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Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion

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INHERENT (GENDER) UNREASONABLENESS OF THE CONCEPT OF REASONABLENESS IN THE CONTEXT OF MANSLAUGHTER COMMITTED IN THE HEAT OF PASSION

INTRODUCTION

> *I seriously wonder how many men married five, four years would have the strength to walk away without inflicting some corporal punishment.*[1]
>
> —Hon. Robert E. Cahill

Judge Robert E. Cahill uttered this statement during his sentencing of Kenneth Peacock, who was convicted of voluntary manslaughter for killing his wife after catching her in bed with another man.[2] Judge Cahill ultimately sentenced Peacock to eighteen months in prison.[3] Although Judge Cahill admitted that he personally believed Peacock's actions were justified by his wife's indiscretions, the Judge felt that his hands were tied, and that punishment was legally required.[4]

The statements made by Judge Cahill in the *Peacock* case reveal the male bias pervasive throughout the American legal system and, more specifically, in the law of voluntary manslaughter, which is grounded in the traditional notion of men's crimes.[5] Male bias can be seen in the many layers of the male-dominated legal system, from the prevalence of male decision-makers,[6] to the inherent sex-bias in jury

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1. Tamar Lewin, *What Penalty for a Killing in Passion?*, N.Y. TIMES, Oct. 21, 1994, at A18.

2. Peacock, a long-distance trucker, came home early from a run and found his wife of five years in bed with another man. Peacock chased the man away, and, after hours of "drinking and arguing, shot his wife in the head with a hunting rifle." *Id.*

3. *Id.*

4. *Id.* Judge Cahill, who has since refused to discuss the case, originally said that although he wished he did not have to subject Peacock to such a sentence, he knew he had to "'to make the system honest.'" *Id.* (quoting Hon. Robert E. Cahill).

5. *See* Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 262 (1996) (arguing that the way in which current legal doctrines are "grounded in traditional notions of men's crimes" makes it hard to accommodate the female perspective and experience).

6. A.B.A. COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE OF WOMEN IN THE LAW 3 (Nov. 13, 2009) [hereinafter CURRENT GLANCE OF WOMEN], http://www.abanet.

selection,[7] to the male-oriented laws,[8] and to the lingering influence of the "reasonable man" standard. This institutionalized male bias is a product of a larger male-dominated society that promotes gender stereotyping and categorization.[9] The effects of gender bias on the concept of reasonableness is particularly stark in cases like *Peacock* that involve killing in the heat of passion.[10]

Male defendants who kill in the heat of passion often find protection in the doctrine of voluntary manslaughter.[11] The flexible sentencing associated with voluntary manslaughter emerged in the common law as an alternative to the rigidity of murder sentences in order to afford leniency to males who have committed violent acts in response to provocation.[12] Today, voluntary manslaughter continues to accommodate men who kill their wives in the heat of passion, but not women who kill their husbands for the same reason,[13] due to the gender bias inherent in the concepts of objective and subjective reasonableness.[14]

An important aspect of the modern definition of voluntary manslaughter is the focus on the reasonableness of the perpetrator's actions.[15] Although many crimes require the use of a basic standard of

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org/women/CurrentGlanceStatistics2009.pdf. Women are underrepresented in both state and federal courts. In 2009, women made up only twenty-seven percent of U.S. Circuit Court Judges, twenty-five percent of U.S. District Court Judges, and thirty-two percent of justices on state courts of last resort. *Id.*

7. Cameron McGowan Currie & Aleta M. Pillick, *Sex Discrimination in the Selection and Participation of Female Jurors: A Post-*J.E.B. *Analysis*, 35 JUDGES J. 1, 2, 4 (1996).

8. Keller, *supra* note 5, at 262.

9. Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 GENDER & SOC'Y 510, 515 (2004).

10. An expert on domestic violence was quoted as stating that, through its *Peacock* decision, "'[t]he court is saying that [killing in the heat of passion] is socially understandable for a man to do.'" Lewin, *supra* note 1, at A18 (quoting Elizabeth Schneider).

11. The notion that the law treats men who kill in the heat of passion less harshly than others who commit homicide is underscored by Peacock's extremely light eighteen-month sentence. *Id.*

12. *See, e.g.*, Bartram v. State, 364 A.2d 1119, 1152-53 (Md. Ct. Spec. App. 1976) (discussing the difference between first-degree murder and homicides committed in "hot-blooded fury" and stating that the latter "may lower the blameworthiness from the murder level to the manslaughter level"); *see also* Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1061-62 (2005) (reviewing CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003)) (explaining that "[b]y recognizing that a reasonable heat of passion could negate the malice required for murder," the law of voluntary manslaughter saved male defendants who killed while engaged in brawls from the death sentence).

13. Indeed, just "a day after the [*Peacock*] judge acted, another Baltimore judge handed down a three-year sentence to a woman who pleaded guilty to voluntary manslaughter for killing her husband after 11 years of abuse." Lewin, *supra* note 1, at A18.

14. In general, juries think it is understandable that a man will act out violently against his wife when he learns about her adultery. *Id.*

15. *Compare* GA. CODE ANN. § 16-5-2(a) (West 2010) (adopting a definition of voluntary manslaughter that judges the adequacy of provocation by comparing the actor's response

reasonableness, the way in which the "reasonable man" standard is applied in cases of voluntary manslaughter is particularly harsh for women perpetrators who fall victim to the genderized reasonable *man*.[16] When the reasonableness standard is objectively applied, it is the image of the stereotypical male that is invoked, and strict gender divides ensure that women are seen as the excluded "other."[17] Voluntary manslaughter originated to accommodate men and has adapted accordingly.[18] Today, women are still viewed as outsiders who find little place and protection in the law of voluntary manslaughter.[19]

Conversely, when reasonableness is subjectively applied by states that follow the Model Penal Code's approach,[20] and the effect that a defendant's gender has on the reasonableness of his or her actions is considered, women defendants fall victim to societal stereotypes and are judged against prescribed female gender roles.[21] In cases involving voluntary manslaughter, reasonableness is a double-edged sword for women who are not accommodated in the traditional male conception of reasonable provocation, and who also face discrimination at the hands of a subjective reasonable standard plagued by stereotypical gender roles.[22]

One thing that is striking is the lack of studies that focus on the gender element of crimes committed in the heat of passion.[23] Further, scholars have been highly critical of the narrow scope of those studies

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to that of the objective reasonable person), *with* MODEL PENAL CODE § 210.3 (1962) (taking a highly subjective approach to reasonableness by focusing on the actual viewpoint of the defendant).

16. Burke, *supra* note 12, at 1061-62 (discussing the disparate impact of the provocation defense on women). Current defense law is based on the reasonableness standard, and, in most jurisdictions, self-defense is justified if the defendant reasonably believed that the force was necessary to prevent an imminent threat of unlawful physical force. Richard Klein, *Race and the Doctrine of Self Defense: The Role of Race in Determining the Proper Use of Force to Protect Oneself*, 4 J. RACE GENDER ETHNICITY 30, 30 (2009).

17. *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 636 (1983) ("[O]bjectivity—the nonsituated, universal standpoint, whether claimed or aspired to—is a denial of the existence or potency of sex inequality that tacitly participates in constructing reality from the dominant point of view.").

18. *See* Burke, *supra* note 12, at 1061-62 (discussing how the common law expanded to recognize a category of provocation based on a man witnessing his wife's adultery).

19. *See* Keller, *supra* note 5, at 255 (pointing out that women who kill an intimate partner or spouse often receive harsher prison sentences).

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

21. Keller, *supra* note 5, at 272.

22. *Id.* at 268 ("'[M]yths, biases, and stereotypes about women pervade the judicial decision-making process and often affect the outcomes of cases.'") (quoting CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE 191 (1989)). Women are also frequently targets for "'victim blaming.'" *Id.*

23. *See id.* at 258 (noting that the studies regarding such violent crimes often do not take into account factors that are frequently associated with sex).

that do exist.[24] Although some studies of sex disparities in sentencing have concluded that, generally, women spend less time in prison than men who have committed identical crimes, these studies fail to account for legally relevant and important variables, such as a defendant's prior criminal record, or the severity of the offense.[25] Such variables are significant, in light of the fact that approximately eighty percent of women who kill or assault their partners have no prior criminal record. This alone may explain why women offenders generally receive lesser sentences than men who kill or assault their partners.[26] Currently, the extent to which women are actually penalized by the male bias pervasive in both the objective and subjective reasonableness standards in the context of voluntary manslaughter is unclear.[27] Comprehensive studies are therefore needed to present a clearer picture of the discriminatory application of the crime of voluntary manslaughter.

Policymakers need to re-examine the statutory definitions of voluntary manslaughter and crimes committed in the heat of passion. The gender bias inherent in the concept of reasonableness as it relates to voluntary manslaughter must be exposed from behind the guise of objectivity. Though examining statutes and the concept of reasonableness is a start, the true problem is that prevailing sex stereotypes make it reasonable for a man to kill his wife to "defend his honor," but treat a wife acting violently for the same reasons as completely irrational.[28] Ultimately, society must recognize that this unequal power

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24. *See id.* at 257-58 (discussing the shortcomings of the available studies, which fail to control for important variables or to adequately define "violence"); Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 667 (2001) (explaining that intimate violence studies that do exist fail to identify the instances in which the defendant successfully claimed voluntary manslaughter).

25. Keller, *supra* note 5, at 257. For example, a 1995 study by the U.S. Department of Justice that reported that "wife" defendants were less likely to be convicted and to receive severe sentences when compared to "husband" defendants seemingly failed to take into account the individual defendant's prior criminal records. PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP'T OF JUSTICE, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES, 2 (Sept. 1995), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/SPOUSMUR.PDF.

26. Geris Serran & Philip Firestone, *Intimate Partner Homicide: A Review of the Male Proprietariness and the Self-Defense Theories*, 9 AGGRESSION & VIOLENT BEHAV. 1, 10 (2004).

27. For cases involving female defendants who killed in the heat of passion, see Hoyt v. Florida, 368 U.S. 57 (1961); Scroggs v. State, 94 S.E.2d 28 (Ga. Ct. App. 1956); Bartram v. State, 364 A.2d 1119 (Md. Ct. Spec. App. 1976); Harris v. State, 152 S.W.3d 786 (Tex. Crim. App. 2004).

28. *See* Keller, *supra* note 5, at 262 (contending that women usually kill men they are intimately involved with "defensively," whereas men kill their wives as "an offensive act"). Because legal doctrines are "grounded in traditional notions of men's crimes," they often fail "to accommodate a woman's perspective and experiences." *Id.*

structure within intimate relationships serves to encourage spousal abuse and intimate violence.[29]

Part I of this Note, provides a brief introduction into the discriminatory facets of America's male-dominated legal system, focusing on the role of judges and juries within that system. This information will serve as the backdrop for Part II, which discusses the history and origins of voluntary manslaughter before considering modern developments in the law. This section also breaks down the legal elements of voluntary manslaughter, comparing state statutes to the language of the Model Penal Code. Part III focuses on the "reasonableness" aspect of voluntary manslaughter, and on demonstrating how tests of reasonableness—whether objectively or subjectively applied—are actually gendered in nature. Finally, the Conclusion proposes legal and societal reforms to help remedy the existing gender problems pervasive in the law of voluntary manslaughter.

I. THE MALE-DOMINATED LEGAL SYSTEM

From the top down, the American legal system is male-dominated and has been shaped by male influences.[30] The system is epitomized by the majority presence at the bench of male judges.[31] These judges implement legal doctrines enacted by male legislators[32] and "grounded in traditional notions of men's crimes."[33] That this system fails to accommodate the female perspective and experience may also function to affect sentencing determinations.[34] The high percentage of male homicide perpetrators and victims indicates that homicide itself is an

29. *See* Serran & Firestone, *supra* note 26, at 10 (focusing on how feelings of possessiveness and the male need to control his partner encourages abuse and increases the risk of homicide within intimate relationships).

30. *See* Sharyn L. Roach Anleu, *Critiquing the Law: Themes and Dilemmas in Anglo-American Feminist Legal Theory*, 19 J.L. & SOC'Y 423, 423 (1992) (arguing that the "Anglo-American legal systems . . . favour men's interests and actually reinforce male domination").

31. *See* CURRENT GLANCE OF WOMEN, *supra* note 6, at 2 (providing statistics showing the disparity between male and female judges at both the state and federal levels).

32. Women currently hold less than seventeen percent of the seats in the 111th U.S. Congress, and at the state level, women make up less than twenty-five percent of elected legislators. *Facts About Women Legislators*, NAT'L FOUND. FOR WOMEN LEGISLATORS, http://www.womenlegislators.org/women-legislator-facts.php (last visited Nov. 22, 2010). For more information on female representation at both the state and federal level, see, *Facts on Women Officeholders*, *Candidates, and Voters*, RUTGERS UNIV. CTR. FOR AM. WOMEN & POLS., http://www.cawp.rutgers.edu/fast_facts/index.php (last visited Nov. 22, 2010).

33. Keller, *supra* note 5, at 262.

34. *Id.*

overwhelmingly male act.[35] Additionally, the circumstances under which men and women kill and the identity of their victims tend to vary along gender lines.[36]

Throughout American legal history, the law of homicide has primarily focused on the control and punishment of male violence because the vast majority of homicide defendants are male.[37] Furthermore, "criminal law has been developed by male common law judges, codified by male legislators, enforced by male police officers, and interpreted by male judges and juries."[38] Voluntary manslaughter is no exception; the legal standards that define "adequate provocation" and "reasonableness" reflect a very male view of the concept of justifiable homicidal violence.[39]

As demonstrated by Judge Cahill's statement included at the beginning of this Note,[40] male common law judges responsible for developing the law bring with them their male perspectives, which are often influenced by societal gender stereotypes.[41] In spousal-killing cases, judges may ultimately treat male defendants with increased leniency, based on the perception that unfaithful wives goad their husbands into the act of killing through their improprieties.[42] This

35. "In 1984, eighty-seven percent of those arrested in the United States for homicide and seventy-five percent of homicide victims were male." Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1679 (1986). A 2007 Department of Justice Report corroborates those statistics: in 2005, men were nearly ten times more likely than women to commit murder. *Homicide Trends in the U.S.: Trends by Gender*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, [hereinafter *Homicide Trends*], http://bjs.ojp.usdoj.gov/content/homicide/gender.cfm (last visited Nov. 22, 2010). Additionally, men were murdered at nearly four times the rate of women in 2005. *Id.*

36. Women rarely kill, but, when they do kill, they most often kill male intimates. Taylor, *supra* note 35, at 1680-81. According to the Department of Justice, "[b]oth male and female offenders are more likely to target male victims than female victims." *Homicide Trends*, *supra* note 35. It should be noted that statistics have long shown that when women kill intimates, they do so as a measure of self-defense in response to beatings. Taylor, *supra* note 35, at 1698. This propensity is often connected to Battered Women's Syndrome, a subject relevant to the discussion of female homicide and voluntary manslaughter but outside the scope of this Note. For further information about Battered Women's Syndrome, see Daniel D. Angiolillo, *Seeking Truth, Preserving Rights—Battered Women's Syndrome/Extreme Emotional Distress: Abuse Excuse or Syndrome Defense*, 24 PACE L. REV. 253 (2003); Alene Kristal, Note, *You've Come a Long Way, Baby: The Battered Women's Syndrome Revisited*, 9 N.Y.L. SCH. J. HUM. RTS. 111 (1991); Pamela Posch, Comment, *The Negative Effects of Expert Testimony on the Battered Women's Syndrome*, 6 AM. U. J. GENDER & L. 485 (1998).

37. *Homicide Trends*, *supra* note 35.

38. Taylor, *supra* note 35, at 1681.

39. *Id.* at 1679.

40. Lewin, *supra* note 1, at A18.

41. *Id.* (discussing how Judge Cahill's statements reflect the male gender perspective in heat-of-passion killings).

42. Keller, *supra* note 5, at 268.

deserving-victim concept works in conjunction with another model based on female stereotypes: the evil-woman hypothesis, which predicts that male judges will treat female defendants more harshly, based on the view that deviant women are an anomaly to the image of the stereotypical "virtuous woman."[43] Although over-simplified, these kinds of gender stereotypes can be highly influential during sentencing, and may ultimately lead to the development of prejudicial case law.[44]

Another factor that leads to the dominance of the male perspective is sex discrimination in jury selection, which results in the wrongful exclusion of female jurors (and their female perspectives) from participating in the judicial process.[45] This is problematic because, ultimately, jurors are given the power to determine the guilt or innocence of a defendant in most cases involving voluntary manslaughter.[46] A lack of female jurors can have dire consequences for the defendant.[47] Due to the lack of comprehensive studies on the subject, though, it is unclear whether female and male jurors do decide cases involving murder committed in the heat of passion differently, and whether those decisions are affected by the defendant's gender.[48] What is clear, is that, given the responsibility entrusted to jurors to decide whether voluntary manslaughter is appropriate based on the facts of a case,[49] the stakes are too high for criminal defendants' futures to have to depend on the gender makeup of a jury.

Jurors themselves are discriminated against in the jury selection process.[50] Yet, when making decisions, juries as a whole seem to rely on gender stereotypes that dictate that it is reasonable for

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43. *Id.* at 270. Put another way, the admittedly simplistic "'evil woman' hypothesis predicts that judges will view a convicted female as a 'fallen woman' and throw the book at her in disgust." *Id.* (citation omitted).

44. Many feminist groups believe that sentencing in situations similar to that in the *Peacock* case "reflect a widespread acceptance of male violence against women." Lewin, *supra* note 1, at A18.

45. Currie & Pillick, *supra* note 7, at 6. There was a time when juries were made up almost entirely of men; women were not required to serve on juries. *See* Hoyt v. Florida, 368 U.S. 57, 65 (1961) (citing a Florida statute that provided that no woman would be required to perform jury service, though she could volunteer for it).

46. *See* People v. Berry, 556 P.2d 777, 780 (Cal. 1976) ("'In the present condition of our law *it is left to the jurors* to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did . . . commit his offense under a heat of passion.'" (quoting People v. Logan, 164 P. 1121, 1122 (Cal 1917))).

47. *See Hoyt*, 368 U.S. at 65 (holding that a woman's conviction for killing her husband in the heat of passion by an all-male jury did not violate her rights under the Fourteenth Amendment).

48. *See* Currie & Pillick, *supra* note 7, at 41 (discussing "the shortcoming of all gender-difference [jury] studies," including the failure to take into account factors other than gender, such as race, age, income, and religion).

49. *Berry*, 556 P.2d at 780.

50. Currie & Pillick, *supra* note 7, at 6.

a man to react hastily when he learns about his wife's acts of adultery.[51] This suggests that gender stereotypes condoning male dominance and aggression are so pervasive that they are internalized by both male and female jurors.[52]

II. THE DEVELOPMENT OF VOLUNTARY MANSLAUGHTER

Voluntary manslaughter first emerged in the sixteenth century to protect men who engaged in the common practice of defending their honor through physical attack or mutual violence from the death penalty.[53] Eventually, the common law expanded "to include the 'sight of adultery'" as a category of provocation,[54] mitigating the punishment for men who killed their adulterous wives.[55] The definition of protecting one's honor was merely expanded to incorporate societal norms dictating that a "respectable" man would not only be inclined to "physically retaliate against any perceived affront,"[56] but that he should also be expected to retaliate against any trespass on his most precious property: his wife.[57]

The expansion of the doctrine of provocation to include discovering adultery reflects the historical treatment of wives as the property of their husbands.[58] As noted by the English House of Lords, "jealousy is the rage of a man, and adultery is the highest invasion of property. . . . [A] man cannot receive a higher provocation."[59] Today,

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51. *See* Lewin, *supra* note 1, at A18 (noting how jurors often flinch from convicting of murder a man who kills his wife after finding her in bed with another man).

52. *See* Cecilia L. Ridgeway, *Framed Before We Know It: How Gender Shapes Social Relations*, 23 GENDER & SOC'Y 145, 145 (2009) (asserting that gender provides one of culture's "primary frame[works] for organizing social relations"); Judith Taylor, *The Problem of Women's Sociality in Contemporary North American Feminist Memoir*, 22 GENDER & SOC'Y 705, 711 (2008) (contending that, through their memoirs, feminist thinkers "convey the belief that women treat each other poorly because they have been emotionally marred by . . . gender socialization").

53. Burke, *supra* note 12, at 1061-62. In the early days of the doctrine of voluntary manslaughter, the law of provocation saved male defendants who were torn between upholding the code of honor that dictated that men should retaliate when attacked or insulted and the prospect of receiving the death penalty in cases of murder. Miller, *supra* note 24, at 671.

54. Burke, *supra* note 12, at 1062.

55. *See* Rowland v. State, 35 So. 826, 827 (Miss. 1904) (explaining that a husband is justified in killing either the man who he catches in bed with his wife or his wife). Finding "no difference in the degree of the crime, whether the betrayed husband slays the faithless wife or her guilty paramour," the court that held both instances constitute manslaughter, not murder. *Id.*

56. Miller, *supra* note 24, at 671.

57. *See* Burke, *supra* note 12, at 1062 ("[P]rovocation law reflected not just a judicial understanding of the physical reactions of men, but prevalent norms about women as male property.").

58. Burke, *supra* note 12, at 1062.

59. Regina v. Mawgridge, 84 Eng. Rep. 1107, 1115 (Q.B. 1707).

though women are no longer legally viewed as property of their husbands, "the doctrine of voluntary manslaughter continues to perpetuate a violent form of male subordination of women."[60]

In today's society, where duels for honor have been eradicated, the typical paradigm for the use of voluntary manslaughter is exemplified by the facts of the *Peacock* case: an unsuspecting husband comes home and catches his wife in bed with another man.[61] Blinded by rage, he retaliates against her in a way that ultimately proves fatal for her.[62] The wife's only role within this paradigm is as the blameworthy victim.[63] This "presents a further substantive barrier to judging fairly the culpability of female homicide defendants" who claim that their violent acts should receive the protection of the doctrine of voluntary manslaughter.[64]

It is not just the typical voluntary manslaughter paradigm that has been slow to accommodate women; the legal imposition of that doctrine has been equally slow in expanding to protect women and still fails to provide gender parity.[65] In 1946, 275 years after English courts first recognized what they called the "defense of provocation,"[66] an English court finally stated that women who kill their adulterous husbands can avail themselves of the provocation defense.[67]

The American common law doctrine of voluntary manslaughter is also characterized by its historical and continued lack of protection for women.[68] Historically, the law specifically defined the legally permissible categories of adequate provocation in cases of voluntary manslaughter to include adultery, mutual combat, false arrest, and violent

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60. *See* Miller, *supra* note 24, at 667-68 (arguing that although women have achieved near gender parity in many areas of their lives, they continue to face subordination through liberal application of the doctrine of voluntary manslaughter to male defendants). Additionally, while the notion that women are the property of their husbands is far less pervasive throughout American society than in other cultures, there is still a sense that American men have power over their wives' "sexual and reproductive capacities." Serran & Firestone, *supra* note 26, at 3. It seems safe to say, then, that "'men around the world [still] think and talk about women and marriage in proprietary terms.'" *Id.* (citation omitted).

61. Lewin, *supra* note 1, at A18.

62. *Id.*

63. Taylor, *supra* note 35, at 1698.

64. *Id.*

65. *See* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1339 (1997) (discussing how the O.J. Simpson trial led journalist Susan Estritch to call for legislatures to abolish the heat of passion defense because of the considerable disadvantages it imposes on women).

66. Taylor, *supra* note 35, at 1694.

67. Holmes v. Dir. of Pub. Prosecutions, [1946] A.C. 588.

68. Taylor, *supra* note 35, at 1694 (discussing how the "honor defense" allowed courts to simply acquit a male defendant who killed in the heat of passion caused by learning of his wife's adultery).

assault.[69] These narrow categories were created by judges who had the propensities of the average adult male in mind.[70] In some states, a husband's killing of his adulterous wife upon discovering her in bed with another man was considered justifiable homicide until as late as the 1970s.[71] Although the modern conception of voluntary manslaughter makes no specific reference to gender and purports to be gender neutral, the doctrine cannot escape its clear gendered roots.[72]

Today, voluntary manslaughter often mitigates the sentence of a homicide that would otherwise be murder[73] when the homicide is committed due to an "extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[74] The justification for the partial defense provided by voluntary manslaughter is that an individual who kills while under the influence of intense emotional or mental disturbance is "less deserving of punishment than" someone who commits premeditated murder.[75] Accordingly, those who kill in the heat of passion are treated as lacking the requisite malice.[76] This reduces the individual's culpability in the eyes of the law.[77] Additionally, in cases of voluntary manslaughter, a degree of culpability is assigned to the victim as the provoker, in order to justify the reduced sentence.[78] The

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69. Nourse, *supra* note 65, at 1341. These four categories, referred to as the "'nineteenth century four,'" found justification in the traditional male code of honor. *Id.* at 1340-41 (internal quotation omitted).

70. *See* Keller, *supra* note 5, at 266-69 (describing the role that judicial discretion plays in sentencing defendants). Keller argues that the clearest explanation for disparate sentencing of men and women "is the negative bias against women held by a large number of judges." *Id.* at 267.

71. Lewin, *supra* note 1, at A18. For example, until 1974, Texas viewed a violent revenge by a "victimized" husband on his adulterous wife as justified in the eyes of the law. Serran & Firestone, *supra* note 26, at 3.

72. *See* Burke, *supra* note 12, at 1061-62 (comparing the lack of gender neutrality in the application of the crime of voluntary manslaughter to similar shortcomings in the utilization of the concepts of "retreat and imminence in the self-defense context").

73. The Model Penal Code classifies voluntary manslaughter as a second-degree felony. MODEL PENAL CODE § 210.3(1)(b) (1962).

74. *Id.*

75. Burke, *supra* note 12, at 1060.

76. *See, e.g.*, People v. Najera, 138 Cal. App. 4th 212, 215, 220 (2006) (explaining that, in cases of voluntary manslaughter, a complete lack of malice is not assumed, but a defendant found to have acted in the heat of passion is said to have lacked the malice necessary for murder). Most United States jurisdictions divide murder into two degrees. First-degree murder requires a defendant's premeditation and deliberation, whereas second-degree murder is categorized by the absence of these two elements. Taylor, *supra* note 35, at 1683. Further, "[i]f the absence of premeditation and deliberation stems from a total loss of self-control caused by adequate provocation by the victim, and if the defendant killed without an opportunity to cool off or regain control, then the homicide is classified as voluntary manslaughter." *Id.* (citation omitted).

77. Burke, *supra* note 12, at 1060.

78. The victim is said to share in the liability for the provoked murderous act. Taylor, *supra* note 35, at 1720.

adulterous actions of unfaithful wives have been treated as "especially provoking" and deserving of shared culpability.[79]

Voluntary manslaughter[80] is categorized by the presence of serious provocation.[81] Notably, the common law as codified by some states and the Model Penal Code differ as to how "reasonableness" should be judged.[82] According to the Model Penal Code, a homicide is categorized as manslaughter if it "is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[83] Thus, the Model Penal Code takes a more subjective and nuanced approach, judging reasonableness "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[84] Conversely, the common law has developed a more objective approach, which uses a "reasonable person" standard to determine the adequacy of provocation. In Georgia, a state that has adopted the common law approach,

> 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 . . . .[85]

Under the common law approach, the key element is that the provocation must have been sufficient to cause a reasonable man to lose his sense of self-control.[86] The common law standard does not ask if a rea-

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79. *Id.* at 1721-22.

80. There are four elements of heat of passion: "'(1) adequate provocation; (2) a passion or emotion such as fear, terror, anger, rage or resentment; (3) [the] homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and (4) a causal connection between the provocation, passion, and homicide.'" JOSEPH G. COOK ET AL., CRIMINAL LAW 546 (6th ed. 2008) (quoting Hogan v. Gibson, 197 F.3d 1297, 1308 (10th Cir. 1999)).

81. *Id.* at 545.

82. *Compare* GA. CODE ANN. § 16-5-2(a) (West 2010) (adopting an objective common law standard of reasonableness) *with* MODEL PENAL CODE § 210.3(1)(b) (1962) (defining reasonableness under a subjective approach that considers the individual actor's circumstances).

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

84. *Id.*

85. GA. CODE ANN. § 16-5-2 (West 2009).

86. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 653 (2d ed. 1986). It is important to note that it is not the *duration* of the provocation that is determinative; rather, it is the *intensity* of the provocation that must be measured using a reasonable man standard. *See* People v. Wharton, 53 Cal. 3d 522, 570 (1991) (concluding that although the two-week period of torment by the defendant's wife may have been sufficient to justify a heat-of-passion instruction, the instruction was not appropriate given the long duration of the provocation.).

sonable man would *kill* in such a situation,[87] as killing is rarely viewed as legally justifiable.[88] Instead, the law treats the provoked homicide as an *understandable* response[89] deserving of less severe punishment.[90] Objective reasonableness, on the other hand, simply looks at the defendant's actions and asks if the provocation would be sufficient to trigger the same heat of passion response in the reasonable person.[91]

Many modern categories of provocation have their roots in the English common law system.[92] For example, English courts found adequate evidence of provocation when the provoker made a physical assault or threat, or when the provoker's actions were unlawful or deemed immoral.[93] Allowances for provocation caused by immoral acts applied specifically to the actions of adulterous wives.[94] American courts later adopted these categories, which became the foundation of the common law formulation of reasonableness and adequate provocation.[95]

Common law has since expanded from the rigidity of the "nineteenth century four" categories of adequate provocation.[96] Most questions regarding adequate provocation now go to the jury.[97] The trend to put these decisions in the hands of the jury has been described as follows: "rigid definitions of provocation have given way to a generalized 'reasonable person' standard of provocation that jurors are

87. LAFAVE & SCOTT, *supra* note 86, at 654.

88. *Id.* Provocation is rarely regarded as a justification and is usually treated as an excuse. Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 22 (1998).

89. Heller, *supra* note 88, at 22; Taylor, *supra* note 35, at 1687.

90. Heller, *supra* note 88, at 23.

91. Burke, *supra* note 12, at 1047. The fundamental inquiry is whether the defendant was provoked "to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." People v. Berry, 556 P.2d 777, 780 (Cal. 1976) (quoting People v. Logan, 164 P. 1121, 1123 (Cal. 1917)).

92. Taylor, *supra* note 35, at 1686-88. Today, though the modern common law doctrine of voluntary manslaughter remains very similar in England and the United States, the doctrine has proven difficult to apply to other cultures and societies. *Id.*

93. In the seventeenth century, the doctrine of adequate provocation was seen as a way to rebut the element of malice under the theory "that the cause of the killing lay not in some secret hatred or design in the breast of the slayer but rather in provocation given by the deceased which inflamed the slayer's passions." A. J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 292-93 (1976).

94. *Id.* at 294.

95. Taylor, *supra* note 35, at 1686.

96. Nourse, *supra* note 65, at 1341.

97. People v. Berry, 556 P.2d 777, 780 (Cal. 1976). The Ohio Supreme Court has attempted to provide some guidelines concerning when a voluntary manslaughter jury instruction should be given. In *Shane v. State*, 590 N.E.2d 272, 274 (Ohio 1992), the court stated that such a jury instruction is only proper "when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter."

entrusted to apply."[98] Modern common law, however, continues to view certain categories of provocation as inherently unreasonable.

The most notable of these categories is provocation alleged to have been brought on by mere words or other verbal provocation.[99] The majority position throughout common law jurisdictions is that words alone cannot constitute adequate provocation.[100] Many state courts have held that because verbal provocation does not constitute an immediate assault on one's person or property, mere words—no matter how offensive or insulting—will not furnish adequate provocation for homicide.[101] In such jurisdictions, words are insufficient justification for murder as a matter of law, which means that the jury is not given a chance to determine the reasonableness of the response for the purposes of adequate provocation and voluntary manslaughter.[102]

A minority of jurisdictions are, however, beginning to shy away from this bright line rule by allowing juries to consider voluntary manslaughter in cases involving verbal provocation.[103] This reflects the approach of the Model Penal Code, which focuses on subjective

98. Burke, *supra* note 12, at 1060. The jury's crucial role sheds light on the potential negative impact of both gender bias in the selection of jurors and jurors' reliance on gender stereotypes in cases of voluntary manslaughter. *See* discussion *supra* Part I.

99. *See* Girouard v. State, 583 A.2d 718, 722 (Md. 1991) ("'[I]nsulting words or gestures, no matter how opprobrious, do not amount to an affray, and standing alone, do not constitute adequate provocation.'" (quoting Sims v. State, 573 A.2d 1317, 1322-23 (Md. 1990))). Words can constitute adequate provocation, however, if they are accompanied by conduct indicating a clear intention to cause harm. *Id.*

100. *Id.*; LAFAVE & SCOTT, *supra* note 86, at 655 ("[I]t is often held that a reasonable man may be provoked into a passion when he . . . is hurt by violent physical blows, or is unlawfully arrested or discovers his spouse in the act of adultery; but that he can never be provoked by mere words . . . ."). There has been a tendency for the law of voluntary manslaughter to attempt to provide categories of what constitutes reasonable provocation. *Id.*

101. *See, e.g.*, People v. Chevalier, 544 N.E.2d 942, 944 (Ill. 1989) (discussing the rule that no matter how aggravated, abusive, or indecent, mere words are insufficient provocation to allow for a mitigated sentence of voluntary manslaughter); State v. Castro, 592 P.2d 185, 187 (N.M. 1979) (holding that the provocative words uttered by the victim during a phone call with the defendant did not, as a matter of law, constitute adequate provocation).

102. In such jurisdictions, words are insufficient provocation as a matter of law, so cases in which the sole provocation at issue is verbal do not go to the jury. *Girouard*, 583 A.2d at 722-23 (explaining that words, no matter how offensive, are insufficient to reduce homicide from murder to manslaughter).

103. COOK ET AL., *supra* note 80, at 555. This approach is more in keeping with the Model Penal Code, which avoids making bright line rules regarding reasonableness by requiring consideration of the mindset of the individual at the time of the killing. *Id. See* LAFAVE & SCOTT, *supra* note 86, at 655 ("In modern times, however, there seems to be a growing realization that what might or might not cause a loss of self-control in a reasonable Englishman of a century ago might not necessarily produce the same reaction in the reasonable Anglo-American of today."). Scholars predict the continuation of the "trend away from the usual practice of placing the various types of provocatory conduct into pigeon-holes." *Id.*

reasonableness and requires examination of the individual's actual motivations.[104]

Both the common law and relevant statutes further narrow the scope of voluntary manslaughter by disallowing any meaningful cooling-off period between the provocation and the homicide.[105] Accordingly, the defendant must have killed before he had time to process the provocation and calm down.[106] Under the modern common law conception of voluntary manslaughter, the defendant must demonstrate: reasonable provocation; that he or she was, in fact, provoked; that a reasonable individual would not have cooled off between the provocation and the homicide; and that the defendant did not cool off during this lapse of time.[107] Many state statutes have incorporated this no-cooling-off requirement.[108] This constraint is justified by the notion that after a reasonable period of time, provoked individuals are expected to have had a chance to calm down and gather their thoughts.[109] Under the common law, any killing that occurs after a period of reflection is presumed to have been committed with premeditation and deliberation.[110]

Conversely, the Model Penal Code does not contain any language requiring that the defendant not have had a cooling-off period in cases of heat of passion voluntary manslaughter.[111] This is because "'[a]n

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

105. *E.g.*, GA. CODE ANN. § 16-5-2(a) (West 2010). Georgia's statute provides that if there is "an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard . . . the killing shall be attributed to deliberate revenge and be punished as murder," instead of as voluntary manslaughter. *Id.* Other states' statutes have adopted similar wording. *See, e.g.*, ALA. CODE § 13A-6-3(a)(2) (LEXISNEXIS 2010) (stating that the act must occur before a reasonable cooling-off(period); IOWA CODE ANN. § 707.4 (West 2010) (emphasizing that there must not be an interval of time "between the provocation and the killing in which a person of ordinary reason and temperment would regain control and suppress the impulse to kill"); LA. REV. STAT. ANN. § 14.31(A)(1) (2009) (explaining that there must not be a period of time for a person to cool between the provocation and the homicide).

106. *See* LAFAVE & SCOTT, *supra* note 86, at 667 (explaining that under the majority objective reasonableness standard, a defendant will be found to have cooled off if a reasonable amount of time lapsed, even if the defendant had not, in fact, cooled off at the time of the killing). Similarly, if a defendant actually cooled off quickly following provocation, he may not claim the defense of voluntary manslaughter just because the "reasonable person" would not have been cool and calm at the time of the killing. *Id.* at 663. In this way, the common law objective standard does, to some extent, take into account the mindset of each defendant.

107. Hogan v. Gibson, 197 F.3d 1297, 1308 (10th Cir. 1999). *See also* Taylor, *supra* note 35, at 1687 (laying out similar components for the heat of passion defense).

108. Burke, *supra* note 12, at 1047; LAFAVE & SCOTT, *supra* note 86, at 661.

109. LAFAVE & SCOTT, *supra* note 86, at 663.

110. *See* Sheppard v. State, 10 So. 2d 822, 824 (Ala. 1942) ("[T]he law says the injured husband must reflect, must not brood over his hurt, then slay the wife or her paramour. If he does, he is guilty of murder.").

111. *See* MODEL PENAL CODE § 210.3 (1962) (failing to address whether the defendant must have acted without first having had time to cool).

action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore.'"[112]

Due to these differences in the legal limitations and treatment of those convicted of voluntary manslaughter under the Model Penal Code and common law approaches, the standard adopted by each state may significantly affect how a voluntary manslaughter case proceeds in a given jurisdiction. In recent years, states have begun to adopt the Model Penal Code's subjective standard in provocation cases.[113] Still, many states have chosen to retain the common law approach by continuing to rely on an objective reasonableness approach.[114] More important is the fact that though precise statutory language varies from state to state, the "reasonable person" remains a key concept in the law of voluntary manslaughter.[115]

III. REASONABLENESS AND VOLUNTARY MANSLAUGHTER

Whether the objective common law approach or the Model Penal Code's subjective approach is used, the concept of reasonableness is central to the law of voluntary manslaughter.[116] Interestingly, no matter the approach actually adopted by a particular state, when jurors are asked to envision "the reasonable person," it is assumed that they conjure up an image of the average person who is statistically similar to most other people.[117] Some experts posit, however, that

112. People v. Casassa, 49 N.Y.2d 668, 676 (1980) (quoting People v. Patterson, 39 N.Y.2d 288, 303 (1976)).

113. *E.g.*, ARK. CODE ANN. § 5-10-104(a)(1)(B) (West 2010); CONN. GEN. STAT. ANN. § 53a-54a(a) (West 2010); DEL. CODE ANN. tit. 11, § 641 (2010); N.Y. PENAL LAW § 125.25(a) (Consol. 1998); OR. REV. STAT. § 163.118(1)(b) (2010); OR. REV. STAT. ANN. § 163.135(1) (West 2009); *see also* State v. Dumlao, 715 P.2d 822, 828, 830-31 (Haw. Ct. App. 1986) (adopting a subjective view of emotional disturbance and stressing that reasonableness of perception does not equal accuracy of perception).

114. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1103(2) (2010); GA. CODE ANN. § 16-5-2(a) (West 2010); LA. REV. STAT. ANN. § 14:31(1) (2009); MINN. STAT. ANN. § 609.20(1) (West 2009); NEV. REV. STAT. ANN. § 200.050(1) (West 2009); N.J. STAT. ANN. § 2C:11-4(b)(2) (West 2010); UTAH CODE ANN. § 76-5-205.5(4) (West 2010). Common statutory language in the laws of these jurisdictions indicates that the provocation or excuse must be reasonable or adequate to provoke the passions of the reasonable or ordinary person and does not mention the actual actor.

115. The Model Penal Code also uses the term "reasonableness," which is determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be, as opposed to relying on an objective societal view of reasonable conduct, as does the common law. MODEL PENAL CODE § 210.3(1)(b) (1962).

116. *Id.*

117. *See* Burke, *supra* note 12, at 1047 (describing the empirical notion of reasonableness used in defense law, which "ask[s] jurors to decide what a typical person

jurors' "reasonable person" does not accurately reflect the average person, but rather, serves as a personification of a community ideal of reasonable behavior.[118] This creates "an objective and largely unitary standard" that may seem gender neutral but, in reality, has clear gendered roots.[119]

The concept of reasonableness, then, is itself characterized by idealized—and genderized—notions of reality.[120] Both objective and subjective reasonableness add to this distorted reality by presenting their own sets of respective gender issues that have been largely minimized or ignored by the legal community.[121] The primary difference between objective and subjective reasonableness lies in the extent to which the jury is permitted to consider a defendant's individual characteristics.[122]

Objective reasonableness is inextricably tied to the purportedly *gender-neutral* "reasonable person" standard.[123] Many American courts have adopted the objective reasonableness standard to accommodate the belief that the law should be based upon a standard of conduct that is generally accepted.[124] Theoretically, there is an element of justice in an objective standard that holds all members of a community to the same standard,[125] but this advantage is neutralized by the

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would have believed, felt, or done in the defendant's circumstances" and addressing the argument that this is "the sole measure of reasonableness").

118. Mark A. Rothstein, *The Impact of Behavioral Genetics on the Law and the Courts*, 83 JUDICATURE 116, 118 (1999) (contending that "[t]he hypothetical reasonable person is not the average person . . . but the personification of a community ideal of reasonable behavior"); *cf.* Heller, *supra* note 88, at 17-18 (explaining that, in self-defense cases, jurors must be biased to the norms of their communities in order to "[e]nforc[e] the conscience of the community").

119. Rothstein, *supra* note 118, at 118 (discussing how the reasonable person standard was once the reasonable *man* standard); Taylor, *supra* note 35, at 1689-92 ("Rather than developing a separate standard for women, criminal law has held and continues to hold female defendants to a male standard of reasonableness.").

120. *See* Nourse, *supra* note 65, at 1387 ("[T]he law's technique, its personification of the defense, leads quite naturally to the feminist argument that the law asks questions about men to define gender.").

121. *E.g.*, Taylor, *supra* note 35, at 1689 (stating that the homosexual male receives no separate consideration under the objective "reasonable man" standard).

122. Burke, *supra* note 12, at 1051. Naturally, subjective reasonableness allows the decision-maker to consider more of the defendant's personal characteristics when determining reasonable behavior. *Id.* at 1043; Heller, *supra* note 88, at 4.

123. Many statutes make direct reference to the "reasonable person." *See supra* note 114 and accompanying text (identifying several statutes that include the concept of reasonableness and the reasonable person in the statutory language).

124. *See* Heller, *supra* note 88, at 4 (evaluating the argument "that subjective standards of reasonableness are antithetical to" certain fundamental standards of criminal law).

125. *Id.* at 9 (noting that the American legal system was founded on the idea that applying the law justly means applying the same general rule to different cases and defendants).

standard's lack of *meaningful* objectivity and equality in the way in which it is applied.[126]

Despite a facade of neutrality, the supposed "reasonable person" standard cannot escape its gendered roots in the tradition of the reasonable *man*:[127] the "reasonable man" standard that first emerged in England in the middle of the nineteenth century birthed the "reasonable person" standard.[128] The history of the "reasonable man" standard reveals centuries of discrimination towards women.[129] It was commonly held that the standard did not apply to female defendants, who were thought to be incapable of reasonable, rational thought.[130] Instead of developing a new standard free from a history of sex discrimination and free of gendered language,[131] the legal community continues to hold females to a standard of reasonableness clearly rooted in the male experience.[132] As a result, women have no real place in either the past or the present of the reasonable person standard.[133]

Not only is objective reasonableness not inherently gender-neutral, judges and jurors add to the problem by relying on their own gender prejudices and stereotypes in applying the standard to criminal defendants.[134] Even though society has progressed in its views of the marital relationship, thousands of years of viewing women as the marital property of their husbands is not easily erased.[135] This culturally ingrained tradition of male dominance and ownership may lead jurors to find a woman's act of adultery more "provoking," than adultery

126. Taylor, *supra* note 35, at 1690 (contending that the seemingly gender-neutral "reasonable person" standard "masks a profoundly gender-based and sex-specific standard").

127. *Id.* at 1691.

128. Rothstein, *supra* note 118, at 118.

129. Taylor, *supra* note 35, at 1691.

130. Daniels v. Clegg, 28 Mich. 32, 41-42 (1873) ("No one would ordinarily expect, and the defendant had no right to expect, from a young woman thus situated . . . the same degree of competency, which he would expect of ordinary men under like circumstances . . . ."). Indeed, "[t]here is not a single common-law reference to a 'reasonable woman.'" Taylor, *supra* note 35, at 1690.

131. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, *in* FEMINIST LEGAL THEORY: FOUNDATIONS 61-63 (D. Kelly Weisberg ed., 1993) (arguing that the reasonable man standard cannot be de-genderized by merely changing the word "man" to "person"; there must also be change to the underlying male model upon which the standard is based). Even basic linguistics show the extent of women's exclusion under the standard, as "'man' does not include 'woman,' nor are the terms interchangeable." Taylor, *supra* note 35, at 1691-92 (citation omitted).

132. Taylor, *supra* note 35, at 1691.

133. *Id.*

134. Keller, *supra* note 5, at 268 (noting that gender prejudices and stereotypes are often pervasive in the judicial decision-making process and can even impact the outcome of a case). *See also* Burke, *supra* note 12, at 1045-46 (discussing juror reliance on biased social norms).

135. Though antiquated, the view that women are men's sexual property lingers even in today's common law. Miller, *supra* note 24, at 672.

committed by a husband.[136] Jurors may not even be aware of their own gender biases, because such biases are deeply ingrained in societal norms.[137] Such cultural biases lead, however, to disparate application of the already male-biased objective reasonableness standard.[138]

In addition to the problems of inherent gender prejudice, the whole idea of trying to accommodate the behavior of men and women into one simplistic standard ignores the fact that criminal behavior is not gender neutral.[139] In particular, research indicates that men and women react differently to spousal infidelity.[140] This identifiable difference in reaction means that male behavior will be treated as the norm; though the law purports to be neutral, it often actually favors the male experience by conflating it with the human experience.[141] Ultimately, female defendants fall victim to a legal theory that makes no attempt to accommodate or even understand the female experience.[142] As one scholar argues: "[a]sking a woman to behave as a reasonable man places her violent behavior—when it does not comport with a male norm—outside the boundaries of reason."[143]

An objective standard based on the behavior of men clearly makes it difficult to judge women equitably.[144] Perhaps more troubling is the fact that because gender discrimination underlying the common law notion of "objective" reasonableness is hidden behind a facade of gender-neutral language, detection of the true discriminatory nature

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136. Jurors are far more willing to view homicide committed by men as having been reasonable when triggered by female infidelity. Burke, *supra* note 12, at 1045. *See also* Taylor, *supra* note 35, at 1721 (asserting that the law of voluntary manslaughter "has always considered a woman's act of adultery especially provoking").

137. *See* Ridgeway & Correll, *supra* note 9, at 510 (describing the theory among scholars that "gender is an institutionalized system of social practices for constituting people as two significantly different categories, men and women, and organizing social relations of inequality on the basis of that difference").

138. *See* Burke, *supra* note 12, at 1045 (theorizing that juror reliance on biased social norms allows male defendants to invoke the claim of provocation more successfully than female defendants).

139. Studies of intimate homicide reveal that men and women kill under different circumstances and with different motives. *Id.* at 1062; Serran & Firestone, *supra* note 26, at 2.

140. Serran & Firestone, *supra* note 26, at 3 (noting that this may be because infidelity has distinct consequences for men). For example, it may raise uncertainty as to the paternity of any children born, which may then lead to escalated frustration and violence. *Id.* This male desire to control female reproductive capacities may be one reason the law of voluntary manslaughter and adequate provocation has long recognized and accommodated the male struggle against female infidelity. *Id.*

141. MacKinnon, *supra* note 17, at 658 ("When [the state] is most ruthlessly neutral, it will be most male . . . .").

142. Taylor, *supra* note 35, at 1691-92.

143. *Id.* at 1692.

144. *Id.* at 1725.

is prevented.[145] Whereas laws that are more noticeably discriminatory are quick to raise public concern, the concept of objective reasonableness hides the fact that women are largely treated as the unprotected "other."[146] A closer look reveals both the widespread social acceptance of male violence against women who stray from their "duty" to honor their husbands,[147] and the law's willingness to grant leniency to men who retaliate against their unfaithful wives, but not to women who kill their adulterous husbands.[148]

Subjective reasonableness, as adopted by the Model Penal Code,[149] provides an increasingly popular alternative to the common law's objective reasonableness standard.[150] The Model Penal Code conception of voluntary manslaughter "was designed to sweep away 'the rigid rules that have developed with respect to the sufficiency of particular types of provocation, such as the rule that words alone can never be enough.'"[151] Adopted by several states,[152] this standard judges the reasonableness of one's explanation or excuse "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[153] This approach furthers the Model Penal Code's general requirement of inquiring into the defendant's mindset to ascertain whether he or she had the requisite mens rea, and to determine appropriate punishment.[154]

Unlike the rarely used *pure* subjective standard,[155] the Model Penal Code actually incorporates a basic level of objectivity by requiring

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145. *Id.* at 1690. *See also* Burke, *supra* note 12, at 1062 ("[T]he adultery-provocation doctrine purported to be gender-neutral, but had an unquestionably disparate impact by gender.").

146. Taylor, *supra* note 35, at 1683, 1687 (acknowledging that, from the inception of the reasonableness standard, the law "has referred to one sex only": the "reasonable *man*") (emphasis added).

147. For statistics indicating the stark contrast between the number of female and male victims of intimate violence in America, see *Homicide Trends*, *supra* note 35.

148. Keller, *supra* note 5, at 272-73.

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

150. In recent years, states have begun to embrace the Model Penal Code's approach. *See supra* note 111 and accompanying text.

151. People v. Casassa, 49 N.Y.2d 668, 679 (1980) (citation omitted). *See also* Nourse, *supra* note 65, at 1339 ("The Model Penal Code (MPC) represents the height of the liberal reform movement and the culmination of the law's move away from categorical rules.").

152. Heller, *supra* note 88, at 69.

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

154. *See* Leah Durland, Comment, *Overcoming the Persecutor Bar: Applying a Purposeful Mens Rea Requirement to 8 U.S.C. § 1101(a)(42)*, 32 HAMLINE L. REV. 571, 591 (2009) (discussing the Model Penal Code's widely followed formulation of mens rea).

155. Heller, *supra* note 88, at 69. It should be noted that there are different conceptions of subjective reasonableness, each of which controls for different factors. *See id.* at 54-55 (discussing the emergence of new subjective standards and the purely subjective standard). However, as these other approaches are less commonly used, they will not be considered in this Note.

that the defendant's provoked response also be objectively reasonable, though the reasonableness of that response is analyzed under the circumstances as the defendant believed them to be at the time he or she acted.[156] It follows that in order to qualify under the doctrine of voluntary manslaughter, provoked actions must be objectively reasonable at their core.[157] The only place where subjectivity comes into play is in determining the defendant's perceptions of the circumstances, not in assessing the reasonableness of the resulting emotional response.[158]

Application of the Model Penal Code's approach requires the finder of fact to ask two basic questions: 1) how did the defendant perceive the situation?; and 2) did the defendant respond reasonably based on his or her perceptions?[159] In order for the defendant's actions to fall under the protections of the doctrine of voluntary manslaughter, the defendant's perception of the situation must have caused him or her to "act under extreme emotional disturbance."[160]

It is often not possible for the trier of fact, particularly a jury, to fully understand and appreciate a defendant's unique perceptions as they are called to do under the subjective approach.[161] Jurors are forced to rely on certain key, distinguishable features present in all individuals to help them surmise how the defendant felt and perceived the situation.[162] Gender is one of the key features most presumed to influence greatly individuals' general perceptions of the world and their reactions in specific situations.[163]

As previously discussed, the Model Penal Code approach is not a purely subjective standard, as its application requires consideration of the objective reasonableness of the defendant's "explanation or excuse."[164] Under the Model Penal Code approach highlighted in *Casassa*, jurors are not meant to consider each individual trait and

156. *Id.* at 68.

157. *Id.* ("*Perceptions* do not have to be objectively reasonable under the MPC standard; *reactions* to perceptions, however, still do.").

158. *Id.* at 68-69.

159. *Id.*

160. People v. Casassa, 49 N.Y.2d 668, 678-79 (1980).

161. *See* Miller, *supra* note 24, at 678 (highlighting the problem of "jury confusion" resulting from the hybrid subjective-objective Model Penal Code approach). Miller discusses a case where, at the trial for a man charged with killing another man over a parking spot, the jury sent a note to the judge asking him to clarify the standard for evaluating reasonableness. *Id.*

162. *See Casassa*, 49 N.Y.2d at 680 (rejecting the idea that the trier of fact can and should consider all the idiosyncratic characteristics of an individual and holding that some personal traits and feelings, such as those stemming from a mental disability, are too peculiar to be worthy of mitigating force).

163. *See* Ridgeway & Correll, *supra* note 9, at 511 (explaining that gender beliefs about men and women are at the core of our cultural and our social structure).

164. MODEL PENAL CODE § 210.3(1)(b) (1962); Heller, *supra* note 88, at 68.

idiosyncrasy of a defendant.[165] Yet when jurors attempt to analyze the reasonableness of a defendant's actions "'from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be,'"[166] they must have a manageable way to place themselves in the defendant's shoes.[167] One of the easiest ways for jurors to do this is to take into account the defendant's gender. How gender is believed to influence one's perceptions and thought process will accordingly nearly always play a role in the reasonableness analysis.[168]

Other obvious characteristics, such as age and race, are also relatively easy to determine and, like gender, carry with them readily identifiable stereotypes.[169] Gender categorization is unique though, as it serves as the foundation of our society's structure.[170] Gender can be distinguished from age or race because gender is dichotomous: there are only two sexes, each with clearly defined gender parameters.[171] This is a dichotomy in which the male perspective and experience is

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165. *See Casassa*, 49 N.Y.2d at 680 (distinguishing those normal individual traits that the jury should consider from those which are too "peculiar"). *But see* Heller, *supra* note 88, at 69 (arguing that "the MPC standard's category of 'reasonable' self-defensive and provoked acts encompasses any act that a reasonable person with the defendant's *unique perceptions* would have committed" (emphasis added)).

166. *Casassa*, 49 N.Y.2d at 678 (quoting N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1998)).

167. *See* Miller, *supra* note 24, at 678 (explaining that juries find it difficult to understand the "balance between the objective and subjective inquiries into a defendant's perception of the alleged affront").

168. Studies show that widely held gender beliefs do exist in our contemporary society. The holders of these beliefs ascribe certain stereotypical characteristics to individual men and women based solely on their gender. *See, e.g.*, Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competence*, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 880 (2002) (analyzing paternalistic stereotypes); Lloyd B. Lueptow et al., *Social Change and the Persistence of Sex Typing: 1974-1997,* 80 SOC. FORCES 1, 2 (2001) (assessing the implications of change and stability in sex typing through study of measures of femininity and masculinity); Janet T. Spence & Camille E. Buckner, *Instrumental and Expressive Traits, Trait Stereotypes, and Sexist Attitudes: What do They Signify?*, 24 PSYCHOL. WOMEN Q. 44 (2000) (exploring college students' self-perceptions, gender attitudes, and sexist stereotypes).

169. *See* Fiske et al., *supra* note 168, at 879-80 (discussing various levels of stereotyping along race, gender, and age lines).

170. Ridgeway & Correll, *supra* note 9, at 511 ("Widely held gender beliefs are in effect cultural rules or instructions for enacting the social structure of . . . inequality that we understand to be gender . . . . Thus, while cultural beliefs about gender are indeed stereotypes, they have a substantially broader social significance than our common understanding of the phrase suggests.").

171. *See id.* at 513 ("[A]bstracted, hegemonic understandings of men and women are roughly consensual in that virtually everyone in the society knows what they are and likely expects that most others hold these beliefs.").

granted superiority.[172] Conversely, stereotypes involving race and age do not fit neatly into just two distinct hierarchical categories.[173]

Ultimately, when jurors try to perceive things as the defendant would have in order to determine the reasonableness of his or her actions, it is likely that the gender of the defendant plays a particularly large role in shaping the jurors' perceptions.[174] Under the Model Penal Code approach, therefore, jurors are likely to ascribe gender stereotypes to a female defendant when asking if the defendant acted as a reasonable person would have in the defendant's situation.[175] Underlying this inquiry lies the question of whether a "reasonable woman" would, or rather, should experience extreme emotional disturbance, as defined under the doctrine of adequate provocation, as a result of discovering her husband's infidelity.[176]

Male acts of aggression in response to spousal infidelity have long been considered reasonable under the doctrine of voluntary manslaughter,[177] and male defendants have long received greater protections under the law of voluntary manslaughter, in part due to the societal belief that spousal infidelity is more shameful for a man than it is for a woman.[178] On the other hand, the act of a wife killing her unfaithful spouse during a fit of rage is a far less common and

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172. Taylor, *supra* note 35, at 1691.

173. *Id.* at 514 ("[R]esearch demonstrates that male or female is usually the first category that people sort self and other into in social relational contexts, possibly because it is a simple, binary classification while other classifications are usually more complex."). For articles discussing the nature and impact of race and age stereotypes and classifications, see Candice P. Holliday, *The Age Discrimination in Employment Act of 1967: Issues Litigated at the Supreme Court Level*, 84 FLA. BAR J. 20 (2010), *available at* http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/; Angela James, *Making Sense of Race and Racial Classification*, 4 RACE & SOC'Y 235 (2001); Kristen A. Myers & Passion Williamson, *Race Talk: The Perpetuation of Racism Through Private Discourse*, 4 RACE & SOC'Y 3 (2001).

174. Burke, *supra* note 12, at 1079-80 ("[S]tereotypes can affect jury decisionmaking whenever reasonableness is part of the doctrinal landscape."). For example, women are generally "seen as less competent" but "'nicer' and better at communal tasks." Ridgeway & Correll, *supra* note 9, at 513.

175. *Cf.* Taylor, *supra* note 35, at 1692 ("Asking a woman to behave as a reasonable man places her violent behavior—when it does not comport with a male norm—outside the boundaries of reason.").

176. Ridgeway & Correll, *supra* note 9, at 513, 519. There is support for the idea that men and women are grouped into two distinct gendered categories in which the prevailing gender stereotypes are then projected onto all individuals in that category. Those who do not comport with their prescribed gender stereotype are treated as abnormal and threatening to one's social standing. *Id.*

177. The typical paradigm in heat of passion cases is presented in *Peacock*. Lewin, *supra* note 1, at A18.

178. Burke, *supra* note 12, at 1077-78. The level of shame felt as a result of a spouse's infidelity may be viewed as affecting a defendant's level of emotional disturbance, which then serves as the gauge for the existence of adequate provocation under the doctrine of voluntary manslaughter. *Id.*

acceptable occurrence.[179] This can partially be attributed to the fact that women "are not socialized to express their anger through aggression."[180] Instead, women are taught not to be surprised by male infidelity, and to respond to their husbands' indiscretions in a less violent manner than would be expected from husbands discovering their wives' infidelities.[181]

Under the standard application of the subjective Model Penal Code approach, gender is presumed to affect women's perceptions of what is reasonable, so the answer to the question of whether a woman has acted reasonably is often based on gender stereotypes.[182] As an initial matter, female homicide defendants do not, and cannot, conform to gender stereotypes, as homicide is a "male" crime.[183] Accordingly, a woman who kills in the heat of passion has strayed much further from social norms than men who kill under similar circumstances.[184]

The history of the doctrine of voluntary manslaughter serves as a protective measure for men "provoked" to kill by their unfaithful wives and completely excludes the female experience.[185] Women who kill are already outliers, and women who kill in the heat of passion fall even further outside gender and societal norms.[186] Though studies have been inconclusive on this point, this different view of men and women murderers may result in the imposition of more severe penalties on women who kill in the heat of passion.[187] This is not to say that all jurors are inherently sexist in their application of the law, but most seem to be influenced by the prevalence of gender stereotypes in modern society.[188]

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179. *See* Taylor, *supra* note 35, at 1698 (describing women's place in the typical voluntary manslaughter paradigm as the adulterer, undeserving of sympathy, as opposed to as the enraged, provoked, and justified male spouse).

180. Miller, *supra* note 24, at 680. For articles that compare male and female stereotypical traits in more depth, see Michael M. Conway et al., *Status, Communality, and Agency: Implications for Stereotypes of Gender and Other Groups,* 71 J. PERSONALITY & SOC. PSYCHOL. 25 (1996), and Fiske et al., *supra* note 168, at 878-80.

181. Miller, *supra* note 24, at 669. Women are taught to respect their husbands and be loyal in their relationships; men are conceived as being "prone to infidelity." *Id.*

182. *See id.* (arguing that because of these stereotypes, women are less likely to benefit to the Model Penal Code's approach to subjective reasonableness).

183. Again, men are almost ten times more likely than women to commit murder. *Homicide Trends*, *supra* note 35.

184. Miller, *supra* note 24, at 681.

185. Taylor, *supra* note 35, at 1698.

186. Miller, *supra* note 24, at 669-70.

187. *See* Taylor, *supra* note 35, at 1732 (discussing how a woman whose experience and reaction differs from that of most other women may actually be penalized by a subjective double standard).

188. Jurors often cannot escape exposure to gender stereotypes, as such stereotypes "are institutionalized in the media, government policy, [and] normative images of the family." Ridgeway & Correll, *supra* note 9, at 513. *See also* Burke, *supra* note 12, at 1053

In its application, the Model Penal Code approach of limited subjectivity is not as progressive or gender-sensitive as it may initially appear.[189] It is true, however, that the subjective approach does avoid the facade of gender neutrality inherent in the objective approach, which really just masks the conflation of the male experience with the human experience.[190] The subjective approach reflects the notion "that sensitivity to the genders of the victim and the offender is necessary to avoid equating male behavior with human behavior, and thus too easily excusing the killing of women by men whose gender roles are threatened."[191] Although male behavior is not equated with human behavior under the subjective standard, the male experience is still preferred and normalized.[192]

As long as the male and female experiences are equally valued, there is nothing inherently problematic about considering a defendant's gender as part of a reasonableness standard. The reality, however, is that the male experience has always been favored and normalized.[193] Adding to this bias inherent in the concept of reasonableness is the fact that the doctrine of voluntary manslaughter was not conceptualized to include women;[194] rather, voluntary manslaughter was meant to accommodate a wholly-male experience.[195] Accordingly, taking gender into account may ultimately do female defendants who do not fit the voluntary manslaughter paradigm a disservice.[196]

CONCLUSION

Although both objective and subjective reasonableness are plagued by problems of gender inequality, the Model Penal Code's subjective standard of reasonableness is "more retributively" just than the common law's objective reasonableness approach, which fails to

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(discussing the unlikelihood of neutralizing juror bias through jury instructions); Miller, *supra* note 24, at 690 ("When a jury makes its determination, its decision is inescapably colored by the cultural bias in favor of men.").

189. *See* Heller, *supra* note 88, at 69-71 (discussing the shortcomings of the MPC's limited subjectivity standard and calling for a standard that "embrace[s] a determinist account of human perception, assuming that how an individual perceives the world is causally determined by her personal characteristics").

190. Taylor, *supra* note 35, at 1723.

191. *Id.*

192. Miller, *supra* note 24, at 690-91.

193. "Male culture is a lens through which we are all trained to see, [and] which disproportionately values male experiences and perspectives," while simultaneously devaluing women's beliefs and lives. *Id.* at 690.

194. Taylor, *supra* note 35, at 1689-92.

195. *Id.*

196. *Id.* at 1734 (discouraging the desire to confine women's behavior to specific categories).

take into account the defendant's actual perceptions of the external circumstances that provoked his or her homicidal act.[197] Due to the advantages that applying this restrained level of subjectivity has over applying the objective approach, the use of an even more subjective approach may seem like an attractive option for remedying some of the shortcomings of the Model Penal Code's mixed subjective-objective approach. By taking jurors' attention away from surface characteristics like gender, jurors may apply the heat of passion doctrine to women more fairly than they currently do.

In practice, however, a more subjective approach may actually not be favorable for women because the more particularly the jury defines the relevant reasonable person under the doctrine of voluntary manslaughter, the more likely it will be to find a defendant's response reasonable.[198]

This is an undesirable outcome for women, as women are more often victims in cases of spousal homicide and other intimate or sex-related killings.[199] Accordingly, an approach that treats homicide defendants with leniency would have a disproportionately positive effect on males by influencing juries to apply the doctrine of voluntary manslaughter more liberally with male defendants. This would result in lesser sentences for males who commit violent crimes in the heat of passion.[200] Ultimately, a more purely-subjective standard could actually *increase* the rate of violence against women.[201]

The Model Penal Code standard is workable. The problem lies in the fact that America's patriarchal society values the male experience over the female experience.[202] Women who do not comport with proscribed gender stereotypes, such as women who murder their husbands, are seen as threatening to mainstream society and must be controlled through legal measures.[203] America's male-dominated legal

197. Heller, *supra* note 88, at 86 (positing that the common law objective approach fails to take into account an individual's characteristics). Under the common law approach, "[a]cts attributable to character are freely willed and nonexcusable; acts attributable to overwhelming circumstances are determined and excusable." *Id.*

198. *Id.* at 71. Juries applying the Model Penal Code approach are already more likely to find a defendant's provoked act to be reasonable compared to juries applying the objective approach. *Id.* Making the standard more subjective would only increase the likelihood that a jury would find the defendant's actions to have been reasonable.

199. Taylor, *supra* note 35, at 1692; *Homicide Trends*, *supra* note 35.

200. Burke, *supra* note 12, at 1045 ("[J]uror reliance on biased social norms permits majority culture defendants to claim self-defense and provocation more successfully than nonmajority defendants . . . .").

201. *See* Taylor, *supra* note 35, at 1696 ("The law of provocation endorses men's ownership of women's sexuality by expressly sanctioning violent reactions by husbands to their wives' infidelity.").

202. Miller, *supra* note 24, at 690-91.

203. *Cf.* Serran & Firestone, *supra* note 26, at 13 ("In the case of women killing their partners, the victims tend to initiate the violence during the homicide altercation . . . .

system was built around a society tolerant of male violence, and nowhere are its gendered roots more noticeable than in the history of the doctrine of voluntary manslaughter. Male violence should no longer be treated as an inevitable fact of life, and aggression in male defendants should not be so readily accepted as a natural reaction to attacks against male dignity and honor. Women today have achieved gender parity in many aspects of life, but the doctrine of voluntary manslaughter continues to perpetuate male violence as an effective means of subordinating women.[204]

At the same time, efforts need to be made to attempt to understand female violence. Although most women who receive protection under the doctrine of voluntary manslaughter kill in self defense,[205] it may also be reasonable for women, like men, to react "offensively" to provocation. Women who kill in the heat of passion should not be treated as more blameworthy then their male counterparts. In order to accomplish this gender parity, the female experience *must* be incorporated into the understanding of what constitutes reasonableness under voluntary manslaughter.

At a more basic level, unequal power relations promoted by gender hierarchies encourage abuse and increase the risk of male violence within intimate relationships.[206] Patriarchy has long been accepted and internalized by both men and women.[207] Male dominance and ascribed male superiority has its roots in American history, and the pervasiveness of the male bias has led to complacency by both men and women in continuing to perpetuate repressive gender stereotypes. Accordingly, the legal community has yet to question seriously either the standard of objective reasonableness, which equates the male experience with the human experience, or the subjective reasonableness standard, which ultimately also favors the male experience.

Justifying and excusing male violence has had, and will continue to have, dire consequences for women. As a male in a position of great legal authority, Judge Cahill's statement included at the beginning of this Note is very telling. As the *Peacock* case illustrates, gender norms have long dictated that corporal punishment is an appropriate and justifiable response to female infidelity. Women must be set free from their historical role as victims in the sexist paradigm that is the

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Battered women have little reason to believe the criminal justice system will protect them.").

204. Miller, *supra* note 24, at 667-68.

205. Taylor, *supra* note 35, at 1698.

206. Serran & Firestone, *supra* note 26, at 13 ("The law and the patriarchal hierarchy have legitimized wife beating and control, resulting in unequal power relationships between men and women.").

207. Ridgeway & Correll, *supra* note 9, at 513-16 (describing how both men and women project gender stereotypes onto themselves and onto one another).

doctrine of voluntary manslaughter. Progressive standards alone are clearly insufficient when their application in a gendered society prevents meaningful equality, as is the case when women are held to a male standard of reasonableness under the voluntary manslaughter paradigm. Until society addresses the patriarchal gender hierarchy, women will continue to play the dual role of deserving victim and unprovoked assassin in the context of murders committed in the heat of passion.

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