentators consider the insights that psychological research on control failures may offer for criminal law theory and doctrine in general and its implications for the scope of the provocation defense in particular.[39] This Article accepts commentators' invitation to consider psychological research for the purpose of reconstructing the provocation defense in accordance with empirical evidence but departs from its conclusion that criminal law doctrine should draw on the psychological concept of self-control. Instead, this Article considers the ways in which a myriad of intense emotions, including anger and fear, might impair individuals' judgment. In turn, this might also result in lethal aggression, as supported by psychological research on judgment and decision-making, particularly dual-process theories.

Cognitive psychologists developed dual-process theories to explain two ways of thinking: one is fast, intuitive, emotional, and irrational, and the other slow, deliberate, and rational.[40] These theories define diminished rationality as a shortfall in behavior compared to fully instrumental rationality.[41] While dual-process theories initially developed to explain economic behavior, they carry extensive ramifications for various other areas. Criminal law scholars, however, have yet to consider the significance of these theories for the scope of criminal responsibility in general and for rethinking excuse defenses, such as provocation, in particular.

This Article considers the implications of psychological research on the provocation defense by making two key arguments. First, it posits that the notion of impaired judgment offers a broad-based doctrinal framework for provocation and should therefore replace the misguided loss of self-control

35. *See* Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 296–97 (2003).

36. *See infra* Parts III.B–C.

37. *See infra* Part III.C.

38. *See* Hollander-Blumoff, *supra* note 26, at 530–31.

39. *Id.* at 525–26.

40. *See infra* Part III.A.

41. *See* Robert D. Cooter & Michael D. Gilbert, *Constitutional Law and Economics*, *in* RESEARCH METHODS IN CONSTITUTIONAL LAW: A HANDBOOK (Malcolm Langford & David S. Law eds., forthcoming 2020) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123253 [https://perma.cc/2M5R-EW64].

paradigm that currently underpins provocation laws. Grounding provocation claims in the concept of impaired judgment would extend the defense to different types of defendants that the loss of self-control theory fails to help, including fearful killers like Rebekah Mellon.[42] Second, the Article argues that, while the advantages of such psychological research are invaluable, it has some intrinsic limits for the purpose of revisiting provocation's scope. Provocation's adequacy element calls for normative evaluations, which rest on a combination of policy considerations, communities' shared values, contemporary cultural norms, and moral principles rather than on empiricism.[43] While dual-process theories support provocation's subjective prong, that is, the defendant's extreme emotional arousal, they are unable to offer any insights for shaping provocation's objective component, namely its normative dimension. A reformulated provocation defense, which is grounded in the notion of impaired judgment, must incorporate some value-based elements to direct decision makers' inquiries into the normative question of who among defendants deserve mitigation. Specifically, defendants do not deserve to be stigmatized and punished as murderers when they were provoked by the deceased's wrongful act.

The Article proceeds as follows: Part I outlines the role that the loss of self-control theory currently plays in underpinning modern understanding of the provocation defense as reflected in scholarly writings and courts' decisions. Part II elaborates on the pitfalls of provocation's loss of self-control theory, which result in a defense that is both over- and underinclusive. Drawing on an analogy to the widespread rejection of loss of self-control theory in the insanity defense area, this Part further posits that this theory should similarly be dismissed in the provocation context. Part III examines the concept of impaired judgment as an alternative to the loss of self-control theory. It begins with a general discussion of psychological research on dual-process theories, then contemplates its implications for the provocation defense. Part IV first acknowledges the intrinsic limits of psychological research for deciding what types of defendants whose decision-making and judgment processes have been impaired might deserve mitigation. Next, it considers the addition of a policy-based component that would assist juries in determining the circumstances that make provocation adequate from a normative perspective.

I. LOSS OF SELF-CONTROL THEORY UNDER EXISTING LAW

Grounded in a retributivist position of "just desert," the rationale underlying the provocation defense is that provoked actors kill because they lose self-control.[44] It is the loss of self-control that makes them less morally

42. *See supra* text accompanying notes 1–12.

43. *See* Morse, *supra* note 35, at 299 nn.21–22 (contending that normative judgments should be made by jurors at the guilt phase rather than by judges at sentencing).

44. *See* Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47, 71 (1986) (discussing the retributivist theory of punishment and the role of the victim's guilt in provocation as a basis for reduced sentence).

culpable than unprovoked killers and thus deserving of reduced punishment.[45] This position implicitly acknowledges the actor's motive for the crime because it assumes that people who kill in response to provocation by the deceased have a less blameworthy motive than those killing for other motives, such as greed or revenge.[46] The defendant's loss of self-control is perceived as a somewhat understandable motive compared to, for example, killing motivated by revenge, which modern societal values denounce as deplorable.[47]

Existing provocation laws significantly vary by jurisdiction, making it difficult to generalize about the defense's precise elements. Broadly speaking, a majority of jurisdictions retain the essence of common law's "heat of passion" defense.[48] In these jurisdictions, murder charges are typically mitigated to voluntary manslaughter when three requirements are met: (1) a subjective prong requires that the defendant kill while in a sudden heat of passion; (2) an objective prong requires that the passion was the result of adequate provocation; and (3) the defendant did not have an opportunity to cool off.[49]

At first blush, current formulations that draw on the traditional provocation defense do not explicitly adopt any language requiring proof that the provoked actor had lost self-control.[50] The loss of self-control requirement, however, is deeply embedded in the defense in various ways. The concept of loss of self-control is often used by courts when explaining the test to determine when provocation is sufficiently severe and objectively reasonable.[51] Courts hold that provocation is adequate only when a

45. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 530–41 (7th ed. 2016).

46. *See* Douglas Husak, "*Broad" Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 475–76 (2012).

47. *See* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter, Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 104–05 (1992) (noting that a retaliatory killing is antithetical to the doctrinal understanding of voluntary manslaughter and that revenge killings are marked by cool calculation as opposed to hot-blooded killing).

48. DRESSLER, *supra* note 45, at 530.

49. *Id.* (nothing that, additionally, there must be a causal link between the provocation, the passion, and the killing). This Article uses the terms "manslaughter" and "voluntary manslaughter" interchangeably as jurisdictions that amended their penal codes use the term "manslaughter," while jurisdictions that retain the traditional common-law offense use the term "voluntary manslaughter."

50. Some jurisdictions that do not use loss of self-control language rely instead on the concept of "irresistible passion." *See, e.g.*, GA. CODE ANN. § 16-5-2(a) (2020) ("A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder."). A plausible argument could be made that the irresistible passion and loss of self-control are synonymous concepts in this context, as defendants who could not resist their impulse to kill necessarily lost their ability to exercise self-control.

51. *See, e.g.*, KAN. STAT. ANN. § 21-5404(a)(1) (2020) ("Voluntary manslaughter is knowingly killing a human being committed upon a sudden quarrel or in the heat of

reasonable or ordinary person would have similarly lost control as a result of the provocation.[52] Other times, the loss of self-control theory is integrated into jury instructions on manslaughter, explaining that inadequate provocation is one that would not have caused a reasonable person to have lost self-control.[53] Still, other jurisdictions incorporate the loss of self-control theory into the cooling-off requirement, for example, by stating that the defendant must have killed before there was an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill.[54]

Jurisdictions also vary on whether defendants must establish complete loss of self-control in order to prevail on a provocation claim. In some jurisdictions, provoked killers do not need to prove complete inability to control their behavior.[55] Instead, defendants must demonstrate that ordinary individuals in similar circumstances would have also been similarly provoked.[56] Yet other jurisdictions go as far as requiring the defendant to

passion . . . ."). When discussing whether a voluntary manslaughter jury instruction should have been given, Kansas courts use loss of self-control language. *See, e.g.*, State v. Hayes, 327 P.3d 414, 418 (Kan. 2014) (noting that a key element of voluntary manslaughter is provocation that is "sufficient to cause an ordinary man to lose control of his actions and his reason" (quoting State v. Gallegos, 190 P.3d 226, 231 (Kan. 2008))); State v. Henson, 197 P.3d 456, 463 (Kan. 2008) ("The test for whether severe provocation exists is objective, and the provocation must be sufficient to cause an ordinary person to lose control of his or her actions or reason."); *see also* State v. Shane, 590 N.E.2d 272, 276 (Ohio 1992) (explaining that for provocation to be reasonably sufficient to reduce murder to voluntary manslaughter "it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control").

52. People v. Mendoza, 664 N.W.2d 685, 690 (Mich. 2003); People v. Pouncey, 471 N.W.2d 346, 350 (Mich. 1991).

53. State v. Adamcik, 272 P.3d 417, 448 (Idaho 2012) (affirming the trial court's jury instruction of malice aforethought as "[t]he defendant deliberately intended to kill as a result of provocation which the jury determines would not have caused a reasonable person to have lost his self-control and reason").

54. *See, e.g.*, IOWA CODE § 707.4 (2020) ("[A] person commits voluntary manslaughter when that person causes the death of another person, under circumstances which would otherwise be murder, if the person causing the death acts solely as a result of sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a person and there is not an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill."); KAN. STAT. ANN. § 21-5404; State v. Chavez-Aguilar, 253 P.3d 362, 370 (Kan. Ct. App. 2011) (upholding the trial court's refusal to instruct the jury on voluntary manslaughter on the theory that there was plenty of time for the defendant to reflect on his actions after the fight with the deceased and to regain self-control); People v. Sullivan, 586 N.W.2d 578, 582 (Mich. Ct. App. 1998) (stating that among the elements of provocation is the requirement that "the provocation must be adequate, namely, that which would cause a *reasonable person* to lose control").

55. *See* Paul Litton, *Is Psychological Research on Self-Control Relevant to Criminal Law?*, 11 OHIO ST. J. CRIM. L. 725, 733 (2014).

56. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 305–06, 305 n.148 (1996) (observing that the provocation defense does not require complete loss of self-control).

establish evidence of complete inability to exercise self-control.[57] These courts stress that for provocation to be objectively reasonable, defendants must show that they had lost *all* control and were unable to refrain from committing the homicide.[58] They further observe the extreme nature of the defendant's mental state, noting that a complete lack of self-control is "an extreme mental disturbance or emotional state[,] . . . a state in which a person's ability to exercise judgment is overcome to the extent that the person acts uncontrollably."[59] Consequently, in jurisdictions that require complete lack of self-control, severe impairment in the ability to exercise self-control does not suffice to establish provocation.[60]

The role that the loss of self-control theory plays in the provocation defense becomes even more apparent in jurisdictions with recently revised penal codes. Under modern manslaughter statutes, the defendant's loss of self-control is often an explicit element of the offense.[61] Beginning in the second half of the twentieth century and culminating in the years following the publication of the commentary to the Model Penal Code (MPC), the subjective prong of the defense—killing while in a heat of passion—turned into a requirement that the defendant had lost self-control at the time of the killing.[62] Even jurisdictions that did not adopt EMED were heavily influenced by the MPC commentary, which placed a premium on the notion of loss of self-control.[63] These jurisdictions either revised their manslaughter statutes, stating that provocation is adequate if it causes a reasonable or

57. *See, e.g.*, WIS. STAT. § 939.44(1)(b) (2020) ("'Provocation' means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death.").

58. People v. Brown, No. 249896, 2004 WL 2601712, at *1–2 (Mich. Ct. App. Nov. 16, 2004) (upholding the trial court's refusal to instruct the jury on voluntary manslaughter and noting that there was no evidence that the defendant lost all control and was unable to act deliberately).

59. State v. Spooner, No. 2015AP2089-CR, 2017 WL 2774491, at *7 (Wis. Ct. App. June 27, 2017).

60. Commentators believe that provocation does not require complete loss of self-control and that provocation mitigates punishment because it impairs the actor's volition. *See* Kahan & Nussbaum, *supra* note 56, at 305–06.

61. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-1101, 13-1103 (2020) ("'Adequate provocation' means conduct or circumstances sufficient to deprive a reasonable person of self-control."); *id.* § 13-1103(A)(2) ("[A person commits manslaughter by] committing second degree murder as defined in section 13-1104, subsection A upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim."); *see also* MINN. STAT. § 609.20(1) (2020) ("[Whoever] intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances, provided that the crying of a child does not constitute provocation"); WIS. STAT. § 939.44 (defining "adequate" as "sufficient to cause complete lack of self-control in an ordinarily constituted person" and defining "provocation" as "something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death").

62. *See* Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 650.

63. *See* Nourse, *supra* note 23, at 1340 n.54.

ordinary person to lose self-control, or judicially interpreted provocation to require the defendant's loss of self-control.[64]

While the precise role that the loss of self-control theory plays in jurisdictions whose provocation defense is formulated after the traditional heat of passion defense arguably varies, the theory is undoubtedly the cornerstone of EMED.[65] Adopted only in a minority of jurisdictions, EMED requires both a subjective element under which the defendant killed while experiencing extreme mental or emotional disturbance and an objective element requiring that there is a "reasonable explanation or excuse" for this extreme mental state (as opposed to an explanation or excuse for the killing itself).[66] EMED provides a much broader basis for mitigation compared to the common law's heat of passion defense since the concept of extreme emotional disturbance encompasses a wide array of circumstances under which intense emotions cause defendants to lose self-control.[67] EMED does not require any specific provocative incident to establish the defense.[68] Furthermore, it requires neither a sudden, single incident to trigger the emotional disturbance nor a cooling off period.[69] Instead, the defense is sufficiently broad to recognize that extreme emotional disturbance may result from a series of cumulative incidents that may build up over an extended period, in which the defendant's intense emotions never subsided.[70] Moreover, unlike the heat-of-passion defense, which is mostly perceived as an anger-based defense, EMED recognizes that additional emotions, including fear, may trigger the defendant's extreme emotional disturbance.[71]

While the defense's statutory language refers only to extreme emotional disturbance rather than loss of self-control, courts in EMED jurisdictions routinely rely on the notion of the defendant's loss of self-control to explain the defense's subjective element.[72] For example, courts observe that "[a] defendant cannot establish an extreme emotional disturbance defense without evidence that he or she suffered from a mental infirmity not rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-

64. *See supra* note 61 and accompanying text (providing examples of statutory adoption of loss of self-control); *see also* State v. Johnson, 236 P.3d 517, 522–24 (Kan. 2010) (providing examples of judicial adoption of the loss of self-control requirement by Kansas courts).

65. *See* Nourse, *supra* note 23, at 1340.

66. DRESSLER, *supra* note 45, at 545–46.

67. The MPC's EMED defense combines two separate bases for mitigation: (1) the emotional disturbance prong, which follows the steps of the common law's heat of passion defense, even if significantly expanding it and rejecting its rigid limits, and (2) the extreme mental disturbance prong, which is one form of diminished mental capacity, or partial responsibility, under the common law, reserved for mental diseases and disturbances falling short of a full-blown insanity defense. *See* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 827 n.114 (2003).

68. *See* Denno, *supra* note 62, at 651.

69. *Id.*

70. People v. Patterson, 347 N.E.2d 898, 908 (N.Y. 1976).

71. People v. Roldan, 647 N.Y.S.2d 179, 184 (App. Div. 1996).

72. *See, e.g.*, State v. Lambdin, 424 P.3d 117, 125–26 (Utah 2017).

control."[73] Other courts note that, to establish extreme emotional disturbance, defendants must demonstrate that they acted with "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from [an] impelling force of the extreme emotional disturbance."[74]

In short, despite variation among different jurisdictions on the provocation defense's precise requirements, contemporary understanding of the defense heavily draws on the loss of self-control theory to explain the defendant's subjective mental state, even in jurisdictions that do not make the defendant's loss of self-control an explicit element of the defense.[75]

The loss of self-control theory also figures prominently in scholarly writings on the provocation defense. While commentators cannot agree on a single way to describe the defense, often using different formulations to characterize it and debating whether it ought to be understood as a partial excuse or partial justification, most commentators agree that the notion of loss of self-control is a key part of the defense.[76] For example, Professor Joshua Dressler observes that the underlying rationale for the provocation defense is based on the idea of the defendant's partial loss of self-control.[77]

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73. People v. Roche, 772 N.E.2d 1133, 1138–40 (N.Y. 2002) (concluding that the defendant was not entitled to a jury instruction on manslaughter based on emotional disturbance because he did not claim that he suffered from a loss of self-control).

74. Spears v. Commonwealth, 448 S.W.3d 781, 790 (Ky. 2014) (quoting McClellan v. Commonwealth, 715 S.W.2d 464, 468 (Ky. 1986)).

75. To be clear, in both common law and MPC jurisdictions, the defendant's loss of control standing alone is not sufficient to warrant a jury instruction on voluntary manslaughter. An objective element is always necessary. While EMED requires a reasonable explanation for the extreme emotional disturbance, common-law provocation leaves the jury to decide under which circumstances the defendant was adequately provoked. But establishing the defendant's loss of self-control is often a necessary prerequisite for considering whether provocation's objective requirement has been met. *See* People v. Dorch, No. 328119, 2016 WL 6992233, at *1–3 (Mich. Ct. App. Nov. 29, 2016) (holding that the defendant, who claimed that he killed the deceased out of fear that a group of people were about to attack him, did not lose control but rather acted out of reason and with control).

76. For a comprehensive summary of the extensive scholarly debate about whether provocation is a partial excuse or partial justification, see generally Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027 (2011). While the majority of commentators view provocation as grounded in a loss of self-control rationale, a minority position rejects this view. Professor Stephen Morse expresses the most prominent position opposing the loss of self-control theory. *See* Morse, *supra* note 35, at 295–96. Morse argues that different actors have different capacities for rational thinking and advocates for a general excuse defense based on diminished rationality. *Id.* Morse notes that the provocation defense ought to be understood as one example of diminished rationality, but his broader theory captures a host of circumstances where actors' rationality is diminished, including due to mental disorders. *Id.* The diminished rationality theory that Morse advocates is not individually applied to the specific features of the provocation defense. *See id.*; *see also* Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 255 (2000) (defining rational thought as requiring three elements: (1) the ability to perceive accurately, to get the facts right; (2) the ability to form justifiable beliefs; and (3) the ability to reason instrumentally, weighing the facts appropriately and according to a minimally coherent order of preferences).

77. *See* Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 974 (2002) (noting that the modern defense of provocation is about excusable loss of control and that the defendant does not need to fully

Based on the premise that provocation is all about emotions and human imperfections, Dressler posits that the defense is concerned with "impaired capacity for self-control."[78] He further notes that we punish a person who kills upon provocation because "[h]e did not control himself as much as he *should* have, or as much as common experience tells us he *could* have, nor as much as the ordinarily law-abiding person *would* have."[79] Psychology and law professor Reid Fontaine adds that the defense ought to be understood in excusatory terms as a provoked actor reacts to substantial emotional upset, without which he would not have lost self-control.[80]

Other commentators also stress the centrality of the notion of loss of self-control to contemporary understanding of the provocation defense. Professor Victoria Nourse observes that the modern emphasis on the loss of self-control theory represents a conceptual shift from the common law's perception of provocation as a partial justification towards viewing it as a partial excuse.[81] Traditional provocation, her argument continues, was limited only to predefined categories, whereas the contemporary view of the defense recognizes a host of circumstances that may result in defendants' loss of control.[82] Professors Dan Kahan and Martha Nussbaum further observe that, while traditional common law emphasized victims' wrongdoing to establish the adequacy of provocation, de-emphasizing the defendant's volitional impairment, provocation laws' modern trend is to reemphasize the notion of loss of self-control.[83]

Despite general agreement that the concept of loss of control is crucial to modern views of the provocation defense, commentators disagree on the precise role that it plays in constructing provocation laws. Some commentators contend that, today, loss of self-control is a distinct element of the provocation defense. Professor Stephen Garvey, for example, notes that the defense consists of three requirements: (1) adequate provocation; (2) passion; and (3) reasonable loss of self-control.[84] Yet others argue that loss of self-control is not a separate element of the defense. For example, Professors Mitchell Berman and Ian Farrell disagree with Garvey's description of "reasonable loss of self-control" as an independent element.[85] Making it an additional requirement conflates the defense's two separate

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lose control but instead may experience substantial impairment of his capacity for self-control).

78. *Id.* at 978–79.

79. Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 467 (1982).

80. *See* Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27, 45–47 (2009).

81. *See* Nourse, *supra* note 23, at 1339.

82. *See id.* at 1339–40.

83. *See* Kahan & Nussbaum, *supra* note 56, at 315 (noting that, while contemporary provocation focuses on volitional impairment, the authors support an evaluative view which is more consistent with de-emphasizing volitional impairment).

84. *See* Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1691 (2005) (adding a fourth requirement that describes the effect of the defense: mitigation rather than acquittal).

85. *See* Berman & Farrell, *supra* note 76, at 1042–43.

elements, namely, that (1) the defendant acted following a passionate emotion of a kind and to a degree that interferes with the defendant's ability to exercise self-control and (2) provocation is adequate if it would provoke an ordinary, reasonable, or average person.[86] According to them, provocation does not explicitly use the loss of control language or make it a separate element. Instead, the notion of loss of self-control is used to explain the passion element as an emotional response that impairs the defendant's ability to exercise self-control.[87]

This brief overview of the provocation defense demonstrates that the defense is mostly described in judicial opinions and scholarly accounts as predicated on the notion of loss of self-control.[88] Additionally, the loss of self-control paradigm overshadows not only jurists' treatment of the defense but also societal expectations. Recurring depictions of killers in popular culture further contribute to the prevalent narrative that provoked perpetrators lost self-control.[89] The portrait of an actor who is out of control is deeply entrenched in society's psyche to the extent that it necessarily constructs juries' perceptions of the types of provoked killers who merit mitigation of punishment. Society is willing to regard provoked killers as less morally blameworthy because it concedes that, in some circumstances, individuals are so overwhelmed by intense emotions that most ordinary people in the same predicament would similarly lose self-control. But the near-consensus that loss of self-control is provocation's focal point should not stop us from calling into question the wisdom of this familiar account and revealing its limitations and deficiencies. The following Part turns to examine what is wrong with provocation's loss of self-control paradigm.

II. THE PITFALLS OF LOSS OF SELF-CONTROL THEORY

The wide range of defendants claiming to have been provoked to kill and the substantial variance in the circumstances underlying their offenses cast doubt on whether the loss of self-control theory is best suited to support provocation's doctrinal framework. The sections below demonstrate that the notion of loss of self-control is not only unhelpful in its use of confusing terminology but is also misleading for the purpose of determining the scope of the provocation defense. Part II.A argues that reliance on the loss of self-control theory sometimes results in an overinclusive application of the provocation defense, yet other times in an underinclusive one, as Part II.B argues. Part II.C explores the rise and fall of the loss of self-control theory

86. *Id.*

87. *See id.* at 1043.

88. *See* Nourse, *supra* note 23, at 1339–40 ("Modern theories of provocation assume that passion knows no specific circumstances, but may arise in any situation. We partially excuse defendants who kill in passion because they lacked self-control . . . . MPC commentary helped to solidify and legitimize a theory of the defense based on self-control that was far more influential than the draft itself.").

89. *See* Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 283–84 (2015) (discussing popular culture depictions of provoked killers as actors who "snapped").

under the insanity defense and questions why this rejected theory continues to play a pivotal role under the provocation defense.

A. Loss of Self-Control Theory Is Overinclusive

Commentators have long noted that the contemporary understanding of provocation's loss of self-control theory is too expansive, resulting in courts giving manslaughter jury instructions in cases where mitigation is unwarranted.[90] The most powerful attack on the provocation defense, often referred to as the "feminist critique," stresses the gender-based implications of an overly broad view of loss of self-control theory and its detrimental effect on female victims of male violence.[91] The loss of self-control theory, the argument continues, allows controlling men to receive manslaughter jury instructions in cases where they claimed to have lost self-control after their female intimate partner attempted to end the relationship.[92]

Commentators further lament that the loss of self-control theory is unable to distinguish between actors who genuinely cannot control their violent behavior (or, at the least, their ability to control such behavior is significantly undermined) and actors who simply fail to control their violent impulses.[93] Professor Donna Coker notes that professionals working with abusive men who battered their intimate partners (but did not kill them) observe that one of the most common excuses they gave for their violence was that they were "out of control."[94] Several factors, however, suggest that they simply failed to control themselves rather than being truly unable to do so. First, evidence demonstrates that these batterers engage in risk-weighing behavior, which contradicts their loss of self-control account, as they admittedly experience similar rage in other settings, such as the workplace, but they do not respond violently in those settings.[95] Second, many batterers state that they did not want to hurt their partner seriously, suggesting that they exercised some measure of control over the degree of violence used.[96]

In an oft-cited 1997 article, Professor Nourse argues that laws' reliance on the loss of self-control theory is problematic because it masks normative questions about which types of losses of self-control warrant mitigation.[97] Nourse further contends that defendants deserve the law's compassion only if they stand on equal normative position vis-à-vis their victims.[98] Coining the phrase "warranted excuse," Nourse suggests that mitigation might be warranted only if the defendant reacted violently in response to some unlawful act committed by the victim, one that the law independently

90. For a comprehensive summary of the scholarly critique, see generally *id.* at 283–99.
91. *See* Nourse, *supra* note 23, at 1335–36; *see also* Gruber, *supra* note 89, at 283–99.
92. *See* Gruber, *supra* note 89, at 294.
93. *See id.* ("[M]en who killed their partners in response to threatened or attempted separation were extremely successful at getting their provocation claims to the jury.").
94. *See* Coker, *supra* note 47, at 75.
95. *Id.* at 95.
96. *Id.* at 96.
97. *See* Nourse, *supra* note 23, at 1369–70.
98. *See id.* at 1396.

punishes.[99] But if the provocative incident is not in itself criminal, she continues, the murder charge should not be mitigated to manslaughter, especially when a woman was killed by her male intimate partner after pursuing legal action in attempting to end the relationship.[100] Nourse concludes that the provocation defense should be denied in such cases because it is normatively unwarranted and sends the wrong message to women to stay with controlling spouses in unwanted relationships.[101]

Two decades after Nourse's scathing critique, courts continue to instruct juries on manslaughter charges in circumstances where mitigation is unwarranted from a normative perspective. A 2012 New York Court of Appeals decision poignantly demonstrates the implications of the law's continued reliance on an overly expansive view of a defendant's loss of self-control. The highly disturbing facts underlying the decision in *People v. McKenzie*[102] show that the defendant stabbed his girlfriend with a knife forty-seven times following a heated verbal confrontation between them about the victim's admission that she was sexually unfaithful and her refusal to engage in sexual relations with the defendant.[103] The defendant retrieved a knife from the kitchen and, as the argument escalated into a physical altercation, repeatedly stabbed her to death.[104] Shortly after, the defendant admitted the killing to a friend, claiming that it was the result of loss of self-control as he had "just snapped."[105] That friend testified that the defendant appeared "spaced out" and "out of it" at the time of the incident.[106] In a 911 call explaining to the dispatcher what had happened, the defendant also said that he had "just lost it" and had "blacked out."[107]

The trial court refused to instruct the jury on manslaughter, reasoning that while the manner of the repeated stabbing of the victim was indicative of the defendant's loss of self-control, there was no evidence that the defendant had a mental infirmity that fell short of a mental disease or disorder, as the EMED defense requires.[108] The jury convicted the defendant of second-degree murder and the defendant appealed.[109] The Court of Appeals agreed with the defendant that a jury instruction on manslaughter should have been given.[110] The court stressed that the extreme emotional disturbance defense does not hinge on evidence of an underlying psychiatric disorder and that courts use the term "mental infirmity" in the broader sense, referring to "any reasonably

99. *See id.*
100. *See id.*
101. *See id.* at 1334.
102. 976 N.E.2d 217 (N.Y. 2012).
103. *Id.* at 219.
104. *Id.*
105. *Id.* at 220.
106. *Id.*
107. *Id.*
108. *Id.* at 220–21.
109. *Id.* at 219.
110. *See id.* at 220.

explicable emotional disturbance so extreme as to result in and become manifest as a profound loss of self-control."[111]

The court's conclusion that the subjective component of the EMED defense—the defendant's loss of self-control—was satisfied is hardly problematic. Indeed, the evidence introduced at the defendant's trial established that, as a result of his rage over his girlfriend's admission of infidelity, he became extremely angry.[112] Moreover, the court correctly notes that nothing in EMED's statutory language suggests that the defendant's emotional disturbance ought to rise to the level of mental infirmity.[113] My critique of the court's decision therefore does not take any issue with the first part of the holding. But the second part of the decision regarding the objective inquiry into whether there was a reasonable explanation or excuse for the defendant's extreme emotional disturbance is deeply troubling.

In addressing EMED's objective requirement that the evidence should support the inference that there was a reasonable explanation for the defendant's emotional disturbance, the court stated that the jury could have plausibly concluded that the victim's rejection of the defendant, along with her verbal disclosure of infidelity, "precipitated not just ordinary anger or even rage, but an onrush of emotion leaving the defendant bereft of self-control."[114] The court then concluded that the question of the reasonableness of the explanation is a question of fact that should have been left to the jury.[115] By that, the court implied that the victim's admission of sexual infidelity might qualify as a "reasonable explanation or excuse" for the defendant's emotional disturbance. This position evokes archaic notions of alleged violation of male honor, perpetuating long-discarded views that women's sexual infidelity excuses male violence.[116]

The court's position that the reasonableness of the defendant's explanation ought to be decided by the jury as a question of fact is misguided. Instead, the court should have concluded that the defendant's claim that the victim sexually rejected him and disclosed her sexual infidelity (a perfectly legal course of action) is insufficient, as a matter of law, to constitute a "reasonable explanation or excuse" for the defendant's emotional disturbance. A judicial statement that the defendant's loss of control claim ought to be denied on legal rather than factual grounds is normatively necessary and based on sound public policy reasons. The court should have explicitly rejected the claim that extreme rage over an intimate partner's sexual infidelity can be considered an objectively reasonable explanation for the defendant's emotional disturbance.[117]

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111. *Id.* at 221.
112. *Id.* at 219.
113. *Id.* at 220–21.
114. *Id.*
115. *Id.* at 221–22.
116. *See* Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 199, 205 (2005).
117. *Id.* at 219.

Moreover, the court's decision to let the jury decide whether the defendant's explanation for what the court refers to as being "bereft of self-control" improperly justifies mitigation. It conveys a highly disconcerting message to the jury. It embodies a problematic normative statement that implies that there are circumstances where a woman's sexual taunting of a man is so severe as to deprive him completely of self-control and that the jury may plausibly consider her behavior as a reasonable explanation for his lethal violence.[118] Furthermore, this holding not only conflates EMED's subjective and objective inquiries but also practically obliterates the defense's necessary normative aspect. Under EMED, the defendant's loss of self-control alone is never sufficient to satisfy the defense's elements.[119] Rather, it must be supplemented with an objective component, namely, proof that there was "a reasonable explanation or excuse for the defendant's emotional disturbance."[120] In *McKenzie*, however, the court's analysis focused solely on the reasonableness of the explanation from the defendant's viewpoint,[121] which not only de-emphasized the objective element but also stripped the defense of any normative dimension.

In addition, the argument that the loss of self-control theory results in an overinclusive application of the provocation defense stands even without embracing the feminist critique. Gender-neutral arguments similarly support the conclusion that the theory is overly broad, as it might result in partial mitigation where it is unwarranted from a normative perspective. As Professor Rebecca Hollander-Blumoff notes, control failure is a psychological concept that is primarily observational, catching within its wide net a host of actors whose conduct may fairly be described as "out of control."[122] As an empirical matter, the argument continues, many offenders may be viewed as having lost their self-control, yet the criminal law is unwilling to partially excuse them.[123] Notably, highly intoxicated perpetrators who killed while under the influence of drugs or alcohol have similarly lost their self-control, yet the law rarely reduces their punishment on these grounds.[124] Hollander-Blumoff suggests that the criminal law

118. *Cf.* People v. Berry, 556 P.2d 777 (Cal. 1976) (giving a voluntary manslaughter jury instruction for the defendant who killed his wife after she sexually taunted him and admitted infidelity). For a critique of the *Berry* decision, see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 17–19, 43–45 (2003).

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

120. *Id.*

121. People v. McKenzie, 976 N.E.2d 271, 220–21 (N.Y. 2012).

122. *See* Hollander-Blumoff, *supra* note 26, at 505, 510 (noting the difference between self-control in psychology and criminal law).

123. *Id.*

124. While most jurisdictions refuse to recognize defendants' voluntary intoxication as a defense to a crime, some jurisdictions do recognize it as a defense to those crimes requiring the mens rea of knowledge or intent. In some states, the defendant's voluntary intoxication may be a partial defense to crimes that require specific intent or a mens rea of purpose or knowledge. *See, e.g.*, Commonwealth v. Henson, 476 N.E.2d 947, 953 (Mass. 1985) (holding that the defendant may introduce evidence showing that, because of intoxication, he did not premeditate or deliberate the homicide); State v. Brown, 931 P.2d 69, 73–75 (N.M. 1996) (holding that excessive consumption of alcohol can negate the statutory requirement of

underestimates the situations in which perpetrators have lost their self-control because its conception of control failure is normative and socially construed, whereas psychologists use overly broad and descriptive definitions of control failures.[125]

Indeed, the main problem with an overly broad understanding of the loss of self-control theory is that it lacks any prescriptive dimension, which may provide some guidelines for deciding who among actors who have lost self-control might deserve mitigation of punishment from a normative standpoint. Since criminal excuses are generally predicated on society's normative evaluations of defendants' behaviors, the broadly defined loss of self-control theory proves misguided for that purpose.[126] One reason for the misguidance is that the theory focuses on the *effect* of intense emotions on defendants' violent behavior. Such a descriptive account cannot meaningfully contribute to understanding the *cause* behind the behavior. Instead, a plausible way to distinguish among different types of actors who have lost self-control is by shifting the emphasis from the effect of behavior to its cause and evaluating the behavior from a normative standpoint. This point is revisited in Part IV.B by considering adding a requirement that would limit the application of the provocation defense in circumstances where the deceased committed no legal wrong. For the moment, it is sufficient to acknowledge that society might be willing to offer some leniency only if lethal violence is caused by somewhat understandable reasons.

B. Loss of Self-Control Theory Is Underinclusive

The critique of provocation's loss of self-control theory on overbreadth grounds has been so influential that it eclipsed the fact that this theory sometimes proves too narrow for certain types of perpetrators, including female defendants whose behavior does not comport with the perceived image of a loss of self-control.[127] To date, however, commentators have yet to acknowledge that the loss of self-control theory may also be underinclusive in some circumstances.

Exposing this hidden dimension of the loss of self-control theory is especially imperative because underinclusiveness concerns are arguably more troubling than overinclusiveness ones. An overly narrow understanding of loss of self-control creates a threshold that might foreclose the only way of giving jury instructions on manslaughter. If courts find that the subjective loss of self-control requirement is not established, the objective requirement, which is much harder to satisfy, will likely not be met and the provocation claim may not be brought before a jury. In contrast, an

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subjective or actual knowledge). However, some jurisdictions categorically reject the excuse of intoxication as a defense to all crimes, including intentional murder. *See, e.g.*, MONT. CODE ANN. § 45-2-203 (2020) (providing that an intoxicated person "is criminally responsible" and "an intoxicated condition is not a defense to any offense").

125. *See* Hollander-Blumoff, *supra* note 26, at 504–05.

126. *See generally* John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 578–79 (1998).

127. *See, e.g.*, *supra* notes 1–4 and accompanying text.

overly broad construction of provocation's subjective prong neither dictates the final outcome of the case nor necessarily results in unwarranted mitigation. The defendant's loss of self-control is never, in itself, a sufficient basis for mitigation.[128] Under all formulations of the defense, an additional objective element is required, whether it is an inquiry into the adequacy of provocation or into the reasonableness of the explanation for the emotional disturbance.[129] Therefore, the harms of refusing to consider mitigation if provocation is too narrowly construed far exceed the harms of giving juries more manslaughter instructions. Such harms are especially pronounced in our current criminal justice system, whose sentencing laws are excruciatingly harsh, including mandatory minimums for offenders convicted of murder charges.[130] Moreover, the consequences of excluding manslaughter jury instructions are particularly detrimental for defendants of color who comprise a majority of murder defendants.[131]

Several reasons support the argument that the loss of self-control theory often proves underinclusive. The theory mostly envisions an enraged actor who experiences an uncontrollable impulse to react violently immediately following a sudden provoking incident.[132] This view, however, provides only a partial account of provoked killers.[133] It fails to take into consideration the typical reactions of certain types of provoked killers whose behavior does not externally manifest as loss of self-control.[134] People may be provoked to act violently in a wide range of situations, for which the loss of self-control theory does not account.[135] Consequently, jury instructions on manslaughter are not given in a host of circumstances, precluding potential mitigation for defendants when it might be normatively warranted.

To begin, the loss of self-control theory does not neatly fit within situations in which defendants were provoked to kill by emotions other than anger. The theory is largely predicated on the emotions of anger and rage, failing to recognize other intense emotions such as fear and desperation.[136] Historically, anger was perceived as the righteous response of a man whose honor, judged by masculine norms, had been wrongly violated by the deceased, leading the actor to respond physically and angrily.[137] Today, provocation continues to be perceived mostly as an anger-based defense due

128. *See supra* note 81 and accompanying text.

129. *See supra* notes 51–53 and accompanying text.

130. *See* Caroline Forell, *Domestic Homicides: The Continuing Search for Justice*, 25 AM. U. J. GENDER SOC. POL'Y & L. 1, 5–6 (2017); *see also* Gruber, *supra* note 89, at 325–27.

131. *See* Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 185 (2014) (discussing the disparate effects of heavy-handed sentencing laws on racial minorities through homicide statistics).

132. *See supra* Part I.

133. *See* Buchhandler-Raphael, *supra* note 30, at 1739–56.

134. *Id.* at 1739–40.

135. *See id.* at 1738–56.

136. *See id.* at 1780–81.

137. *See* Berman & Farrell, *supra* note 76, at 1036–37 (elaborating on Professor Jeremy Horder's account of the development of the provocation doctrine under English law, under which the defendant, a "gravely affronted man[,] was justified in responding physically and angrily").

to the prevalence of the loss of self-control paradigm.[138] Ample psychological research supports the behavioral effects of anger on a person's ability to maintain self-control, finding a strong connection between anger and reactive aggression.[139] The notions of anger and loss of self-control are closely linked, operating as cause and effect in triggering provocation; anger is the cause for the defendant's behavior and its effect is loss of self-control.

Scant scholarly attention has been given to the fact that fear is another type of intense emotion that might trigger provocation. In a 1986 student comment, Lauri J. Taylor critiques the provocation defense as being overly narrow, failing to provide mitigation to provoked women who kill abusive intimate male partners out of fear.[140] Taylor argues that men typically react to provocative incidents caused by the deceased with anger, whereas women typically react to the deceased's behavior mostly with fear, depression, and sadness.[141] Provocation stemming from women's fear may be cumulative, differing from men's sudden anger that leads them to kill immediately.[142] Taylor concludes that the provocation doctrine privileges men's anger over women's fear.[143] Taylor's argument that current understanding of provocation is too narrow largely remains underdeveloped in the literature. Instead, the opposite argument that the loss of control theory is overly broad took hold.[144]

Taylor's critique, however, is only partially correct. She is right that the anger-based understanding of provocation disadvantages women perpetrators who sometimes kill domestic abusers in nonconfrontational situations, out of fear for their lives, and that provocation laws privilege anger over other emotions. But Taylor is wrong in making the essentializing assumption that all women are always provoked to kill by fear while all men are always provoked by anger. Granted, it may be empirically correct that some women kill male partners who physically abused them out of fear rather than out of mere anger. But in reality, some women kill out of anger and jealousy, just like some men kill out of fear.[145] Case law demonstrates that

138. Dressler, *supra* note 79, at 959 n.5 (noting that provocation law is mostly about anger).

139. *See generally* LEONARD BERKOWITZ, AGGRESSION: ITS CAUSES, CONSEQUENCES, AND CONTROL (1993); Leonard Berkowitz, *On the Formation and Regulation of Anger and Aggression: A Cognitive-Neoassociationistic Analysis*, 45 AM. PSYCHOLOGIST 494 (1990); Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition*, 19 J. BEHAV. DECISION MAKING 115 (2006).

140. *See* Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1704–07 (1986).

141. *See, e.g.*, *id.* at 1714–15 (describing fear).

142. *Id.* at 1719.

143. *See id.*

144. *See supra* Part II.A.

145. *See, e.g.*, People v. Davidson, No. B223722, 2012 WL 1534352, at *2, *15 (Cal. Ct. App. May 2, 2012) (affirming the conviction of a woman who killed her husband out of anger because he was having an affair); State v. Ruiz-Ascencio, 406 P.3d 900 (Kan. 2017) (affirming the conviction of a male defendant who killed another man out of fear); State v. Story, 334 P.3d 297 (Kan. 2014) (affirming the conviction of a female defendant whose jealousy led her to kill her girlfriend's female date).

defendants who are provoked to kill by fear are often men who kill other men in social encounters such as "drug deals gone sour."[146] The essentializing claim that women necessarily kill out of fear and men necessarily respond in raging anger is therefore not only misleading but it also impedes doctrinal developments that would extend the provocation doctrine to additional types of defendants, male and female.[147]

Instead, the gender-neutral argument advanced here is that the loss of self-control theory is underinclusive because it accommodates mostly defendants—men and women—who act out of anger, failing to provide a basis for mitigation for defendants—both male and female—who act out of fear. The law ought to recognize fear-based provocation and acknowledge that the implications of recognizing such a defense extend above and beyond familiar gender-based dichotomies, including, among others, accommodating the experiences of men who kill other men out of fear in circumstances falling short of self-defense.[148] Recognizing provocation triggered by powerful emotions beyond anger requires abandoning the loss of self-control theory, which mostly fits behavioral features typical of angry actors, rather than fearful or desperate ones.

Another reason why the loss of self-control theory is underinclusive is that it fails to capture the fact that not all provoked actors visibly appear as if they have lost their self-control. When actors are provoked by fear, rather than by anger, there is often no evidence suggesting that they had lost self-control, as their behavior fails to externally manifest the type of reactions that decision makers expect people who are "out of control" to exhibit.[149] The loss of self-control theory mistakenly assumes that actors visibly display their emotions, making it easy for decision makers to discern whether they had lost their self-control. Psychological research, however, shows that people do not always display the appropriate emotions before making a decision and that people who do not display emotion often have an impaired ability to make good decisions.[150] The problem is that court decisions often do not take this reality into account, treating loss of self-control, instead, as a necessary part of the defendant's state of mind.[151] Courts typically rely on defendants' own testimonies, as well as other witnesses' testimonies, to conclude that the defendant's conduct was neither indicative nor consistent with a loss of self-

146. *See* Buchhandler-Raphael, *supra* note 30, at 1754.

147. *See generally* Jamie R. Abrams, *The Feminist Case for Acknowledging Women's Acts of Violence*, 27 YALE J.L. & FEMINISM 287, 309–12 (2016) (critiquing the gendered-based stereotypes surrounding female perpetrators who killed their abusers and noting that the criminal justice system not only pathologizes them but also treats female perpetrators more harshly, especially when they do not fit the traditional scripts about femininity).

148. *See* Buchhandler-Raphael, *supra* note 30, at 1725–26.

149. *See, e.g.*, State v. Mack, 694 N.E.2d 1328, 1331 (Ohio 1998); State v. Goff, No. 11CA20, 2013 WL 139545, at *9 (Ohio Ct. App. Jan. 7, 2013).

150. *See* Antonio R. Damasio, *The Somatic Marker Hypothesis and the Possible Functions of the Prefrontal Cortex*, 351 PHIL. TRANSACTIONS 1413, 1418 (1996).

151. *See, e.g.*, People v. Dorch, No. 328119, 2016 WL 6992233, at *3 (Mich. Ct. App. Nov. 29, 2016) (per curiam).

control image that is associated with the provocation defense.[152] This one-dimensional dependence on loss of self-control results in courts' refusal to give jury instructions on manslaughter when defendants are not perceived as having been provoked because they failed to exhibit an angry state of mind.[153]

The problem is further exacerbated in circumstances where provoked killers appear calm and composed. Yet, the psychological reaction of suppressing emotions explains why it is fairly common for defendants to visibly exhibit behavior suggesting that they are in control.[154] Research shows that emotions are often suppressed only to reoccur at a later point in time.[155] While some actors might respond immediately following a provoking incident, others may be successful at suppressing intense emotions at the moment of the incident, thus not appearing to have lost self-control.[156] Relatedly, another typical emotional reaction involves rumination on the provoking incident, as individuals may keep ruminating on the incident for a while, only to react to it later on.[157] Psychological studies further find that when these intense emotions subsequently resurface, they might be even more powerful than their original manifestation.[158] This explains why defendants' fear and anger, which initially might have been successfully suppressed for a long period of time, could not have been tamed and regulated any longer, resulting in lethal violence.

Another reason why the loss of self-control theory often proves underinclusive lies with the fact that it is premised on the assumption that defendants were suddenly provoked and overwhelmed by instantaneous, unexpected anger that caused them to immediately erupt in a violent attack. The theory's emphasis on the suddenness of the provoking incident assumes that a temporal requirement is embedded in the provocation defense.[159] Indeed, manslaughter statutes in many jurisdictions require that the provocation is caused by a sudden, inflammatory incident.[160] This vision of

152. *See, e.g.*, State v. Hernandez, No. 2 CA-CR 2009-0232, 2010 WL 3341283, at *2 (Ariz. Ct. App. Aug. 25, 2010).

153. *See, e.g.*, Commonwealth v. Patton, 936 A.2d 1170, 1176 (Pa. Super. Ct. 2007).

154. *See* Steven J. Sherman & Joseph L. Hoffmann, *The Psychology and Law of Voluntary Manslaughter: What Can Psychology Research Teach Us About the "Heat of Passion" Defense?*, 20 J. BEHAV. DECISION MAKING 499, 506 (2007).

155. *See* Jennifer S. Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799, 812 (2015).

156. *See* Norman J. Finkel, *Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 48–49 (1996) (noting that psychological research shows that adults who have suffered abuse in childhood may strongly react in the heat of passion in adulthood).

157. *See* Lerner et al., *supra* note 155, at 812; *see also* State v. Gounagias, 153 P. 9, 14 (Wash. 1915).

158. *See* Lerner et al., *supra* note 155, at 812.

159. *See* Christine M. Belew, Comment, *Killing One's Abuser: Premeditation, Pathology, or Provocation?*, 59 EMORY L.J. 769, 793–96, 800 (2010) (noting that provocation law's suddenness requirement assumes a temporal element).

160. *See, e.g.*, OHIO REV. CODE ANN. § 2903.03 (LexisNexis 2020) (requiring a "sudden fit of rage").

emotions' immediate effect, however, is not always accurate because provocation is often cumulative.[161] The notion of cumulative provocation refers to the idea that emotional arousals stemming from anger, fear, desperation, and hopelessness may build up over time, culminating in lethal violence after the defendant has reached a "breaking point."[162] The loss of self-control theory proves too narrow whenever homicides are committed in response to cumulative provocation, which are not manifested as a sudden loss of self-control and are erroneously interpreted as cold acts of calculated revenge, namely, as premeditated killings.[163]

The notion of cumulative provocation is buttressed by research findings on suppression of emotions that show why individuals who have been subjected to multiple emotional arousals react only after reaching a breaking point.[164] Research also shows that the emotions of anger and fear are inextricably linked rather than mutually exclusive to the extent that experiencing fear promotes anger, so that if actors fear, they also become increasingly angry.[165] This research carries practical implications for understanding the reactions of provoked killers who might react violently due to the combined effect of multiple provoking incidents rather than a single and sudden event. However, courts often refuse to give manslaughter instructions in cases where there is no evidence showing that the defendant suffered a sudden, unanticipated loss of self-control.[166] Many jurisdictions explicitly reject the notion of cumulative provocation, insisting that the defendant's passion must be sudden and caused by the deceased's highly provoking act.[167]

The requirement that the defendant's emotional arousal results from a single and sudden provoking incident might seem plausible where the parties have never met prior to the altercation at issue, such as a road rage incident or a drunken bar brawl, or where there is no tumultuous history or intimate relationship between them.[168] In contrast, in circumstances where the defendant and the deceased have known one another prior to the encounter preceding the killing, case law demonstrates that provoking behavior patterns may develop over considerable time as opposed to sudden and heightened instigative situations which manifest in a single moment of loss of self-

161. *Cf.* Finkel, *supra* note 156, at 49.

162. Pennsylvania courts, for example, have long adopted the theory of cumulative provocation. *See* Commonwealth v. McCusker, 292 A.2d 286, 290 (Pa. 1972); *see also* Commonwealth v. Stonehouse, 555 A.2d 772, 782 (Pa. 1989).

163. *See, e.g.*, State v. Gonzales, 884 N.W.2d 102, 121–23 (Neb. 2016) (holding that the evidence did not support a finding of "sudden quarrel" manslaughter in a case where the defendant left the crime scene and returned later with a weapon and that the "killing appear[ed] to be an act of vengeance").

164. *See* Finkel, *supra* note 156, at 48–49.

165. *See* Jun Zhan et al., *The Neural Basis of Fear Promotes Anger and Sadness Counteracts Anger*, NEURAL PLASTICITY, June 2018, at 1, 12.

166. *See, e.g.*, People v. Sepulveda, 65 P.3d 1002, 1006–07 (Colo. 2003).

167. *See, e.g.*, COLO. REV. STAT. § 18-3-104 (2020); People v. Lanari, 926 P.2d 116, 121 (Colo. App. 1996).

168. *See, e.g.*, State v. Gover, No. 05AP-1034, 2006 WL 2411531, at *1–2 (Ohio Ct. App. Aug. 22, 2006).

control.[169] Provocation in these cases is not caused by a sudden, single reaction but, instead, by a culmination of a series of provoking incidents.

Cumulative provocation is particularly prevalent in circumstances involving intimate partner battering.[170] The most common reason domestically abused individuals kill their batterers is a misperceived need for self-protection, namely overreaction to a threat that cannot meet self-defense's strict requirements.[171] Recognizing cumulative provocation is essential, especially in circumstances where the defendant and the deceased have been involved in a long-term physically abusive relationship, consisting of tension-building scenarios, where repeated provocative incidents have progressively built up in a slow burn reaction that culminated in homicide.[172] Provocation law's continued reliance on the loss of self-control theory, which fails to acknowledge this gradual process, therefore hinders any doctrinal development of the notion of cumulative provocation. Rejection of this theory is thus a necessary measure for accommodating provocation's cumulative effect.

C. Loss of Self-Control Theory's Rejection in the Insanity Defense Context

An analogy to the related doctrine of the insanity defense further supports my contention that provocation's loss of self-control theory is flawed. Loss of self-control is not a concept distinct to the provocation defense's realm. One of the tests for the insanity defense is also predicated on defendants' lack of self-control, namely, substantial impairment in volition.[173] The essence of this test is that perpetrators who are found to be legally insane are perceived as unable to exercise self-control over their behavior and they are therefore not subject to criminal penalty.[174]

The law's treatment of defendants who suffer from mental disorders that affect their ability to control their conduct has considerably fluctuated over the years, first towards recognizing a volition-based test as one basis for the insanity defense but later shifting away from such test.[175] Historically, volition-based tests were not a part of the insanity defense, which was limited

169. *See, e.g.*, People v. Wharton, 809 P.2d 290, 320 (Cal. 1991) (holding that the trial court also should have given the instruction that "legally adequate provocation could occur over a considerable period of time").

170. *See, e.g.*, State v. Jacobson, 418 P.3d 960, 965–67 (Ariz. Ct. App. 2017) (upholding the defendant's murder conviction of her live-in boyfriend after ruling that psychiatric evidence that the defendant suffered from PTSD as a result of past acts of domestic violence by the deceased was inadmissible because it rested solely on the defendant's account).

171. *See* Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27, 28–29 (2006).

172. *See, e.g.*, State v. Vogel, 85 P.3d 497 (Ariz. Ct. App. 2004).

173. *See* Hollander-Blumoff, *supra* note 26, at 514–17; *see also* Jane Campbell Moriarty, *Seeing Voices: Potential Neuroscience Contributions to a Reconstruction of Legal Insanity*, 85 FORDHAM L. REV. 599, 617–18 (2016).

174. Hollander-Blumoff, *supra* note 26, at 517.

175. *See* Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 781–82 (1985).

to include only defendants' cognitive incapacity.[176] Under the *M'Naghten* test, adopted in all U.S. jurisdictions, defendants were deemed legally insane if they were incapable of knowing the nature and quality or understanding the legal or moral wrongfulness of the criminal act.[177] The cognitive-based insanity defense was subject to extensive critique, on the grounds that it was too narrow, accommodating only defendants suffering from psychoses and ignoring a host of other mental disorders that affect defendants' ability to control their conduct.[178]

Heeding this criticism, most states, as well as federal courts, expanded their insanity defense by adding an inquiry into defendants' capacity for volitional control.[179] Broadly stated, laws adopted one of two types of control-based insanity tests. The earlier of the two, often referred to as the "irresistible impulse" test, provides that the defendant may be found legally insane if, as a result of a mental disorder, he or she acted from an irresistible and uncontrollable impulse and had lost the power to choose between right and wrong to avoid committing the act.[180] The MPC advocated a broader control-based test, under which an actor may be found legally insane if, as a result of a mental disease or defect, he lacked substantial capacity to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.[181] While different jurisdictions use various formulations for their volition-based insanity defenses, the notion of impairment in the capacity for self-control plays a prominent role under any of these tests.[182] The underlying idea behind all volition-based tests is that actors whose mental disorders affected their ability to exercise self-control will not be responsible for their criminal conduct.

In the past three decades, however, the volition-based test of the insanity defense was subjected to fierce scholarly attack.[183] The application of the test proved problematic given questionable acquittals, most notably that of John Hinckley, who was acquitted of the attempted assassination of President

176. *See generally* Stephen P. Garvey, *Agency and Insanity*, 66 BUFF. L. REV. 123 (2018) (discussing the historical development of insanity tests).

177. *See* Morse, *supra* note 175, at 806 & n.89.

178. *See* Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1210–12 (2000).

179. DRESSLER, *supra* note 45, at 348–49, 483.

180. Clark v. Arizona, 548 U.S. 735, 749–53 (2006).

181. MODEL PENAL CODE §§ 4.01–4.02 (AM. LAW INST. 1985).

182. *See* Hollander-Blumoff, *supra* note 26, at 515 (noting that, while all tests for the insanity defense rest on the idea that the defendant committed a crime because he or she could not control their violent behavior, the role of the loss of self-control theory is especially dominant under the volition prong of the insanity defense).

183. *See, e.g.*, Stephen J. Morse, *Against Control Tests for Criminal Responsibility*, *in* CRIMINAL LAW CONVERSATIONS 449, 449–51 (Paul H. Robinson et al. eds., 2009) [hereinafter Morse, *Against Control Tests*] (discussing his objections to control-based tests); Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 929 (2011) [hereinafter Morse, *Mental Disorder*]; Richard J. Bonnie, Remarks at Symposium on the Affirmative Defense of Insanity in Texas: Why "Appreciation of Wrongfulness" Is a Morally Preferable Standard for the Insanity Defense 50, 51–52, 59–60 (Feb. 7, 2003), http://www.txpsych.org/wp-content/uploads/2016/02/insanitytranscript.pdf [https://perma.cc/94ZU-ZDTF].

Reagan, despite extremely thin evidence that Hinckley was unable to control his conduct.[184] The public perceived these acquittals as unwarranted, blaming the insanity defense's volition-based test as the primary culprit.

Scholars critique the control-based insanity test mainly due to the lack of scientific research that is capable of distinguishing inability to exercise self-control from simply failing to control behavior.[185] Professor Stephen Morse is the most prominent critic of control-based tests, arguing that courts should reject altogether the notion of an "uncontrollable" urge or any other purported loss of control as a basis for the insanity defense.[186] Morse contends that the loss of self-control criterion for the purpose of determining criminal nonresponsibility is "conceptually unclear, scientifically and clinically unverifiable, and practically unworkable."[187] Morse further suggests that only a defect in the capacity for rationality can work as a coherent nonresponsibility criterion.[188] He thus advocates replacing the loss of self-control test with a lack of capacity for rationality to determine legal insanity.[189]

Additionally, Professor Richard Bonnie notes that the main problem with control-based tests is that psychiatrists do not believe they have a sufficient scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of that capacity.[190] The American Psychiatric Association opined that "[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."[191] Bonnie concludes that, since psychiatrists are unable to draw a meaningful line between control incapacity and control failure and between different degrees of impairment, there is no objective basis for legally distinguishing between offenders who were undeterrable and those who are merely undeterred.[192]

As a result of this critique, control-based insanity tests fell out of favor and the tide turned against them. The upshot was that many jurisdictions amended their laws by abolishing these tests, leaving intact only cognitive-based tests as bases for acquitting defendants on legal insanity grounds.

184. *See* Garvey, *supra* note 176, at 141–42.

185. *See* Morse, *Against Control Tests*, *supra* note 183, at 449 (providing the most elaborate critique of volition or control tests for the insanity defense).

186. *See* Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1594, 1608 (1994) [hereinafter Morse, *Culpability and Control*]; *see also* Stephen Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1065 (2002) [hereinafter Morse, *Uncontrollable Urges*].

187. Morse, *Uncontrollable Urges*, *supra* note 186, at 1035.

188. *Id.*

189. *Id.* at 1064.

190. *See* Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983).

191. Am. Psychiatric Ass'n, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983).

192. *See* Bonnie, *supra* note 190, at 197.

Today, in about half of the states, defendants' volitional impairment is not an independent basis for exculpation.[193]

The decline of volition-based tests for the insanity defense provides a cautionary tale that casts doubt on the continued reliance on the loss of self-control theory as underpinning provocation doctrine. Provocation's loss of self-control theory squarely hinges on the same problematic theory that underlies the insanity defense's volitional impairment test. Surprisingly, however, while most commentators agree that volition-based insanity tests are deeply problematic, they rarely reach a similar conclusion regarding the reliance on the loss of self-control theory in the provocation defense or call for an overhaul of the defense's doctrinal basis.[194] However, drawing an analogy from the convoluted history of the rise and fall of control-based insanity tests sharpens the intrinsic flaws embedded in provocation's loss of self-control theory, which remains fraught with the same drawbacks characterizing volition-based insanity tests.

In both the provocation and the insanity defense realms, there is no psychological or psychiatric basis for accurately demarcating the line between genuine impairment in capacity to exercise control and simple failure to do so.[195] The loss of self-control concept is indeterminate because it captures both of these circumstances, where arguably only incapacity to exercise control should provide grounds for mitigation. Another shortcoming that characterizes the loss of self-control theory is that the precise degree to which defendants ought to experience impairment in their capacity for self-control remains unclear. To successfully raise the provocation defense, some jurisdictions go as far as requiring the defendant to lose self-control completely.[196] Courts in these jurisdictions stress that for provocation to be objectively reasonable, defendants must establish that they had lost *all* control and were unable to refrain from committing the homicide.[197] In other jurisdictions, however, severe impairment in the ability to exercise self-control, falling short of complete incapacity, may suffice to prevail on a provocation claim.[198]

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193. DRESSLER, *supra* note 45, at 346; *see also* 18 U.S.C. § 17(a) (2018) (stating the federal test for the insanity defense, which eliminated the volitional prong).

194. *But cf.* Stephen J. Morse, *The Irreducibly Normative Nature of Provocation/Passion*, 43 U. MICH. J.L. REFORM 193, 194 n.4 (2009) (opposing the use of the loss of control notion to describe the provocation defense); Nourse, *supra* note 23, at 1382–83.

195. *See generally* Paul Litton, *The Mistaken Quest for a Control Test: For a Rationality Standard of Sanity*, *in* THE INSANITY DEFENSE: MULTIDISCIPLINARY VIEWS ON ITS HISTORY, TRENDS, AND CONTROVERSIES 185 (Mark D. White ed., 2017).

196. *See, e.g.*, *supra* note 57.

197. *See, e.g.*, *supra* note 58; *see also* People v. Pouncey, 471 N.W.2d 346, 350–51 (Mich. 1991) (stressing that provocation is objectively reasonable when the defendant could not refrain from the crime); State v. Spooner, No. 2015AP2089-CR, 2017 WL 2774491, at *6–7 (Wis. Ct. App. June 27, 2017) (stressing that provocation is adequate only if the defendant could not refrain from the crime, and in this case there was no evidence that the defendant lost all control and was unable to act deliberately).

198. *See, e.g.*, State v. Lambdin, 424 P.3d 117, 125 (Utah 2017) (The court observed that the notion of self-control does not rest on a binary understanding and that people do not possess complete self-control until they reach a certain level of stress and emotion and then

Moreover, the starkly different treatment of the same loss of self-control theory under the provocation and insanity doctrines creates a conceptual inconsistency that is hard to reconcile. It remains unclear why a theory that has been widely rejected in the realm of the insanity defense continues to play a pivotal role under the provocation defense. Arguably, there are several differences between the use of the loss of self-control concept under the insanity defense and its use in provocation cases. The insanity defense requires evidence that either defendants completely lost the ability to exercise self-control over actions or that such ability was significantly impaired.[199] The provocation defense requires neither complete loss of capacity for self-control nor substantial impairment in such capacity.[200] Instead, it requires evidence that an ordinary person in the defendant's circumstances would also have similarly experienced that same powerful emotion that led the defendant to lose self-control.[201] Moreover, loss of self-control in the insanity context serves as a complete excuse, leading to a verdict of not guilty by reason of insanity, whereas the same concept in the provocation context serves only as a partial excuse by mitigating charges from murder to manslaughter.[202] Furthermore, an objective inquiry concerning the adequacy of the provocation supplements and significantly limits the loss of self-control inquiry.[203]

Yet, these differences cannot fully account for a vastly different legal treatment of the same theory because similar ideas regarding individuals' capacity for control stand at the core of both doctrines. If the underlying theme in both contexts is that the defendant committed the homicide while being in an emotional state of inability to exercise control over conduct, there is no principled way to explain the different legal position taken under the two doctrines. Furthermore, the provocation defense arguably incorporates, through the back door, a theory that has already been mostly rejected in the closely related area of the insanity defense. It remains unclear why defendants who suffer from mental disorders that significantly impair their capacity to control conduct cannot be excused due to the law's narrow construction of insanity defense, while defendants who do not suffer from mental disorders but lose self-control due to overwhelming emotions may be partially excused.

Drawing on insights from the law's treatment of volition-based insanity tests leads to the conclusion that loss of self-control is an unsuitable legal concept for both the insanity and provocation defenses. The main doctrinal implication of this analogy is that the law should cease to rely on the

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lose control entirely. Instead, "the average person's ability to exercise self-control is measured along a scale."); Kahan & Nussbaum, *supra* note 56, at 305–12 (observing that the provocation defense does not require complete loss of self-control).

199. Kahan & Nussbaum, *supra* note 56, at 341.

200. *See* Morse, *supra* note 194, at 194 n.4.

201. *See* Litton, *supra* note 55, at 733–34.

202. *See supra* note 81 and accompanying text.

203. For further discussion of the limiting effect of the adequacy requirement, see *infra* Part IV.B.

misguided loss of self-control theory as underpinning the provocation defense and instead replace it with an alternative theory.

The following Part turns to psychological theories to consider their ramifications on the provocation doctrine and to ultimately construct a revised defense.

III. THE PROMISE OF DUAL-PROCESS THEORIES

From its inception, the legal concept of loss of self-control that underlies the provocation defense was not grounded in any psychological research explaining either the mechanisms of individuals' loss of self-control or the scientific meaning of control failures.[204] Instead, the notion of loss of self-control hinged on laypersons' intuitive and mostly descriptive understanding of impulsive and uncalculated behavior. As Professor Nourse succinctly observes, provocation's loss of self-control theory "purports to depend upon [the defendant's] behavior (lack of self-control), but it never provides a behavioral theory" to support it.[205]

In recent years, legal scholars increasingly venture into scientific studies, considering the implications they might carry for the law, including, among others, criminal defenses. For example, a major area of interest for criminal law scholars concerns neuroscience research, as brain imaging techniques explain the neuroscientific mechanisms that lead individuals to commit violent crimes.[206] Examining psychological research for the purpose of better understanding criminal conduct and developing criminal excuses, such as the provocation defense, in accordance with that knowledge is yet another step in this direction.

A. Psychological Research on Loss of Self-Control

In the past two decades, commentators began to explore psychological research on loss of self-control to consider its implications for various legal doctrines which draw on this notion.[207] In a thought-provoking paper, Hollander-Blumoff argues that criminal law scholars have neglected to consider psychological studies on self-control.[208] Drawing on two strands of

204. *See* Nourse, *supra* note 23, at 1369.

205. *Id.*

206. *See generally* Elizabeth Bennett, *Neuroscience and Criminal Law: Have We Been Getting It Wrong for Centuries and Where Do We Go from Here?*, 85 FORDHAM L. REV. 437, 450 (2016) (suggesting that developments in neuroscience will likely lead to the expansion of existing excuses); Christopher Slobogin, *Scientizing Culpability: The Implications of* Hall v. Florida *and the Possibility of a "Scientific Stare Decisis*,*"* 23 WM. & MARY BILL RTS. J. 415 (2014).

207. *See, e.g.*, Sherman & Hoffmann, *supra* note 154, at 513–16; *see also* Hollander-Blumoff, *supra* note 26, at 505 (arguing that criminal law should rely on the insights gained from psychological research to suggest meaningful reforms to substantive criminal law doctrines).

208. *See* Hollander-Blumoff, *supra* note 26, at 503–04.

research, she suggests that these studies carry important insights that support a better understanding of the legal concept of self-control.[209]

The first strand concerns construal-level theory, which distinguishes between low-level construal that is implicated when individuals focus on specific details of events happening in the short term and high-level construal, where individuals focus on future events in general and abstract terms, carefully contemplating their behavior.[210] According to psychological research, self-control is conceptualized as acting in accordance with high-level rather than low-level construal.[211] This research further establishes that regulation of behavior requires people to act in concert with high-level construal, which promotes self-control.[212] It also finds that individuals whose mental representations focus on low-level qualities are less successful at exercising self-control compared to individuals who act in accordance with high-level construal.[213]

A second line of research rests on psychological experiments showing that all voluntary effort, including cognitive, emotional, and physical, draws on a limited pool of mental energy.[214] Since individuals' self-control is an expandable resource, it may be completely depleted once they exert significant effort on mental energy.[215] This mental strength model of self-control draws on the phenomenon of ego depletion to explain failures of self-control.[216] Hollander-Blumoff concludes that, in light of these psychological studies, criminal law may significantly underestimate the host of circumstances in which individuals do not have the ability to control their actions.[217] But she also recognizes a mismatch between psychology and law, as psychological research on loss of self-control is mostly descriptive, reflecting empirical reality in psychology rather than a legal and moral position, which calls for normative judgments about behaviors.[218]

The turn to psychological research to support a better understanding of legal concepts is a welcome step in the right direction.[219] The psychological account of the notion of self-control is critical to explaining criminal conduct.

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209. *Id.* at 529.

210. *See* Kentaro Fujita & Jessica J. Carnevale, *Transcending Temptation Through Abstraction: The Role of Construal Level in Self-Control*, 21 CURRENT DIRECTIONS PSYCHOL. SCI. 248, 249 (2012); Kentaro Fujita et al., *Construal Levels and Self-Control*, 90 J. PERSONALITY & SOC. PSYCHOL. 351, 363–65 (2006).

211. *See* Fujita & Carnevale, *supra* note 210, at 249; Fujita et al., *supra* note 210, at 363–65.

212. *See* Hollander-Blumoff, *supra* note 26, at 533.

213. *Id.*

214. *See* Martin S. Hagger et al., *Ego Depletion and the Strength Model of Self-Control: A Meta-analysis*, 136 PSYCHOL. BULL. 495, 516–18 (2010).

215. *Id.*

216. *Id.*

217. *See* Hollander-Blumoff, *supra* note 26, at 505.

218. *Id.* at 551–52 (observing that the law makes normative judgments about the type of behavior involved where psychology makes no such judgments).

219. Some legal scholars, however, cast doubt on whether psychological research on loss of control has any implications for better understanding criminal defenses. *See* Litton, *supra* note 55, at 734–39.

Many types of criminal acts may fairly be characterized as control failures, and psychological research describing such failures facilitates clearer understanding of what drives criminal behavior. But psychological research on loss of self-control does little to promote a more principled understanding of the normative scope of the provocation defense. Psychological research does not contribute much to the legal understanding of excuse defenses, in general, and the provocation defense, in particular, because it does not draw the normative line between behaviors that warrant mitigation and those that do not.[220]

In addition, the problems that characterize courts' reliance on the theory of loss of self-control further support the conclusion that this theory inadequately supports the legal concept underlying the provocation defense. This conclusion calls for considering different strands of psychological research that offer a behavioral theory that focuses on the causes for control failures rather than merely describing its effects. Such theory would support an alternative legal concept that is more suitable for determining the scope of the provocation defense.

The following sections first examine behavioral psychology research concerning judgment and decision-making, specifically, dual-process theories. They then consider their implications for the provocation defense.

B. Psychological Research on Dual-Process Theories

Dual-process theories in general and the notion of impairment in decision-making processes and judgments in particular are recurring themes in cognitive psychology today.[221] These theories offer an alternative way of understanding individuals' information processing and reasoning, one that rejects the basic premise underlying theories of rational choice and deterrence that researchers previously relied upon in trying to understand human behavior, including criminal offending.[222]

Rational choice theories' approach to crime, originally developed by economist Gary Becker as an economic-based model for understanding individuals' financial decisions, asserts that people are rational actors, choosing to commit crime when it provides them with the greatest benefit.[223] Drawing on Bentham's utilitarianism, these theories hold that criminal actors engage in a form of cost-benefit calculus to determine whether to commit a

220. *Id.* at 739.

221. *See generally* Megan Eileen Collins & Thomas A. Loughran, *Rational Choice Theory, Heuristics, and Biases*, *in* THE OXFORD HANDBOOK OF OFFENDER DECISION MAKING 10 (Wim Bernasco et al. eds., 2017).

222. *Id.*

223. *See* Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 390 (1993) (providing an analysis that indicates that three factors determine frequency of crime: (1) costs of crime due to arrest and punishment; (2) financial, social, and personal gains from offending; and (3) a host of variables like income, time, and opportunities).

crime.[224] Criminologists describe the decision to engage in criminal activity as a two-stage process.[225] In the "initial involvement" model, individuals consider a host of criminal and noncriminal ways of satisfying their goals and needs, taking into consideration their personal beliefs and experiences.[226] In the "criminal event" model, actors select among certain situations to engage in crime, based largely on the perceived costs and benefits.[227]

In the past decades, scholars began to cast doubt on the rational theory and deterrence models' ability to fully explain criminal behavior.[228] Leading legal theorists, Frank Zimring and Gordon Hawkins, urged the investigation of a variety of factors that condition the differential effects of legal threats and recognized that a high degree of emotional arousal is one critical factor affecting criminal decision-making by eclipsing thought of future consequences.[229]

Today, ample research demonstrates that people often do not act as rational decision makers, instead making errors in their choices and judgments and making decisions that are not in their best interests.[230] Acknowledging the inherent limitations in rational choice models, Nobel laureate Herbert Simon coined the concept of bounded rationality to modify previous understandings of rational choice models.[231] Simon suggests that individuals' perceptions of costs and benefits are limited by their bounded rationality, a concept referring to the cognitive, situational, informational, and computational limitations that may influence rational decision-making and the shortcuts people often take in making decisions. Importantly, Simon argues that "in order to have anything like a complete theory of human rationality, we have to understand what role emotion plays in it."[232]

In recent years, behavioral psychologists developed sophisticated dual-process theories of information processing and reasoning mechanisms to consider how individuals make decisions when operating under intense emotions, such as anger and fear, and in stressful situations like threatening

224. *See* Derek Cornish & Ronald Clarke, *Introduction* to THE REASONING CRIMINAL: RATIONAL CHOICE PERSPECTIVES ON OFFENDING 1, 1–16 (Derek B. Cornish & Ronald V. Clarke eds., 1986).

225. Ronald V. Clarke & Derek B. Cornish, *Modeling Offenders' Decisions: A Framework for Research and Policy*, 6 CRIME & JUST. 147, 167–69 (1985).

226. *Id.*

227. *Id.* at 169–70.

228. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1066–75 (2000).

229. *See* FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 136 (1973) ("Decisions about criminal conduct that are made when a person is in circumstances which provoke great emotional arousal may be less amenable to threats than decisions that occur when the potential criminal is less aroused, because very high degrees of emotional arousal may eclipse thoughts of future consequences by riveting all of the potential criminal's attention on his present situation.").

230. *See* Cooter & Gilbert, *supra* note 41 (manuscript at 4).

231. *See generally* HERBERT A. SIMON, MODELS OF BOUNDED RATIONALITY (1982).

232. *See* HERBERT A. SIMON, REASON IN HUMAN AFFAIRS 29 (1983).

circumstances.[233] While psychologists advanced multiple strands of dual-process theories (or dual-system models) that focus on different variables, their theories all share some key features regarding actors' decision-making and judgment processes.[234]

Broadly stated, psychologists identify two types of thought processes underlying reasoning and decision-making that constantly compete for control of individuals' actions.[235] One type implicates an implicit, automatic, fast, uncontrolled, and mostly unconscious thought process, whereas the other implicates explicit, reasoned, slow, controlled, and conscious thinking.[236] In a given conflict between these two opposing forces, the automatic, rapid, and partly conscious mode of thinking sometimes overrides the intentional, controlled, and deliberate decision-making and, when that happens, actors' behavior is sometimes harmful, not only to their own interests but also to others.[237] Moreover, research shows that when the automatic thought processing is operated, actors tend to rely on a single explanation for a situation rather than search and weigh all the evidence to find the best possible cause or explanation.[238] This type of automatic and unconscious process is also closely linked to hidden and implicit biases, including availability bias, namely, the tendency to rely on things that people immediately think about.[239]

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233. *See* JOSEPH LEDOUX, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE 149–50, 163–65, 174–78 (1998). *See generally* Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49 (Thomas Gilovich et al. eds., 2002).

234. This Article uses the terms dual-process theories or models and dual-system models interchangeably.

235. These systems are often referred to as "System I" and "System II," terminology which was originally coined by psychologist Keith Stanovich. *See* KEITH E. STANOVICH, RATIONALITY AND THE REFLECTIVE MIND 16–19 (2011). Stanovich also uses the terms "Type 1" and "Type 2" processes. *See* Keith E. Stanovich, *Distinguishing the Reflective, Algorithmic, and Autonomous Minds: Is It Time for a Tri-process Theory?*, *in* IN TWO MINDS: DUAL PROCESSES AND BEYOND 55, 55–60 (Jonathan St. B. T. Evans & Keith Frankish eds., 2009). Stanovich further clarifies that System I should be used in plural because, in actuality, it is a set of systems in the brain that operates autonomously in response to their own stimuli and is not under the control of the analytic process system. *Id.* Stanovich also suggests that dual-process theories should be further modified to include a tripartite process model, suggesting that in addition to System I's automatic mind, System II should be further subdivided into what he refers to as two separate "minds": the algorithmic mind and the reflective mind. *Id.* at 57–60. The algorithmic mind deals with slow thinking that demands computation. *Id.* at 58–60. The reflective mind regulates behavior at a high level of generality. *Id.* It refers to individual differences in rational thinking dispositions. Stanovich further argues that superficial or "lazy" thinking is a flaw in the reflective mind and a failure of rationality. *Id.*

236. *See* Jonathan St. B. T. Evans, *In Two Minds: Dual-Process Accounts of Reasoning*, 7 TRENDS COGNITIVE SCI. 454, 454 (2003).

237. *See* Jean-Louis van Gelder, *Dual-Process Models of Criminal Decision Making*, *in* THE OXFORD HANDBOOK OF OFFENDER DECISION MAKING, *supra* note 221, at 166, 171.

238. *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION: FROM BRAINS TO CULTURE 135–44 (2008).

239. *See* Susan T. Fiske & Eugene Borgida, *Providing Expert Knowledge in an Adversarial Context: Social Cognitive Science in Employment Discrimination Cases*, 4 ANN. REV. L. & SOC. SCI. 123, 127–30 (2008).

Nobel laureate, economist, and psychologist Daniel Kahneman developed the most prominent dual-process theory, challenging previous assumptions that individuals always make logical decisions.[240] In a groundbreaking book, Kahneman differentiates between the intuitive "System I," which is fast and emotional, and the deliberate "System II," which is slower and more logical.[241] These conceptual systems process information differently; System I "operates automatically and quickly, with little or no effort and no sense of voluntary control."[242] It is constantly active, waiting to operate immediately, and heavily relies on heuristics and biases.[243] For example, System I is immediately activated when individuals' intuitions tell them that they are threatened and should run away from danger.[244] System II is the deliberate system, which allocates attention to effortful mental activities that demand it.[245] Its operations are often associated with the subjective experience of agency, choice, and concentration.[246] System II often prevents inappropriate impulses from overt expression, as it overrules the impulses generated by System I.[247]

Kahneman provides an elaborate account of how problems concerning individuals' objectively unreasonable decision-making occur, demonstrating that this happens whenever only System I is activated.[248] He contends that individuals' decision-making processes often consult both types of thinking and that the division of labor between these systems works most of the time, as acting on intuitions, feelings, and impressions usually operates well.[249] But Kahneman claims that individuals tend to be overconfident, placing too much focus on their intuitions and too little on cognitive efforts that they find unpleasant, therefore tending to avoid them as much as possible.[250] When situations become more complex, they demand the involvement of System II, which intervenes by correcting or replacing the erroneous intuitive judgments generated by System I. In these circumstances, Kahneman continues, a conflict between the dual systems arises, resulting in erroneous judgments that occur when System II fails to get activated and correct decisions triggered solely by System I.[251] This happens because System II calls for deliberate activation and, since it requires effort and attention, it cannot last for long periods of time.[252] System II becomes lazy as it is depleted quickly, sometimes leading individuals to make decisions relying

240. *See generally* DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011). There is no single dual-process theory but multiple accounts involving the notion of double process reasoning with variations among them.
241. *Id.* at 20–21.
242. *Id.* at 20.
243. *See id.* at 19–20.
244. *Id.* at 20.
245. *Id.* at 21.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* at 24.
250. *Id.* at 45.
251. *See id.* at 26.
252. *Id.* at 21.

solely on System I, which is much more prone to making errors in specified circumstances.[253] One of Kahneman's key conclusions therefore is that individuals' decision-making and judgments that solely rely on System I may result in irrational behavior.[254]

A critical part of understanding the concept of actors' impairment in judgment rests on highlighting the intersection of law and emotions in general, the causal connection between intense emotional arousal, and dual-process theories in particular. Psychologists draw attention to the relationship between these theories and the role of emotion—often referred to as "affect"[255] in psychological jargon—in judgment and decision-making.[256] In the past three decades, research on emotion, judgment, and decision-making has considerably developed, examining the mechanisms that explain the influence of affect on individuals' behavior.[257] Broadly stated, this line of research concludes that emotions constitute powerful, pervasive, and predictable drivers of decision-making, implicating the most influential decisions in one's life.[258] It further concludes that impairment in judgment may sometimes harm others.[259]

In the last two decades, psychological research has undergone a significant revolution, resulting in acknowledgment of the role that emotions play in shaping actors' thought processes and judgment and affecting their behavior.[260] Historically, the prevalent view adhered to a dichotomy between reason and cognition on one hand and emotions on the other.[261] Emotions were traditionally understood as a threat to rationality, by overwhelming and distorting actors' rational thinking.[262] Psychological research, however, underwent an "affect revolution," establishing that reason and emotions are not contrasting concepts but rather inseparable components of integrative thought processes and alternative decision-making choices.[263]

Following this conceptual shift, the contemporary understanding of psychologists today is that emotions play a salient role in the course of

253. *Id.* at 25, 44–45.

254. *Id.* at 411–18.

255. *See* Paul Slovic et al., *The Affect Heuristic*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 233, at 397, 397.

256. *See* Evans, *supra* note 236, at 454.

257. *See* Lerner et al., *supra* note 155, at 801, 812.

258. *Id.* at 816.

259. *See id.* (explaining that emotions can be harmful).

260. For an excellent and recent review of the shifts in psychologists' understanding of emotions and the interplay between emotions and the law, see Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829, 847–54 (2018). Extensive literature now explores the relationship between law and emotions. The works of Susan Bandes, Kathryn Abrams, Terry Maroney, Martha Nussbaum and Dan Kahan, among others, examine the role that emotions play in various contexts, including in the criminal law. *See, e.g.*, THE PASSIONS OF LAW (Susan A. Bandes ed., 1999); Kathryn Abrams, *Exploring the Affective Constitution*, 59 CASE W. RES. L. REV. 571 (2009); Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010); Kahan & Nussbaum, *supra* note 56; Terry Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006).

261. Keren, *supra* note 260, at 849.

262. *Id.*

263. *Id.* at 852.

rational and cognitive decision-making processes.[264] Under this view, reason and emotion are *not* opposing forces because emotions influence actors' thoughts and judgments and are shaped by them.[265] Put differently, emotions are not irrational forces but are in fact rational themselves and there is no conflict between them and cognitive-based rational decision-making processes.[266] While the traditional understanding was that emotions are static forces and direct products of certain stimuli, the contemporary view is that emotions are complex processes that integrate highly cognitive features.[267] For example, this recognition of the complex interplay of actors' cognition and their emotion rejects the dated view that anger and fear are bursts of negative feelings accompanied by some visceral reactions, adhering instead to the understanding that these emotions are integral parts of actors' cognitive thought processes and judgments.[268]

One area where intense emotions carry harmful effects on other individuals involves the commission of crimes.[269] Research on criminal behavior shows that criminal decision-making is often affected by emotions, sometimes directly shaped by cognitive reactions.[270] The affect heuristic suggests that people make judgments and decisions by consulting their emotions.[271] Significant research is devoted to studying the influence of both anger and fear on judgment and choices, including the role that fear plays in assessing risks.[272] Research also demonstrates that when emotional influences are unwanted and deleterious, it is difficult to reduce their effect through effort alone, even if under certain circumstances, such harmful effects can be reduced.[273] For example, research establishes that individuals sometimes attempt to regulate their emotions by suppressing them.[274] Such suppression, however, can be counterproductive as emotions can intensify the very emotional state one attempts to regulate.[275]

Kahneman's work integrates dual-process theories with psychological research on the role that intense emotions play in judgment and decision-making. Interweaving these multiple layers of psychological research, Kahneman's project clarifies the ways that emotion-based decisions are

264. *Id.* at 853.
265. *Id.* at 853–54.
266. *Id.*
267. *Id.* at 854.
268. *Id.*
269. *See generally* NORMAN J. FINKEL & W. GERROD PARROTT, EMOTIONS AND CULPABILITY: HOW THE LAW IS AT ODDS WITH PSYCHOLOGY, JURORS, AND ITSELF (2006).
270. *See* Carlton J. Patrick & Debra Lieberman, *Not from a Wicked Heart: Testing the Assumptions of the Provocation Doctrine*, 18 NEV. L.J. 33, 45–47 (2017).
271. *See* Slovic et al., *supra* note 255, at 397; *see also* PAUL SLOVIC, THE PERCEPTION OF RISK 415–25 (2000).
272. *See, e.g.*, Joseph Cesario et al., *The Ecology of Automaticity: How Situational Contingencies Shape Action Semantics and Social Behavior*, 21 PSYCHOL. SCI. 1311, 1312 (2010) (focusing on fear); Lerner & Tiedens, *supra* note 139, at 115–37 (focusing on anger).
273. *See* Lerner et al., *supra* note 155, at 812.
274. *See* Richard M. Wenzlaff & Daniel M. Wegner, *Thought Suppression*, 51 ANN. REV. PSYCHOL. 59, 61–62 (2000).
275. *Id.*

made through the use of automatic processing and heuristic reasoning, which occur rapidly, unintentionally, and without much awareness. This account explains why intense emotional arousals cause impairments in individuals' judgment and decision-making processes. Kahneman further elaborates on the links between System I and emotions like anger and fear, stressing that these intense emotions trigger the automatic, semiconscious, and intuitive modes of System I's thinking.[276] He also notes that the amygdala part of the brain, whose primary role serves as a "threat center," is activated in various emotional states.[277] Specifically, brain imaging conducted on individuals reveal intense responses of the amygdala to threatening pictures that they did not recognize. Kahneman further shows that emotional arousals of anger and fear are "associative, automatic and uncontrolled" and that they produce impulses for protective actions.[278] Individuals may not even be consciously aware of these emotive experiences, therefore making it difficult to influence them. Kahneman explains that even if System II may "know" that the probability of risk is low, that knowledge does not eliminate the automatic response of System I, which cannot be turned off.[279]

In addition, Kahneman demonstrates how the emotions of anger and fear influence individuals' judgment of probability of events and outcomes. Emotions are not only disproportionate to an event's probability but they are also insensitive to the exact level of probability.[280] Two key insights that Kahneman highlights concern the related phenomena of overestimation and overweighting.[281] Overestimation happens when people exaggerate the probabilities of unlikely events. Overweighting happens when people assign too much weight to unlikely outcomes. Overestimation of events and overweighting of unlikely outcomes are key features of System I and therefore account for individuals' excessive responses to rare events.[282] "Although overestimation and overweighting are distinct phenomena, the same psychological mechanisms are involved in both: focused attention, confirmation bias, and cognitive ease."[283]

C. Implications of Dual-Process Theories for Provocation Law

Dual-process theories have been extensively applied in the field of economic decision-making, as these theories largely focus on the practical implications of the two modes of thinking for behavioral economics.[284] Dual-process theories, however, have far broader implications than financial decision-making. Kahneman's nuanced project includes multiple examples that apply dual-process theories in a variety of different contexts, including

276. KAHNEMAN, *supra* note 240, at 301.
277. *Id.*
278. *Id.* at 323.
279. *Id.*
280. *Id.*
281. *Id.* at 137–45.
282. *Id.* at 324.
283. *Id.*
284. *Id.* at 256–99.

decision-making of legal actors such as judges.[285] These examples demonstrate how overreliance on System I's heuristics leads individuals to erroneous thinking and faulty behaviors, including criminal offenses.

In recent years, criminology researchers began applying dual-process theories in an attempt to better understand criminal offenders' behaviors.[286] One variation of dual-process theory distinguishes between "hot" and "cool" modes of thinking,[287] describing their influence on criminal decision-making. The "hot" form of information processing is the affective, or emotion-based mode, whereas the "cool" form is the cognitive, thought-based mode.[288] The emotions of anger and fear are perceived as immediate emotions, namely, they are felt at the time of decision, unlike anticipated emotions like guilt, regret, or shame that are felt only when the outcomes of decisions are experienced.[289] This "hot-cool" framework stresses the discrepancy between people's cognitive evaluation of a situation and their emotional reaction to it.[290] The hot-affective mode, triggered by strong emotions, generates impulses that are influenced by variables which play only a minor role in cognitive evaluations. Criminal behavior results from the sole operation of the "hot" mode. Consolidating criminology-based application of dual-process theories with research on emotions' influence on decision-making therefore provides important insights into understanding one of the paradigm examples of unreasonable behavior, namely, criminal wrongdoing.

While dual-process theories have been applied in multiple areas of study, legal scholars have yet to consider their implications for the purpose of criminal excuses in general and the provocation defense in particular.[291] As noted earlier, Morse has long argued that the concept of diminished

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285. *Id.* at 43–44 (discussing the findings of a study involving eight parole judges in Israel, who spent days reviewing applications for parole). The default decision was denial of parole, with only 35 percent of applications approved. *Id.* at 43. The study found that about 65 percent of requests were granted immediately following the judges' meals, whereas approvals gradually declined in the two hours before the meals, with zero approvals immediately before the meals. *Id.* at 44.

286. *See* Kyle J. Thomas & Jean Marie McGloin, *A Dual-Systems Approach for Understanding Differential Susceptibility to Processes of Peer Influence*, 51 CRIMINOLOGY 435, 440–41 (2013); Kyle Treiber, *A Neuropsychological Test of Criminal Decision Making: Regional Prefrontal Influences in a Dual Process Model*, *in* AFFECT AND COGNITION IN CRIMINAL DECISION MAKING 193, 195 (Jean-Louis van Gelder et al. eds., 2014) (Using dual-process theories, researchers who examine differences in adolescents' susceptibility to peer pressure find that highly impulsive individuals are more susceptible to situational influences and immediate considerations and are more likely to rely on the fast and automatic mode of processing.).

287. Janet Metcalfe & Walter Mischel, *A Hot/Cool-System Analysis of Delay of Gratification: Dynamics of Willpower*, 106 PSYCHOL. REV. 3, 3–4 (1999).

288. *See* van Gelder, *supra* note 237, at 170.

289. *See* George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, *in* HANDBOOK OF AFFECTIVE SCIENCES 619, 620–21 (Richard J. Davidson et al. eds., 2003).

290. *See generally* van Gelder, *supra* note 237.

291. *But cf.* Kenneth W. Simmons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 76–79 (2008) (citing Kahneman's earlier work on dual-process theory and discussing its implications for the justification of self-defense, but not provocation).

rationality underlies both the insanity and the provocation defenses.[292] Morse suggests that a better understanding of control failures causing criminal behavior must rest on the notion of defects in the defendant's rationality that are not the defendant's fault.[293]

While the argument that I advance embraces Morse's rejection of the loss of self-control concept as underlying the provocation defense, I depart from his suggestion that an alternative conceptualization of criminal excuses including provocation ought to rest on the concept of diminished rationality. As discussed above, contemporary understanding of emotions is that they are not some irrational forces that interfere with actors' rationality.[294] Instead, the prevalent view today is that emotions are themselves rational, an integral part of complex cognitive processes. This view further recognizes that emotions play a significant role in affecting actors' decision-making processes and their judgments.

Moreover, Morse's call to ground excuse defenses in the theory of diminished rationality is not supported by insights gained from dual-process theories, particularly from the ways these theories conceptualize impairment in thought processes and judgments. Instead of drawing on the concept of diminished rationality, the argument below rests on the idea that the provocation defense is best understood as grounded in the notion of impaired judgment.

Psychological research on dual-process theories has promising implications for considering criminal excuses in general and for revisiting the scope of the provocation defense in particular. Applying dual-process theories to the analysis of the provocation defense provides a doctrinal construct that substitutes the notion of impaired judgment for the misguided loss of self-control theory. As previously noted, one drawback of the loss of self-control theory is that it is not grounded in any psychological theory explaining the causes of provoked killers' behavior.[295] The notion of loss of self-control merely describes an outcome—control failure—rather than focusing on the causes for such failure. Conversely, dual-process theories not only shift the focus away from effect to cause but also provide a behavioral theory that cures the apparent disconnect between the legal standard for provocation and the psychological research underlying it.

To be clear, the notions of loss of self-control and impaired judgment are conceptually intertwined, representing two sides of the same coin, with the

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292. *See generally* Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 333–36 (1998) (positing that diminished rationality is a basic excusing condition and that provocation and insanity exemplify how actors' capacity for rationality is reduced). In a later work, Morse proposes that the law adopt a generic doctrinal mitigating excuse of partial responsibility (a "Guilty But Partially Responsible" verdict) that would apply to all crimes when the defendant's capacity for rationality was substantially diminished at the time of the crime, substantially affecting the criminal conduct. *See* Morse, *supra* note 35, at 299–300.

293. *See* Morse, *Culpability and Control*, *supra* note 186, at 1595.

294. *See supra* notes 261–68 and accompanying text.

295. *See supra* Part III.

former focusing on provocation's effect and the latter on its cause. Psychological research supports both of these concepts, as they examine similar questions from different angles, thus complementing rather than conflicting with one another.[296] Yet, given the many shortcomings embedded in loss of self-control as the *legal* concept underlying the provocation defense, the notion of impaired judgment is better suited for understanding the causes for provoked actors' behavior and for providing the governing rationale for the defense. In particular, the impaired judgment concept offers a broader legal construct compared with the loss of self-control theory. It covers various behavioral responses that characterize different types of provoked killings triggered by a host of intense emotions, including ones that the loss of self-control concept fails to capture.

Dual-process theories provide a doctrinal framework that comprehensively account for provoked actors' thought processes and decision-making. These theories recognize that provoked killers' thoughts and actions are sometimes intuitive, automatic, reflexive, and subconscious responses and that intense emotional arousals may affect such reactions. They further recognize that when emotions such as anger and fear affect actors' thought processes, their judgment may be impaired and result in aggressive reaction.[297] Importantly, dual-process theories acknowledge that since these emotive processes occur at the subconscious level of awareness, rather than being consciously experienced, individuals' ability to influence them is rather limited.[298]

Dual-process theories further provide a moral basis and a guiding rationale for the provocation defense. The defense's main purpose is to draw a legal boundary between cold, calculated killings and those that are spontaneously affected by extreme emotional arousal and are thus perceived as less blameworthy.[299] Dual-process theories illustrate the ways that provocation cases exemplify the latter and actors' behavior therefore cannot be deemed fully calculated and objectively reasonable. The key implication of applying dual-process theories to the provocation defense is that, since provoked killers' thought processes are intuitive and automatic, their judgment is impaired and their ability to influence the operation of such processes is

296. Courts sometimes refer to these concepts interchangeably when discussing provocation triggered by intense emotions and considering the reasonable reactions of an average person to such emotions. *See, e.g.*, State v. Lambdin, 424 P.3d 117, 126 (Utah 2017) (holding that the defendant must prove that the type and amount of stress would cause the average reasonable person's rationality to be overwhelmingly and substantially "overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions" and that, while the average reasonable person may experience anger or other emotions in the face of large amounts of stress, the stress and emotion must be extreme, indicating that the connected impaired reasoning and loss of self-control must be overwhelming and substantial).

297. *See* ANTONIO R. DAMASIO, THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS 51–55 (1999) (observing that emotions are inseparable from the idea of reward and punishment).

298. KAHNEMAN, *supra* note 240, at 415–17.

299. *See* Dressler, *supra* note 77, at 967–75.

constrained. Therefore, their fault is arguably diminished, and the degree of their criminal responsibility conceivably ought to be reduced.

Dual-process theories' fundamental notion of impaired judgment brings home the point that thought processes affected by various intense emotions significantly impair actors' judgment and choices. This may result in criminal offending, which is the epitome of faulty judgment and decision-making.[300] Dual-process theories explain why provoked actors kill by stressing that their sound judgment is impaired as a result of the intuitive, rapid operation of the emotive mode. This automatic mode of thinking accounts for actors' aggressive behavior, as their judgments and actions occur fast, overriding fully reasonable thought processes and judgments. Applying the insights of dual-process theories to the provocation defense therefore supports the conclusion that provocation cases ought to be viewed as one example of impaired judgment where an actor's thinking was obscured and failed to overrule impulsive behavior.

Dual-process theories further explain the reasons why provoked killers make mistaken and objectively unreasonable decisions, as the psychological research discussed above shows that overreliance on the intuitive information processing system can lead to mistakes.[301] This happens because, whenever actors' decision-making is triggered by reflexive thought processes, it bypasses the corrective mechanisms that the competing fully reasoned thought system offers and prevents the intervention of deliberate and calculated modes of thinking. This type of thought process explains why actors sometimes react in a way that seems objectively unreasonable. Put differently, actors sometimes overreact to perceived threats and to certain emotional experiences. While these overreactions are often not objectively reasonable, they are nonetheless understandable given the circumstances that the actors faced, such as experiencing anger and fear in response to victims' behaviors.[302]

Relatedly, another problem with automatic thought processing is its association with implicit and hidden biases because provoked actors heavily rely on heuristics and biases.[303] Among the characteristics of automatic thought processing are the phenomena of overweighting and overestimation and the fact that actors rely on a single explanation for a situation.[304] These features explain why actors sometimes kill out of fear, overestimating and overreacting to what they mistakenly perceive as imminent threats.

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300. *See* Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 177–78 (2000) ("[P]eople usually slide into crime . . . because of a series of small irrational decisions.").

301. *See supra* Part III.B.

302. For further elaboration on the idea of understandable reactions, see *infra* Part IV.

303. *See generally* L. Song Richardson & Phillip Atiba Goff, *Self Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 298 (2012) (discussing the automatic thought process in the context of self-defense and explaining the role of heuristics in mistaken self-defense situations).

304. *See supra* Parts II.B, III.B.

The impaired judgment concept thus supports a broader-based theory for understanding the provocation defense, compared to loss of self-control, as it covers a wider range of circumstances in which actors' thought processes and judgments were impaired, even if their behavior did not visibly manifest as loss of self-control. Recall that one of loss of self-control theory's shortcomings is that it mistakenly relies on a binary dichotomy under which people are either in complete control or "out of control."[305] Psychological research, however, shows that individuals' behavior rarely falls under such twofold division. Psychologists believe that "people think, decide, and react to other people along a continuum of processes [ranging] from automatic to controlled."[306] Impaired judgment theory is better suited to capture provoked killers' judgment and decision-making because it recognizes that their behavior encompasses a continuum of processes, rather than a momentary control failure. This position aligns with the understanding that provoked actors kill because their judgment might have been significantly impaired, even if not completely destroyed.

Another implication of reliance on the notion of impaired judgment as underlying provocation cases is that it provides a proper doctrinal framework for recognizing cumulative provocation, which the loss of self-control theory fails to do.[307] As noted earlier, conceptualizing the provoked actor as someone who temporarily loses self-control mistakenly envisions a single moment in time in which control is lacking.[308] Psychologists, however, dismiss such static view, observing that emotional responses do not necessarily occur at a single, discrete moment but rather may evolve over time.[309] The concept of impaired judgment encompasses this understanding as it does not adopt a limiting temporal requirement. Instead, it rests on the idea that judging and acting upon these judgments involve an aggregate process rather than a static moment. The more expansive concept of impaired judgment supports the conclusion that actors' thought processes and judgments can be impaired due to the cumulative effect of multiple provoking incidents.

Relatedly, another drawback in the loss of self-control theory lies with its restrictive cooling-off element, which assumes that shortly after experiencing intense emotional arousal, people regain self-control.[310] This assumption,

305. *See supra* Part II.B.

306. *See* Fiske & Borgida, *supra* note 239, at 125.

307. *See supra* Part II.B.

308. *See, e.g.*, State v. Ruiz-Ascencio, 406 P.3d 900, 904 (Kan. 2017) (holding that the quarrels were not unforeseen, abrupt, or otherwise sudden and, even if the defendant acted out of fear, there was no evidence that he acted in the heat of passion because the quarrels began earlier in the night, which signified that they were not sudden).

309. FINKEL & PARROTT, *supra* note 269, at 95–97 (rejecting a static view of emotions).

310. *See, e.g.*, People v. Stringer, No. 310228, 2013 WL 4005911, at *5 (Mich. Ct. App. Aug. 6, 2013) (holding that, under the circumstances of this case, a lapse of time existed, albeit a short one, during which a reasonable person could have controlled his passions before firing the gun and that the defendant had an opportunity to cool down before shooting the gun when he went to his vehicle to retrieve the gun and while walking the approximately thirty feet to the victim's van).

however, is mistaken, as psychologists recognize that a person's thought processes and judgments may remain impaired long after a provoking incident.[311] Psychologists further stress that provocation may "linger, fester, and reactivate" over time.[312] As previously noted, this perpetual effect is especially common in situations involving domestic abuse.[313] The notion of impaired judgment, which denies that passage of time and necessarily leads to the actor's regaining reasonable thinking, is thus better suited for recognizing a long-lasting provoked state, resulting in continuous impairment in judgment.

Finally, unlike the loss of self-control theory, impaired judgment theory recognizes a host of other emotions beyond anger that similarly impair thought processes and judgment. Such emotions include fear, desperation, extreme sadness, and hopelessness.[314] Additionally, the loss of self-control theory assumes that a single emotion, namely anger, operates exclusively in a provoking incident. In reality, however, emotions are not always mutually exclusive and may also transform over time.[315] For example, defendants who have been subjected to prolonged physical abuse at the hands of the deceased, may concurrently experience not only anger at the deceased but also fear of future physical harm.[316] Dual-process theories recognize that actors may simultaneously experience more than a single emotion that impairs their judgment. In sum, dual-process theories accommodate the pervasive effects that intense emotions have on individuals' decision-making and judgment, sometimes resulting in criminal behavior. The theories' understanding of actors' impairment in decision-making processes and judgment is thus better suited than loss of self-control theory to support the provocation defense.

IV. REINVIGORATING PROVOCATION'S NORMATIVE DIMENSION

As noted earlier, one of the pitfalls of the loss of self-control theory is the fact that it purports to rest on a behavioral theory, but it is not buttressed by any psychological research on the causes for loss of self-control.[317] The previous Part resolves this concern by showing that psychological research on dual-process theories supplies the missing behavioral model that supports the legal claim of provoked killers and by advocating the replacement of the loss of self-control notion with the alternative concept of impaired judgment.

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311. *See* Finkel, *supra* note 156, at 49.

312. *See* Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669, 689 (2000).

313. *See supra* Part II.B; *see also* SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 142–44 (1998); Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 166 (2009).

314. *See* Lerner et al., *supra* note 155, at 804.

315. FINKEL & PARROTT, *supra* note 269, at 95–96.

316. *See* Buchhandler-Raphael, *supra* note 30, at 1776–82 (elaborating on the ways that fear impairs judgment). A full consideration of the similar effects of other emotions exceeds the scope of this Article.

317. *See* Nourse, *supra* note 23, at 1369; *see also supra* note 205 and accompanying text.

Yet, there is another major drawback in the loss of self-control theory that dual-process theories, standing alone, are unable to rectify. While these theories provide a behavioral account of the causes behind provoked killers' actions, they stop short of considering the circumstances under which mitigating punishment is normatively warranted. The concept of impaired judgment, in itself, proves insufficient as the sole moral basis for provocation's partial excuse. Part IV.A addresses the inherent limitations in relying on empirical evidence for making normative evaluations, and Part IV.B proposes adding a key feature to provocation's elements that would assist juries in making such assessments.

A. The Limits of Psychological Empirical Evidence

A notable trend in recent years is the law's increasing turn to empiricism, namely, jurists' reliance on empirical scientific evidence to shape law's substance, both for the purpose of interpreting statutes and for deciding individual cases.[318] Consistent with this direction, criminal law often turns to disciplines such as psychology, psychiatry, sociology, and neuroscience to make choices relevant to the scope of criminal responsibility.[319]

Criminal law's reliance on empirical research to facilitate development of existing doctrines has invaluable advantages. Historically, criminal law has mostly counted on society's moral intuitions and communities' shared norms in deciding questions regarding the limits of criminal responsibility.[320] Relying on such intuitive positions sometimes resulted in the law getting it right, but other times, in inconsistent and unprincipled outcomes.[321] Elaborating on the tremendous advantages that empirically based criminal law has over an intuition-based one exceeds the scope of this Article. Grounding criminal law in a solid empirical basis is critical not only for guiding decision makers to reach fair outcomes in individual cases but also for the continued development of defenses in accordance with contemporary scientific knowledge.[322]

Without minimizing the numerous benefits that empirical psychological research in general and dual-process theories in particular carry for developing criminal defenses, it is also crucial to raise some concerns regarding their intrinsic limitations.[323] Psychological models in general and

318. *See generally* Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 123–33 (2003) (noting that many areas of law are becoming empirical enterprises, as courts in recent years have taken an empirical turn).

319. *See, e.g.*, Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers*, 2002 U. ILL. L. REV. 851 (discussing the problems of criminal law's reliance on empiricism).

320. *See generally* Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151, 1154–60 (2010).

321. *See* Nourse, *supra* note 23, at 1341 (observing that the provocation doctrine is currently in extreme disarray).

322. *See* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter?: A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 189 (2004).

323. *Cf.* Clare Huntington, Essay, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 232–33 (2018) (stressing the limitation of empirical evidence in the area of family law).

dual-process theories in particular are incapable of providing normative guidelines to assist decision makers in determining, based on public policy considerations, who among subjectively provoked killers *ought* to be partially excused. This feature is a central constraint ingrained in attempts to rely on empirical evidence to shape the contours of criminal defenses. This is due to the fact that psychological research and criminal excuses have completely different goals; psychological research provides a positivist account, mostly describing individuals' behaviors for the purposes of diagnosis and treatment.[324] Importantly, its goal is not to evaluate who among those exhibiting certain behavior are less morally culpable and thus deserving of mitigation. In contrast, criminal excuses such as provocation are concerned precisely with determining what types of perpetrators deserve more lenient treatment. Psychologists and criminal jurists therefore speak different languages: while the former focuses on describing behaviors, the latter aims to punish perpetrators according to their "just desert," namely, in proportion to their moral culpability.[325]

The psychological insights gleaned from dual-process theories, and particularly the notion of impaired judgment, are insufficient, standing alone, for determining the scope of criminal responsibility. They broadly apply to many forms of criminal offending that the law is unwilling to excuse, even partially, as a matter of sound public policy. While these psychological theories are paramount to understanding provoked killers' behavior, they are unable to assist the legal inquiry into the circumstances under which courts *should* instruct juries on manslaughter verdicts. Dual-process theories, or any other psychological theories for that matter, have thus only partial impact in shaping the scope of the provocation defense because they leave open the question of who among defendants whose judgment was impaired deserve to be partially excused. The point here is not to claim that psychological research is irrelevant to provocation but to underscore the fact that it is insufficient, in and of itself, to supply a comprehensive theoretical basis for the defense. Impaired judgment theories, therefore, offer only partial promise for reconstructing provocation law. They must be supplemented with a principled theory that would not only guide decision makers in identifying the types of provoked killers whose punishment ought to be mitigated but would also add a limiting mechanism, grounded in normative reasons and policy arguments, to constrain the application of the broad construct that the impaired judgment concept offers.

B. Provocation's Normativity

A theory that aims to identify who, among different types of provoked killers, might deserve reduced punishment rests on the premise that it must be grounded in normatively based inquiries, rather than in empirical

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324. *See* Hollander-Blumoff, *supra* note 26, at 505.

325. The idea of "just desert" embodies a retributivist position under which criminal actors should be punished in proportion to their specific wrongdoing. *See generally* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 84–92 (1997).

psychological evidence. Such normative assessments are implicitly embedded in provocation's objective dimension, that is its "adequacy" element. The requirement that the provocation be adequate encompasses a prescriptive view that evaluates the defendant's reaction in relation to the deceased's provoking behavior.

From its inception, the provocation defense included a subjective prong, requiring that the defendant kill while in a heat of passion, and an objective component, requiring adequate provocation, measured against a reasonable person's standard.[326] Today, while adequacy remains an element of the provocation defense in all non-MPC jurisdictions, its role has been de-emphasized.[327] The reason lies with the modern trend towards emphasizing provocation's notion of loss of self-control, which has become the heart of the defense.[328] Focusing mostly on the defendant's subjective state of mind results in underplaying provocation's adequacy dimension.

Dual-process theories, with their emphasis on impaired judgment, similarly focus on actors' subjective mental states, as their key inquiry is whether defendants' overwhelming emotions impaired their judgment and decision-making. The concept of impaired judgment is thus only capable of addressing provocation's subjective dimension. It is unable to provide any insights for provocation's objective aspect because adequacy is essentially a normative notion which does not hinge on descriptive accounts of defendants' state of mind.[329]

Moreover, strengthening provocation's normative dimension is necessary as a means of offsetting the effect of applying dual-process theories, which arguably expands the scope of the provocation defense by recognizing additional types of provoked killings. Revitalizing provocation's normative dimension counterbalances such expansion by limiting the circumstances under which provocation would be deemed adequate and by ensuring that only defendants whose actions warrant mitigation are able to successfully rely on the defense.

To bolster provocation's normative dimension, the defense's elements must incorporate some principles that would assist decision makers in drawing the line between impaired judgment cases that warrant mitigation and those that do not. These principles ought to encompass intrinsic evaluative standards that draw on shared societal norms and values to enable decision makers to judge provoked killers' behavior.[330] Their purpose is to guide the question of whether society is able to understand provoked killers'

326. DRESSLER, *supra* note 45, at 530.

327. *See* Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 733 (1995).

328. *See* Nourse, *supra* note 23, at 1339.

329. *Id.* at 1379.

330. *See* Kenneth W. Simmons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 663–64 (2000) (noting that community values are embedded into provocation's reasonableness inquiry).

objectively unreasonable behavior and subsequently mitigate punishment. This view aligns with a basic tenet of the criminal law, which aims to punish only actors who deviate from shared societal norms and expectations about proper behavior.[331]

There is a consensus among commentators that the provocation defense calls for normatively based determinations.[332] Professors Dan Kahan and Martha Nussbaum's seminal work on the evaluative conception of emotions in criminal law distinguishes between a mechanistic and an evaluative conception of emotions in criminal law, advocating for the latter position.[333] The loss of self-control theory, they continue, rests on a mechanistic understanding of the emotions.[334] Instead, Kahan and Nussbaum place a premium on a normative, value-based evaluation of emotions by stressing the significance of actors' motives for engaging in criminal behaviors.[335] Kahan and Nussbaum's evaluative conception of emotions recognizes that provoked defendants' actions express an appropriate valuation of the good that is threatened by the deceased's wrongful provocation.[336]

Additionally, considering whether provocation law should adopt broader mitigating standards, Professor Stephen Morse points out that the scope of the provocation doctrine embodies normative questions and that determining which cases of impaired rationality are excusable reflect "a socially based evaluative judgment that some rationality diminutions . . . are not the defendant's fault."[337] But commentators do not fully elaborate on the specific content of provocation's normative dimension, as the prevailing view today is that rigid rules should not dictate what circumstances amount to "adequate" provocation, instead leaving the jury to decide these questions on a case-by-case basis.[338] This view represents a conceptual shift from common law where "adequacy" was limited to cover only predefined categories embodying the deceased's wrongdoing evaluated against social norms that hinged on violation of male honor according to archaic values and prevalent mores of that time.[339] After courts recognized that these categories

331. *See generally* Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L.J. 1628, 1634 (2015).

332. *See, e.g.*, Kahan & Nussbaum, *supra* note 56, at 307–10 (suggesting that provocation law embodies an evaluative view of emotions, namely, it expresses a view on which emotional responses to provocation are morally warranted, with the jury assessing emotions against the background of community mores); *see also* LEE, *supra* note 118, at 235–36 (advocating a normative reasonableness standard rather than merely positivist reasonableness); PILLSBURY, *supra* note 313, at 147–55 (noting that provocation law's emphasis on determining the "adequacy" of the provocation through the lens of the ordinary person masks the normative assumptions behind these assessments).

333. *See* Kahan & Nussbaum, *supra* note 56, at 275–301.

334. *Id.* at 322.

335. *Id.* at 315–18.

336. *Id.* at 315.

337. Morse, *supra* note 35, at 300; *see also* Morse, *supra* note 194, at 196, 205 (noting that "it's all normativity, all the way down").

338. DRESSLER, *supra* note 45, at 532.

339. *See* JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 186–97 (1992).

were too narrow, they rejected fixed rules in favor of flexible and fluid standards that juries need to apply.

While the advantages of replacing set rules with elastic standards cannot be ignored, there are also downsides to consider. Since adequacy is a vague and overly broad concept, its application risks inconsistencies across the board in outcomes of provocation claims.[340] While indeterminate concepts like adequacy must rely on objective measures for evaluating defendants' behavior, existing laws fall short of filling this abstract term with concrete substance. The removal of rules created a lacuna after juries were left without guiding principles on how to apply the amorphous adequacy concept, as they were not provided with alternative standards to direct their evaluative conclusions. Consequently, juries are forced to rely on their own moral intuitions in deciding whether provocation is adequate. But communities differ on shared moral values, which risks juries applying their personal moral intuitions inconsistently in deciding this question. If, rather than making normative and objective determinations based on critical morality, juries relied on subjective and positive morality, the result might be detrimental to both defendants and victims.[341]

Recognizing these difficulties by no means suggests that juries should not engage in normative inquiries in evaluating provocation's adequacy. Juries' key role, beyond the obvious task of fact-finding, is to decide complex normative questions.[342] This mission is especially salient in considering criminal defenses where juries are the best-suited institutional actors for capturing societal norms and shared moral values regarding criminal wrongdoing.[343] But to assist juries in making normative evaluations concerning provocation's adequacy, I advocate the addition of a key component that draws on the idea of contributory responsibility by making the deceased's wrongful act an element of provocation.[344] Currently, no provocation formulation explicitly makes the deceased's criminally wrongful act an element of the defense.[345] While some jurisdictions require, in broad terms, "provocation by the victim," no statutory language unequivocally

340. *See* Nourse, *supra* note 23, at 1341–42 (noting the many inconsistencies in the application of provocation claims).

341. *See* Jeremy Waldron, *Particular Values and Critical Morality*, 77 CALIF. L. REV. 561, 585–86 (1989).

342. *See generally* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407 (1999) (discussing the role of juries' normative determinations in tort and contract law).

343. *See generally* Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255.

344. For an explanation of the borrowed term "contributory responsibility" from Professor Heidi M. Hurd, see generally Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503 (2005).

345. In some jurisdictions, only provocation by the victim, as opposed to third parties, is considered in determining whether adequate provocation exists. *See, e.g.*, State v. Turgeon, 676 A.2d 339, 341–42 (Vt. 1996); *see also* Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645, 685–86 (2003).

provides that provocation is adequate only if it stems from the deceased's legally wrongful act.[346]

In recent years, commentators have weighed in on the idea of incorporating the deceased's wrongdoing into the provocation defense. Requiring that the defendant and the deceased stand on equal moral footing, Professor Victoria Nourse contends that manslaughter instructions should only be given in cases where defendants react to a grave wrong that the law otherwise punishes, denying such instructions to defendants who react in response to the victim's lawful conduct.[347] Evaluating the defendant's reaction vis-à-vis the deceased's wrongful behavior is precisely what makes the defendant's behavior understandable, even if not fully excused.[348] Professor Aya Gruber draws on the idea of relational wrongdoing, advocating a general defense based on the victim's contributory liability for the crime.[349] Professor Vera Bergelson introduces the notion of conditionality of rights to suggest that the deceased's contribution to the offense ought to matter for the provocation defense.[350] Other commentators disagree with the idea of considering the deceased's wrongdoing, claiming that it is both under- and overinclusive.[351]

Drawing on these proposals, I suggest that the deceased's wrongful act ought to be one piece of provocation's normative dimension. To be clear, introducing evidence that the deceased committed a wrongful act against the defendant by no means suggests fully litigating the deceased's precise role in the homicide, including deciding whether such act was indeed committed according to evidentiary standards applicable in criminal proceedings. Granted, such determinations are neither practically possible given that the deceased cannot testify nor normatively warranted given that the law cannot hold the deceased criminally accountable. Instead, I posit that the wrongful act element may be proven if defendants introduce evidence that the deceased's provoking behavior caused them to reasonably believe that the deceased committed a legally wrongful act against them.[352] Incorporating defendants' beliefs that the deceased had criminally wronged them does not mean that the test is purely subjective, resting on defendants' thoughts alone. Rather, the jury will decide whether, under defendants' specific

346. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-1101(4), 13-1103(A)(2) (2020) (establishing adequate provocation "by the victim").

347. *See* Nourse, *supra* note 23, at 1396 (noting that women who end romantic relationships commit no wrongdoing).

348. *Id.* at 1338, 1384, 1394.

349. *See* Gruber, *supra* note 345, at 681–82 (suggesting that provocation law should focus on whether the victim's behavior is wrongful enough to partially excuse the defendant's behavior).

350. *See* VERA BERGELSON, VICTIMS' RIGHTS, VICTIMS' WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW 32 (2009) (suggesting that the conditionality of rights should be a guiding principle to determine circumstances where the deceased's wrongdoing matters).

351. *See* Hurd, *supra* note 344, at 508–09.

352. This qualification is also aimed at ensuring that the provocation defense is not underinclusive in that it would allow a defendant to raise the defense in cases involving "misdirected retaliation" where defendants kills innocent bystanders mistakenly believing they provoked him. An elaboration on this topic exceeds the scope of this Article.

predicaments, taking into account the surrounding circumstances and the objective characteristics of both parties, defendants reasonably believed that the deceased legally wronged them.

Some readers might balk at the thought of linking provocation's adequacy to the deceased's wrongdoing. Arguably, attributing blame to dead victims is problematic given that their account is missing at trial. This concern may be alleviated where other witnesses can shed light on the deceased's conduct preceding the killing. A more disconcerting difficulty is that taking the deceased's wrongdoing into consideration is incompatible with the criminal justice system's rejection of constructs that attribute blame to victims by suggesting that they partially contributed to the crime.[353]

Conceding that adding a wrongful act requirement to provocation's elements exacts a certain toll, a cost-benefit analysis suggests that the likely benefits of such addition offset its costs. Incorporating this requirement would not only provide juries with much-needed guidance for evaluating provocation's adequacy but also supplement their assessment with the missing normative component. The wrongdoing requirement aligns with the underlying rationale behind the provocation defense, namely, that mitigation is warranted because provoked killers are less morally culpable than unprovoked killers.[354] The deceased's wrongful act is a crucial element that explains why some defendants who experienced impaired judgment deserve reduced penalty while others do not. Many defendants commit crimes while experiencing impaired judgment, yet neither law nor accepted societal values supports mitigation.[355] What makes provoked killers deserving of mitigation is the fact that they share at least some of the blame with the deceased. It is the deceased's wrongful act that gives them a justifiable sense of being wronged, according to shared community norms, values, and moral standards.[356] Adding a wrongful act requirement thus supplies the moral basis for mitigation because it explains why the defendant had legitimate grounds for feeling legally wronged by the deceased's provoking behavior.

Further, making the deceased's wrongdoing an element of provocation does not suggest that the homicide is justified, as accepting a provocation claim only partially excuses defendants.[357] The wrongful act requirement embraces a societal norm of relational responsibility that rests on the idea that the defendant's moral culpability is relative rather than absolute, and it is determined in relation to that of the deceased's. The deceased's relative contribution to the lethal event, combined with the defendant's reduced

353. *See* Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 397 (2005) ("Criminal law . . . has explicitly rejected the idea of contributory fault.").

354. *See* Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 382 (1994).

355. The paradigm example involves heavily intoxicated defendants whose rationality was significantly impaired as a result of heavy consumption of drugs, alcohol, or their combination.

356. *See* Nourse, *supra* note 23, at 1338, 1404–05.

357. *See* Berman & Farrell, *supra* note 76, at 1065 (arguing that provocation is both a partial justification and a partial excuse). An elaboration on whether provocation is a partial excuse or a partial justification is not needed for my arguments here.

moral culpability, draws a normative line between reasons for killings that society is willing to understand and those that it is not. It makes the defendant's lethal reaction somehow understandable—albeit unjustified—in communities' eyes because the defendant is perceived as someone who overreacted to the deceased's wrongful act.

Adding a wrongful act element also mitigates possible concerns that some readers are likely to raise, including that reliance on broad dual-process theories overstretches the scope of an already expansive and controversial defense, resulting in unwarranted leniency towards dangerous defendants. Grounding a criminal defense on these theories may risk flooding the gates with questionable psychological testimony aimed at bolstering a host of dubious defenses, including the "abuse excuse" and other scientifically suspect "syndromes."[358] These concerns are overstated for several reasons. First, unlike self-defense, accepting a provocation claim does not lead to full acquittal of any crime but instead only mitigates the conviction from murder to manslaughter, which carries a reduced, yet still hefty sentence. Second, broadening the doctrinal scope of the provocation defense would not lead to the acceptance of all such defensive claims as juries are free to reject them on factual grounds. Finally, while dual-process theories enlarge the doctrinal basis for the provocation defense, adding the wrongful act element offers a limiting mechanism that counteracts the effect of expansion. Reemphasizing the role of provocation's normative dimension alleviates any worries that reliance on dual-process theories might result in the massive acceptance of provocation claims. The reconstructed defense envisioned here ought to be reserved for aberrational situations in which defendants overreacted to exceptional circumstances caused by the deceased's criminal wrongdoing.

The main implication of adding the constraint of a wrongful act requirement is that juries would be instructed that the deceased may not be deemed to have committed a wrongful act if they engaged in conduct that they had a legal right to pursue. One notable example in which such requirement would limit the scope of the provocation defense concerns defendants who killed intimate partners who wanted to terminate the relationship and claimed that their partners' behavior provoked them to kill.[359] Under contemporary societal norms, any party to an intimate relationship may exercise the legal right to end it, for whatever reason.[360] Therefore, the deceased would not be deemed to have committed a wrongful act in these circumstances, barring the defendant's provocation claim. Since provocation's objective inquiry precedes the subjective one, establishing the deceased's wrongful act would become a prerequisite for considering the

358. *See* Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1, 2 (1998) (explaining the term "abuse excuse," defined by Alan Dershowitz, as the legal tactic used by criminal defendants to claim a history of abuse as an excuse for violent retaliation).

359. *See* Nourse, *supra* note 23, at 1332.

360. *Id.* at 1407–08.

subjective test.[361] Excluding the subjective inquiry for defendants who did not kill in response to wrongdoing on the deceased's part further sharpens the normatively based assessments at the heart of the provocation defense. It sends an expressive message that society is willing to understand, at least partially, a defendant's overreaction to the deceased's provoking behavior only when it was caused by the deceased's legal wrongdoing. Put differently, while defendants' overreaction to certain emotional experiences, like anger and fear, may not be fully justified or excused, it may nonetheless be perceived as an understandable reaction, given the circumstances that defendants were facing.

Moreover, as previously mentioned, commentators extensively criticize the gender-based dimension embedded in provocation claims, which arguably allow angry males who kill female partners to receive a jury instruction on manslaughter but deny such an instruction for fearful women who kill abusive partners.[362] The position advocated here aims to dismantle provocation's gender-based concerns by adopting a gender-neutral approach to the defense. Killing because of anger, possessiveness, and jealously should never be partially excused regardless of the defendant's gender because there is no wrongful act on the deceased's part, regardless of gender. Consequently, this approach would deny recognition of a provocation claim to female defendants who kill out of anger, absent any criminal wrongdoing by the deceased male.[363] But it would also allow male defendants to prevail on provocation grounds if they killed a female who committed a wrongful act.[364]

Making the deceased's wrongdoing an element of the provocation defense calls for both a modification and a clarification. First, this element ought to include not only a single wrongful act but also multiple wrongful acts in order to reflect the reality that provoked killers often react to a series of acts by the

361. *See, e.g.*, State v. Braden, 785 N.E.2d 439, 455 (Ohio 2003) (deciding the objective prong first).

362. *See* Forell, *supra* note 130, at 3–4.

363. *See, e.g.*, State v. McClain, 591 A.2d 652, 656 (N.J. Super. Ct. App. Div. 1991). The court upheld the trial court's refusal to instruct the jury on voluntary manslaughter where the defendant killed her boyfriend after being angry at him for years of cheating on her. *Id.* The court held that the evidence did not support the objective test requiring that a reasonable person would have lost control. *Id.*

364. State v. Swihart, No. 2-CA-CR 2010-0136, 2011 WL 5506098, at *1, *3 (Ariz. Ct. App. Nov. 10, 2011). The court upheld the jury instructions on the provocation defense in a case where the male defendant and the deceased, his female girlfriend, became intoxicated and commenced a verbal confrontation that turned into a physical fight, in which both parties equally participated. *Id.* The deceased turned over furniture and broke items in the defendant's apartment and both the defendant and the deceased were striking each other. *Id.* The defendant and the deceased exchanged multiple threatening text messages, including one in which the deceased said that she had people "on the way" to kill the defendant. *Id.* The deceased then left the defendant's apartment but returned to it later. *Id.* Shortly after, the defendant's roommate found the deceased shot while the defendant was on his knees screaming. *Id.* After the deceased died from a single gunshot wound to her chest, the defendant was charged with murder but the jury convicted him of manslaughter, likely accepting the defendant's theory that the deceased's wrongful acts, including physical confrontation and threatening text messages, provoked him to kill her. *Id.*

deceased that might have been committed over an extended period of time.[365] Consider Part II's discussion of cumulative provocation, which is especially salient in cases involving domestically abused defendants who endured multiple incidents of physical abuse by the deceased.[366] In these circumstances, defendants' actions are triggered not solely by the last abusive incident but by the cumulative effect of the deceased's various wrongful acts.[367]

Second, the wrongful act requirement must include the deceased's verbal threats to inflict serious physical harm on the defendant. Since many jurisdictions retain the traditional rule that "words alone" do not amount to provocation, the deceased's threats might not be sufficient to meet the wrongful act requirement.[368] Provocation's wrongful act element must include an explicit verbal threat of physical harm to cover situations where defendants appear to overreact to the deceased's threats but fall short of a right to self-defense because the threats were not sufficiently imminent.[369] An imminence requirement is especially problematic in cases where defendants were subjected to prolonged physical domestic abuse but killed their abusers at a moment when physical confrontation was absent.[370] These defendants overreact to threats that are not objectively imminent, yet they misperceive the threat and overestimate its magnitude and proximity because of their impaired judgment.[371] Recognizing provocation claims in these cases is therefore appropriate from the perspective of sound public policy.

C. A Test Case

The facts underlying the 2015 Kansas Supreme Court decision in *State v. Brownlee*[372] may serve as a test case for applying the reformulated provocation doctrine advocated above that rests on the theory of impaired judgment. In this case, a male defendant shot and killed a man following a verbal argument that deteriorated into physical confrontation stemming from the deceased's touching the defendant's sister in a sexual manner without her consent.[373] The trial court refused to instruct the jury on voluntary manslaughter, resulting in the defendant's murder conviction.[374] Upholding

365. *See, e.g.*, State v. Vogel, 85 P.3d 497, 498 (Ariz. Ct. App. 2004).

366. *See supra* Part II.B.

367. *See, e.g.*, State v. Tierney, 813 A.2d 560, 568 (N.J. Super. Ct. App. Div. 2003) (noting that a prolonged course of physical abuse by the deceased that the defendant reasonably believed would continue might be considered adequate provocation).

368. *See, e.g.*, State v. Rambo, 951 A.2d 1075, 1081 (N.J. Super. Ct. App. Div. 2008) (quoting State v. Castagna, 870 A.2d 653, 675 (N.J. Super. Ct. App. Div. 2005)) (explaining that threats to kill and burn the house down are "words alone" and thus insufficient for provocation).

369. *Vogel*, 85 P.3d at 502.

370. *See* Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 284 (2002).

371. *See supra* Part III.B.

372. 354 P.3d 525 (Kan. 2015).

373. *Id.* at 542.

374. *Id.* at 534–35.

the conviction, the Kansas Supreme Court held that a voluntary manslaughter instruction was not factually appropriate.[375] The court reasoned that the evidence was insufficient to prove that the defendant had lost self-control or acted out of passion.[376] There was no sudden quarrel between the defendant and the deceased, rather the dispute between them merely "simmered" throughout the evening.[377]

Brownlee supports my contention that the loss of self-control theory is underinclusive, resulting in the provocation defense being too narrowly construed. To instruct the jury on voluntary manslaughter, Kansas law requires evidence of provocation that "cause[s] an ordinary man to lose control of his actions and his reason."[378] The loss of self-control theory plays a critical part in the court's problematic interpretation of provocation's elements. The court placed a heavy premium on the fact that the defendant visibly appeared composed during the events that led to the shooting, trying to calm other partygoers and diffuse tensions with the deceased.[379] This view not only downplayed the defendant's emotional arousal but also underestimated the significance of the physical confrontation with the deceased. The court further emphasized the requirement that, for adequate provocation, the quarrel must be *sudden* and rejected the view that the defendant experienced cumulative provocation, which gradually simmered over the course of the evening.[380]

Hypothetically, applying the proposed impaired judgment framework to *Brownlee* would have likely resulted in a jury instruction on voluntary manslaughter. The facts of the case demonstrate that both the objective and subjective elements of the proposed provocation defense could have been met. Beginning with the question of the deceased's legal wrongdoing, the evidence shows that it was the deceased's wrongful act that provoked the defendant. Witness testimony established that the deceased was threatening both the defendant's sister and the defendant himself. They testified that the deceased sexually touched the defendant's sister and, when her boyfriend confronted him, the deceased responded with the threat: "I'll smack you . . . and your bitch."[381] Witnesses further testified that the deceased also threatened that he would "snatch little n—s' guns and beat 'em with it" and that he would be back later to hurt the defendant.[382] These statements not only constitute criminal offenses, namely concrete threats to inflict physical

375. *Id.* at 542. Two justices dissented from the majority's decision, holding that the jury should have been instructed on voluntary manslaughter. *Id.* at 548, 551 (Luckert, J., dissenting).

376. *Id.* at 542 (majority opinion).

377. *Id.* (providing additional reasons for rejecting a voluntary manslaughter jury instruction, including that the defendant's sister and her boyfriend were provoked, the defendant was just a third party, and the case involved mere words which are not considered adequate provocation).

378. *Id.* at 541 (quoting State v. Hayes, 327 P.3d 414, 418 (Kan. 2014)).

379. *Id.* at 542.

380. *Id.*

381. *Id.*

382. *Id.*

harm, but also go over and above mere words, which, under Kansas law, do not amount to provocation.[383]

Additionally, the evidence supports the conclusion that a jury could have reasonably concluded that the defendant's judgment was impaired as a result of both the physical confrontation between him and the deceased and the deceased's threatening statements. The evidence shows that immediately prior to the shooting, when the defendant was confronted by the deceased outside the house, the initial verbal confrontation between the defendant and the deceased escalated into a physical one. Several witnesses testified that the shooting was the culmination of an angry altercation between the deceased and the defendant. One witness testified that it was the deceased who initiated the physical altercation, telling the defendant that he wanted to fight.[384] Given these testimonies, a broader view of provocation, one that rests on impaired judgment theory, could have led a jury to conclude that the defendant shot the deceased as a result of intense emotional arousal that impaired his judgment, that it was triggered by the deceased's wrongful act, and that it would have likely provoked any ordinary person in these circumstances.

CONCLUSION

Mildred Hayes, the protagonist in the film *Three Billboards Outside Ebbing, Missouri* is portrayed not only as an incredibly angry woman but also as a deeply grieving victim.[385] Admittedly, she has objectively sound reasons for experiencing rage and sorrow. Hayes is the indirect victim of heinous crimes perpetrated against her teenage daughter, who was raped and murdered and her killer was never found. Hayes's fury and frustration with the town's police chief leads her to pay for three billboards in which she blames him for failing to bring the perpetrator to justice. The film depicts the transformation that Hayes undergoes from a desperate, sad, and angry victim to a ruthless villain, perpetrating a series of violent crimes. While she is initially perceived as a sympathetic victim who expresses understandable anger, as the plot unfolds, her character transforms into an unhinged, raging woman seeking vengeance. The film nowhere portrays Hayes as someone who just "snapped" and lost self-control. Instead, her actions seemingly express agency and autonomy as she retains her composure, appearing cool and carefully calculating violent actions, including a plan for a revenge killing.

383. State v. Hayes, 327 P.3d 414, 418–19 (Kan. 2014) (holding that "mere words or gestures . . . do not constitute legally sufficient provocation"); State v. Johnson, 236 P.3d 517, 523 (Kan. 2010) (defining quarrel to include the exchange of threats between two persons).

384. *Brownlee*, 354 P.3d at 551 (Luckert, J., dissenting).

385. Inkoo Kang, Three Billboards *Centers Female Vengeance, but It's Really About the Salvation of Men*, SLATE (Dec. 5, 2017, 8:33 AM), http://www.slate.com/blogs/browbeat/2017/12/05/three_billboards_female_vengance_misses_the_weinstein_moment.html [https://perma.cc/C22M-SHCF].

This construction of societal perceptions, which draws on an essentialist account about gender identities, is not unique to film.[386] The criminal justice system is similarly keen on embracing an essentialist narrative of female perpetrators by taking a binary approach under which women killers may either act out of fear, overreacting to what they perceive as defending themselves against imminent deadly attacks, or alternatively as mentally deranged, crazy, or unhinged women.[387] The "angry woman" is a notion that the justice system has difficulty grappling with.[388]

This Article reveals the various implications that the loss of self-control theory carries for different types of provoked killers. It shows that this theory mostly accommodates the typical reactions of angry perpetrators but fails to account for violent actions that are triggered by a host of other emotions. For actors who maintain self-control, whose behaviors do not align with societal expectations of how provoked killers normally react, the criminal justice system carries especially harsh consequences because it views them as calculating, vengeful murderers.

This Article thus aims to illuminate the flaws of essentialism as they are reflected in the provocation doctrine. It rejects an essentialist account of provocation that cuts across gender lines, under which male defendants necessarily lose self-control, acting out of anger, whereas female defendants act out of fear, overreacting to nonimminent physical threats. As scholars argue, essentialism about identities is usually wrong, and most groups of people are defined by various social identities and are thus enormously diverse.[389] Instead of relying on the familiar dichotomies that underlie provocation, this Article urges a gender-neutral view of provoked killers, acknowledging that their violence is triggered by a myriad of intense emotions over and above anger, including fear, grief, desperation, hopelessness, or their combination. Under this account, women may be provoked to kill out of anger while men may be provoked to kill out of fear. Moreover, both males and females may kill out of mixed emotions and combined motives.

By applying dual-process theories to better understand the provocation defense, this Article offers a doctrinal framework that potentially alleviates some of the harsh consequences stemming from mandatory minimum sentencing laws for murder convictions, including their disproportional effect on racial minorities.[390] Additionally, the notion of impaired judgment is sufficiently capacious to cover a broad range of circumstances in which a

386. *See* Susan Gelman, *Psychological Essentialism in Children*, 8 TRENDS COGNITIVE SCI. 404, 404 (2004) (defining essentialism as "the view that certain categories have an underlying reality or true nature that one cannot observe directly but that gives an object its identity, and is responsible for other similarities that category members share").

387. *See* Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 6 (1994).

388. *See generally* Jessica J. Salerno et al., *Closing with Emotion: The Differential Impact of Male Versus Female Attorneys Expressing Anger in Court*, 42 LAW & HUM. BEHAV. 385, 387–88 (2018).

389. *See* KWAME ANTHONY APPIAH, THE LIES THAT BIND: RETHINKING IDENTITY 29 (2018).

390. *See* Gruber, *supra* note 89, at 325.

variety of emotions beyond anger provoke violent reactions. This suggestion leaves many open questions for future work, including, among others, whether the impaired judgment construct might allow mitigation for defendants who kill out of mercy and compassion.[391] But this Article also illuminates the need to place normative limits on the scope of mitigation in order to conform with sound public policy considerations. It acknowledges that dual-process theories are only able to provide a partial promise for reshaping provocation doctrine and that, at the end of the day, normativity governs, as no civilized society is willing to offer leniency to all individuals whose judgment was impaired due to overwhelming emotions. Society's readiness to mitigate murder charges hinges on moral principles encompassing contemporary shared community values. Rethinking the moral basis for provocation thus demands that the doctrine rest on moral judgments, confirming societal views about which types of killings are less morally blameworthy than murder.

391. *See* Michal Buchhandler-Raphael, *Compassionate Homicide*, 98 WASH. U. L. REV. (forthcoming Aug. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537967 [https://perma.cc/AN78-RZFW] (proposing a new partial excuse, grounded in the emotion of compassion, that would reduce the grade of the homicide in cases where actors killed loved family members out of compassion for the victims); *see also* R. A. Duff, *Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?*, 58 INQUIRY 189 (2015) (considering the role of compassion as a basis for mitigating actors' criminal liability in the context of assisted suicide).