MURDER, MINORITY VICTIMS, AND MERCY

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Should the jury have acquitted George Zimmerman of Trayvon Martin's murder? Should enraged husbands receive a pass for killing their cheating wives? Should the law treat a homosexual advance as adequate provocation for killing? Criminal law scholars generally answer these questions with a resounding "no." Theorists argue that criminal laws should not reflect bigoted perceptions of African Americans, women, and gays by permitting judges and jurors to treat those who kill racial and gender minorities with undue mercy. According to this view, murder defenses like provocation should be restricted to ensure that those who kill minority victims receive the harshest sanctions available. Equality is thus achieved by ratcheting up punishment. There is a similar bias in the application of the death penalty, where those who kill racial minorities receive more leniency than those who kill whites and are often spared execution. But the typical liberal response here is to call for abolition rather than more frequent executions. Equality is thus achieved by ratcheting down punishment. This Article asserts that the divergence between the accepted scholarly positions on the provocation defense and capital punishment can be explained by provocation critics' choice to concentrate on spectacular individual instances of leniency toward those who kill gender minorities and death penalty theorists' tendency to view the entire institution of capital punishment as racist and retrograde. The Article then

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provides the institutional sketch of noncapital murder law currently missing from provocation analysis by discussing sentencing practices, the demographic composition of murder defendants, and the provocation defense's potential role as a safety valve. It concludes that inserting institutional analysis into the critical assessment of provocation might undermine the prevailing scholarly dogma supporting pro-prosecution reform.

INTRODUCTION

The power to be lenient is the power to discriminate.[1]

For criminal law professors like me, criminal lawyers, and even the public at large, the spring of 2012 was the spring of Trayvon Martin and George Zimmerman. Not since O.J. Simpson, or maybe more accurately Casey Anthony, has a criminal case captured the public imagination and created such outrage and controversy.[2] The shooting certainly incorporates all the ingredients of a media spectacle: an innocent, teenage

1. McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (quoting K. DAVIS, DISCRETIONARY JUSTICE 170 (1973)).

2. *See generally The Trayvon Martin Case*, HUFFINGTON POST, http://huffingtonpost.com/news/trayvon-martin (web portal dedicated to the Trayvon Martin Case).

African American victim; a "white-Hispanic," generally non-criminal, neighborhood-watch leader defendant; and a lax reaction from police in a racially-divided community.[3] Had Trayvon Martin or George Zimmerman possessed an extensive criminal record, had this been a case of black-on-black violence, or had the police arrested immediately, the story may not have provoked the collective ire, but rather festered in the social media graveyard like so many other crime reports.

Once the case made national headlines, the expert public commentary, at least from the political center-left, was swift and unified.[4] The apparent problem is Florida's "Stand Your Ground" law, which removes the duty to retreat before using deadly force.[5] The logic of the critique is perfect in its simplicity: Zimmerman shooting Trayvon and the police's reaction were unjust; the stand your ground law enabled these events; and therefore, the stand your ground law is unjust.[6] The center-left and progressive opinions on the case are strikingly consistent, holding that broad self-defense laws that benefit racist or racialist[7] killers must be tightened up, operatively making it easier for prosecutors to obtain murder convictions.[8] The bulk of the defense of Florida's stand your

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3. *See id.*

4. *See generally id.* (blog posts from minority and progressive commentators criticizing the "Stand Your Ground" law and police handling of Zimmerman's case); *infra* note 8.

5. *See* FLA. STAT. § 776.013(3) (2012) ("A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force . . .").

6. In support of this conclusion, proponents have offered evidence of other unjust stand your ground cases. *See, e.g.*, Kameel Stanley & Connie Humburg, *Many Killers Who Go Free with Florida 'Stand Your Ground' Law Have History of Violence*, TAMPA BAY TIMES, July 22, 2012, http://www.tampabay.com/news/courts/criminal/many-killers-who-go-free-with-florida-stand-your-ground-law-have-history/1241378 (chronicling cases of abusers, gang members, and other "habitual offenders" utilizing the defense); Nils Kongshaug, *Trayvon Martin's Death Puts Florida's "Stand Your Ground" Law Under New Scrutiny*, ABCNEWS.COM (March 25, 2012), http://abcnews.go.com/US/trayvon-martin-stand-ground-laws-scrutiny-florida-shooting/story?id=15988474 (quoting Florida State Attorney as stating that the law is used by "thugs and gangs and drug dealers").

7. A racialist killer might not harbor conscious racial enmity but may be influenced by negative racial stereotypes, such as "blacks are criminals." *See* Peggy Cooper Davis, *Law as Microagression*, 98 YALE L.J. 1559, 1570 n.51 (1989) (using "the term 'racialist' to describe judgments controlled by racial stereotypes without adopting the accusatory tone suggested by the word 'racist'").

8. *See NAACP Responds to Texas A&M Study Showing Danger of Stand-*

ground law accordingly comes from neo-conservatives, tea partiers, neighborhood warriors, and a few intrepid defense attorneys and civil libertarians.[9]

The mainstream liberal/progressive[10] position condemns murder defenses that "devalue" minorities and women and allow jurors and judges to treat defendants who kill such victims with disproportionate mercy. It calls on the law to eliminate or narrow these defenses to ensure that such defendants receive the harshest sanctions available.[11] Progressive theorists, for example, have advanced a powerful argument calling for abolition or limitation of the provocation (heat-of-passion) defense because controlling and abusive men

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Your-Ground Laws, NAACP, http://www.naacp.org/press/entry/naacp-responds-to-texas-am-study-showing-danger-of-stand-your-ground-laws (quoting NAACP President Ben Jealous as stating, "'stand-your-ground' legislation does more harm than good"); Sean Lengell, *Black Caucus Members offer Resolution to Honor Trayvon Martin*, WASH. TIMES INSIDE POL. BLOG (April 4, 2012, 6:46 PM), http://www.washingtontimes.com/blog/inside-politics/2012/apr/4/black-caucus-members-offer-resolution-honor-trayvo/ (noting Congressional black caucus's call for law's repeal). *Cf. ACLU Reacts to Murder Charge Against George Zimmerman in Trayvon Martin Shooting*, AM. CIV. LIBERTIES UNION, http://www.aclu.org/racial-justice/aclu-reacts-murder-charge-against-george-zimmerman-trayvon-martin-shooting (discussing ACLU support for the outside investigation that led to Zimmerman's arrest).

9. *See Gun Owners of America Chief Defends George Zimmerman: Trayvon Martin was 'Assailant,'* DEMOCRATICUNDERGROUND.COM (Mar. 26, 2012), http://www.democraticunderground.com/1002472118 (quoting executive director of the organization as stating, "Martin 'gave up his rights'"); Judson Phillips, *Injustice: The Liberal Lynch Mob and the George Zimmerman Case*, TEA PARTY NATION (Mar. 28, 2012), http://www.teapartynation.com/forum/topics/injustice-the-liberal-lynch-mob-and-the-george-zimmerman-case (asserting that "Trayvon Martin start[ed] a fight [and]caused his death"); Alan Dershowitz, *Drop George Zimmerman's Murder Charge*, NYDAILYNEWS.COM (May 18, 2012), http://www.nydailynews.com/opinion/drop-george-zimmerman-murder-charge-article-1.1080161?localLinksEnabled=false (stating that an "ethical" prosecutor would drop the murder charge).

10. This Article uses the term "liberal" in its colloquial sense as pertaining to a politically left/progressive agenda and not to denote adherence to the philosophy of Lockean neo-classical liberalism. Progressive legal scholars harbor a skepticism of authoritarian criminal justice *see infra* Part IV.A, but they are also attuned to the ways in which seemingly neutral laws reflect and reinforce racial and gender hierarchies.

11. The Trayvon Martin case is strikingly similar to the Bernhard Goetz case, in which a white subway passenger was acquitted on self-defense grounds of an admitted execution-style shooting of four black youths. *See* People v. Goetz, 497 N.E.2d 41 (N.Y. 1986). Commentators problematize New York's broad self-defense law for allowing the jury to deem Goetz's actions reasonable. *See, e.g.,* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) [hereinafter *Race and Self-Defense*].

who kill their female partners can utilize it to mitigate murder charges to manslaughter.[12] Having diagnosed the problem as one of gender disparity—female victims are uniquely disadvantaged by the provocation defense[13]—progressives propose to ratchet up punishment to ensure that male perpetrators of intimate killings are punished to the same degree as other killers.[14] In fact, when it comes to wife-killers who claim provocation and racialist killers who claim self-defense (like Zimmerman), liberals regard ratcheting up as the sole means of achieving equal treatment of minority victims.[15]

Discriminatory leniency also occurs outside the provocation and self-defense contexts. Death penalty experts observe a similar disparity in capital punishment administration where killers of black victims receive disproportionate mercy and are spared execution.[16] If progressive death penalty discourse followed the same trajectory as discourse on intimate homicide and Trayvon Martin, liberals would call for a ratchet-up solution to ensure that black victims in capital cases receive equal treatment. They would propose reforms like returning to a mandatory death penalty, race-conscious prosecutorial mandates, or special victim advocates in minority victim cases.[17] Instead,

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12. *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003) [hereinafter REASONABLE MAN]; Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997); Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71 (1992).

13. Critics have also noted that LGBT victims are disadvantaged by the defense. *See infra* notes 65–68 and accompanying text. *See, e.g.*, Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992) (critiquing the provocation defense on sexual orientation grounds). There is less evidence that those who kill minority victims particularly benefit from the provocation defense. *But see* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1301 (2004) (describing society's tolerance for post-September 11 [racial] violence as reflecting heat-of-passion-based reasoning).

14. *See* Miller, *supra* note 12, at 669 (stating that broad provocation laws permit jurors "to give voice to their own prejudices").

15. *See infra* Part II.B.

16. *See infra* Part II.A.

17. *See* Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1436–38 (1988) (discussing "level up" solutions (more executions) to the problem of death penalty disparity).

commentators point to the racial disparity in the death penalty as a ground to uniformly ratchet down punishment and abolish capital punishment.[18] This illustrates that ratcheting up is not the exclusive method of remedying disparity. Every inequality case "poses the problem of whether to 'level up' or 'level down.'"[19] Provocation theorists, like death penalty scholars, could propose to remedy provocation's gender disparity by making the heat-of-passion defense exceedingly easy to satisfy for all defendants.

This Article explores why liberals advance ratchet-up, severity-enhancing remedies to address victim disparities caused by broad murder defenses like provocation, but choose ratchet-down, leniency-enhancing remedies to address victim disparities caused by discretion in capital punishment. The striking divergence between progressive provocation and death penalty analyses, I argue, can be attributed to a difference in focus. Provocation critics tend to concentrate on terrible individual homicides. Reading the facts of such sensational cases triggers not just the egalitarian desire to treat women and LGBT victims like other victims, but the retributive desire to see the perpetrators suffer the highest penalty under law.[20] By contrast, death penalty scholars start with a set of baseline objections to any penal structure that permits execution.[21] When assessing the death penalty disparity, they look at capital punishment institutionally—its philosophical groundings,[22] its larger effects on subordinated groups and

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18. *See infra* Part III.B.

19. Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 161–62. In civil antidiscrimination law, progressives generally prefer "level up" solutions that mandate minority participation in benefits over "level down" solutions that deprive everyone of benefits. *See, e.g.,* Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law,* 46 WM. & MARY L. REV. 513 (2004). The criminal context is complicated by the fact that "level up" proposals that purportedly benefit minority victims simultaneously burden perpetrators, who are often minorities. *See infra* notes 290–295 and accompanying text.

20. *See infra* notes 70–75 and accompanying text (narratives of spectacular provocation cases).

21. *See* Matthew B. Robinson, *The Real Death Penalty: Capital Punishment According to the Experts*, 45 NO. 2 CRIM. LAW BULLETIN ART 3 (2009) (surveying "expert" death penalty scholars and finding that 80 percent indicated opposition to capital punishment and 9 percent indicated support).

22. *See, e.g.*, Claire Finkelstein, *A Contractarian Argument Against the Death Penalty*, 81 N.Y.U. L. REV. 1283, 1284 (2006) (setting forth an a priori moral

communities,[23] and its place within an evolved global civilization.[24] Seen in an institutional light, capital-sentencing decisions that reflect and reinforce racial hierarchy confirm the morally fraught nature of the entire capital punishment enterprise.[25]

If provocation critics focused more globally on non-capital murder sentencing and its negative effects on individuals and society, they might also hesitate before prescribing ratchet-up, carceral solutions to provocation's disparities.[26] The trajectory of murder sentences, the racial composition of murder arrestees, and the likely role provocation plays within this institution renders dubious the proposition that abolishing or restricting provocation furthers anti-subordination goals and progressive values. Provocation scholars' focus on specific cases of gendered and racialized violence[27] instead of the aggregate

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argument against the death penalty); *infra* note 209 and accompanying text. *But see* Cass Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 750 (2005) (asserting that if capital punishment really deters, it may be "morally obligatory").

23. *See* Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005 (2001) (discussing deleterious effects of criminal enforcement on black communities); *infra* notes 218–19 and accompanying text.

24. *See* Harry Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45–46 (1994) (asserting that the death penalty's legality should be measured "in part, against international norms").

25. *See, e.g.,* Ronald J. Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL L. REV. 1431, 1431 (1998) (characterizing racial statistics as a weapon in the "arsenal" against capital punishment); *see infra* Part III.B.

26. Although illustrating the difference between insular and institutional foci could be made by juxtaposing liberal death penalty analysis with either liberal self-defense or provocation analysis, for clarity and brevity, this Article focuses on comparing death penalty analysis with provocation analysis. Notwithstanding scholarship on the *Goetz* case, *see supra* note 11, there seems to be more critique of provocation law. Moreover, the differences between murder and manslaughter and execution and imprisonment are a matter of degree, whereas self-defense is all-or-nothing. Finally, the Trayvon Martin case has already prompted some institutional examination of self-defense law. *See* U.S. COMM. ON CIV. RTS. SPECIAL INVESTIGATION: STAND YOUR GROUND LAWS & RACIAL BIAS 1 (2012) (proposing to study racial disparities in stand your ground laws, but not seeking to examine the global effect of restricting self-defense).

27. While some theorists discuss the effect of broad provocation formulas on intimate homicide cases in the aggregate, they limit their analysis to male-on-female intimate homicide cases. *See infra* notes 84–90 and accompanying text. However, they generally propose remedies that affect *all* provocation cases without analyzing how provocation law affects defendants in non-intimate homicide cases. *See infra* Part II.B.

effect of provocation law on offenders and sentencing explains why these progressives support reforms that bolster a penal system they otherwise passionately criticize.[28]

Part I of this Article provides a brief sketch of provocation law. Part II analyzes the progressive critique that the provocation defense invites discriminatory mercy toward those who kill gender minorities and the ratchet-up proposals to remedy the disparity. Part III describes the racial critique of the death penalty and demonstrates how the ratchet-down solution is a product of institutional reasoning. Part IV provides an institutional description of non-capital murder law by examining the radical transformation in murder sentencing over the last several decades, its effect on prison populations and marginalized communities, and how provocation law operates within this structure. The conclusion discusses why viewing non-capital murder law institutionally might move liberal-minded scholars to depart from the current dogma that lawmakers should narrow the provocation defense so that killers of minority victims receive harsher punishment.[29]

I. THE PROVOCATION DEFENSE IN BRIEF

Criminal law theorists have long debated whether a defendant's anger and passion should mitigate murder charges to manslaughter and whether a victim's emotion-inciting but not illegal conduct should partially justify his demise.[30] Theorists and jurists also struggle with whether provocation should principally concern the defendant's mental or emotional

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28. The issue of insular versus institutional focus exists in other criminal law contexts, like domestic violence law. *Compare* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1850, 1881–82 (1996) ("[W]e cannot allow violence to go unchecked under the rationale that state intervention is always racist, ethnocentric, or classist."), *with* LINDA MILLS, FROM INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE 31 (2003) (noting that men of color are prosecuted for domestic abuse at "disturbingly disproportionate rates").

29. *See infra* note 57 and accompanying text (observing popularity of this view).

30. Joshua Dressler asks, "[W]hy is the impassioned killer consistently treated more leniently than the calm killer?" *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 422 (1982) [hereinafter *Rethinking Passion*]. *See also* Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1031 (2011) (noting that the debate over provocation has lasted "several decades but [is] yet to bear satisfactory fruit.").

state (making it operate as an excuse), the quality of the victim's act (making it operate as a justification), both, or neither.[31] One factor contributing to the philosophical complexity is that there are many different permutations of the defense. Some formulations strongly focus on the defendant's state of mind, and others are preoccupied with the nature of the victim's behavior.[32] This Part takes a quick look at different provocation formulations and the scholarly debate over the defense.

Provocation law vacillates between a retributivist emphasis on defendant culpability and a "transactional" view of criminal law that accounts for both parties' contributions to a criminal event.[33] The different formulations of provocation thus exist along a spectrum from victim-centered (emphasizing the nature of the victim's conduct) to defendant-centered (focusing on the defendant's subjective intent and circumstances).[34] Traditional provocation law limits the defense to discrete categories of purportedly provocative behavior, typically mutual combat, false arrest, physical assault, and adultery.[35] Many jurisdictions further specify that words alone, no matter how incensing, cannot constitute

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31. *See* Symposium, *The Nature, Structure, and Function of Heat of Passion/Provocation as a Criminal Defense*, 43 U. MICH. J.L. REFORM 1, *et seq.* (2009) [hereinafter Provocation Symposium] (several articles debating the nature of provocation as justification or excuse); Dan Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996) (provocation is neither justification nor excuse). *See, e.g.*, *Rethinking Passion, supra* note 30 (provocation is a partial excuse); A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292 (1976) (provocation is a partial justification).

32. *See infra* note 34.

33. *See* George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1538 (2002) (stating that provocation law shows "it is possible to distribute guilt among the parties to a criminal transaction"); 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, 677 n.150 (2003) [hereinafter *Victim Wrongs*] (observing that certain provocation formulations focus on "the entire transaction including the victim's behavior").

34. *See* Nourse, *supra* note 12, at 1342 (observing that provocation's "two poles" are the defendant-centered MPC formulation and the victim-centered, traditional categorical view).

35. *See id.* at 1341 (calling these categories the "nineteenth century four"); *Victim Wrongs*, *supra* note 33, at 677 n.153 (listing traditional categories). *See, e.g.*, People v. Garcia, 651 N.E.2d 100, 110 (Ill. 1995) (limiting provocation to physical assault or injury, mutual quarrel or combat, illegal arrest, and adultery); Rogers v. State, 819 So.2d 643, 662 (Ala. Crim. App. 2002) (limiting provocation to witnessed adultery and imminent assault of the defendant or a close relative).

adequate provocation.[36] These formulations emphasize the quality of the victim's act as much as or more than the defendant's actual emotional state.[37] On the other end of the spectrum is the Model Penal Code's (MPC) extreme emotional disturbance defense, which mitigates murder to manslaughter when the defendant acts "under the influence of extreme mental or emotional disturbance."[38] The MPC contains no requirements as to the form of provoking behavior and thus focuses nearly exclusively on the defendant's emotional state.

In the past, liberal criminal law scholars tended to view the defendant-centered approach to provocation as the forward-thinking view,[39] reflecting the general precept that criminal law should be about the defendant's intent and actions.[40] It is true that some commentators regarded even the narrow categorical approach as over-inclusive, allowing too many fully culpable killers to claim provocation.[41] Indeed, the pacifist view is that any killing not in valid self-defense is fully morally condemnable.[42] Nevertheless, progressive criminal law scholars historically regarded the categorical approach as under-inclusive, asserting that juries might reasonably find victim behavior not included in the categories to be adequately

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36. *See, e.g.*, Cassels v. State, 92 P.3d 951, 960 (Colo. 2004) ("[W]ords that revile, disparage, or insult . . . can never rise to the level of legal provocation."); State v. Shane, 590 N.E.2d 272, 277 (Ohio 1992); Girouard v. State, 583 A.2d 718, 721 (Md. 1991) (same).

37. *See* Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 161 (2009) (observing that the categorical approach "requires moral-social assessment of the reasons for the defendant's emotion"). *But see* JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 89 (1992) (stating that categories served the "evidentiary" function of corroborating defendants' claims of passion).

38. AMERICAN LAW INST., MODEL PENAL CODE § 210.3(1)(b) (1980) [hereinafter MPC].

39. *See* Nourse, *supra* note 12, at 1339 (characterizing the MPC as "the height of the liberal reform movement").

40. *See id.*; *Rethinking Passion, supra* note 30, at 460 (stating that the doctrine recognizes that a provoked actor "is not fully blameworthy"). *Cf.* Payne v. Tennessee, 505 U.S. 801, 859 (1991) (Stevens, J., dissenting) (criticizing the Court's acceptance of victim impact evidence in capital sentencing on the ground that "[t]he victim is not on trial").

41. *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 636 (1981) (stating that jibes, assaults, or adultery would never provoke an ordinary man to kill); HORDER, *supra* note 37, at 178 (asserting that equating "action in moments of unexpected anguish" with reasonable action is a "sham").

42. *See, e.g.*, Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 33 (1984) ("Reasonable people do not kill no matter how much they are provoked").

provocative.[43] Taking a cue from the 1968 MPC revision, several jurisdictions shifted away from the traditional approach to "enlightened" defendant-regarding versions of provocation law.[44] Of course, focusing on defendant culpability does not answer the question of *when* a defendant is less culpable. Many experts and jurisdictions abide by the view that the provocation defense should only be available when a "reasonable person" would have been moved to kill.[45]

Requiring the defendant's actions to be reasonable is more victim-centered than a purely subjective approach. If the reasonable person is generally nonviolent, only the most extreme victim conduct is adequately provoking.[46] Then again, a broad construction of reasonableness permits defendants to claim reasonable provocation even when the victim's conduct was not wrongful.[47] As such, reasonableness is also subject to under-inclusiveness and over-inclusiveness objections. To the victim advocate, the fluidity of reasonableness can undermine

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43. *See, e.g.*, Joshua Dressler, Comment, *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) [hereinafter *Provocation Reflections*] (noting with approval states' shift away from "rigid" categories); Richard Singer, *The Resurgence of Mens Rea: I-Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. Rev. 243, 249 (1986) (asserting that the jury should decide provocation's adequacy). *See also* MPC & COMMENTARIES § 210.3(1)(b) (1980) (stating that the drafters "[r]ejected the categorical approach in order to avoid arbitrary exclusion of some [mitigating] circumstances").

44. *See* Nourse, *supra* note 12, at 1340, n.52–55 (discussing this shift and citing statutes and cases); REASONABLE MAN, *supra* note 12, at 284; Kahan & Nussbaum, *supra* note 31, at 309 ("Modern authorities have tended to abandon categorical definitions of adequate provocation.").

45. *See, e.g.*, GA. CODE ANN. § 16-5-2 (West 2012) ("reasonable person"); LA. REV. STAT. ANN. § 14:31(1) (2011) ("average person"); MO. REV. STAT. § 565.001(1) (2010) ("person of ordinary temperament"); NEV. REV. STAT. ANN. § 200.050 (LexisNexis 2009) ("reasonable person"); WIS. STAT. ANN. § 939.44(1) (West 2010) ("ordinarily constituted person"). *See* REASONABLE MAN, *supra* note 12, at 235 (characterizing the purpose of reasonableness as creating "uniformity and fairness").

46. *See* A.P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE §10.5(b)(iii) at 348 (2d ed. 2003) (asserting that the reasonable person would rarely "intentionally kill, in peacetime, except in self-defense"). *Cf.* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 247 (1978) ("[T]he reasonable person does not kill at all, even under provocation.").

47. *See generally infra* notes 104–08 and accompanying text (discussing the critique of reasonableness); Jody D. Armour, *Race Ipsa Loquitor: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 789–90 (1994) (discussing the "reasonable racist" problem and noting that "prevailing beliefs and attitudes may fall short of" moral attitudes).

the interests of victims who engaged in innocent behavior.[48] From the defense perspective, the standard invites juries to view the defendant's decisions through the lens of their own experiences instead of understanding his life circumstances.[49]

The MPC shifts the inquiry from the question of adequate provocation to whether the defendant acted under a condition of extreme emotional disturbance.[50] It adopts a defendant-centered perspective, in which blameworthiness corresponds directly with capacity to form intent.[51] However, even the MPC does not completely escape the lure of reasonableness, as it requires that there be a "reasonable explanation or excuse" for the defendant's diminished mental state.[52] Today, defendant-centered versions of the provocation defense have largely supplanted the traditional approach.[53] Currently, eleven states

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48. *See* Cathryn Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 32 (1986) (observing that subjective reasonableness might encourage killing "innocent" victims); *Race and Self-Defense, supra* note 11, at 385 (arguing that under subjective reasonableness, defendants' beliefs "outweigh all other considerations").

49. *See* Singer, *supra* note 43, at 278; *cf.* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1310 (2001) (criticizing criminal law for repressing "the reality of social influences" in favor of a "shaky idea of free will") (internal quotation marks omitted).

50. *See* MPC § 210.3(1)(b).

51. *See supra* note 34 and accompanying text. *Cf.* Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119, 135–36 n.45 (2008) ("[N]egligence is (most often) an illegitimate basis upon which to premise retributive punishment").

52. MPC § 210.3(1)(b); *see also Rethinking Passion, supra* note 30, at 468 (setting forth a defense based primarily on loss of self-control but retaining reasonableness). There are formulations of the diminished capacity defense that are purely subjective and thus represent the far end of the defendant-centered perspective. Wholly dispensing with reasonableness makes the normative quality of the victim's behavior almost irrelevant to the question of appropriate punishment. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-13 (West 2012); MO. REV. STAT. §§ 552.015.2(8), 552.030(3) (2012); N.J. STAT. ANN. § 2C:4-2 (LexisNexis 2012); ALASKA STAT. § 12.47.020 (2012); HAW. REV. STAT. ANN. § 704-401 (LexisNexis 2012); ME. REV. STAT. ANN. tit. 17-A, § 38 (2012); MONT. CODE ANN. § 46-14-102 (2012); UTAH CODE ANN. § 76-2-305(1). This extremely liberal position limits punishment and allows for consideration of a defendant's personal background. *Compare* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 401–03 (1976) ("[P]eople turn to crime for reasons such as economic survival, a sense of excitement or accomplishment, and an outlet for frustration, desperation, and rage."), *with* Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1249–50 (1976).

53. It appears that only two states, Alabama and Illinois, retain any categorical restrictions on provoking behavior. *See, e.g.*, Riggs v. State, 2013 WL

employ a version of the MPC extreme emotional disturbance defense.[54] Accordingly, the vast majority of jurisdictions' provocation formulations focus to varying degrees on the "adequacy" of provoking conduct and in turn, the "reasonableness" of the defendant's overriding passion.[55]

II. DISCRIMINATORY LENIENCY IN PROVOCATION LAW

The various provocation defense formulations have and continue to generate "passionate" debate.[56] In recent decades, one of the most compelling critiques of the defense has come, not from tough-on-crime conservatives, but progressive scholars, predominantly feminist and queer theorists concerned with the defense's operation in cases involving female and LGBT victims.[57] These theorists (referred to collectively as

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1859018, at *8 (Ala. Crim. App. May 3, 2013) ("[T]his Court recognize[s] the following three situations in which murder may be reduced to manslaughter on the basis that there existed legal provocation: '(1) when the accused witnesses his or her spouse in the act of adultery; (2) when the accused is assaulted or faced with an imminent assault on himself; and (3) when the accused witnesses an assault on a family member or close relative.'") (quoting Rogers v. State, 819 So.2d 643, 662 (Ala. Crim. App. 2001)); People v. Hernandez, 562 N.E.2d 219, 226 (Ill. App. 2d. 1990) ("In Illinois, only four situations have been recognized as engendering the type of 'serious provocation' which warrants partial or incomplete exoneration for the commission of a homicide. They are: (1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the offender's spouse."). *See* Wayne R. LaFave, 2 SUBST. CRIM. L. § 15.2 (2d ed. 2012) (noting the "trend away from the usual practice of placing the various types of provocatory conduct into pigeon-holes"); *See* Berman & Farrell, *supra* note 30, at 1038 (observing that "the categorical approach was replaced by a standard of reasonableness.").

54. *See* Berman & Farrell, *supra* note 30, at 1044 n.64 (observing that currently nine states, Arkansas, Connecticut, Delaware, Hawaii, Kentucky, Montana, New York, North Dakota, and Oregon, adopt the MPC formula in whole and two, New Hampshire and Utah, adopt it in part).

55. *See, e.g.,* statutes cited *supra* note 45. *Cf.* Berman & Farrell, *supra* note 30, at 1039 (noting that "states differ, for example, as to whether mere words or wrongs done to a third party may amount to adequate provocation, and as to whether a time delay between the provoking act and the killing . . . precludes the defense") (footnotes omitted).

56. *See, e.g.,* Provocation Symposium, *supra* note 31 (articles debating the nature and optimal formulation of the provocation defense).

57. Joshua Dressler explains:

> Today . . . provocation law is under attack. Of course, one might expect law-and-order advocates to criticize a doctrine that can permit an intentional killer to avoid conviction for murder. . . . Modern criticism of provocation law is more interesting than that, however. Heat-of-passion law has been the subject of ethical, and most especially, feminist attack.

"provocation critics") assert that provocation law adopts and reinforces masculinist, if not misogynist, views of human emotion and reaction.[58] Even the narrow traditional provocation defense is subject to the critique that the adultery category gives license to jealous male killers, and the other categories privilege violence based on male honor. However, the broad provocation formulations, particularly the MPC defense, generate the most disapprobation because they give the greatest leeway to defendants, including sexist and homophobic defendants, to argue they were provoked.[59]

Today, political positions on provocation have inversely shifted. Far from heralding defendant-centered formulations as "enlightened,"[60] progressives concerned with race and gender justice now condemn broad heat-of-passion laws as sexist and subordinating and call for provocation's abolition or a return to narrow, prosecution-friendly versions of the defense.[61] This Part discusses the progressive critique of provocation as discriminatory against women and LGBT victims and critics' proposed solutions to the defense's disparity problems. The first subsection will describe the origin and nature of the feminist position that provocation law allows state actors and jurors to treat those who kill gender minorities with undue leniency. The next subsection will examine the proposed solution to provocation's problems and reveal how the proposals, although heterodox in character, nonetheless uniformly ratchet up punishment.

A. The Progressive Critique of Provocation's Gender Disparities

Beginning in the 1990s, progressive criminal law theorists

> We are told that "[v]oluntary manslaughter [heat-of-passion doctrine] has never been a female-friendly doctrine" and, indeed, "continues to perpetuate a violent form of male subordination of women."

Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 960–61 (2002) [hereinafter *Difficult Subject*] (quoting, Miller, *supra* note 12, at 667–78).

58. *See, e.g.*, Nourse, *supra* note 12, at 1386 (asserting that broad provocation formulas "protect[ ] older gender norms"). *See Victim Wrongs*, *supra* note 33, at 680 (noting the feminist critique that provocation law benefits men "whose anger is informed by patriarchal beliefs").

59. *See infra* notes 84–88 and accompanying text.

60. *See supra* note 43 and accompanying text.

61. *See infra* Part II.B.

lodged a forceful scholarly attack on the provocation defense.[62] Scholars became aware of many cases in which abusive and controlling men asserted the provocation defense after killing female partners who had not engaged in any wrongdoing.[63] In turn, those concerned with gender equality in criminal law expressed extreme unease with such defendants utilizing the provocation defense, similar to the outrage generated by Zimmerman's use of self-defense.[64] Around the same time, scholars publicized the relationship between provocation law and heterosexism and homophobia.[65] The issue gained national attention with a couple of headline-grabbing cases. The media extensively covered the 1998 murder of Matthew Shepard, which later inspired a namesake federal hate crime law.[66] The defendants tortured and brutally murdered the gay teenage Shepard and unsuccessfully claimed provocation.[67] Many also recall the 1995 "Jenny Jones murder," in which the straight male defendant killed a man who revealed having a "crush" on him on a national talk show. He also argued provocation unsuccessfully at trial.[68]

The provocation critique is insular in focus, both philosophically and methodologically. Philosophically, critics are primarily concerned with individual cases in which women and LGBT homicide victims are devalued because the defendant receives, or more often is simply permitted to seek, lenient treatment under the law. Methodologically, provocation critics extensively employ the persuasive tool of victimization

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62. *See* articles cited *supra* note 12.

63. *See* Coker, *supra* note 12, at 101–02.

64. *See, e.g.*, Pillsbury, *supra* note 37, at 166 (discussing provocation defendants' "patriarchal, jealous rage"); Horder, *supra* note 37, at 192.

65. *See, e.g.*, Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81, 86–89 (1992); Mison, *supra* note 13; *see also* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008) [hereinafter *Gay Panic*]; Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629 (2001).

66. *See* Matthew Shepard and James Byrd, Jr. Hates Crimes Prevention Act, 123 Stat. 2835 (2009) (codified as 42 U.S.C.A. § 3716 *et seq.*).

67. *See generally* MATTHEWSHEPARD.ORG, http://www.matthewshepard.org/ (website of the Matthew Shepard Foundation); *Gay Panic, supra* note 65, at 523–31 (describing case).

68. *See Talk Show Held Negligent in Guest's Killing*, CNN.COM (May 7, 1999), http://articles.cnn.com/1999-05-07/entertainment/9905_07_talk.show.slaying.03_1_scott-amedure-jonathan-schmitz-amedure-family?_s=PM:SHOWBIZ; *Gay Panic, supra* note 65, at 495–97 (describing case).

narrative to demonstrate that the very existence of such cases constitutes a grave miscarriage of justice. The literature critiquing provocation is rife with exacting depictions of cases in which abusive men commit horrific murders of women, the women's children and family members, and other third parties.[69] Criminal law scholars have poured through the books to bring such cases to public light.

In the well-known 1996 article *Passion's Progress*, Victoria Nourse describes several actual cases of men committing brutal murders when women tried to sever the relationship,[70] upon jealousy-induced speculation about infidelity,[71] and after exes moved on to new relationships.[72] Each vignette ends with the stark fact that the judge instructed the jury it could apply the provocation defense.[73] Prolific provocation scholar Cynthia Lee provides heart-wrenching details of provocation cases like that of Mark Chicano, whose girlfriend broke up with him and months later, was living with another man, Raymond:

> Mark crept into the bedroom and struck Raymond on the head with a crowbar. Ellen cried out and tried to protect Raymond. This only enraged Mark who continued to strike Raymond with the crowbar until Raymond was lifeless. Mark then started kicking and punching Ellen. . . . At this point, Ellen's eleven-year-old son entered the room and started screaming. Mark turned to the boy, grabbed him by the throat to quiet him, and then strangled him to death. Mark turned back to Ellen and struck her on the head twice with the crowbar, killing her almost instantly.[74]

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69. *See* Nourse, *supra* note 12, at 1342–43, 1351–52.

70. *See id.* Nourse quotes extensively from the fact sections of murder cases, including the case of "Smith" who, after finding out his wife Becky filed for divorce, "shot through the door [of Becky's family's home], killing Becky's half-sister, then went into the house and killed Becky's mother. Sometime later, as the ambulance attendants administered to the victims, Smith killed Becky and the daughter she was holding in her arms." *Id.* at 1343 (footnote omitted).

71. *See id.* at 1362–63 (relating such stories).

72. *See id.* at 1358–59 (relating such stories).

73. *See id.* at 1342–43, 1351–52, 1358–59, 1362–63 (all stories end with "[t]he jury was instructed that it could return a verdict of manslaughter based on 'extreme emotional disturbance'" or a very similar statement).

74. REASONABLE MAN, *supra* note 12, at 38. *See also id.* at 36–37 (describing the Hippolito Martinez case, in which married Martinez saw his female paramour dancing with a man (her brother) and then "struck Esther in the face and shot her

Similarly, the influential 1992 California Law Review note, *Homophobia in Manslaughter*, meticulously depicts cases in which judges permitted brutal murderers to argue provocation simply because the decedent was gay.[75]

Narrative can play a significant role in exposing and rectifying social injustice by bringing often-obscured facets of legal and social arrangements into vivid focus.[76] As a technique of persuasion, storytelling is invaluable, and it is utilized in a wide-ranging array of legal documents from cases and legislative enactments to scholarly articles.[77] Nevertheless, in the criminal law context, narrative generally carries a prosecutorial valence because graphic descriptions of criminal behavior arouse observers' emotional inclinations to exact painful punishment without regard to larger issues of equality,

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five times" and later "told police, 'I shot her and I hope she dies.'"); Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L. J. 197, 201 (2005) (recounting case of Randall Dixon who killed his fiancée for dancing with another man and stating, "[h]e first attacked her at the celebration, then followed her to her sister's house, where he beat her until she stopped breathing. He revived her with mouth-to-mouth resuscitation, then took her home and continued the assault. When the beating stopped at 5:00 a.m., . . . she never woke up."); CAROLINE FORELL & DONNA MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 170 (2000) (quoting facts in a dissent to a murder reversal, including the coroner's testimony that the deceased had "many bruises, many violent bruises and injuries to [her] head").

75. Mison, *supra* note 13, at 167–70 (describing various cases, including one in which the "defendant pushed the victim out of the car, chased him, knocked him down, kicked him, pulled his pants down to hinder pursuit, took his jewelry, left him lying near the creek in which the body was later found, and drove home in the victim's car"). *See also Gay Panic*, *supra* note 65, at 500–05.

76. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1988) ("Stories, parables, chronicles, and narratives are powerful means for destroying [prevailing] mindset."); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1412 (1992) ("Critical race theorists believe . . . telling counterstories about the victim's experience may help to change the dominant culture.") (footnote omitted); Susan Ayres, *Incest in a Thousand Acres: Cheap Trick or Feminist Re-Vision?*, 11 TEX. J. WOMEN & L. 131, 143 (2001) ("The power of storytelling is especially effective in feminist re-vision because it provides an alternative discourse for silenced feminine voices and perspectives."). *See generally* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (recounting influential feminist narratives and analyzing the critique of narrative).

77. *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 876 n.254 (1997) (observing that legal storytelling challenges "dominant legal rules" that reproduce hierarchy); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1435 (1993) ("Individualized stories are essential to avoid the dehumanizing abstractions that allow people to forget or trivialize the suffering of others.").

efficiency, or fairness.[78] For this reason, detailing true crime stories is often the province of crime victims' rights reformers and politicians.[79] Consequently, while narrative can be a tool of liberation, for those whose liberatory sympathies extend to marginalized criminal defendants, telling victim stories is, at best, a double-edged sword.[80]

Descriptions of horrendous killings prime the reader to believe the provocation doctrine is patently unjust because it helps bad defendants (abusers) and treats good victims (faithful wives trying to leave) as provocateurs.[81] This sets the stage for another type of evidence—statistical data demonstrating the prevalence of such unjust outcomes in jurisdictions with permissive provocation laws. Some of the evidence is defendant-regarding—for example, Donna Coker's revelation that a number of men who claim provocation in

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78. *See* JOSEPH A. AMATO, VICTIMS AND VALUES: A HISTORY AND A THEORY OF SUFFERING 175 (1990) ("There is an elemental moral requirement to respond to innocent suffering."); Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 412 (1996) ("We ought not to pretend that storytelling and empathy are value neutral, when in fact they are potent weapons . . . .").

79. *See* Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 568 (2002) (observing that during the war on crime, "[t]he victim became increasingly pitted against the offender."); MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 192 (2002) ("To maintain its fever pitch of hatred, the war on crime needs ever more, and ever more sympathetic, victims."). *See, e.g.*, 142 CONG. REC. 10,312 (1996) (statement of Rep. Schumer) (discussing sex offenders' "restless and unrelenting prowl for children").

80. Narrative is helpful to the progressive agenda when it "challeng[es] one or more narratives of the majoritarian faith." Richard Delgado, *Stark Karst*, 93 MICH. L. REV. 1460, 1471 (1995) (reviewing KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION (1993)). However, there is good reason to question whether victimhood stories disrupt rather than support dominant subordinating ideologies. *See supra* note 79. Moreover, "[l]istening to individual narratives may make it more difficult to engage with the larger, systemic, and more fundamental group problems." Naomi Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education,* 39 U. BALT. L.F. 57, 69 (2009).

81. *See* R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 190 (Prentice-Hall, Inc. ed., 1980) (asserting that "vivid information . . . may have a disproportionate impact on beliefs and inferences"); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 207–09 (1973) (finding that vivid descriptions are easily recalled and can cause the listener to overestimate the frequency of the described phenomenon). *See generally* Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391 (2006).

intimate homicide cases have histories of domestic violence.[82] Other statistics are victim-regarding, for example, Victoria Nourse's findings that broad provocation formulas benefit men who kill women for attempting to separate.[83]

Professor Nourse discovered after extensive data analysis[84] that in MPC jurisdictions, provocation claims based at least in part on women's attempted separation constituted the vast majority of intimate homicide provocation claims reaching juries, far surpassing claims involving physical violence.[85] This is compared to "traditional" categorical jurisdictions (namely, Illinois and Alabama),[86] where victim-violence claims composed the majority of provocation claims reaching juries and separation-based claims reached juries least frequently.[87] Moreover, in traditional jurisdictions, judges disallowed provocation claims when the only possible provocative act was separation, whereas in MPC jurisdictions, pure separation cases constituted 26 percent of all intimate homicide provocation claims reaching juries.[88]

Although Nourse provides a fascinating snapshot of how different provocation formulations might affect the relative success of male-on-female intimate homicide defendants' claims, she confines her analysis to this narrow category of cases. Professor Nourse does not focus more globally on how broad versus narrow formulations of the heat-of-passion defense affect defendants' claims across the board.

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82. Coker, *supra* note 12, at 84 (discussing data suggesting that often "the male killer has a history of violence with the homicide victim"). *Cf.* Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 319 (1996) ("[T]he majority of men who kill their female intimates have documented histories of violent assaults.").

83. *See infra* notes 87–88 and accompanying text.

84. *See* Nourse, *supra* note 12, at 1332 n.2 (including every intimate homicide involving a provocation claim in MPC jurisdictions over a fifteen year period and "samples" from non-MPC jurisdictions). Nourse does not do standard regression but intends the data to be illustrative, stating that her argument "could as easily be made with ten cases as with 200." *Id.* at 1348 n.97.

85. *See id.* at 1347 (revealing that 67 percent of MPC provocation claims reaching juries involved separation whereas only 17 percent involved physical violence).

86. *See id.* at 1413.

87. *See id.* at 1349 (Table B) (revealing that in traditional jurisdictions physical violence-based provocation claims constituted 68 percent of all claims reaching juries compared to pure separation claims' 0 percent.).

88. In addition, in MPC jurisdictions, 79 percent of all pure separation claims reached juries. *See id.* at 1349, 1356 (charts with percentages).

Nevertheless, one can glean some other patterns from the data that are not discussed in the paper. First, it seems that more overall provocation claims reached juries in MPC jurisdictions than in traditional jurisdictions.[89] In addition, all grounds for the provocation defense, not just separation, enjoyed greater success in MPC jurisdictions.[90] Consequently, the statistical analysis serves to confirm what one might readily predict at the outset: moving from a restrictive categorical approach to a permissive MPC approach allows defendants in intimate homicide cases to argue provocation based on a wider variety of victim conduct and permits those arguing provocation, on whatever ground, to enjoy greater success.

Clearly, however, progressive critics are worried about gender disparity, not across-the-board leniency.[91] Their concern is that the provocation defense encourages jurists and jurors to apply prevailing sexist norms, not that it leads people to empathize with defendants generally. Of course, it may be that permissive provocation laws have the greatest impact in cases where state actors and jurors are already inclined to be lenient because of sexist cultural norms.[92] If this is so, expansive

89. In MPC jurisdictions ninety-nine out of 133 intimate homicide provocation claims reached juries (74.43 percent), whereas in traditional jurisdictions only thirty-eight out of eighty-one such claims reached juries (46.91 percent). *Id.* at 1349. Despite that adultery is a traditional category, *see supra* note 35, in MPC jurisdictions, out of 133 total intimate homicide cases, fifty-three adultery cases reached the jury, whereas in traditional jurisdictions, out of eighty-one total intimate homicide cases, only seventeen adultery cases reached the jury. Nourse, *supra* note 12, at 1347–49 (Tables A&B). In addition, seven "other" claims reached juries in MPC jurisdictions, compared to one in traditional jurisdictions. *Id*. For the latter two findings, there is not enough data to calculate percentages.

90. Simple infidelity claims enjoyed a 75 percent "success rate" (meaning that 75 percent of all infidelity-based provocation claims reached juries) in MPC jurisdictions and a 44 percent success rate in traditional jurisdictions. Mixed separation and infidelity claims enjoyed an 88 percent success rate in MPC jurisdictions and a 39 percent success rate in traditional jurisdictions. *Id.* at 1362. Physical violence claims enjoyed a 77 percent success rate in MPC jurisdictions and a 60 percent success rate in traditional jurisdictions. *Id*.

91. There is the contention, arguably unrelated to statistical disparity, that allowing even one sexist killer to be deemed "reasonable," expresses legal approval of sexism. *See, e.g.,* Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN L. REV. 1171, 1201 (2004) (contending that provocation may "reinforce[ ] norms that equate male virtue with devotion to patriarchal conceptions of honor"). *Cf.* Kahan and Nussbaum, *supra* note 31, at 360 (asserting that broad provocation formulations send "a message that fosters and gives comfort to . . . reprehensible feelings").

92. *Cf.* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010) (study

provocation laws likely disproportionately benefit men who kill women and LGBT people. However, feminist literature does not contain evidence showing that broad provocation formulations like the MPC's do not comparably advantage other homicide defendants.[93] Moreover, there is some evidence that men who kill female intimates are not culturally privileged actors[94] and are, in fact, less likely to benefit from permissive provocation laws than other types of defendants.[95] We will return to the question of which defendants are most likely to be affected by the provocation defense in Part IV. Nevertheless, for critical scholars, the problem with provocation is clear: those who kill socially marginalized victims or kill in otherwise culturally consonant ways can utilize the provocation defense, arguably more successfully than other types of killers.

B. The Upward Ratchet Solution to Provocation's Disparities

Proposed remedies to provocation's gender problems range from tinkering with jury instructions[96] to outright abolition.[97] Although remedies vary greatly, they converge on the idea that lawmakers should reform provocation law to make it more difficult for particular defendants to avoid murder convictions. Although the purpose of reform is to address narrow classes of cases involving sexist and homophobic killers, inevitably, the implementation of such proposals would make it harder for any

finding that mock jurors' cultural predispositions on gender equality predicted their verdicts in a date rape case more than the actual formulation of the rape law).

93. *See supra* notes 89–90 and accompanying text.

94. *See* Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 45–51 (2010) (observing that in the late nineteenth and early twentieth centuries, cultural mores dictated that "unmanly" wife killers should receive higher punishment); Stuart M. Kirschner et al., *The Defense of Extreme Emotional Disturbance: A Qualitative Analysis of Cases in New York County*, 10 PSYCHOL. PUB. POL'Y & L. 102, 126 (2004) (finding such defendants to be unsuccessful on their EED claims).

95. *See id.*

96. *See infra* notes 115–18 and accompanying text.

97. *See, e.g.*, HORDER, *supra* note 37, at 186–97 (advocating abolition); Miller, *supra* note 12, at 692–93; Rozelle, *supra* note 74, at 233 (advocating abolition except in cases of imperfect self-defense and defense of others and resisting unlawful arrest).

murder defendant to invoke the provocation defense.[98] This is a consequence critics tend to ignore or accept as necessary (and even beneficial).[99]

There are different methods of remedying formal inequality produced by discretion. Law reform might act as a blunt instrument, stamping out the discretion, or it might act in a managerial manner, trying to coax nondiscriminatory exercise of discretion. Equality-seeking proposals can also ratchet up (raise the penalty for sexist and homophobic killers) or ratchet down (lower the penalties for all other killers).[100] To illustrate, some progressive reformers propose the blunt ratchet-up reform of abolishing provocation or returning it to its categorical form.[101] Alternatively, progressives could seek to counter the disparity between privileged (sexist) killers and other killers by making it exceedingly easy for anyone to claim provocation so that lenity is widespread and not as determined by the victim's status (a blunt ratchet-down reform).[102] Managerial reforms that control discretion through, for example, prosecutorial guidelines, legal education, and jury instructions can also ratchet up or down.[103] Jury instructions could be reconstructed to make it easier to convict sexist killers of murder, or they could make it harder to convict killers who fall outside of that class.

The blunt reform favored by many progressive provocation critics involves restricting the definition of reasonableness. Having argued that subjective or even juror-defined reasonableness standards produce unjust individual results, progressives believe that the answer is to move to a narrower "normative" conception of reasonableness that allows fewer defendants to assert that they were reasonably provoked.[104]

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98. Some proposals are so narrow that they might not have an effect outside of a small group of cases. *See, e.g.*, Mison, *supra* note 13, at 177 (urging judges to "find as a matter of law that a homosexual advance is insufficient provocation").

99. *See infra* notes 119–20.

100. *See* REASONABLE MAN, *supra* note 12, at 277 (observing that "[w]henever inequities exist in the criminal justice system, one can either ratchet up . . . or ratchet down").

101. *See supra* note 97 and accompanying text (discussing abolition of provocation).

102. *See supra* note 19 and accompanying text (discussing leveling down).

103. *See, e.g.*, *infra* notes 112–21 and accompanying text (provocation proposals).

104. *See,* Nourse, *supra* note 12, at 1392–99 (replacing reasonable provocation with a "warranted excuse"); REASONABLE MAN, *supra* note 12, at 234–59

Professor Nourse, for example, would require defendants claiming provocation to have a "warranted excuse," meaning society would view the claim of provocation "uncontroversially."[105] Similarly, Professor Lee supports a "normative" conception of reasonableness[106] focusing not just on whether "the ordinary person *would have* felt and acted the way the defendant did," but also on whether "the defendant acted the way he *should have* acted."[107] Thus, in order to conclude that the defendant was provoked, the jury has to find not only that the defendant's emotions were that of an objectively reasonable person but also that his act was one that an objectively reasonable person should do. These ratchet-up reforms, requiring pumped-up normative reasonableness, logically make it more difficult for sexists and homophobes to defend against murder charges. They also make it harder for other defendants (men in fights, battered women, bullied kids) to invoke the provocation defense.[108]

Yet perhaps if bigoted killers disproportionately benefit from lenity in provocation law, they would disproportionately bear the brunt of a punitive legal change. Maybe ratcheting up could thwart provocation claims from those who kill minority victims at a higher rate than claims from other murder defendants, creating equality overall. However, the effects of legal changes are not generally distributed in such a manner. More commonly, the favored defendant or defendant who offends against the disfavored victim will disproportionately benefit from lenient laws and at the same time be disproportionately *unaffected* by punitive laws.[109] Critical legal

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(advocating a "normative" conception of reasonableness); Kahan & Nussbaum, *supra* note 31, at Part IV (endorsing an "evaluative" formulation in which defendants' emotional reactions must stem from correct moral appraisals).

105. Nourse, *supra* note 12, at 1392.

106. *See* REASONABLE MAN, *supra* note 12, at 260–69.

107. *Id.* at 246. Other proposals leave unchanged the reasonableness standard, but create other restraints. *See, e.g.,* Coker, *supra* note 12, at 129–30 (implicitly endorsing a lack of predisposition requirement); *Victim Wrongs*, *supra* note 33, at 712 (explicitly endorsing a lack of predisposition requirement).

108. *See* REASONABLE MAN, *supra* note 12, at 273 (noting that proposed reforms "heighten[ ] juror scrutiny of all claims of reasonableness, making it more difficult for defendants claiming they were provoked to receive . . . mitigation"). For instance, a lack of the predisposition prong would likely disqualify anyone with prior convictions. *See Victim Wrongs*, *supra* note 33, at 713 (observing that such defendants "would be afraid to assert the [provocation] defense because of its potential to make admissible otherwise irrelevant prior crimes evidence").

109. REASONABLE MAN, *supra* note 12, at 42 (observing that even though

theorists have long argued that "objective" standards simply reflect the behaviors of culturally privileged actors.[110] One should accordingly expect state actors and jurors generally to view the provocation claims of privileged defendants (i.e., a white straight man who kills a gay man) as normatively reasonable and warranted and those of culturally subordinated defendants (i.e., a black gang member who kills the person confronting him) as normatively unreasonable and controversial.[111] Of course, ratcheting down would suffer the same problem, with killers in favored scenarios enjoying the benefits of broadened discretion more than killers in disfavored scenarios do. This illustrates the problem that any blunt reform, whether ratchet-up or ratchet-down, might not remedy disparity given the multiple other opportunities for discretion (charging, sentencing, etc.).

There are also various managerial proposals that seek to guide the exercise of discretion in provocation law.[112] Some proposals involve adopting a female-centric conception of reasonableness, such that a defendant (male or female) can only claim heat-of-passion if a similarly situated woman would be provoked to kill.[113] A "reasonable woman" standard would likely increase murder convictions, given society's general view of women as far more pacifistic than men.[114] Cynthia Lee suggests a more neutral managerial approach involving instructing jurors to analyze defendant reasonableness by "switching" the identities of one or more of the parties to the criminal event.[115] For example, in a "gay panic" case, the judge could instruct the jury to decide whether the killing would have

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Texas eliminated provocation, non-majority defendants still received disproportionately lenient treatment during sentencing).

110. *See* Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 818 (1992) ("Powerful actors . . . want objective standards applied to them simply because these standards always, and already, reflect them and their culture.").

111. *See* Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1066 (2005) (reviewing REASONABLE MAN, *supra* note 12) ("If a bar is unlevel, it can be leveled only by adjusting one side more than the other" rather than simply "rais[ing] the bar entirely, with its original slant intact.").

112. *See infra* notes 113–121 and accompanying text.

113. *See* FORELL & MATTHEWS, *supra* note 74, at 175–78.

114. *See id.* at 179–80 (positing that under this standard "claims of intimate provocation will become a rarity and eventually disappear entirely").

115. REASONABLE MAN, *supra* note 12, at 252–59 (proposing switching to make minority status "salient" to jurors).

been reasonable if the defendant had been gay and the decedent straight. Unlike many provocation critics, who are preoccupied primarily with discriminatory mercy, Lee also problematizes the law's tendency to prevent certain disempowered defendants, like black men who react violently to racist statements[116] and women who kill cheating partners, from invoking the defense.[117] In any case, when it comes to wife-killers, switching aids the prosecution because it requires juries to hold male defendants to female (nonviolent) standards.[118]

Switching appears to operate most frequently as an upward ratchet.[119] Moreover, although in theory switching could help the rare female defendant who kills her cheating husband by having the jury view her as a (more hotheaded) man, switching might actually have the opposite effect given the bias in favor of female defendants.[120] Switching could also disadvantage certain sympathetic defendants who benefit from dominant cultural sensibilities. A battered woman claiming provocation would have a harder time defending if the jury were asked to decide whether a similarly situated battered man would have killed his female batterer. Lee accounts for such defendants by simply exempting them from the switching paradigm.[121]

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116. *Id.* at 58–64.

117. *See id.* at 51 (observing the "double standard that favors men who kill in response to female infidelity over women who kill in response to male infidelity"). *But see* Laurie Ragatz & Brenda Russell, *Sex, Sexual Orientation, and Sexism: What Influence Do These Factors Have on Verdicts in a Crime-of-Passion Case?*, 150 J. SOC. PSYCHOL. 341, 354–55 (2010) (conducting study and finding that "violence perpetrated by heterosexual female defendants toward their unfaithful partner was perceived as more acceptable than violence perpetrated by male or homosexual defendants.").

118. REASONABLE MAN, *supra* note 12, at 217–19.

119. *See id.* at 249 (stating that the problem "is not that jurors are insufficiently empathetic to defendants" but rather that they are "too likely to empathize with [privileged] defendant[s]").

120. *See* Amy Farrell, Geoff Ward & Danielle Rousseau, *Intersections of Gender and Race in Federal Sentencing: Examining Court Contexts and the Effects of Representative Court Authorities*, 14 J. GENDER RACE & JUST. 85, 85–86 (2010) ("Decades of research confirm that women receive less-severe sanctions than men across all phases of the criminal justice system. In fact, leniency toward women has become an almost accepted phenomenon among scholars studying criminal case processing.") (footnote omitted).

121. *Id.* at 219 ("[G]ender-switching might not be appropriate in a case involving a battered woman who kills her abuser during a confrontation."); *but see* Burke, *supra* note 111, at 1073 (advocating switching in battered woman cases "to

In the end, there are vast differences in progressives' various proposals to remedy the perceived discrimination problems of provocation law, but they all have something in common. The proposals tend to increase the probability and severity of punishment for those accused of murder. One might assert that this is just happenstance. Perhaps provocation critics are concerned with relative rather than absolute punishment and ratcheting up is the more politically feasible choice.[122] In other words, these scholars care about equal treatment of minority killers and other killers, but not about the ultimate sentence for murder, so punitive proposals are only preferable because they are more likely to be implemented. However, critics' form of argumentation, particularly the extensive use of descriptive narrative, belies any such agnosticism regarding leniency toward sexist and homophobic killers.[123]

More importantly, progressive theorists do and should care about the ultimate punishment defendants receive.[124] Accordingly, many critics of provocation forthrightly support ratcheting up as both a retributively palatable reform and a solution to inequality.[125] This position necessarily implicates two assumptions: (1) the amount of punishment sexist and homophobic defendants, and all other defendants, will receive under the reformed system is the just amount; and (2) reform promotes equality in particular cases without exacerbating inequality in other areas (or any exacerbation is outweighed). Provocation theorists have not spent a significant amount of time discussing either of these issues. Those who propound provocation reforms tend to concentrate on how legal changes could affect sexist defendants in a specific set of intimate homicide cases rather than examining the broader

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prevent jurors from applying gendered stereotypes of helplessness and passivity and to encourage jurors and litigants to focus on the objective circumstances").

122. *See, e.g.*, REASONABLE MAN, *supra* note 12, at 273.

123. *See supra* notes 78–80 and accompanying text (discussing the promise and peril of crime narratives).

124. *See, e.g.*, *Gay Panic*, *supra* note 65, at 566 (observing that reforming provocation might "play a role in mediating th[e] cultural dispute" over homosexuality).

125. *See* Nourse, *supra* note 12, at 1336 (criticizing permissive provocation laws for denying that men "are acting as moral agents" and making them "play the role of the helpless female, dependent [and] victimized by inarticulate impulse").

consequences of narrowing a murder defense.[126]

Why do provocation critics look at these cases in a vacuum and exempt them from the usual progressive and critical race skepticism of increased criminalization? Some theorists note that even in liberal criminal law discourse, critiques of the American penal state and mass incarceration tend to fade in the face of truly violent defendant behavior.[127] While the "war on drugs" and tough prosecutions of "victimless" crimes constitute favored targets of left-leaning scholars, few are willing to condemn high sentences for crimes of violence.[128] Murder apparently marks the dividing line where certain progressives' anxiety over the criminal system's treatment of marginalized defendants gives way to preoccupation with marginalized victims' rights to retribution and the expressive messages sent by lack of harsh punishment.[129]

III. DISCRIMINATORY LENIENCY IN CAPITAL PUNISHMENT

Provocation critics' prosecutorial stance appears to rest on the idea that because homicide is an "ultimate act" and killers generally deserve "ultimate punishments," we should be more troubled about killers who are under-punished for discriminatory reasons than with any issue of over-punishment or the social ills created by punishment.[130] By contrast, in the

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126. *See supra* Part II.A.

127. *See* James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 49 (2012) ("Since it is especially difficult to suspend moral judgment when the discussion turns to violent crime, progressives tend to avoid or change the subject."). *But see, e.g.*, Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) (unpacking the popular conception and dialogue of violence and demonstrating how it sustains mass incarceration).

128. *See* Ristroph, *supra* note 127, at 613 (noting that although fear of violence has fueled the dystopian American penal system, the "call to focus [critically] on actual physical violence has largely gone unheeded"); Forman, *supra* note 127, at 48 (criticizing liberal scholars for focusing nearly exclusively on the war on drugs because "the *state's response* to violent crime—less diversion and longer sentences—has been a major cause of mass incarceration").

129. For example, liberals routinely call for elevated punishment of hate crimes to vindicate the interests of minority victims. *See, e.g.*, Ari Ezra Waldman, *Tormented: Antigay Bullying in School*, 84 TEMP. L. REV. 385, 437 (2012) ("[T]he objective gay rights activists hope to achieve through hate crime legislation [is] sending a message that gay bashing is no different than lynching an African American man simply because he is black.").

130. *See, e.g.*, REASONABLE MAN, *supra* note 12, at 277–78 (contending that ratcheting up "makes particular sense when the defendant has taken another

death penalty context, progressives are highly skeptical of dogmatic retributive declarations about killers deserving ultimate punishments.[131] Liberal scholars similarly emphasize that death penalty law treats those who kill subordinated (black) victims more leniently than those who kill privileged (white) victims but arrive at the opposite conclusion from provocation scholars.[132] When faced with racially discriminatory leniency, death penalty scholars do not propose to cabin discretion to be lenient; rather, they call for more widespread leniency.[133] This Part looks at the racial disparity critique of the death penalty and then turns to how institutional reasoning has led death penalty scholars to use discriminatory leniency as an argument, not for equalizing harsh punishment, but for abolishing the harsh punishment practice.

A. Liberal Critiques of Capital Punishment's Disparities

Upon hearing that the death penalty is "racist," many simply assume that the discrimination consists of black defendants disproportionally receiving death sentences.[134] However, the primary discrimination regards the race of victims, not defendants.[135] Even so, most people are correct in connecting the racial argument with the capital punishment

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human being's life"). However, violence is not a pre-legal concept, and "we are presently ill-equipped to disentangle understandable concern for bodily safety from irrational fear, prejudice, or thoughtless punitiveness." Ristroph, *supra* note 127, at 575.

131. *See, e.g.*, Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1677 (1986) ("Those who claim a moral justification for capital punishment must reconcile that belief with other moral considerations."); Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1175 (2009) (contending that execution "is the 'ultimate' penalty only because some jurisdictions have decided to actually *use* the death penalty instead of capping punishment").

132. *See infra* Parts III.A. and III.B.

133. *See infra* Part III.B.

134. *See* Letters to the Editor, *Does Race Bias Taint the Death Penalty?*, N.Y. TIMES, July 15, 2011, http://www.nytimes.com/2011/07/16/opinion/l16death.html?_r=0 (noting that the death penalty disparity "surprisingly, implies that, nationally, there is death penalty discrimination not against blacks, but against whites"). *Cf.* Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 419–20 (1994) (noting the shift in the nature of death penalty bias from race-of-defendant bias to race-of-victim bias).

135. *See infra* note 142 and accompanying text.

abolitionist position.[136] The racial critique of the death penalty gained national attention when abolitionist lawyers and social scientists submitted statistical evidence of racial disparity in the administration of capital punishment to the Supreme Court on behalf of the defendant in the 1987 case *McCleskey v. Kemp*.[137]

Warren McCleskey, an African American, received the death penalty in Georgia for killing a white police officer during an armed robbery.[138] McCleskey's attorneys argued to the Supreme Court that racial discrimination in the application of capital punishment rendered Georgia's sentencing regime unconstitutional under the Eighth Amendment's prohibition of cruel and unusual punishment and the Fourteenth Amendment's Equal Protection Clause.[139] To establish the factual claim of disparity, the defense relied exclusively on data compiled and analyzed by University of Iowa law professor David Baldus and his co-authors (collectively, "the Baldus studies").[140] The Baldus studies surprisingly revealed that white defendants were *more* likely to get the death penalty than black defendants.[141] It confirmed more predictably that defendants who killed white victims received capital punishment more frequently than those who killed black victims and that black defendants who killed white victims had the greatest chance of a death sentence.[142] Consequently, the defense had to package their anti-death penalty arguments in light of the reality of victim-based discrimination. This was not exceedingly difficult to do in the Eighth Amendment context. Prior precedent ruled that "arbitrary and capricious" capital punishment impositions are unconstitutional,[143] and the

136. *See infra* notes 173–77 and accompanying text.

137. 481 U.S. 279 (1987).

138. *Id.* at 283–84.

139. *See generally* Brief for Petitioner, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811), 1986 WL 727359 [hereinafter *McCleskey Brief*].

140. *Id.* at 7–18. For a discussion on Professor Baldus's legacy, *see* Symposium, In Memoriam: David C. Baldus, 97 IOWA L. REV. 1865, 1991 (2012).

141. *McCleskey*, 481 U.S. at 286 (noting the "reverse racial disparity").

142. *McCleskey Brief*, *supra* note 139, at 11–12 (stating that defendants in white-victim cases are nearly eleven times more likely to receive a death sentence than defendants in black-victim cases and 22 percent of black murder defendants who killed whites were sentenced to death compared to 3 percent of white defendants who killed blacks).

143. *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976) (stating that capital procedures must "minimize the risk of wholly arbitrary and capricious action").

defense simply contended that death sentences significantly influenced by victim race are arbitrary and capricious.[144] The defense highlighted that:

> [T]he race of the victim in Georgia exerts as much influence on the sentence outcome as whether the defendant had a prior murder conviction. It is more important in determining life or death than the fact that the defendant was the prime mover in the homicide, or that he admitted guilt and asserted no defense.[145]

However, one might think the fact that the death penalty disparity was victim-based would hinder the defendant's equal protection argument. The prototypical discrimination claim involves a litigant subjected to direct discrimination because of the litigant's subordinate status.[146] McCleskey, however, arguably bore the brunt of a discriminatory privilege directed toward his white victim. The defense phrased much of its equal protection argument in terms of McCleskey's race, stressing the finding that "the race of the defendant—especially when the defendant is black and the victim is white—influences Georgia's capital sentencing process."[147] The defense also emphasized the unconstitutionality of discrimination against African American victims, contending that "[s]ystematically treating killers of white victims more harshly than killers of black victims can have no constitutional justification."[148]

The Supreme Court ultimately rejected both of McCleskey's claims. The Court disposed of the equal protection argument on the principle ground that McCleskey had not demonstrated that his jury or Georgia acted with discriminatory intent.[149] The majority attempted, critics say with little analytical success, to distinguish McCleskey's

144. *McCleskey Brief*, *supra* note 139, at 99–100 (stating that racial influence "produces, by definition, a pattern of sentencing that is legally 'arbitrary and capricious'").

145. *Id.* at 88.

146. *See* Lee & Bhagwat, *supra* note 19, at 177 n.97 (1998) (asserting that post-*McCleskey*, the Supreme Court seems to have endorsed an "individualized understanding of the equal protection right," in which capital defendants only have third-party standing to litigate discrimination against victims).

147. *McCleskey Brief*, *supra* note 139, at 35–36.

148. *Id.* at 40.

149. McCleskey v. Kemp, 481 U.S. 279, 297–99 (1987).

disparate impact evidence from the type of impact evidence permitted to prove discriminatory intent in Title VII and jury venire cases.[150] However, when it came to the state's claim that McCleskey lacked standing to challenge Georgia's discrimination against black victims not involved in his case, the Court sided squarely with the defendant. It stated, "It would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on an unjustifiable standard such as race, religion, or other arbitrary classification. Because McCleskey raises such a claim, he has standing."[151] The Court seemed to be saying that a defendant may properly point to discriminatory mercy in unrelated minority-victim cases to argue for similar lenient treatment in his white-victim case.[152]

Any implication that increased leniency can remedy discriminatory discretion ends with that statement. The Court rejected McCleskey's Eighth Amendment criticism of discriminatory discretion by referring to, of all things, defendants' interests.[153] Emphasizing discretion's "substantial benefits" to defendants,[154] the Court declared that "a capital punishment system that did not allow for discretionary acts of leniency would be totally alien to our notions of criminal justice."[155] The Court set up a dichotomy in which the state can either fix racial disparity by eliminating discretionary leniency (for example, reverting to the mandatory death penalty) or preserve the possibility of lenity with its concurrent risk of racial discrimination. In essence, the majority, like provocation critics, portrayed defendant-unfriendly ratcheting up as the sole solution to the problem of undervalued minority victims.[156]

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150. *Id.* at 294–95. The Court moreover denied that Georgia's deliberate maintenance of a racially disproportionate capital punishment system evidenced intentional racial animus. *Id.* at 297–99.

151. *McCleskey*, 481 U.S. at 291 n.8 (citation omitted).

152. *See* David C. Baldus et al., *Race and Proportionality Since* McCleskey v. Kemp *(1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 144 (2007) [hereinafter *Race and Proportionality*] ("*McCleskey* handed claimants in the federal courts a procedural victory, i.e., standing to bring race-of-victim claims."). However, in other passages, the majority indicates the exact opposite, stating, "*McCleskey* cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." *Id.* at 306–07.

153. *McCleskey*, 481 U.S. at 312.

154. *Id.* at 311.

155. *Id.* at 312 (internal citations omitted).

156. *See* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM.

The Court simply ignored the possibility that the system could "value" black victims by ratcheting down the punishment for white-victim killings.[157]

Since *McCleskey*, scholars have engaged in multiple replication studies and new studies of disparities in death penalty application.[158] Expert opinion on the nature of capital punishment discrimination is quite uniform: the problem is that a death sentence is far more likely in cases involving white victims than in cases involving minority victims.[159] A few studies note a defendant race-based disparity, and several confirm the evidence presented by McCleskey that the combination of black defendant and white victim produces death penalty verdicts more than any other defendant-victim combination.[160] However, studies have not consistently confirmed a defendant-based bias and the question of whether there is such a disparity appears to remain open.[161]

& MARY BILL RTS. J. 345, 389 (1998) ("[T]he Court in *McCleskey* focused on the fact that the discrepancy in sentencing resulted from discretionary leniency.").

157. *See McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting) ("If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder 'for whites only') and no death penalty at all, the choice mandated by the Constitution would be plain.").

158. *See* studies cited *infra* note 159.

159. *See* Robinson, *supra* note 21, at 3 (surveying death penalty "experts," finding that 84 percent believed it was racially biased and that "the racial bias in capital punishment does not pertain to race of defendant but rather to race of victim"). *See, e.g.*, Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2145 (2011) (conducting twenty-eight year study and concluding that victim race "is a strong predictor of who is sentenced to death in North Carolina"); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN L. REV. 27, 105 (1984) (conducting study of eight states' capital systems and finding that race-of-victim discrimination "is a remarkably stable and consistent phenomenon"); Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 MICH. J. RACE & L. 135, 177 (2009) (conducting study and concluding that "[d]efendants of whatever race who kill White victims are significantly worse off than defendants who kill Black victims").

160. *See, e.g.*, David C. Baldus, et al., *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story From Southwest Arkansas (1990–2003) with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, 76 TENN. L. REV. 555, 571–72 (2009) (finding the combination of black defendant and white victim to be significant).

161. *See, e.g.*, Radelet & Pierce, *supra* note 159, at 2135 (discussing studies indicating that "the race of the victim, and not the race of the defendant, was the principal non-legal factor associated with contemporary death sentencing"); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING:

Because abolitionists by and large gather and analyze the empirical data, the victim-based disparity is described in nefarious terms. Scholars have identified the primary problem as conscious and unconscious biases causing the devaluation of black victims.[162] Many have asserted that society harbors racialized perceptions of harm, such that state actors and jurors see white victims as suffering more than black victims do.[163] Some studies demonstrate same-race bias,[164] and others find that biases against black victims transcend juror race.[165] Scholars highlight evidence that attribution of blame is similarly racialized.[166] In addition to tracing the death penalty

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RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990) (synthesizing twenty-eight death penalty studies and concluding that "the race of victim influence was found at all stages of the criminal justice system process" but "evidence for the influence of the race of defendant on death penalty outcomes was equivocal"), *available at* http://www.gao.gov/assets/220/212180.pdf.

162. *See* Gross & Mauro, *supra* note 159, at 107 (observing that "it has been argued that our society tends to view blacks as 'devalued crime victims'"); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 32 (2002) (contending disparity shows that "[w]hite lives are considered to be more valuable than black lives").

163. *See, e.g.*, DAVID R. KARP & JARRETT B. WARSHAW, WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY, 287–88 (James R. Acker & David R. Karp eds., 2006) (study reporting that jurors paid more attention to the suffering of white victims' families than to those of nonwhite victims).

164. *See, e.g.*, Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 402–03 (2012) (asserting that "ingroup bias" may make white jurors sympathize more with white victims); BRYAN C. EDELMAN, RACIAL PREJUDICE, JUROR EMPATHY, AND SENTENCING IN DEATH PENALTY CASES 21–37 (2006) (study finding that white jurors in death cases were more empathetic to white victims); Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 909 (1996) (connecting white juror/white victim empathy to race-of-victim disparities).

165. *See* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2105 (2010) (observing that discrimination may result from all jurors sympathizing more with white victims); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) (study finding that even with five or more black jurors, mock juries were more likely to sentence black defendants to death, but that disparity decreased with increasing number of black jurors). *Cf.* Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 455 (1995) (noting that "minority jurors may have reservations about the death penalty").

166. *See, e.g.*, Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 282 (2007) ("Studies show that jurors are less empathetic toward black defendants"); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 82 (1993) (noting

disparity to racist and racialist attitudes, experts have connected the disparity to other conditions of inequality correlated to race, such as the inability of economically and socially marginalized victims' families to insist on adequate police investigation[167] and the woeful representation afforded to indigent defendants.[168]

Jurors and judges are prime targets of criticism, but prosecutors tend to draw the majority of scrutiny and condemnation. Many experts explain victim-based bias nearly exclusively with reference to prosecutorial discretion.[169] They maintain that prosecutors are overtly discriminatory, or at least exhibit the same internal biases as jurors.[170] Others note that prosecutors' seemingly neutral determinations about winnable death cases at worst are racist and at best reflect and reinforce existing inequalities.[171] Finally, scholars publicize that death penalty prosecutors are overwhelmingly white and hypothesize that greater prosecutorial diversity might reduce disparity.[172]

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that "a significant number of studies" find that white jurors are more likely than black jurors to convict black defendants).

167. *See* Unah, *supra* note 159, at 157 (noting that "more information is usually gathered about the crime and its aggravating circumstances in White-victim cases").

168. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843–44 (1994); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 433 (1993).

169. *See* Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 360 (2009); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1815, 1819–20 (1998); Unah, *supra* note 159, at 177; Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 644 n.120 (1998); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 327 (1988).

170. *See* Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 347, 348 (2005) (observing popularity of the argument that "prosecutors devalue black victims' lives and do not regard black-victim murders as seriously as white-victim murders").

171. *See* Gross & Mauro, *supra* note 159, at 107 (noting the argument that prosecutors pursue the death penalty in "homicides that are visible and disturbing to the majority of the community, and these will tend to be white-victim homicides").

172. *See, e.g.*, Pokorak, *supra* note 169, at 1817 (finding that capital prosecutors "are almost entirely white" and suggesting that unconscious bias may influence their decisions); Jules Epstein, *Death-Worthiness and Prosecutorial Discretion in Capital Case Charging*, 19 TEMP. POL. & CIV. RTS. L. REV. 389, 410 (2010) (linking disparity to prosecutor race and citing 1998 study indicating that

Abolitionists characterize the failure to impose death in black-victim cases as a devaluation of African American victims or other manifestation of racial animus in order to underscore the unjust nature of the entire death penalty enterprise.[173] Consequently, studies finding that leniency in black-victim cases increases with the number of black jurors,[174] or arguments that link mercy in black-victim cases with African American opposition to the death penalty, receive minimal attention.[175] However, casting leniency in black-victim cases as a devaluation or dehumanization of black victims puts abolitionists in a strange position because it implies that the valuing or humanizing move is to impose the death penalty.[176] Nevertheless, liberal legal scholars have always used the racial

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"97.5% of the chief prosecutors were white and only 1.2% were black").

173. *See supra* note 162 and accompanying text.

174. *See* Eisenberg, *supra* note 170, at 370 (conducting empirical study and concluding that "[t]he death sentence rate in black defendant-black victim homicides decreases as the black population percent increases" suggesting that "minority community skepticism about the justness of the death penalty" contributes to disparity). Interestingly, at the time this Article was written, this 2005 Cornell Law Review article authored by a leading legal empiricist was cited only three times on Westlaw. One article cited it for the proposition that death eligible cases are expensive. David McCord, *Lightning Still Strikes: Evidence from the Popular Press That Death Sentencing Continues to be Unconstitutionally Arbitrary More Than Three Decades After Furman*, 71 BROOK. L. REV. 797, 858 n.189 (2005). The second cited it to show that white jurors are more likely to convict African Americans. Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209, 235 n.193 (2011). The third cited it for the proposition that empirical legal scholarship "spur[s] debate." Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 3 n.3 (2007).

175. *See* Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 46–47 (2000) (citing studies and concluding that "black juror[s] [are] more likely to have found the defendant likable as a person no matter what the race of the victim or the defendant" or the circumstances of the crime) (citations omitted).

176. For example, it is surprising when Evan Lee and Ashutosh Bhagwat follow the observation that black-victim bias imposes "important harms" by denying black victims' families "the sense of closure and 'justice' that the death penalty affords," with a proposal to remedy the "overvaluation" of white victims through commutation and the "undervaluation" of black victims through money damages. Lee & Bhagwat, *supra* note 19, at 149, 161–70. Similarly, one could hardly predict an abolitionist conclusion from feminist theorist Martha Chamallas's statement that when failure to impose death causes "emotional harm" to "the family and friends of the undervalued black victim" and "reinforces a cultural belief in the inferiority of blacks and generally contributes to the maintenance of white supremacy." *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 473 (1998).

argument as an anti-death penalty argument.[177] The next subsection discusses the consensus among death penalty scholars that the solution to the problem of discriminatory leniency in capital punishment is abolition.

B. The Downward Ratchet Solution to Capital Punishment's Disparities

On a balmy Halloween afternoon in South Los Angeles in 2010, five-year-old Aaron Shannon Jr. proudly walked out into the family yard, sporting his new Spiderman costume.[178] He was excited to show the costume to his grandfather, who in turn, like any proud grandparent, was overjoyed to snap a picture of his adorable grandchild. Aaron dressed up to go with his family to an annual Halloween party in the neighborhood. As Aaron's grandfather happily shot pictures, two shooters of a different kind stealthily approached the alley behind Aaron's residence. Shots rang out, and a terrified Aaron dashed away. A bullet pierced five-year-old Aaron's skull as he ran for his life. He later died. Aaron's uncle and grandfather were also shot but ultimately survived. The police later arrested Leonard Hall and Marcus Denson, members of the violent street gang, the Kitchen Crips, for the shootings. Rather than charging Denson and Hall with capital murder for the senseless and wanton slaying of young Aaron, a charge readily available in California, L.A. prosecutors merely charged the killers with using a firearm resulting in death, a noncapital offense. Despite the horrific nature of the crime, the District Attorney decided to exercise moderation. Then again, Aaron was African American and from the inner city.

The above narrative, a true story relayed in a manner similar to progressive provocation narratives,[179] illustrates in stark terms the claim that discretion in death penalty law leads institutional actors to exercise undue tolerance toward

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177. *See infra* notes 187–97 and accompanying text.

178. I constructed this narrative from the following news report: *Boy Shot to Death on Halloween Wearing his Spiderman Costume*, KTLA.COM (last visited Dec. 31, 2012) [hereinafter *Boy Shot*], http://www.ktla.com/news/landing/ktla-south-la-boy-shot,0,567065.story; *see also* Richard Winton, *Aaron Shanno Jr., 5*, LATIMES.COM (last visited Aug. 24, 2013), http://projects.latimes.com/homicide/post/aaron-shannon-jr/.

179. *See* sources cited *supra* notes 70–80 and accompanying text (discussing provocation narratives).

minority killers.[180] However, one is unlikely to ever hear this type of narrative from scholars who write about race and the death penalty. This is because the story primes the reader to support the death penalty for the identified killers.[181] Indeed, the facts of the narrative come from a story appearing on KTLA.com (a local Los Angeles news channel's website),[182] which prompted online comments including: "We need an EXECUTION PENALTY!"; "Death penalty should be issued for the responsible person(s)"; and "They should be shot in the head."[183] This is hardly the reaction sought by those using racial arguments to support abolition.

Instead, experts who complain of a racialized death penalty tend to describe cases in a light sympathetic to black defendants sentenced to capital punishment for killing white victims. Stories focus on humanizing the defendant or exposing the procedural deficiencies in the death penalty process.[184] More often, progressives forego storytelling and set forth the racial disparity argument in a scientific or legalistic manner as an antecedent to the conclusion that the death penalty is racially, socially, and morally problematic.[185] Some make the hedged claim that because it is so difficult to eradicate bias, we

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180. *See* sources cited *supra* note 162 (characterizing the phenomenon as devaluation).

181. *See* sources cited *supra* note 81 (discussing narrative and priming).

182. *Boy Shot*, *supra* note 178.

183. Discussion, *Boy Shot to Death on Halloween Wearing His Spiderman Costume*, KTLA.COM, http://discussions.ktla.com/20/ktla2/ktla-south-la-boy-shot/10.

184. For example, abolitionist Sherri Lynn Johnson sympathetically recounts the cases of capital convicts Tommie Smith and Ronnie Howard. Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619, 2649–59 (1998). Of now-executed Smith's case, she states, "[i]t was undisputed that plainclothes Indianapolis police officers burst into Tommie Smith's home before dawn and that Tommie Smith shot and killed one of them. The police officers shot Smith, wounding him so severely that he was unconscious by the time they reached him." *Id.* at 2649. Regarding Howard, Johnson passionately remarks, "Ronnie Howard may not be 'respectable' in the eyes of many white Americans, but . . . he is capable of shame, selflessness, courage, warmth, humanity, and decency, and I am blessed to know him." *Id.* at 2657–58. *See also, e.g.*, Stephen B. Bright, *The Death Penalty and the Society We Want*, 6 PIERCE L. REV. 369, 377–78 (2008) (telling the story of "Exzavious Gibson, a man sentenced to death in Georgia whose IQ was found on different tests to be between seventy-six and eighty-two, [who] stood, totally bewildered, in front of a judge at his first state post-conviction hearing in Georgia without a lawyer" and whose judge "denied relief by signing a twenty-two-page order prepared by the assistant attorney general without changing even a comma.").

185. *See, e.g.*, studies discussed in *supra* notes 158–72 and accompanying text.

should at the very least make sure the ultimate punishment cannot be assessed in a discriminatory manner.[186] However, even while proposing ways to level death penalty impositions, liberal scholars openly express preference for death penalty abolition all together.[187]

Experts are in fair agreement that the current death penalty regimes' discretionary nature creates the problem.[188] Death penalty discretion is twofold: First, statutory aggravating factors are broad and numerous, and are getting more so every year, making it easy to pursue the death penalty in any given murder case.[189] Second, mitigating factors are unlimited, giving leeway to prosecutors and jurors to decline the death penalty in any given murder case.[190] Both factors arguably contribute to racial disparities, but the first, the upward ratchet, receives the bulk of criticism in death penalty scholarship.[191] The discretion inherent in the law of mitigating factors, the downward ratchet, tends to resist progressive critique.[192]

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186. *See, e.g.*, Scott W. Howe, *Furman's Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 472–73 (2007) (inviting the Court to "sensibly" limit capital punishment "based on statistical evidence of racial discrimination"); Tabak, *supra* note 25, at 1445; Singleton v. Norris, 108 F.3d 872, 876 (8th Cir. 1997) (Heaney, J., concurring) (rejecting death penalty on ground that it cannot "ever be administered in a rational and consistent manner").

187. *See, e.g.*, David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence? – An Empirical and Normative Analysis*, 49 SANTA CLARA L. REV. 1, 9 (2009) (calling proposals to level capital punishment "far inferior to eliminating the death penalty entirely"). *See also infra* notes 193–197 and accompanying text.

188. *See, e.g.*, Jeffrey Fagan & Mukul Bakhshi, *New Frameworks for Racial Equality in the Criminal Law*, 39 COLUM. HUM. RTS. L. REV. 1, 6 (2007) ("The racial skew in death verdicts reflects . . . the systematic application of discretion freed from constitutional regulation and oversight.").

189. *See* William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 702–06 (2012).

190. *See* Graham v. Collins, 506 U.S. 461, 471–72 (1993).

191. *See, e.g.,* Berry, *supra* note 189, at 700 (attributing disparities to the inadequacy of aggravating factors and appellate review); Chelsea Creo Sharon, Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 234 (2011) (criticizing capital sentencing statutes' lists of aggravators for their "extraordinary breadth"); *Race and Proportionality*, *supra* note 152, at 175 (linking racial disparity to broad statutory aggravators).

192. *See, e.g.*, Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323 (1992) (asserting that retributive justice requires delimited, individualized mitigation evidence and if such inexorably creates racial disparity, capital punishment

Death penalty literature is replete with other examples of experts' exceeding reluctance to remedy the death penalty's disparity problems through more widespread capital punishment imposition. An especially striking example of the abolitionist construction of the racial argument comes from a recent paper in the *Charleston Law Review* setting forth a racial critique of South Carolina's capital punishment regime.[193] One section of the article concentrates on overtly bigoted statements made by white death penalty prosecutors about black defendants and victims.[194] It provides a "particularly instructive" illustration of prosecutorial racism that consists of the following statement by a death penalty prosecutor to the defense attorney after direct appeal:

> I felt like the black community would be upset though if we did not seek the death penalty because there were two black victims in this case. . . . The only mention that was ever made of race was when I said that I felt like if we did not seek the death penalty, that the community, the black

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should be abolished); Walton v. Arizona, 497 U.S. 639, 716 (1990) (Stevens, J., dissenting) (stating that "the size of the [death-eligible] class may be narrowed to reduce sufficiently that risk of arbitrariness, even if a jury is then given complete discretion to show mercy when evaluating [their] individual characteristics"), *vacated*, Ring v. Arizona, 536 U.S. 484 (2002); *but see* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 392 (1995) ("[T]he Court's insistence that the individualization requirement encompasses all conceivably mitigating evidence undermines its effort to achieve equality in the administration of the death penalty."). The critique of unlimited mitigation evidence usually comes from tough-on-crime conservatives. *See, e.g.,* Graham v. Collins, 506 U.S. 461, 495 (1993) (Thomas, J., concurring) (internal quotations omitted) (denying that "the Eighth Amendment necessarily requires that that discretion be unguided and unlimited with respect to the class of murderers subject to capital punishment"). One might rejoin that the divergence is more a function of the different legal nature of aggravation and mitigation evidence than political predisposition. *See* Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1193 (2003) (asserting that "the asymmetrical nature of the sentencing inquiry manifests the time-honored judgment that punishing the innocent is a graver injustice than acquitting the guilty"); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 118 (1993) ("[T]he functions of aggravation-criteria and of mitigation are not parallel: aggravation serves to place the offense in the class to which mitigation is relevant.").

193. John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 CHARLESTON L. REV. 479, 506–08 (2010).

194. *Id.* at 514–16.

> community would be upset because we are seeking the death penalty in the (Andre) Rosemond case for the murder of two white people.[195]

This statement became the ground for the defendant's successful appeal on the basis of intentional discrimination, a result applauded by the article's authors.[196] However, the kind of ameliorative racial consciousness exhibited by the prosecutor, it seems, would be precisely the attitude that one might imagine could level the death penalty playing field and temper the "devaluation" of black murder victims.[197] Nevertheless, when filtered through an abolitionist lens, the statement is just further evidence that the entire institution of the death penalty is racist and should be eliminated.

A few commentators, notably Harvard law professor Randall Kennedy, have endorsed upward ratchet solutions to the problem of death penalty disparity.[198] Kennedy, like abolitionists, characterizes victim-based disparity as a distinctly negative phenomenon, reflecting that "*in Georgia's marketplace of emotion the lives of blacks simply count for less than the lives of whites*."[199] He endorses race-conscious prosecution, a "level–up" remedy, even though it could result in some killers of black victims (who may be black)[200] receiving the death penalty for racial reasons.[201] Although Professor Kennedy recognizes that abolition could "address the problem

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195. *Id.* at 515–16 (citing State v. Kelly, No. 99-CP-42-1174, at 38 (S.C. Ct. C.P. Oct. 6, 2003) (order granting relief)).

196. *Id.* at 516.

197. *See* Linder, *supra* note 164, at 910 (exhorting prosecutors to "understand the importance of reminding jurors . . . that the lives of black victims are as valuable as lives of white victims" and suggesting that prosecutors "use closing arguments to tell the stories of black victims in such a way as to emphasize points of commonality with white jurors"). *See also infra* note 200 and accompanying text (discussing race-conscious prosecution).

198. *See* Kennedy, *supra* note 17. *See also* Graham v. Collins, 506 U.S. at 495 (Thomas, J., concurring).

199. Kennedy, *supra* note 17, at 1441 (emphasis in original).

200. Killing is largely an intraracial phenomenon. *See* ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, NCJ 236018, 13 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf (finding that between 1980 and 2008, 84 percent of white victims were killed by whites and 93 percent of black victims were killed by blacks).

201. Kennedy, *supra* note 17, at 1438 (analogizing such costs to affirmative action's costs to white job-seekers).

of inequality by leveling downwards the provision of death penalty services," he does not ultimately favor it.[202] Describing the death penalty institutionally as "a useful and highly valued public good,"[203] he opines that "abolition as a remedy for race-of-the-victim disparities is equivalent to reducing to darkness a town in which street lights have been provided on a racially unequal basis."[204] If the electric chair carries a similar public value to electric lights, then it makes sense to reduce disparity through flipping the switch on more, not less, often.

The abolitionist replies to Kennedy's ratchet-up ideas underscore the institutional nature of the capital punishment debate. Some, like Charles Ogletree, detail the death penalty's sordid racial history, including state-sanctioned lynchings, and opine that "[r]ather than executing more people, we could execute fewer."[205] Others, like David Cole, point out the deleterious effects increased criminalization has on marginalized groups, especially black neighborhoods, and conclude that Kennedy's analysis "fails because law enforcement is neither the only nor the most promising 'public good' whose redistribution ought to be considered."[206] Critics similarly assert that racial ratchet-up proposals falsely assume that law-abiding citizens' welfare is inexorably opposed to defendants' welfare.[207] Kim Taylor-Thompson states, "Rather than drawing lines that cast out offenders, communities of color often conceive of their collective future as one that is linked to the fates of their individual members, including lawbreakers."[208] Finally, scholars respond to Kennedy's disparity analysis by reiterating an a priori moral opposition to the death penalty.[209]

Bringing an institutional lens to the question of whether to alleviate discrimination in criminal law through more or less

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202. *Id.* at 1439.
203. *Id.* at 1440.
204. *Id.*
205. *See* Ogletree, *supra* note 162, at 33.
206. David Cole, Essay, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2570 (1995).
207. *See, e.g.*, Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772–73 (1992); Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 1306, 1309 (1998).
208. Taylor-Thompson, *supra* note 207, at 1310.
209. *See, e.g.*, Johnson, *supra* note 184, at 2659 (concluding a censorious review of Kennedy's position by stating, "Compassion in the end is wisdom. Any man's death diminishes me").

punishment is neither illegitimate nor mere politics. Evan Lee and Ashutosh Bhagwat remark that "without some normative baseline, the choice between [ratchet-up and ratchet-down] remedies is arbitrary."[210] Differing baseline commitments explain the divergence between retentionists who see capital punishment's problem as underpunishment of minority-victim killers[211] and abolitionists who see the problem as overpunishment of white-victim killers.[212] That is not to say that all institutional reasons are of equal merit. Debates continue over whether the death penalty deters or produces violence, whether it is morally reprehensible or morally required, whether it is a badge of sovereignty or a violation of universal norms, and whether it helps or hurts marginalized communities.[213] The point is that scholars' analyses of capital punishment's disparities openly take place in the context of these existing debates. The next section examines how similar institutional considerations might shape the debate over provocation's disparities.

IV. THE INSTITUTION OF NON-CAPITAL MURDER LAW

When racial and gender minorities suffer horrific attacks because of their status, the typical reaction is to call on the state to treat the offenders as harshly as, or even more harshly than, those who offend against majority victims.[214] However, this position is in ways at odds with the progressive stance, and indeed the general view of criminal law academics, that the United States penal system is overly authoritarian, highly discriminatory, and even sadistic.[215] This Part first examines the reasons why provocation critics generally do not look at the institutional aspects of murder law when formulating their proposals. Next, it provides a sketch of murder law in the United States and extends an invitation to others to gather

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210. Lee & Bhagwat, *supra* note 19, at 162.

211. *See supra* notes 202–03 and accompanying text.

212. *See, e.g.*, Ogletree, *supra* note 162, at 33 (stating that a remedy might be "ceasing to over-value white life so much"); *supra* notes 187–97 and accompanying text.

213. *See supra* notes 22–25 and accompanying text.

214. *See supra* Part II.A.

215. *See, e.g.*, *infra* notes 216–22 and accompanying text (critiques of the U.S. criminal system); *see* Ristroph, *supra* note 127, at 610 ("The American criminal justice system is the pride of no one.").

more evidence about the provocation defense's intervention in the institution of murder law.

A. Insular Provocation Analysis

Today, the liberal critique of mass incarceration and the American penal state, an institutional critique, is well-trodden academic territory.[216] Some object on human rights grounds that the United States is an outlier among industrialized countries in its punitiveness.[217] Others connect the ideology of crime control to a neoliberal political philosophy that is inherently inhospitable to marginalized members of society.[218] Critical race theorists have demonstrated how the growing carceral state has harmed communities of color and other subordinated groups.[219] Mass incarceration famously has been

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216. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 40–61 (2008) (problematizing mass incarceration); *infra* notes 218–22; *see also* Andrew Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 133 (2011) (observing that "mass incarceration" describes the "explosion of Americans' reliance on imprisonment"). *Cf.* David Cole, *Mass Incarceration: Causes, Consequences, and Exit Strategies. Turning the Corner on Mass incarceration*, 9 OHIO ST. J. CRIM. L. 27, 50 (2011) (calling critiques of mass incarceration "old news").

217. *See* Marie Gottschalk, *The Long Reach of the Carceral State: The Politics of Crime, Mass Imprisonment, and Penal Reform in the United States and Abroad*, 34 LAW & SOC. INQUIRY 439, 450–51 (2009) (noting that "human rights organizations . . . have been drawing increased national and international attention to how US penal practices are way out of line with those of other Western countries.").

218. *See, e.g.*, BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 202–03 (2011) (asserting that the American penal state has "been facilitated by . . . the rationality of neoliberal penality: by, on the one hand, the assumption of government legitimacy and competence in the penal arena and, on the other hand, the presumption that the government should not play a role elsewhere"); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 297 (2009) ("The widening of the penal dragnet under neoliberalism has been remarkably discriminating: . . . it has affected essentially the denizens of the lower regions of social and physical space.").

219. *See, e.g.*, Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 302–04 (2012); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004); Ian F. Haney Lopez, Essay, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1047 (2010).

called "the new Jim Crow,"[220] and some see it as akin to modern day slavery. Loïc Wacquant puts it eloquently: "Just as bondage effected the 'social death' of imported African captives and their descendants on American soil by tearing them apart from all recognized social relations, mass incarceration also induces the civic death of those it ensnares by extruding them from the social compact, thereby making them *civiliter mortui*."[221] Scholars have causally linked crime control reform and discourse in the United States with economic harm, social deterioration, and even the obesity epidemic.[222]

Progressive provocation scholars, by contrast, eschew global concerns over punishment in favor of an insular focus on individual cases of violent victimization. Such a focus tends to normalize, moralize, and even compel state punitive violence as the ethical and required response to individual private violence.[223] Centralizing victims' interests allows critics to exempt out concerns over the penal state. As the death penalty debate demonstrates, however, characterizing disparity as a matter of under-punishment is really a discursive and tactical choice.[224] Provocation scholars, like death penalty theorists, could characterize murder convictions in non-minority victim cases as over-punishment and argue for greater lenity all around. Granted, this may not be the most politically palatable position, but it is the only position that simultaneously addresses inequality and the harms of punishment.[225]

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220. *See, e.g.*, ALEXANDER, *supra* note 216. *See also* Forman, *supra* note 127.

221. Loïc Wacquant, *Race as Civic Felony*, 57 INT'L SOC. SCI. J. 127, 128 (2005) (internal citations omitted).

222. *See, e.g.*, Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 228 (2008) (citing multiple studies demonstrating that U.S. criminal justice tears apart minority communities, disrupts informal social controls, and ultimately has a "perverse escalatory effect[ ]"); Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice*, 90 CALIF. L. REV. 1415, 1417 (2002) (linking increased securitization to "sprawl, traffic congestion, desertion of public spaces and institutions, and a national epidemic in childhood obesity"); Frank O. Bowman, III, *Murder, Meth, Mammon, and Moral Values: The Political Landscape of American Sentencing Reform*, 44 WASHBURN L.J. 495, 505 (2005) ("[T]he human and economic costs of the American experiment in mass incarceration have been high.").

223. *See supra* note 79; Ristroph, *supra* note 127, at 611 (contending that "the perceived threat of violence legitimates the criminal justice system").

224. *See supra* notes 78–80, 124 and accompanying text.

225. Progressive discourse on criminal law is often at odds with popular pro-criminalization sentiments. *See supra* note 79 (discussing victims' rights discourse).

Provocation critics might respond that it is completely proper, and indeed typical in criminal scholarship, to concentrate on the apportionment of criminal liability without taking up issues of punishment and its societal effects.[226] Although as a matter of formalistic penal theory it might be possible to divorce fault from sentencing, for many criminal law scholars, especially for critical theorists from a legal realist background, it is a distinction without a difference.[227] Death penalty analysis exposes that questions of liability and punishment are inexorably linked. A progressive racial justice scholar could conceivably respond to Georgia's racial disparities by proposing that the state more frequently categorizes black-victim cases as aggravated murders, without commenting on the appropriate sentence for aggravated murder. However, it is unlikely that a progressive scholar would set forth such a proposal because it would intervene in a legal regime where the sentence for aggravated murder is death. Similarly, the crux of the progressive critique of provocation is not about the theoretical grading of murder but about how murder law reflects and reinforces gender and racial hierarchy in the real world.[228] Thus, it seems that provocation theorists assume that a murder sentence is the fair baseline for unreasonably provoked killers and see the main problem as state actors and jurors failing, for discriminatory reasons, to apply that sentence to enough defendants.[229]

The insular nature of provocation analysis may also be a function of history. Commentators have always deployed the race and death penalty argument in the name of lenity and as

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226. *See* Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 845 n.397 (2002) (noting the view that "the question of culpability is separate and distinct from the question of punishment"); Kahan & Nussbaum, *supra* note 31, at 366–72 (distinguishing between guilt and sentencing, asserting that mercy in sentencing can reduce the harshness of their liability proposal, but recognizing that the harshness objection poses "the deepest and most interesting challenge" (*id.* at 366)).

227. *See* Joseph Kennedy, *supra* note 226, at 845 (asserting that people make moral decisions "with an eye towards what is at stake").

228. *See supra* note 58 and accompanying text; Anthony Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1194 (1999) ("Postulating alternative theories of objectivity and violence, critical race theorists make claims that undermine the standard gauge of colorblind neutrality, and reconfigure the stock construction of racial violence.").

229. *See* REASONABLE MAN, *supra* note 12, at 278 (stating that ratcheting up "makes particular sense when the defendant has taken another human being's life").

part of a larger institutional objection to capital punishment.[230] By contrast, over the last several decades, legal experts have paid far less attention to non-death murder sentences and virtually no attention to the role the provocation defense plays in the general distribution of punishment for murder.[231] As a result, the progressive criticism of provocation responds primarily to individual instances of gender-biased and facially unjust leniency.[232] Moreover, many critical race scholars condemn the severity of the death penalty because of its historical connection to white domination and African American oppression.[233] Conversely, most of the historical discussion of provocation involves how the doctrine's leniency reflected and reinforced male domination of women.[234] Progressive critics of provocation accordingly concentrate on how ratchet-up proposals take away unfair advantages from socially privileged defendants and pay less attention to the possible burdens on subordinated individuals.[235]

Under- and over-enforcement, however, are two sides of the subordination coin.[236] If favored defendants historically

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230. *See supra* Part III.A.

231. *See infra* notes 296–300 and accompanying text.

232. *See supra* Part II.A.

233. *See, e.g.*, Ogletree, *supra* note 162; G. Ben Cohen, McCleskey's *Omission: The Racial Geography of. Retribution*, 10 OHIO ST. J. CRIM. L. 65, 66 (2012) ("The death penalty's historic, continued intersection with race is deep and well documented."); DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 34 (2010) (arguing that "the distinctive forms of contemporary American capital punishment . . . embody a strikingly precise mirror image of those we see in the lynchings"); FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 89–115 (2003) (documenting correlation between historically high-lynching states and current high-execution states).

234. *See, e.g.*, Kahan & Nussbaum, *supra* note 31, at 307–10 (asserting that the traditional provocation categories reflected value judgments conceiving of women as the property of men); Miller, *supra* note 12, at 668 (stating that "the doctrine of voluntary manslaughter continues to perpetuate a violent form of male subordination of women"). However, a perusal of older history reveals provocation's role as a check against the harshness of murder sentencing. *See* Arthur Lyon Cross, *The English Criminal Law and Benefit of Clergy during the Eighteenth and Early Nineteenth Centuries,* 22 AM. HIST. REV. 544, 545 (1917).

235. *See, e.g.*, REASONABLE MAN, *supra* note 12, at 273 (addressing reforms to the "problem" of "majority culture defendants [being] able to rely on dominant social norms . . . to bolster their claims of reasonableness").

236. *See* Johnson, *supra* note 184 ("Historically, underenforcement and 'overenforcement' were inextricably linked in that they both stemmed from intense racial animosity and extreme power differentials."); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*,

have been able to use provocation to avoid murder charges, just as whites who killed blacks were able to avoid the noose, one fairly could expect history to be replete with instances of disfavored defendants or those who kill favored victims (i.e. black men who killed white men or women) being barred ex ante from invoking provocation.[237] But we do not talk about those defendants. In fact, we do not know about those defendants. Statistics on the global effects of restricting the provocation defense are extremely difficult to unearth.[238] Nevertheless, there is evidence that leading provocation law critics are recognizing the importance of institutional reasoning.[239] In a footnote of a 2004 book review, Professor Nourse makes the following statement:

> Any reform [of provocation] would, however, have to understand the position of the defense within the larger scheme of homicide law: some jurisdictions, for example, use provocation to reduce first- to second-degree homicide and provocation may exist as an important safety valve restricting the potential for the death penalty; in other jurisdictions, provocation may act as a kind of antidote for stringent self-defense rules. These latter factors are why proposals for abolition may be far too simple.[240]

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46 HARV. C.R.-C.L. L. REV. 1, 2 (2011) ("Racial minorities face the double bind of being subject to both underenforcement and overenforcement.").

237. In the rape context, feminists emphasize the history of underenforcement of rape laws stemming from male sexual privilege. *See, e.g.*, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002). But there is another historical story about the overenforcement of rape laws against black men. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990) (observing that for many black women, rape has come to "signif[y] the terrorism of black men by white men, aided and abetted . . . by white women"); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 366 (1993) ("Black men's supposed propensity to rape white women became the pretext for thousands of brutal lynchings in the South.").

238. *See Difficult Subject*, *supra* note 57, at 976 n.77 (noting the lack of empirical evidence on the utilization of provocation in intimate violence cases).

239. *See infra* note 240 and accompanying text.

240. V. F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 364–65 n.11 (2004). Professor Lee also more recently takes the "unpopular position" that defendants should be allowed to argue provocation on the basis of gay panic because, among other things, "[o]pen discussion of pernicious ideas is a better way to deal with such ideas than banning such discussion outright." *Gay Panic*, *supra* note 65, at

The next section endeavors to provide at least a surface understanding of the "larger scheme of homicide law" and the provocation defense's position within it.

B. Institutional Provocation Analysis

When Professor Nourse describes provocation as a "safety valve," she betrays an a priori institutional position against the death penalty. But what about the murder sentencing regimes that do not include capital punishment? While capital punishment has long been a central locus of progressive objection, few theorists, even those concerned with mass incarceration, spare discursive space for critiquing murder sentences.[241] They may reason that murder sentences compose a minute portion of incarceration overall.[242] Even if this is the case, capital cases, which are only a fraction of murder cases, occupy ample space in liberal theorizing. Scholars also might assume that because the maximum penalties for murder have always been great (life in prison or execution), murder sentences remained constant while other sentences exploded. However, over the past several decades, sentences for murder have altered radically in ways that might not be obvious to the casual observer.

Historically, murder sentencing contained two distinct opportunities for discretion: (1) judicial discretion in setting minimum and maximum prison terms[243] and (2) parole board

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479, 480.

241. *See supra* notes 127–29 and accompanying text. Perhaps it is because focusing on murder sentences is of little persuasive value. Yet persuasiveness is rarely the litmus test for progressive penal theorizing given that most in society reserve little sympathy for any kind of criminal. *See supra* note 79; Lynne Henderson, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 586 (1998) (noting the popular view that "[d]efendants are subhuman; they are monsters"); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 770 (1995) (noting that in the media "criminals are represented as one-dimensional demons to be feared and destroyed").

242. *Compare* ALEXANDER, *supra* note 216, at 99 (focusing on drug policy as the cause of mass incarceration and stating "violent crime is *not* responsible for the prison boom"), *with* Forman, *supra* note 127, at 48 (observing that "more prisoners are locked up for violent offenses than for any other type").

243. *See* Frank O. Bowman, III, *Debacle: How the Supreme Court has Mangled American Sentencing Law and How it Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 383 (2010) (discussing the transition from traditional broad judicial

discretion in granting release from prison.[244] In the past, virtually all prison sentences were implemented within the context of statutory parole schemes. Parole statutes stipulated a certain term of imprisonment (either a fixed time or fraction of the maximum, typically one-third), after which murder defendants became eligible for parole.[245] Once a defendant spent the statutory term in prison, the parole board had discretion over whether to grant release. When emancipated, the defendant remained under parole supervision until the expiration of his sentence.[246] While certain jurisdictions gave the parole board full discretion after expiration of the statutory minimum, others permitted judges to prescribe minimum prison terms.[247]

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sentencing discretion for murder convictions to a regimented regime under the SRA). Of course, in capital cases utilizing jury sentencing and those with mandating life or execution statutes, judges could not set minimum or maximum sentences.

244. *See* Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 481 (2010) (observing that modern sentencing reform restricted the traditional discretion of parole boards).

245. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226 (1993) (observing that historically "parole authorities were assigned the task of determining the actual release date for most federal prisoners"). *See, e.g.*, COLO. REV. STAT. ANN. § 39-18-7(3) (West 1963) (permitting life offender to be paroled after ten years); S.C. CODE ANN. § 24-21-610(2) (1977) (same); MISS. CODE ANN. § 47-7-3 (1972) (permitting life offender to be paroled after serving 1/3 of the sentence); N.M. STAT. ANN. § 41-17-24(1) (West 1964) ("[p]risoners may become eligible for parole hearing after they have completed one-third of their minimum sentence . . . ."); OKLA. STAT. ANN. tit. 57, § 332.7 (West 1950) (same); W. VA. CODE ANN. § 62-12-13(4) (LexisNexis 1966) (same).

246. *See, e.g.*, TEX. PENAL CODE ANN. § 42.12 (West 1979) ("The period of parole shall be equivalent to the maximum term for which the prisoner was sentenced less calendar time actually served on the sentence."); W. VA. CODE ANN. § 62-12-18 (LexisNexis 1961) ("The period of parole shall be the maximum of any sentence.").

247. *See* Jon O. Newman, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L. J. 810, 818 (1975) (describing federal sentencing at the time, which permitted judges to choose: (1) regular sentencing that made the defendant eligible for parole after one-third of the sentence (the most common), (2) a sentence where the inmate was immediately eligible for parole and the board had sole discretion, or (3) a minimum sentence term of less than one-third of the maximum imposed). *Compare* CONN. GEN. STAT. ANN. § 54-125 (West 1960); N. M. STAT. ANN. § 41-17-6 (West 1954); TEX. PENAL CODE ANN. § 42.12 (West 1979); W. VA. CODE ANN. § 62-12-13 (LexisNexis 1966) (permitting judges to set maximum prison terms only and granting parole board discretion to parole after expiration of statutory minimum), *with* KAN. STAT. ANN. § 21-4501(b) (West 1974); N.Y. PENAL LAW § 700.00(3)(a) (McKinney 1967); NEB. REV. STAT. §§ 83-1, 105.01(1)

The criminal sentencing reforms of the late twentieth century eroded both judicial and parole board discretion. State efforts to narrow the gap between minimum and maximum penalties curtailed judges' power to set sentences, and so-called "truth in sentencing" virtually eliminated parole.[248] Turning to the truth in sentencing, in 1984, the federal government enacted the Sentencing Reform Act (SRA) as part of a sweeping package of tough-on-crime measures.[249] The SRA radically transformed federal sentencing by, among other things, restricting sentencing to the application of severe guidelines,[250] creating an extensive list of mandatory minimum sentences,[251] abolishing parole in favor of fixed terms of supervised release to be served after, not in lieu of, imprisonment,[252] and requiring offenders to serve at least 85 percent of their sentences.[253] In 1994, Congress authorized the attorney general to award grants to states to similarly revise their sentencing schemes, and in 1998, twenty-seven states and the District of Colombia received grants after making the required legal revisions.[254] By the turn of the century, forty-two states had enacted some form of truth in sentencing, with twenty-eight states and the District of Columbia requiring defendants to serve at least 85 percent of their sentences.[255] Even in states

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(2012) (giving judges discretion to prescribe minimum terms).

248. *See* Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1043 (2010) (observing that "reforms aimed to directly reduce the discretion of either judges or parole boards").

249. Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98–473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.A. & 28 U.S.C.A.); Stith & Koh, *supra* note 245, at 265–66.

250. *See* SRA, 18 U.S.C.A. § 3553 (West 2013); Stith & Koh, *supra* note 245, at 259–60; Dharmapala et al., *supra* note 248, at 1040; Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a "Tough on Crime" Philosophy*, 93 KY. L.J. 305, 318 (2004) (asserting that the United States sentencing guidelines "proved to be less about correcting disparities than . . . increasing the severity of criminal penalties") (internal quotations omitted).

251. *See* SRA, 18 U.S.C.A. § 3559 (West 2013).

252. *See* SRA, 18 U.S.C.A. §§ 3621 & 3583 (West 2013); Stith & Koh, *supra* note 245, at 236.

253. *See* SRA, 18 U.S.C. §§ 3621 & 3624 (West 2013); PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS 3 (1999), *available at* http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf (study on truth in sentencing).

254. Violent Crime Control and Law Enforcement Act, 42 U.S.C.A. § 13702 (West 2013); *see* DITTON & WILSON, *supra* note 253, at 1.

255. *See* DITTON & WILSON, *supra* note 253, at 2, Table 1. *See, e.g.*, ARIZ. REV.

that preserved parole, parole boards became increasingly unwilling to grant release.[256]

In addition, since the 1970s, states have steadily raised murder's statutory minimum and maximum sentences. For first-degree murder, the penalty historically has been death or life imprisonment at the discretion of judges and juries.[257] Thus, tough-on-crime political actors did not have the option to argue for greater severity through higher maximum penalties. States were, however, able to increase mandatory minimums, and over the past several decades, they doubled, tripled, and even quadrupled the amount of time a person convicted of first degree murder must spend in jail.[258] Sixteen states have gone

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STAT. ANN. § 41-1604.09 (2012); CAL. PENAL CODE § 1170.12(c) (West 2012); CONN. GEN. STAT. § 54-125 (2012); 730 ILL. COMP. STAT. 5/5-4-1(10) (2012); MICH. COMP. LAWS ANN. § 791.234 (West 2012); N.Y. PENAL LAW § 70.40 (McKinney 2012); OHIO REV. CODE ANN. § 2967.13 (LexisNexis 2012); 42 PA. CONS. STAT. ANN. § 9756(b)(1) (West 2012); WASH. REV. CODE ANN. § 9.95.110 (West 2012); *cf.* ALASKA STAT. § 33.16.090 (2012) (prisoner must serve at least two-thirds of sentence); MASS. ANN. LAWS ch. 211E § 3(a)(3)(C) (LexisNexis 2012) (offenders must serve 75 percent of sentence).

256. *See* Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1281 (2011) (observing that since the 1980s, parole boards "have become increasingly reluctant to approve" parole of murderers sentenced to life); ROBERT WEISBERG, ET. AL., STANFORD CRIMINAL JUSTICE CENTER, LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 4 (2011) (study finding that life prisoners in California have an 18 percent chance of being paroled and a murder defendant sentenced to life and paroled has a 9 percent chance of the parole decision being reversed by the Governor).

257. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-453(a) (1956); ALA. CODE § 318 (1960 & Supp. 1973); OKLA. STAT. ANN. tit. 21, § 707 (West 1958) (setting sentence for first degree murder as death or of life imprisonment "at the discretion of the jury").

258. *See, e.g.*, COLO. REV. STAT. ANN. §§ 39-18-7, 40-2-3(1) (West 1963); COLO. REV. STAT. ANN. §§ 18-3-102, 18-1.3-401 (West 2012) (raising minimum term for life offenders from ten years in 1963 to LWOP currently); FLA. STAT. ANN. §§ 782.04, 775.082 (West 1992); FLA. STAT. ANN. §§ 782.04, 921.141 (West 2012) (raising minimum sentence from twenty-five years in 1992 to LWOP currently); 38 ILL. COMP. STAT. § 9-1 (1964); 720 ILL. COMP. STAT. § 5/9-1; 720 ILL. COMP. STAT. § 5/5-1-1 *et. seq*. (West 2012) (raising minimum sentence from fourteen years in 1964 to twenty years currently); NEV. REV. STAT. ANN. § 200.030 (LexisNexis 1986); NEV. REV. STAT. ANN. § 200.030 (West 2012) (raising minimum sentence from ten years in 1986 to twenty years currently); N.J. STAT. ANN. § 2C:11-3 (West 1979); N.J. STAT. ANN. § 2C:11-3 (West 2012) (raising minimum sentence from fifteen years in 1979 to thirty years currently); N.M. STAT. ANN. §§ 40A-2-1, 40A-29-2, 41-17-24(4) (West 1964); N.M. STAT. ANN. §§ 30-2-1, 31-18-14, 31-21-10 (West 2012) (raising minimum term for life offenders from ten years in 1964 to thirty years currently); TEX. PENAL CODE ANN. § 1257 (West 1961); TEX. PENAL CODE ANN. §§ 19.03, 12.31 (West 2012) (raising minimum sentence from

so far as to specify life in prison without the possibility of parole (LWOP) as the mandatory minimum for first-degree murder.[259] To illustrate the acute change, in 1967, defendants convicted of first-degree murder in South Dakota and sentenced to life in prison became parole eligible after serving five years.[260] Today, such offenders must remain in prison for the remainder of their natural lives, with no possibility of release.[261]

The law of second-degree murder experienced an even greater transformation. As with first-degree murder, states boosted minimum prison terms.[262] In South Carolina, for example, the mandatory minimum sentence for second-degree murder was ten years in 1977, twenty years in 1985, and thirty

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two years in 1967 to LWOP currently); S.C. CODE ANN. § 16-3-20 (1985); S.C. CODE ANN. § 16-3-20 (2012) (raising minimum term for life offenders from twenty years in 1985 to thirty years currently); S.D. CODIFIED LAWS §§ 22-16-12, 23-60-15 (1967); S.D. CODIFIED LAWS §§ 22-16-12, 22-6-1, 24-15A-32 (2012) (raising minimum term for life offenders from five years in 1967 to LWOP currently).

259. *See* ALA. CODE § 13A-6-2 (2012); COLO. REV. STAT. ANN. § 18-1.3-401 (West 2012); CONN. GEN. STAT. ANN. § 53a-35a (West 2012); DEL. CODE ANN. tit. 636, § 4209 (West 2012); FLA. STAT. ANN. § 775.082 (West 2012); IOWA CODE ANN. § 902.1 (West 2012); LA. REV. STAT. ANN. § 14:30 (2012); MASS. GEN, LAWS ANN. ch. 265, § 2 (West 2012); MICH. COMP. LAWS ANN. § 750.316 (West 2012); MO. ANN. STAT. § 565.020 (West 2012); NEB. REV. STAT. ANN. § 28-105 (West 2012); N.H. REV. STAT. ANN. § 630:1-a (West 2012); N.C. GEN. STAT. ANN. § 14-17 (West 2012); 18 PA. CONS. STAT. ANN. § 1102 (West 2012); S.D. CODIFIED LAWS § 22-6-1 (2012); TEX. PENAL CODE ANN. § 12.31 (West 2012).

260. S.D. CODIFIED LAWS § 23-60-15 (1967).

261. S.D. CODIFIED LAWS §§ 22-6-1(1), 22-16-12 (2012).

262. *See, e.g.*, ALA. CODE § 318 (1960); ALA. CODE § 13A-6-2 (1982) (raising minimum sentence from ten years in 1960 to LWOP in 1982); ALASKA STAT. ANN. § 12.55.125 (West 1989); ALASKA STAT. ANN. § 12.55.125 (West 2012) (raising minimum sentence from five years in 1989 to ten years currently); CAL. PENAL CODE § 190 (West 1970); CAL. PENAL CODE § 190 (West 1988) (raising minimum sentence from five years in 1970 to fifteen years in 1988); DEL. CODE ANN. tit. 11, § 635 (1995); DEL. CODE ANN. tit. 11, § 4205 (2001) (raising minimum sentence from ten years in 1995 to fifteen years in 2001); NEV. REV. STAT. ANN. § 200.030(5) (LexisNexis 1983); NEV. REV. STAT. ANN. § 200.030(5) (LexisNexis 1995) (raising minimum sentence from five years in 1983 to ten years currently); N.M. STAT. ANN. § 40-24-10 (West 1954); N.M. STAT. ANN. §§ 30-2-1, 31-18-15 (West 2012) (raising minimum sentence from three years in 1954 to fifteen years currently); OR. REV. STAT. § 163.115 (1990); OR. REV. STAT. § 163.115 (1999) (raising minimum sentence from ten years in 1990 to twenty-five years in 1999); S.C. CODE ANN. § 16-3-20 (1977); S.C. CODE ANN. § 16-3-20 (1985); S.C. CODE ANN. § 16-3-20 (2001) (raising minimum sentence from ten years in 1977 to twenty years in 1985 to thirty years in 2001); UTAH CODE ANN. § 76-3-203 (LexisNexis 1990); UTAH CODE ANN. § 76-5-203 (West 2012) (raising minimum sentence from five years in 1990 to fifteen years currently).

years in 2001.[263] States also significantly raised the maximum penalties for second-degree murder.[264] For example, from 1963 to today, Pennsylvania increased the maximum sentence for second-degree murder from twenty years to life in prison.[265] Several states raised both statutory minimums and maximums.[266] New Jersey is exemplary of this shift, where between 1979 and the present time, the penalty for second degree murder changed from a range of fifteen to thirty years to a range of thirty years to LWOP.[267] Finally, states have consolidated first and second degree murder into a single category of murder with the potential for ultimate sentences.[268]

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263. *Compare* S.C. CODE ANN. § 16-3-20 (1977), *with* S.C. CODE ANN. § 16-3-20 (1985), *and* S.C. CODE ANN. § 16-3-20 (2012).

264. *See* COLO. REV. STAT. ANN. § 18-1-105 (West 1979); COLO. REV. STAT. ANN. § 18-1.3-401 (West 2012) (raising maximum sentence from twelve years in 1979 to twenty-four years currently); IOWA CODE ANN. §§ 707.3, 902.9 (West 1979); IOWA CODE ANN. §§ 707.3, 902.9 (West 2012) (raising maximum sentence from twenty-five years in 1979 to fifty years currently); MD. CODE ANN. CRIM. LAW. 27-501 (Flack 1951); MD. CODE ANN., CRIM. LAW § 2-204 (West 2012) (raising maximum sentence from eighteen years in 1951 to thirty years currently); N.D. CENT. CODE ANN. §12.1-32-01 (West 1976); N.D. CENT. CODE ANN. § 12.1-32-01 (West 1985) (raising maximum sentence from twenty years in 1976 to thirty years in 1985); 18 PA. CONS. STAT. ANN. § 4701 (West 1963); 61 PA. CONS. STAT. ANN. § 6137(a)(1) (West 2012) (raising maximum sentence from twenty years in 1963 to life currently); VA. CODE ANN. §§ 18.2-32, 18.2-10 (1975); VA. CODE ANN. § 18.2-32 (West 2012) (raising maximum sentence from twenty years in 1975 to forty years currently); WIS. STAT. ANN. § 939.50 (West 1982); WIS. STAT. ANN. § 939.50 (West 2012) (raising maximum sentence from twenty years in 1982 to sixty years currently).

265. *Compare* 18 PA. CONS. STAT. ANN. § 4701 (West 1963), *with* 61 PA. CONS. STAT. ANN. § 6137(a)(1) (West 2012).

266. *See* ARIZ. REV. STAT. ANN. §§ 13-701, 13-1104 (1978); ARIZ. REV. STAT. ANN. § 13-710 (2012) (raising sentence range from seven years determinate in 1978 to 10–25 years currently); ARK. CODE ANN. § 5-4-401 (1987); ARK. CODE ANN. § 5-4-401 (West 2012) (raising sentence range from 5–20 years in 1987 to 6–30 years currently); IND. CODE ANN. § 10-3404 (LexisNexis 1975); IND. CODE ANN. § 35-50-2-3 (West 2012) (raising sentence range from 15–25 years in 1975 to 45–LWOP or death currently); N.J. STAT. ANN. § 2C:11-3 (West 1979); N.J. STAT. ANN. § 2C:11-3 (West 2012) (raising sentence range from 15–30 years to 30 years to LWOP currently); N.C. GEN. STAT. §§ 14-7, 15A-1340.17 (1969); N.C. GEN. STAT. ANN. § 15A-1340.17 (West 2012) (raising sentence range from 2–30 years in 1969 to 7.8–32.75 years currently); TENN. CODE ANN. § 39-2408 (1973); TENN. CODE ANN. §§ 39-13-210, 40-35-111 (West 2012) (raising sentence range from 10–20 years in 1973 to 15–60 years currently); W. VA. CODE ANN. § 61-2-3 (LexisNexis 1977); W. VA. CODE ANN. § 61-2-3 (West 2012) (raising sentence range from 5–18 years in 1977 to 10–40 years currently).

267. *Compare* N.J. STAT. ANN. § 2C:11-3 (West 1979), *with* § 2C:11-3 (West 2012).

268. *See, e.g.*, ALA. CODE § 13A-6-2 (2012); GA. CODE ANN. § 16-5-1 (West 2012); IND. CODE ANN. § 35-50-2-3 (West 2012); KY. REV. STAT. ANN. § 507.020

For example, in 1960, Alabama's sentence for second-degree murder was at least ten years imprisonment, at the sentencer's discretion.[269] Today, Alabama has one category of murder carrying a minimum sentence of LWOP and a maximum of death.[270]

The systematic inflating of sentences for violent crimes like murder produced tremendous changes in the United States prison population. Between 1990 and 1997, increases in incarceration rates of violent offenders accounted for 50 percent of the total increase in the combined state prison population.[271] A study by the Sentencing Project reports an 83 percent increase in the number of offenders sentenced to life imprisonment between 1992 and 2003, a statistic made all the more startling by the fact that the population of life offenders had already doubled between 1984 and 1992.[272] Moreover, the number of inmates serving life without parole increased 170 percent between 1992 and 2003.[273] All in all, between 1970 and 2005, federal and state prison populations have increased by 628 percent.[274]

Today, public toleration of, and even support for, long prison terms continues to be high. In fact, the average person likely would be astounded that in 1960, South Dakota

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(West 2012); ME. REV. STAT. ANN. tit. 17, § 1251 (2012); N.J. STAT. ANN. § 2C:11-3 (West 2012); S.C. CODE ANN. § 16-3-20 (West 2012).

269. ALA. CODE § 318 (1960).

270. ALA. CODE § 13A-6-2 (2012). Likewise, in 1975, Indiana imprisoned murder defendants for not less than fifteen and not more than twenty-five years. IND. CODE ANN. § 10-3404 (LexisNexis 1956 & Supp. 1975). In 1994, this penalty jumped to a mandatory forty-year sentence. IND. CODE ANN. § 35-50-2-3 (LexisNexis 1994). Now, Indiana has only one category of murder that penalizes defendants with a term of between forty-five and sixty-five years. IND. CODE ANN. § 35-50-2-3 (West 2012).

271. DITTON & WILSON, *supra* note 253, at 4.

272. Douglas A. Berman, *The Enduring (and Again Timely) Wisdom of the Original MPC Sentencing Provisions*, 61 FLA. L. REV. 709, 712 (2009) (quoting MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 11 (2004)).

273. *Id.*

274. *Id.* at 711. The Florida Department of Corrections, for example, boasts, "Violent offenders who have been sentenced to prison under the current minimum 85% of sentence served policy [enacted in 1996], on average, will serve a significantly longer period of time in prison than at any time over the past 25 years." *Time Served by Criminals Sentenced to Florida's Prisons: The Impact of Punishment Policies from 1979 to 2004, Section 2 (Violent Crimes)*, FLA. DEP'T OF CORRECTIONS, http://www.dc.state.fl.us/pub/timeserv/annual/section2.html (last visited July 20, 2013).

permitted the release of murderers after five years.[275] To be sure, opposing long sentences for murderers is not a popular position. Nevertheless, as Jonathan Simon argues, "The overall penalty structure in the U.S. is simply too high, and we should be unembarrassed to assert that reforming the law of murder is about reducing it."[276] A stroll through the mental health, hospital, or hospice ward of a prison, bursting at the seams, would undoubtedly cause a progressive to at least pause before espousing legal reforms that increase the absolute number of LWOPs.[277]

Yet perhaps the discovery that such geriatric prisoners include a significant number of sexist, racist, and homophobic killers properly denied the provocation defense would allay liberal compassion. The question is: Who are the individuals that compose the population of murder defendants facing the most exacting murder sentences in a half-century and seeking the "safety valve" of a provocation defense?[278] The snapshot of murder defendants provided here comes directly from the FBI's Bureau of Justice Statistics. It reveals that defendants who perpetrate intimate homicides of women constitute a small minority of the total homicide-defendant population.[279] Between 1980 and 2008, roughly 16 percent of all homicides could be termed intimate homicides.[280] For those homicides, females composed 64 percent of the victims and 30 percent of the defendants.[281] If every one of the female victims of homicide was killed by a male, male-on-female intimate homicides would constitute approximately 10 percent of all homicides. Factor in female-on-female homicides and accidental, properly justified, and uncontroversially provoked killings, and the world of unreasonably passionate male

275. *See supra* note 260.

276. Simon, *supra* note 256, at 1311.

277. *See generally* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1 (2003), *available at* www.hrw.org/sites/default/files/reports/usa1003.pdf (calling the treatment of mentally ill offenders in U.S. prisons a human rights violation); Lyle B. Brown, *The Joint Effort to Supervise and Treat Elderly Offenders: A New Solution to a Current Corrections Problem*, 59 OHIO ST. L.J. 259, 272–75 (1998) (discussing the challenges of incarcerating elderly offenders).

278. *See supra* note 240 and accompanying text.

279. *See* COOPER & SMITH, *supra* note 200, at 18.

280. *Id.* at 18 (Table 9).

281. *Id.* at 10 (Table 5).

intimate killers becomes quite small.[282] Thus, the great majority of murder defendants who might seek to utilize the provocation defense do not appear to be the wife abusers that figure so prominently in scholarly commentary.[283] Consequently, progressive provocation reforms that generally narrow the defense are likely to have distributional effects far broader than those anticipated by reform advocates.

A perusal of other studies also bears out that murder defendants are not generally the powerful and privileged actors about whom provocation critics worry. First, homicide appears to be a phenomenon of youth, with the vast majority of homicide offenders and victims under the age of thirty-five.[284] The FBI reports that in 2005, offenders between eighteen and twenty-four-years-old committed more homicides than any other age group (37 percent), and individuals under the age of twenty-four composed nearly half of all homicide defendants.[285] Although the Supreme Court declared recently in *Miller v. Alabama* that mandatory life without parole for juveniles convicted of murder is cruel and unusual punishment, life sentences for such defendants remain fair game.[286] *Miller* also leaves open the possibility that judges may assess LWOP to juvenile murder defendants after a hearing,[287] and the case does not alter the fact that youthful offenders over seventeen

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282. The FBI report unfortunately has no information on victim/offender gender combinations. In addition, it compiles data on homicide rates from surveys of police departments. Although it exempts from the statistics killings deemed justifiable by the police, it does not account for trial outcomes. *See id.* at 34 (methodology).

283. *See Difficult Subject*, *supra* note 57, at 976 (observing that "the victims of male violence are more often than not other men" and "the provocation defense benefits men, but so do all other excuse and justification defenses, most of which are not considered controversial, because men, far more often than women, kill people for *all* reasons"). In addition, few would dispute that gay panic killings are relatively rare events. *Cf.* Lila Shapiro, *Highest Number Of Anti-Gay Murders Ever Reported In 2011: The National Coalition of Anti-Violence Programs,* THE HUFFINGTON POST (June 2, 2012), http://www.huffingtonpost.com/2012/06/02/anti-gay-hate-crimes-murders-national-coalition-of-anti-violence-programs_n_1564885.html (reporting a total of "30 fatally violent hate crimes" against LGBT people in 2011).

284. *See* BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES (2010), *available at* http://www.bjs.gov/content/pub/pdf/htius.pdf (Age Trends Chart: Victims and Offenders by Demographic Group, 1976–2005).

285. *Id.*

286. 132 S. Ct. 2455, 2460 (2012).

287. *Id.* at 2475 (requiring a consideration of mitigating circumstances before imposing LWOP).

years of age continue to face LWOP and even execution.[288]

Moreover, the population of homicide defendants largely is composed of men of color. FBI data reveals that between 1980 and 2008, African Americans constituted 52.5 percent of homicide defendants.[289] Although the report does not further divide the "white" 45.3 percent of defendants into Latino and non-Latino, a fact that has garnered criticism from race scholars,[290] other statistics are telling.[291] Reports from the Bureau of Justice Statistics on the characteristics of felony defendants in the seventy-five largest counties include a "Hispanic" category.[292] In 2006, the most recent year analyzed, blacks constituted 67 percent of "murder" defendants, Hispanics made up 22 percent, and white "non-Hispanics" represented the remaining 10 percent.[293] Thus, a foray into demography demonstrates that the group most likely to be burdened by the elimination or limitation of the provocation defense is young men of color accused of non-intimate homicides and facing murder charges in one of the most punitive systems on earth.[294]

Statistics on the percentage of murder defendants who

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288. Youthful offenders and juveniles sentenced as adults are routinely mixed with the general prison population. Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults after* Graham *and* Miller, 61 EMORY L.J. 1445, 1458–59 (2012) ("On any given day, thousands of juveniles are housed with adult offenders in jails and prisons. . . . Between 1990 and 1999, the number of juveniles held in adult jails increased by more than 300%."); JAMES AUSTIN ET AL., U.S. DEP'T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT, NCJ182503, 5, Table 2 (Oct. 2000), *available at* https://www.ncjrs.gov/pdffiles1/bja/182503.pdf.

289. COOPER & SMITH, *supra* note 200, at 12 (Table 7).

290. *See, e.g.*, SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 19 (2012) (noting that "using a 'white/black' classification system results in an overcount of non-Hispanic whites in prison and an undercount of Hispanics").

291. *See* THE SENTENCING PROJECT, HISPANIC PRISONERS IN THE UNITED STATES (August 2003), *available at* http://www.sentencingproject.org/doc/publications/inc_hispanicprisoners.pdf (finding that Hispanic men are almost four times as likely to go to prison as whites; Hispanics are the fastest growing population in prison; and they face conviction and incarceration at much higher rates than whites).

292. *See, e.g.*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, NCJ 228944, 19 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

293. *Id.* at 19 (Appendix Table 2).

294. *See* COOPER & SMITH, *supra* note 200, at 16 (finding that "[y]oung males (14 to 24 years-old), particularly young black males, were disproportionately involved in homicide compared to their proportion of the population").

request voluntary manslaughter instructions are difficult to find, and original empirical research on that particular issue is beyond the scope of this article (and the competency of its author). Nevertheless, some existing data indicates that narrowing provocation would burden defendants other than privileged sexists and homophobes.[295] Psychologist Stuart Kirschner and his co-authors studied MPC-style extreme emotional disturbance defense (EED) cases in New York over a ten-year period.[296] They found that, in general, "men who kill women who have left them are *not* able to plead successfully an EED defense."[297] Rather, prosecutors and juries "may be more receptive to EED claims when the defendant, in a highly emotional state, killed or tried to kill in response to physical victimization, or an understandable fear of physical victimization, by the victim; or when there were other extenuating circumstances."[298] Moreover, there is an intuitive and anecdotally supported answer to the question of which murder defendants utilize broad provocation defenses: all who can benefit from it.[299] Upon asking a defense attorney the types

295. *See infra* notes 296–298 and accompanying text.

296. Kirschner et al., *supra* note 94.

297. *Id.* at 131.

298. *Id.* at 130–31.

299. Defendants pursue voluntary manslaughter verdicts in a variety of scenarios outside of separation killing and gay panic contexts. *See, e.g.*, People v. Manriquez, 123 P.3d 614 (Cal. 2005) (defendant sought provocation defense for killing victim after victim called him "motherfucker" and taunted him to use gun); People v. Roman, No. B208461, 2010 WL 2179713 (Cal. Ct. App. June 1, 2010) (provocation defense pursued by defendant who killed victim after bar fight); People v. Memory, 105 Cal. Rptr. 3d 353 (Cal. Ct. App. 2010) (defendant convicted of voluntary manslaughter for killing during a bar fight); People v. Khun, No. C058566, 2009 WL 1383686 (Cal. Ct. App. May 18, 2009) (defendant convicted of voluntary manslaughter for killing during a gang fight); People v. Brooks, 185 Cal. App. 3d 687 (Cal. Ct. App. 1986) (defendant sought voluntary manslaughter instruction for killing a man he believed shot his brother); Webb v. State, 663 S.E.2d 690 (Ga. 2008) (defendant sought provocation defense for killing two friends during a drunken argument); Ellis v. State, 508 N.E.2d 790 (Ind. 1987) (defendant sought provocation defense for killing after a bar fight); State v. Green, 127 P.3d 241 (Kan. 2006) (defendant convicted of voluntary manslaughter for killing in bar parking lot); State v. Purnell, 601 A.2d 175 (N.J. 1992) (defendant sought provocation instruction for killing following a "drug deal gone sour"); State v. Perry, 590 A.2d 624 (N.J. 1991) (provocation defense sought by defendant drug-addict for killing a fellow drug user who advanced toward defendant while he was shooting up); State v. Lowry, 424 S.E.2d 549 (S.C. Ct. App. 1992) (defendant sought voluntary manslaughter instruction for killing a much larger man who had been bullying him). There are also cases in which women claim voluntary manslaughter for killing their controlling and abusive partners. *See Difficult*

of murder cases to which the provocation defense applies, one is unlikely to hear, "I reserve that defense for intimate homicides and gay panic cases." Rather, the attorney will probably answer that she pursues the defense in any case involving plausible victim precipitation and as a perennial back-up to self-defense.[300]

CONCLUSION

After all this analysis, including the institutional perusal of non-capital murder law, where should one stand on George Zimmerman and homophobic and sexist men who kill? Should one be happy that Zimmerman was acquitted? Should one remain unperturbed when judges allow abusers to argue provocation? Should one rejoice when defendants assert "gay panic" in courtrooms? Not really. Nothing in this analysis denies that racist, sexist, and homophobic killings are horrific events. Academics should cast a spotlight on individual cases where social hierarchy produces inequality. They should emphasize that the differentially merciful treatment of minority-victim killers is conspicuous evidence of intentional,

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Subject, *supra* note 57, at 977 ("Indeed, provocation represents the only (or, at least, best) partial defense to murder available to battered women who kill their abusers in many (perhaps most) jurisdictions."); PATRICK A. LANGAN & JOHN M. DAWSON, BUREAU OF JUSTICE STATISTICS, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES, NCJ 153256, (Sept. 1995), *available at* http://bjs.ojp.usdoj.gov/content/pub/ascii/SPOUSMUR.TXT (studying all the intimate homicides in the nation's seventy-five largest counties and finding that 31 percent of women defendants were acquitted (as opposed to 6 percent of men) and of the convicted women, 49 percent were convicted of a lesser charge); *see, e.g.*, McNeil v. Middleton, 344 F.3d 988 (9th Cir. 2003) (battered wife defendant pursued voluntary manslaughter defense); State v. Tierney, 813 A.2d 560 (N.J. Super. Ct. App. Div. 2003) (battered woman defendant asserted provocation defense); *cf.* State v. McClain, 591 A.2d 652 (N.J. Super. Ct. App. Div. 1991) (woman who shot abusive ex-boyfriend presented provocation defense).

300. *See, e.g.*, State v. Redmond, 937 S.W.2d 205, 209 (Mo. 1996) ("One who unreasonably believes that he must use force to defend himself from an imminent attack or uses an unreasonable amount of force cannot escape conviction on grounds of self-defense. But, the jury may nevertheless believe that the confrontation and the showing of the weapon constituted adequate provocation by the victim, which impaired the defendant's self-control and aroused him to kill in sudden passion.") (internal citation omitted); Wood v. State, 486 P.2d 750, 752 (Okla. Crim. App. 1971) ("A homicide may be reduced from murder to manslaughter where the killing was done because the slayer believed that he was in great danger, even if he was not warranted in such belief . . . ."). *See supra* note 299 and accompanying text.

social, institutional, or unconscious bias. However, before decimating self-defense and eviscerating provocation law, scholars also might take into account the larger ramifications of such significant legal changes.[301] There is a natural temptation to engage the massively powerful criminal system in an attempt to send a forceful message of gender and racial equality. However, the anti-subordination benefit of such message-sending is at best uncertain, whereas "there is a concrete, demonstrable harm to locking up more and more people, a disproportionate number of whom are black."[302]

Yes, killers receive little quarter in the public imagination. There is no political downside to being tough on killers, as evidenced by skyrocketing murder sentences. However, the unpopularity of such defendants never has tempted death penalty abolitionists to waiver from their position. I invite provocation scholars to bring that same skeptical, cultural norm-resistant lens to provocation analysis. Provocation critics' ratchet-up remedies may produce justice in certain individual cases, but their effects ripple through a racially and socially fraught system.[303] In this era of racialized mass incarceration, progressive theorists no longer have the luxury of proposing prosecutorial solutions to formal inequality in a vacuum. In the words of Yogi Berra, "In theory there is no difference between theory and practice. In practice there is."[304]

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301. *See* Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1755 (2012) (noting the necessity to "move beyond individual identities and discrimination . . . and adopt a more structural and institutional perspective.").

302. Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1599 (1999).

303. *See* Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1256 (2005) ("Policies meant to increase the severity of punishments for violent crimes will, in the nature of things, disproportionately affect black offenders.").

304. Yogi Berra (quoted in Berry, *supra* note 189, at 688). *See also* Smith, *supra* note 302, at 1600 (asserting that support for prosecutorial solutions to formal inequality are built on a preference for "the imagined over the real").