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Principles for Passion Killing: An Evolutionary Solution to Manslaughter Mitigation

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PRINCIPLES FOR PASSION KILLING: AN EVOLUTIONARY SOLUTION TO MANSLAUGHTER MITIGATION[†]

ABSTRACT

The law recognizes the frailty of human nature by mitigating murder to manslaughter when committed in the heat of passion or under extreme emotional disturbance. Evolutionary analysis entails the scientific study of the principles of human nature. Yet, the law's understanding of human nature is not congruent with evolutionary analysis. To be legally provoked under common law for manslaughter mitigation, a homicide must be in response to one of four kinds of provocation: adultery, mutual combat, false arrest, and violent assault. And under adultery, only sexual infidelity counts. Sexual infidelity is not the only type of infidelity that can push a person into a homicidal rage, and while American jurisdictions have started moving away from the rigid categories, sexual infidelity remains a paradigmatic approach for mitigation. The Model Penal Code attempted to make the law more contextual, but it created a new series of adjudications that are expansive and also incongruent with evolutionary analysis.

This Comment addresses the incongruence of both the common law and the Model Penal Code—which produce gender disparity in manslaughter doctrine—with evolutionary analysis. By exploring why sexual infidelity would provoke passion sufficient for homicidal rage, the Comment develops a mitigating standard for adultery that is consistent with evolutionary analysis and notions of gender equality. It uses evolutionary analysis to determine which universally recognizable forms of jealousy and related passion-laden mental states should also be sufficient provocation to deserve that same mitigation.

The passionate response to sexual infidelity is just one adaptive solution to a threat against a male's reproductive fitness. However, in flagrante delicto does not take the passion-invoking circumstances of the female end of the same evolutionary spectrum into account. Our ancestral mothers faced a different set of evolutionary challenges against their reproductive fitness for which they

[†] This Comment received the 2012 Myron Penn Laughlin Award for Excellence in Legal Research and Writing.

have evolved different impassioned—and potentially deadly—responses. These passions should be incorporated into manslaughter doctrine.

For the law to apply fairly and mitigate for the frailty of human nature, it must take the actual design of the mind seriously. This Comment argues for a better understanding of human nature in manslaughter mitigation that will result in more just adjudications for both men and women.

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INTRODUCTION

*[T]he law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted . . . regards [manslaughter] as of a less heinous character*¹

*To deprive others of their life is one of the most effective means of increasing one's own fitness.*²

Humans kill because we love.³ It is an age-old story familiar to the human race, colloquially deemed a “crime of passion.” Manslaughter mitigation recognizes this frailty of human nature that results in passion killing.⁴ The law takes what would otherwise be murder and reduces the crime itself to a lesser one, indicating the society’s belief that this dynamic part of humanity cannot be as morally culpable.⁵ While there were a limited number of ways to be legally provoked under the traditional common law,⁶ the quintessential provocation has often been thought to be *in flagrante delicto*—the sudden, in-person discovery of one’s romantic partner engaging in sexual activity with someone else.⁷ While many American jurisdictions have moved away from the

¹ Maher v. People, 10 Mich. 212, 219 (1862).

² JOSEPH LOPREATO, HUMAN NATURE AND BIOCULTURAL ETHICS 137–38 (1984).

³ Cf. Margo I. Wilson & Martin Daly, *Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States*, 30 CRIMINOLOGY 189, 189 (1992) (“During the 10 years from 1976 to 1985, a total of 18,417 people are estimated to have been killed by their spouses in the United States.”).

⁴ See *Andersen v. United States*, 170 U.S. 481, 510 (1898) (“The law, in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offen[s]e of a less heinous character than murder.”); *Maher*, 10 Mich. at 219 (“[T]he law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted . . . regards the offense as of a less heinous character”); MODEL PENAL CODE § 210.3 cmt. 5(a), at 55 (Official Draft and Revised Comments 1980) (explaining that the mitigation is a “concession to human weakness” and that “one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence”).

⁵ MODEL PENAL CODE § 210.3 cmt. 5(a), at 54 (Official Draft and Revised Comments 1980).

⁶ Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1023–24 (1958) (enumerating the “nineteenth century four”). When voluntary manslaughter was codified in American jurisdictions, almost all states referred to the common law scheme for guidance in adjudication. MODEL PENAL CODE § 210.3 cmt. 2, at 45 (Official Draft and Revised Comments 1980). Texas was the only state that did not have a manslaughter offense. *Id.* at 45 n.6.

⁷ See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 72 (1992); Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 198–99 (2005).

rigidity of categorical approach,⁸ sexual infidelity remains a paradigmatic approach to manslaughter mitigation.⁹ Note this carnal requirement: the common law sanctions manslaughter for the sudden discovery of *sexual* infidelity, leaving impassioned homicide that results from non-sexual infidelity subject to the laws of murder and sympathies of jurors.

In reality, though, sexual misconduct is not the only kind of iniquitous love affair that causes intense passions.¹⁰ This *in flagrante delicto* category does not seem to describe the range of passions that we colloquially find to be understandable triggers for a crime of passion.¹¹ Indeed, in some particularly sympathetic circumstances, courts have innovated to mete out a just verdict around the rigid law.¹²

The common law's inflexibility has been addressed by the American Law Institute and legal scholarship.¹³ The Model Penal Code disbands this rigidity

⁸ SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 395 (8th ed. 2007) (“[A] minority view[] departs from the conventional common law position that only a few particular circumstances . . . can serve as legally adequate provocation.”); *see, e.g., Maher*, 10 Mich. at 222–23 (“The law can not with justice assume, by the light of past decisions, to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation. . . . Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents.”).

⁹ Rozelle, *supra* note 7, at 199.

¹⁰ *Cf.* MODEL PENAL CODE § 210.3 cmt. 5(a), at 61 (Official Draft and Revised Comments 1980) (“By eliminating any reference to provocation in the ordinary sense of improper conduct by the deceased, the Model Code avoids arbitrary exclusion of some circumstances that may justify reducing murder to manslaughter.”).

¹¹ *Cf.* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1332 (1997) (suggesting that the colloquial understanding of a crime of passion is “the stuff of sordid affairs and bed side confrontations”).

¹² *See, e.g.,* ANN JONES, *WOMEN WHO KILL* 184–88 (The Feminist Press 2009) (1980).

¹³ *See* MODEL PENAL CODE § 210.3 cmt. 5(a), at 55 (Official Draft and Revised Comments 1980) (explaining that the extreme emotional disturbance mitigation is a “concession to human weakness” and that “one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence”); Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 282–83 (1996) (discussing the disparate treatment of male and female killers based on a male-oriented legal structure and arguing to address female characteristics in killing); Nourse, *supra* note 11, at 1392–94 (arguing for a restructuring of manslaughter doctrine based on “warranted excuse[s]”); Rozelle, *supra* note 7, at 232–33 (concluding that manslaughter is inherently a justification defense and, thus, the mitigation should not apply to cases of infidelity at all because there is no threat against the defendant that justifies the use of force); Antonia Elise Miller, Note, *Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion*, 17 WM. & MARY J. WOMEN & L. 249, 272–75 (2010) [hereinafter Miller, *Inherent (Gender) Unreasonableness*] (arguing to reformulate manslaughter mitigation to better understand female violence and remedy gender bias in the reasonable person standard); Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J.

by reformulating manslaughter under the idea of “extreme mental or emotional disturbance.”¹⁴ Under this standard, homicides that occur while the killer is under any extreme emotional disturbance can be mitigated to manslaughter as long as the jury finds it “reasonable” from the defendant’s perspective.¹⁵ This enormous amount of trial court discretion has led to interesting new developments that move manslaughter law to misguided and counter-productive—indeed, damaging—decisions.¹⁶

Feminists have criticized manslaughter doctrine for its disparate impact on women, both in common law and Model Penal Code jurisdictions.¹⁷ Most scholarly solutions to this manslaughter problem involve a sociological or cultural perspective to remedy its apparent incompleteness.¹⁸ This Comment joins that conversation and moves it from a societal critique to an evolutionary standard based on predictability.

To take the “frailty of human nature”¹⁹ seriously as a legal value, the law must look at the design of the human mind rather than current social beliefs or trends. This Comment concludes that a provocation standard that incorporates evolutionary analysis will better tailor manslaughter mitigation to apply to homicide in a more just and systematic way.²⁰ It explores what that frailty in passion over sexual infidelity *is*, expands upon it, and reformulates the doctrine in a gender-neutral way. Or, in the words of the Michigan Supreme Court as early as 1862, the Comment uses evolutionary principles to explore “the laws upon which human nature is constituted”²¹ to determine how manslaughter in cases of infidelity should be adjudicated. It concludes that the fault in manslaughter doctrine is the failure to account for evolutionary threats against

665, 692–93 (2001) [hereinafter Miller, *(Wo)manslaughter*] (arguing to abolish the heat of passion defense to better protect the rights of women).

¹⁴ MODEL PENAL CODE § 210.3(1)(b) (Official Draft and Revised Comments 1980).

¹⁵ *Id.*

¹⁶ *See infra* Part I.B.

¹⁷ *See infra* Part I.A–B.

¹⁸ *See, e.g.,* Nourse, *supra* note 11, at 1392–94 (arguing for a solution based on social beliefs); James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845 (1999); *see infra* Part I.C.

¹⁹ *Andersen v. United States*, 170 U.S. 481, 510 (1898) (“The law, in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offen[s]e of a less heinous character than murder.”).

²⁰ As discussed below, sexual infidelity is only one threat against a human’s reproductive fitness. From an evolutionary perspective, it is more relevant to men than to women. *See infra* Part II.B–C.

²¹ *Maher v. People*, 10 Mich. 212, 219 (1862).

women; the law has sought to apply an evolutionarily masculine perspective to feminine responses, which is inappropriate.²² The evolutionary perspective provides a solution that is mostly free of social and cultural disparities because it provides a standard relevant to all humans, regardless of those factors. If the law mitigates for a certain type of threat against reproductive fitness, it must do so for all threats—not simply those most applicable to men.

Part I of this Comment describes the general landscape of manslaughter mitigation, discussing the common law, the Model Penal Code, and alternative solutions to the disparate impact of the law. Part II juxtaposes the legal landscape with evolutionary theory to demonstrate the underlying incongruence between the law and human nature.²³ After exposing the insufficiency of previous applications of the law, Part III weaves evolutionary principles into manslaughter doctrine and explains how this approach can begin to rid the doctrine of its disparate impact on women.

I. UNFAIR AND UNWIELDY MANSLAUGHTER

There are two paradigmatic approaches in the United States to reduce a homicide from murder to manslaughter: the common law's adequate provocation standard and the MPC's extreme emotional disturbance standard.²⁴ Each scheme produces different results,²⁵ and this Comment concludes that each is inappropriate to mete out just results for all killers impassioned over infidelity and related emotions. This Part explores the boundaries of manslaughter mitigation to give an overview of the current state of the doctrine.

Section A discusses how traditional manslaughter doctrine and its modern trend have excluded alternative forms of threats against one's reproductive fitness from being considered as sufficient provocation. Section B examines

²² See *infra* Part II (explaining the relevant evolutionary differences between men and women as well as describing how displaying intense passions over sexual infidelity is an evolutionarily masculine response).

²³ "Feminine passions" will be used as a term to describe passions derived from emotional infidelity. In turn, "masculine passions" will be used to describe passion or distress evoked by sexual infidelity. The use of these terms is not meant to strictly categorize all women in one way and all men in another way, but rather as a convenient shorthand to describe rather complicated phenomena. The author readily admits that men and women can be provoked into passion and distress for many reasons and cross the sexual categories described by evolutionary psychology. This area of psychology seeks to understand general trends in adaptive behavior that will be significantly predictable rather than absolute rules to be followed by each sex.

²⁴ Miller, *Inherent (Gender) Unreasonableness*, *supra* note 13, at 259 (explaining the different approaches in the common law and the Model Penal Code).

²⁵ *Id.*

the Model Penal Code's approach to manslaughter under extreme emotional disturbance and how it has developed into an expansive definition of manslaughter. Section C looks at alternative ways the disparity in the law has been addressed, both through adjudications and scholarly critiques and solutions.

A. *The Common Law: In Flagrante Delicto and Its Limited Applicability*

At traditional common law, heat of passion manslaughter is not available to mitigate except for a few rigid categories, requiring the court to innovate to mete out justice in particularly sympathetic circumstances.²⁶ And the law has not applied to women in any meaningful way for a number of reasons.²⁷ The primary reason advanced by many feminist legal theorists is the male bias in the law developed by the imbalance of status between men and women.²⁸ This Comment agrees with the assertion that the “reasonable woman” never figured into the “reasonable person” standard at the time,²⁹ and it argues evolutionary principles can remedy this disparity.³⁰

In common law jurisdictions, provocation manslaughter has two prongs that must be satisfied for the mitigation to apply—the heat of passion requirement and the legally sufficient provocation requirement.³¹ The heat of passion prong is a test that combines the following subjective and objective elements:

1. The defendant must have been in the heat of passion.
2. A reasonable person would also have been in the heat of passion.

²⁶ See Russell D. Covey, *Temporary Insanity: The Strange Life and Times of the Perfect Defense*, 91 B.U. L. REV. 1597, 1642–43 (2011) (outlining the use of temporary insanity as a way to avoid murder convictions for homicides convicted in extreme passions).

²⁷ See Miller, *(Wo)manslaughter*, *supra* note 13, at 671–74 (explaining that heat of passion manslaughter mitigation developed out of women's societal roles and the law's view of wives as the property of their husbands); Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1689–92 (1986) (explaining that women have rarely been the defendants in manslaughter cases and that it is not surprising due to their status in the development of this law).

²⁸ See, e.g., Miller, *Inherent (Gender) Unreasonableness*, *supra* note 13, at 253–56; Taylor, *supra* note 27, at 1689–92.

²⁹ Taylor, *supra* note 27, at 1690–91.

³⁰ See *infra* Part III.

³¹ Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1040 (2011) (explaining the requirements of manslaughter mitigation at common law).

3. The defendant must not have cooled down.
4. A reasonable person would not have cooled down.³²

Note that the test is not that the passion caused the individual to commit homicide; the ordinary person does not kill.³³ Rather, the ordinary person's sensibilities are so affected by passion that homicide becomes a potential solution.³⁴

Through the second prong—legally sufficient provocation—the common law limits the scope of what qualifies to provoke a heat of passion to certain categorical circumstances.³⁵ The categories, sometimes referred to as the “nineteenth century four,”³⁶ are adultery, mutual combat, false arrest, and violent assault.³⁷ However, some common law jurisdictions have moved away from this rigidity and permitted the reasonable person standard to satisfy adequate provocation.³⁸ These jurisdictions—except Maryland³⁹—allow *in flagrante delicto* to serve as a paradigmatic category for sufficient provocation.⁴⁰

To claim manslaughter based on a passionate response to adultery, the defendant would have to experience the sudden, visual discovery of her spouse or lover engaging in sexual activity with a paramour.⁴¹ The common law does not allow mere words to serve as adequate provocation;⁴² although some jurisdictions have modified this law, traditional states require the defendant to actually witness the act of sexual infidelity.⁴³

One major criticism of mitigation for homicides committed *in flagrante delicto* is that it perpetuates harmful gender stereotypes.⁴⁴ The notion here is that manslaughter privileges a type of homicide committed most frequently by

³² See *id.* at 1041 (citing WAYNE R. LAFAYE, CRIMINAL LAW 777 (4th ed. 2003)).

³³ See *id.*

³⁴ See *id.*

³⁵ Rozelle, *supra* note 7, at 198–99.

³⁶ Note, *supra* note 6, at 1023–24.

³⁷ Nourse, *supra* note 11, at 1341.

³⁸ KADISH ET AL., *supra* note 8, at 395 (“[A] minority view[] departs from the conventional common law position that only a few particular circumstances . . . can serve as legally adequate provocation.”).

³⁹ MD. CODE ANN., CRIM. LAW § 2-207(b) (LexisNexis 2012).

⁴⁰ Rozelle, *supra* note 7, at 199.

⁴¹ Rozelle, *supra* note 7, at 198–99 & 199 n.7.

⁴² See Nourse, *supra* note 11, at 1342 & n.68.

⁴³ *Id.*

⁴⁴ Miller, *(Wo)manslaughter*, *supra* note 13, at 686.

men: a husband killing his spouse over sexual misconduct.⁴⁵ *In flagrante delicto* reinforces gender stereotypes of male aggression and subordinates women by allowing this kind of crime to be recognized in the law as less heinous.⁴⁶ Interestingly enough, the evolutionary perspective makes a similar criticism, albeit for different reasons. As discussed below,⁴⁷ this Comment argues that we cannot mitigate for one gender's mental frailties without mitigating for the other gender's as well, and, as illustrated through evolutionary analysis, *in flagrante delicto* is an incomplete category that does not include the female perspective.

Take the case of Mary Moriarty and John Shehan as an example of *in flagrante delicto*'s limits.⁴⁸ In 1850, Shehan asked Moriarty to marry him, but he constantly procrastinated initiating wedding plans.⁴⁹ Even after Moriarty became pregnant with his child, bore the child, and witnessed the child's death, he continued to string her along without actually planning the marriage.⁵⁰ After significant time and events passed and they finally began planning the wedding,⁵¹ Moriarty became pregnant again.⁵² Upon discovering this fact Shehan told Moriarty that he did not intend to marry her anymore.⁵³ She tried to persuade him otherwise, but he would not have it.⁵⁴ In a desperate and passionate response to this sudden discovery of abandonment, Moriarty stabbed him twice in the chest, killing him.⁵⁵ As discussed below, this impassioned response to seduction and abandonment is a predictable part of human nature under evolutionary analysis, but falls outside of any mitigating circumstances.

Due to the limits of *in flagrante delicto*, manslaughter could not apply.⁵⁶ The defense attorney for Moriarty asked the jury to apply an unwritten law—

⁴⁵ *Id.* at 667.

⁴⁶ *See id.* at 686.

⁴⁷ *See infra* Part III.B.

⁴⁸ JONES, *supra* note 12, at 184.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* During this lapse in time, Moriarty lost her job and began working and living in the United States Hotel in Memphis. Shehan skipped town on a drinking spree. Upon his return to Memphis, he proposed again to Moriarty and borrowed money from her to pay his bills. *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See* Rozelle, *supra* note 7, at 198–99 (explaining the categories that homicides must fall within for mitigation to apply).

emphasizing that it was the jury's duty to return a "true verdict."⁵⁷ To kill this seducer was no crime; Moriarty delivered "divine retribution" against an evil man who had seduced her.⁵⁸ Because she was morally justified, there could be no murder.⁵⁹ The jury of men, in the mid-eighteen hundreds, "set aside the laws written in books, and by following the laws written upon the breast of men found Mary Moriarty not guilty."⁶⁰ The jury determined these circumstances to be particularly sympathetic and grievous and handed down what it believed to be a fair judgment outside of the rigid heat of passion manslaughter doctrine.⁶¹ The achievement of justice required a persuasive attorney and sympathetic jury rather than equal respect and recognition in the law.

The American Law Institute jettisoned the rigid categorical approach in the MPC.⁶² The ALI found this rigid approach to mitigation inappropriate because it does not include all the circumstances in which a reasonable person could be pushed into homicidal passion.⁶³ In the case of Moriarty, it is likely that the jury could have found a middle ground between justice and mercy.⁶⁴

B. The Model Penal Code: Extreme Emotional Disturbance and Its Wide Application

The American Law Institute set out to reform American criminal law and, in doing so, completely reformulated manslaughter doctrine to reflect a more liberal approach that is context-specific.⁶⁵ The MPC discarded the traditional concept of legally sufficient provocation and replaced the scheme with "extreme . . . emotional disturbance."⁶⁶ The relevant part reads as follows:

(1) Criminal homicide constitutes manslaughter when:

⁵⁷ JONES, *supra* note 12, at 187–88 (emphasis omitted). For a discussion on the "unwritten law," see *infra* Part I.C.

⁵⁸ JONES, *supra* note 12, at 187–88.

⁵⁹ *Id.*

⁶⁰ *Id.* at 188 (internal quotation marks omitted).

⁶¹ See *id.* For an interesting assertion that this method for exonerating women outside of the design of the law was actually more beneficial to women at the time, see Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101, 176–78 (2006).

⁶² MODEL PENAL CODE § 210.3(1)(b) (Official Draft and Revised Comments 1980).

⁶³ *Id.* § 210.3 cmt. 5, at 61.

⁶⁴ Compare JONES, *supra* note 12, at 187–88 (going outside the law to find Moriarty not guilty), with MODEL PENAL CODE § 210.3(1)(b) (Official Draft and Revised Comments 1980) (supporting a reasonable person standard).

⁶⁵ MODEL PENAL CODE § 210.3 cmt. 5, at 61 (Official Draft and Revised Comments 1980).

⁶⁶ *Id.* § 210.3(1)(b).

....

(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.⁶⁷

The purpose of the reform was to apply mitigation in any circumstance causing an extreme emotional disturbance that an ordinary person would find reasonable given the defendant's perspective.⁶⁸ The law became much more subjective and context-specific, and the scope of mitigating circumstances expanded considerably after states adopted this language.⁶⁹ The extension of possible mitigating circumstances, at first glance, seems to have the potential to remedy evolutionary criticisms of the common law doctrine.

For example, in a case involving perceived non-sexual infidelity, the defendant followed her husband to find him seated in a parked vehicle with another woman.⁷⁰ She brought a .22 caliber pistol with her to confront her husband.⁷¹ The evidence established that the husband was fatally shot.⁷² The defendant was convicted of manslaughter after both trial and retrial under a theory of extreme emotional disturbance.⁷³ Note that this case fits none of the nineteenth century four, particularly *in flagrante delicto*, because the lover was not found engaging in a sexual act with a paramour. In a common law jurisdiction, the judge would not have been able to give instructions to the jury for heat of passion manslaughter in this case of perceived non-sexual infidelity.⁷⁴ But in Arkansas, which adopted the MPC in 1976,⁷⁵ the jury

⁶⁷ *Id.* § 210.3(1).

⁶⁸ *Id.* § 210.3 cmt. 5, at 54 ("In assessing the reasonableness of the explanation or excuse, the section focuses upon the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." (internal quotation marks omitted)).

⁶⁹ Nourse, *supra* note 11, at 1331–33.

⁷⁰ *Worring v. State*, 638 S.W.2d 678 (Ark. Ct. App. 1982) (upholding a conviction for manslaughter).

⁷¹ *Id.* at 679.

⁷² *Id.*

⁷³ *Id.* However, the evidence did not establish whether the defendant fired the gun or if the gun discharged when the husband tried to grab it. The court determined that if the alternative fact pattern occurred, the defendant would still be liable for manslaughter because the homicide was a result of the defendant's recklessness. *Id.*

⁷⁴ See Rozelle, *supra* note 7, at 198–99 (referring to the nineteenth century four and the trending and more relaxed contemporary approach).

⁷⁵ Paul H. Robinson & Markus Dirk Dubber, *An Introduction to the Model Penal Code 5* (Mar. 12, 1999), <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>.

determined that the defendant committed manslaughter by acting reasonably under an extreme emotional disturbance in those circumstances.⁷⁶

While the ALI sought to apply manslaughter more effectively, the MPC formulation has been accused of severely disadvantaging women by expanding the scope of the doctrine for situations that do not reflect a colloquial understanding of crimes of passion as involving “sexual betrayal, love triangles, [and] sordid affairs.”⁷⁷ Victoria Nourse documented this expansion of manslaughter mitigation in MPC jurisdictions by studying fifteen years of homicide cases in which the judge allowed a manslaughter instruction to go to the jury.⁷⁸ She noted that 26% of cases that allowed manslaughter instructions to go to the jury involved only separation and departure of lovers without any reported infidelity at all.⁷⁹

Nourse argued that the liberal reform of manslaughter doctrine is a perverse and backwards expansion of manslaughter that “reflects, and thus perpetuates, ideas about men, women, and their relationships that society long ago abandoned.”⁸⁰ Nourse criticized the MPC for creating conflicts within the law, which she attributed to the severe lack of normativity in the mitigation’s application. And because there is no clear structure to the law, it has evolved in incongruent ways.⁸¹ The reform of passion as extreme emotional disturbance has permitted mitigation for provocation that was neither extreme nor illegal.⁸² For example, one case permitted a manslaughter conviction when the defendant killed his ex-girlfriend for dancing with another person.⁸³ Nourse noted that it is very rare for the law to embrace criminal activity that is a response to lawful activity.⁸⁴

⁷⁶ Note that from an evolutionary perspective, this case would likely have been mitigated from murder to manslaughter. The defendant discovered emotional infidelity by her husband, which invokes the problem of her husband potentially funneling resources away from her and to another woman. See *infra* Parts II.C, III.B.

⁷⁷ Nourse, *supra* note 11, at 1332–51; see also Miller, *(Wo)manslaughter*, *supra* note 13.

⁷⁸ Nourse, *supra* note 11, at 1345. Nourse’s study involved ninety-nine cases in MPC jurisdictions, thirty-eight cases in common law jurisdictions, and thirty-five cases in jurisdictions that liberalized traditional rules by following the common law approach but without the rigidity of the nineteenth century four. Her study did not include prosecutors’ decisions in whether to prosecute individuals for the crime because that information would have been too difficult to get. *Id.* at 1345–47.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1332.

⁸¹ *Id.* at 1369–70.

⁸² See *id.* at 1334–35.

⁸³ *State v. Martinez*, 591 A.2d 155, 156 (Conn. App. Ct. 1991).

⁸⁴ Nourse, *supra* note 11, at 1334–35.

This expansion of permissible mitigation would also not fit into an evolutionary model of manslaughter. For example, the departure of a lover is not an evolutionary problem that can be solved by homicide,⁸⁵ and so this is likely not within the set of provocative acts that heat of passion manslaughter meant to address.⁸⁶ The law should be more tailored and systematic, and evolutionary analysis can provide that needed structure by examining the design of the mind itself.⁸⁷ The MPC took the law in the right direction to appropriately and fairly mitigate, but its lack of structure took the law too far.

C. *Alternative Approaches: Unwritten Laws and Scholarly Ideas*

The MPC was not the first attempt to administer justice when the heat of passion manslaughter categories seemed inadequate. When presented with other sympathetic circumstances that reflect the frailty of human nature, juries and judges have turned to alternative or “unwritten” laws to mete out justice.⁸⁸

Throughout the nineteenth century, courts used the temporary insanity defense to address homicides for particularly sympathetic situations that fell outside the *in flagrante delicto* paradigm.⁸⁹ Russell Covey contended that the temporary insanity defense has been used for situations in which the court determined that the defendant was somehow “justified” in committing homicide.⁹⁰ He explained the similarity between provocation manslaughter and the temporary insanity defense as granting relief for difficult circumstances, but he also noted that temporary insanity not only grants relief to the defendant. It completely exonerates her.⁹¹ While a spouse would have to walk in on the unfaithful sexual act to receive manslaughter mitigation under the common law, temporary insanity could be used to completely exonerate late-arriving defendants who would be barred by the cooling-off requirement or defendants who discovered infidelity by hearing about it.⁹² The temporary insanity defense also opened the way to exonerate “honor killings”—those

⁸⁵ Cf. Joshua D. Duntley, *Adaptations to Dangers from Humans*, in THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY 224, 232 (David M. Buss ed., 2005) (enumerating the range of recurrent evolutionary challenges that were solvable by homicide).

⁸⁶ Cf. *Maier v. People*, 10 Mich. 212, 219 (1862) (suggesting that the law is meant to mitigate for the frailties of human nature).

⁸⁷ See *infra* Part III.B.

⁸⁸ Cf. Covey, *supra* note 26, at 1642–51.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

committed by fathers and brothers to vindicate the innocence of their daughters or sisters whom were taken by villainous men.⁹³

Temporary insanity does not seem to be an adequate and effective defense to address these different scenarios. With its permeable borders, the defense seems too fluid and based strongly on societal notions of honor and etiquette. When Daniel Sickles was tried for killing Philip Barton Key the day *after* he discovered that Key had an affair with his wife, the court permitted the temporary insanity defense because he was stricken with an “irresistible impulse” an entire day later.⁹⁴ This approach of permitting alternative adjudications outside of manslaughter to mitigate for colloquially impassioned killers falls victim to Nourse’s critique of the MPC: it lacks consistent structure.⁹⁵ What sufficiently provokes an ordinary person should not be subjected to the fluid notions of what is socially acceptable at the time of the offense. It is even more dangerous to allow this kind of adjudication without any codified standards whatsoever.⁹⁶ Note that temporary insanity and jury nullification present the jury with the extreme options of murder conviction or exoneration without any middle ground that manslaughter mitigation provides. These avenues permit too much room that could allow social prejudices to manifest through convictions of disfavored minorities and the exoneration of favored groups based on social beliefs at the time of trial.

Nourse’s solution for manslaughter’s disparate impact and need for structure is to entirely restructure the doctrine to permit mitigation for only a “[w]arranted [e]xcuse.”⁹⁷ This would entail allowing manslaughter mitigation for defendants who react to a provocative action that is itself illegal because the law already deems the act unacceptable;⁹⁸ the communal concern is clearly demonstrated by the law’s prohibition, as law is a manifestation of society’s values.⁹⁹ The killer who deserves mitigation is the one who “communicate[s]

⁹³ *Id.* at 1643.

⁹⁴ *Id.* at 1641–44 (quoting NAT BRANDT, *THE CONGRESSMAN WHO GOT AWAY WITH MURDER* 172 (1991)) (internal quotation marks omitted).

⁹⁵ *Cf.* Nourse, *supra* note 11, at 1369–70 (critiquing the extreme emotional disturbance mitigation for its lack of normativity).

⁹⁶ *But see* Ramsey, *supra* note 61, at 176–78 (suggesting that male-oriented manslaughter doctrine is actually implemented to constrain male violence against women and that allowing juries discretion in convicting similarly situated women actually resulted in benefits for those female defendants). Ramsey’s article does not advocate for a fair standard; it simply reconceptualizes the feminist critique of the law. *Id.*

⁹⁷ Nourse, *supra* note 11, at 1392.

⁹⁸ *Id.* at 1393 (“In such cases, we ‘understand’ the defendant’s emotions because these are the very emotions to which the law itself appeals for the legitimacy of its own use of violence.”).

⁹⁹ *Id.* at 1392.

an emotional judgment . . . that is uncontroversially shared, indeed, that the law itself recognizes.”¹⁰⁰ The law would permit mitigation because community reacts “with” the defendant for the provocation and response, and that commiseration is actually codified in the law because the victim committed an illegal act against the defendant.¹⁰¹

Interestingly enough, Nourse also concluded that passionate killing that results from infidelity should no longer be afforded mitigation because society no longer punishes adultery.¹⁰² This exposes a fundamental problem in Nourse’s solution: it moves the doctrine too far from its original purpose of objectively recognizing the frailty of human nature and, instead, allows mitigation to be determined by a common consensus of society.¹⁰³ The fluid opinion of what society believes to be acceptable and unacceptable does not have influence on the inherently genetic design of cognition;¹⁰⁴ jealousy over sexual infidelity will still elicit extremely volatile reactions from men for evolutionarily understandable reasons regardless of whether the law punishes adultery.¹⁰⁵ To take the frailty of human nature seriously, the law must look at the principles of human nature rather than current societal beliefs.

Another solution is to delete the doctrine entirely.¹⁰⁶ This idea is also based on the criticism that the law disproportionately harms women.¹⁰⁷ Emily Miller noted that men are the primary beneficiaries of both common law manslaughter and the ALI’s redesign of manslaughter.¹⁰⁸ Both perpetuate a

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 1392–93.

¹⁰² *Id.* at 1396 (“Society is no longer willing to punish adultery. In the absence of such a willingness, the adulterer killer has no claim that his emotions were no different from the emotions to which the law itself appeals to rationalize punishment.” (footnote omitted)).

¹⁰³ *See, e.g.,* *Maier v. People*, 10 Mich. 212 (1862).

¹⁰⁴ STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 60–72 (2002) (explaining that culture is grounded in psychological mechanisms present in all humans, and thus there is a necessary connection between the brain’s genetically designed structure and the way it interacts with society); *cf.* Peter M. Todd, Ralph Hertwig & Ulrich Hoffrage, *Evolutionary Cognitive Psychology*, in *THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY*, *supra* note 85, at 776, 776 (“Humans were not directly selected to process information, or to store it, learn it, attend to it, represent it—or even, in fact, to think. All of these capacities . . . can be seen as epiphenomena arising over the course of evolution from the need to get the central jobs done: survival and reproduction.”).

¹⁰⁵ *See infra* Part II.B; *see also* DAVID M. BUSS, *THE DANGEROUS PASSION: WHY JEALOUSY IS AS NECESSARY AS LOVE AND SEX* 6 (2000).

¹⁰⁶ Miller, *(Wo)manslaughter*, *supra* note 13, at 692.

¹⁰⁷ *Id.* (“By abolishing the heat of passion defense, the law would take a meaningful step forward in protecting the rights of women.”).

¹⁰⁸ *Id.*

sociological problem that “[f]irst, culture socializes a man to express anger through violence, then the man kills a woman who departs, and the jury then reinforces cultural mores by mitigating punishment from murder to manslaughter.”¹⁰⁹

Her solution is to abolish manslaughter doctrine entirely to better ensure the safety of women.¹¹⁰ However, many of Miller’s arguments are based on assumptions stemming from a sociological point of view;¹¹¹ this Comment argues that the law should instead be evaluated from an evolutionary perspective.¹¹² It is important to determine whether the law has an accurate concept of the mind rather than to completely write off the doctrine; the law’s own misconception may have produced disparities at a sociological level of analysis. By examining manslaughter through evolutionary analysis, the law can mitigate for the frailty of human nature that transcends the sexes.

The next section juxtaposes the evolutionary perspective on passion killing with manslaughter doctrine. At common law, these homicides present juries with the option of either a murder conviction or acquittal through jury nullification or temporary insanity.¹¹³ The former feels too harsh but the latter seems too lenient. There is likely a sense of sympathy and understanding because every human (indeed, the ordinary person) is equipped with the same psychological structures. The juxtaposition of evolutionary analysis with legal analysis demonstrates a bias toward flexibility for men and rigidity for women.¹¹⁴

¹⁰⁹ *Id.* at 686.

¹¹⁰ *Id.* at 692.

¹¹¹ *See id.* at 680–83.

¹¹² Indeed, it is the frailty of the *mind* that is mitigated—not the frailty of society. *See Andersen v. United States*, 170 U.S. 481, 510 (1898); *see also* PINKER, *supra* note 104, at 60–72.

¹¹³ *See* Covey, *supra* note 26, at 1642–51 (outlining the use of temporary insanity as a way to avoid murder convictions for homicides committed in extreme passions).

¹¹⁴ To begin, it is important to note that men do, indeed, commit homicide more often than women. *See Expanded Homicide Data Table 6*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl06.xls> (last visited Sept. 24, 2012). Evolutionary theorists have predicted this higher rate of male aggression. However, it still remains the fact that women do become impassioned as men do and may kill as a result of it. *See* Wilson & Daly, *supra* note 3. The important point is that women tend to kill for different reasons, and there is no reason that these female killers, overcome by similarly evolved passions, should not have their crimes mitigated simply because they kill less frequently. For an evolutionary explanation of why men tend to be more aggressive than women, see David M. Buss & Todd K. Shackelford, *Human Aggression in Evolutionary Psychological Perspective*, 17 *CLINICAL PSYCHOL. REV.* 605, 612–13 (1997), which explains that the higher rate of male aggression is due to women controlling men’s access to reproductive success and ensuing conflicts over men’s strategies to achieve access through competition with each other that involves intrasexual violence.

II. PASSION KILLING—AN EVOLUTIONARY PERSPECTIVE

Although it has been accepted that there are more differences *among* men and women than *between* them,¹¹⁵ studies in evolutionary psychology have suggested some important differences that impact the way men and women experience attraction, relationships, and jealousy.¹¹⁶ This Part outlines those differences and their relevance to the evolutionary solution to manslaughter mitigation. Section A provides a general overview of the evolutionary landscape, including a discussion on intra-human homicide and the background causes of sex differences. Section B ventures into male mating strategies and threats against a male's reproductive fitness to give background on the source of the masculine heat of passion. Section C does the same for female mating strategies, jealousy patterns, and related emotional responses, and it illustrates the conflict when the sexes engage in mating behaviors.

¹¹⁵ MICHAEL S. KIMMEL, *THE GENDERED SOCIETY 2* (3d ed. 2008) (explaining the wide range of femaleness and maleness that transcends the sexes).

¹¹⁶ E.g., David M. Buss, *Sex Differences in Human Mate Preferences: Evolutionary Hypotheses Tested in 37 Cultures*, 12 *BEHAV. & BRAIN SCI.* 1, 1–49 (1989); David M. Buss et al., Research Report, *Sex Differences in Jealousy: Evolution, Physiology, and Psychology*, 3 *PSYCHOL. SCI.* 251, 251 (1992); Martin Daly et al., *Male Sexual Jealousy*, 3 *ETHOLOGY & SOCIOBIOLOGY* 11, 18 (1982) (“But although both sexes experience jealousy, just what they experience evidently differs.”); John E. Edlund et al., *Sex Differences in Jealousy in Response to Actual Infidelity*, *EVOLUTIONARY PSYCHOL.* 468 (2006), <http://www.epjournal.net/wp-content/uploads/ep04462470.pdf> (“In conclusion, our results demonstrate that [*sic*] sex differences in jealousy are not limited to responses to hypothetical infidelity scenarios. Sex differences also emerge in response to actual infidelity experiences.”); Maryanne Fisher et al., *Sex Differences in Feelings of Guilt Arising from Infidelity*, *EVOLUTIONARY PSYCHOL.* 441–44 (2008), <http://www.epjournal.net/wp-content/uploads/EP06436446.pdf> (reporting data supporting sex differences in feelings of guilt arising from different types of infidelity); Chris Reiber & Justin R. Garcia, *Hooking Up: Gender Differences, Evolution, and Pluralistic Ignorance*, *EVOLUTIONARY PSYCHOL.* 398–401 (2010), <http://www.epjournal.net/wp-content/uploads/EP08390404.pdf> (reporting data supporting the notion of sex differences in hook-up behavior).

A. *General Evolutionary Principles*¹¹⁷

Homicide is an important topic to evolutionary theorists.¹¹⁸ When a person is killed, the consequences are obvious regarding survival and reproduction.¹¹⁹ The question arises why humans would evolve in a way that would be terribly detrimental to other members of the same species. A few theories have been advanced regarding how homicide came into the human behavioral repertoire. Some suggest that homicidal acts are only the by-products of other evolutionary adaptations.¹²⁰ Others have concluded that homicidal acts are adaptations per se in that they have been used to solve evolutionary problems over history.¹²¹ Whether killing another human is a by-product or an actual adaptation is not the most important question for addressing manslaughter; rather, it is the question of when these homicides are predictable responses.

A wide range of evolutionary challenges is solvable by homicide,¹²² although it is important to remember that homicide is not a desirable solution

¹¹⁷ Before exploring evolutionary principles, it is important to note that there is disagreement among evolutionary psychologists as to the mating repertoire of humans (as monogamous, polygamous, polygynous, or a combination, as well as long-term versus short-term). See David P. Schmitt, *Fundamentals of Human Mating Strategies*, in THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY, *supra* note 85, at 258, 258 (“Some [evolutionary psychologists] contend that humans are exclusively designed for lifelong monogamy. Others argue that humans are designed to mate with more than one person at a time, usually in the form of polygynous or extramarital relationships. Still others posit that humans possess a mixed or *pluralistic* mating repertoire and that men and women each evolved facultative strategies of their own.” (citations omitted)); Donald Symons, *Adaptationism and Human Mating Psychology*, in THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY, *supra* note 85, at 255, 255–57. The manslaughter interest does not lie in what human mating strategies are, but rather what mechanisms have been installed that would incite the individual into a jealous heat of passion to kill. For more information on human mating patterns, see Schmitt, *supra* at 270.

¹¹⁸ See MARTIN DALY & MARGO WILSON, *HOMICIDE* 1–2 (1988); Duntley, *supra* note 85, at 231–36; Douglas T. Kenrick et al., *Power, Harassment, and Trophy Mates: The Feminist Advantages of an Evolutionary Perspective*, in SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES 29, 35 (David M. Buss & Neil M. Malamuth eds., 1996); Margo Wilson et al., *Femicide: An Evolutionary Psychological Perspective*, in FEMINISM AND EVOLUTIONARY BIOLOGY: BOUNDARIES, INTERSECTIONS, AND FRONTIERS 431 (Patricia Adair Gowaty ed., 1997).

¹¹⁹ Duntley, *supra* note 85, at 233–34 (explaining the costs to a human if he or she is killed: loss of future reproduction, damage to existing children, damage to extended kin group, and potential benefits to rivals of deceased’s kin group).

¹²⁰ DALY & WILSON, *supra* note 118.

¹²¹ Joshua D. Duntley & David M. Buss, *Homicide Adaptations*, 16 *AGGRESSION & VIOLENT BEHAV.* 399 (2011). *But see* Russil Durrant, *Born to Kill? A Critical Evaluation of Homicide Adaptation Theory*, 14 *AGGRESSION & VIOLENT BEHAV.* 374 (2009) (critiquing homicide adaptation theory).

¹²² See Duntley, *supra* note 85, at 232 (enumerating the range of recurrent evolutionary challenges that were solvable by homicide).

in most circumstances.¹²³ An important problem is protection of the self and other persons of importance, such as children, spouses, and relatives.¹²⁴ A woman can avoid rape by killing her rapist. A man can avoid being cuckolded by killing his wife's paramour.¹²⁵ A father can protect his spouse, children, and home by killing attackers.¹²⁶ Groups of humans can protect their resources by killing (i.e., engaging in warfare) another group of humans.¹²⁷ Even less favorably for a modern society, a man can kill his stepchild to avoid funneling resources to an individual not carrying his genetic material.¹²⁸ Again, note that homicide is *not* the preferred method in dealing with all of these problems all of the time because a homicidal act comes with high risks and high costs.¹²⁹ But nonetheless, when the combination is right, humans may engage a mental formula to commit homicide, whether it be the product of other adaptations or an adaptation in itself.

Before discussing passion killing propensities and manslaughter, the critical question arises: If the law mitigates some murders to manslaughter and homicidal propensities are built into the psyche for certain circumstances, why not mitigate for *all* circumstances that fall within the purview of an evolutionary challenge? The obvious answer is that to do so would be to commit the naturalistic fallacy—the false notion that just because humans have a tendency to act a certain way the law should allow it in some way. Although humans possess the propensity to kill in a wide range of circumstances that would solve the individual's problems, the law seeks to modify behavior to be more socially desirable.¹³⁰

However, in the realm of manslaughter, the law has reached into the natural world for guidance.¹³¹ When the common law mitigates murder to

¹²³ It is very important to remember that just because a challenge was, and is, solvable by homicide, it is not the inevitable response because other mechanisms engage to protect the individual from the harms of large risks. *See id.* (“In most sets of circumstances, the extremely high costs of committing murder would have outweighed its benefits.”).

¹²⁴ *See id.*

¹²⁵ This will be discussed at length below. *See infra* Part II.B.

¹²⁶ *See* Duntley, *supra* note 85, at 232.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *See* Owen D. Jones, *Evolutionary Psychology and the Law*, in THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY, *supra* note 85, at 953, 953.

¹³¹ *See* *Maier v. People*, 10 Mich. 212, 219 (1862) (“[T]he law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted . . . regards the offense as of a less heinous character . . .” (emphasis added)).

manslaughter for the “frailty of human nature” in cases of sexual infidelity, it incorporates real, natural frailties into the legal framework.¹³² This Comment makes that incorporation clear, predictable, and nondiscriminatory by suggesting a fair standard that is applicable across the sexes. Here, we turn to that very question of what the relevant sex difference really is in the frailty of human nature.

As evolutionary psychologist David Buss stated, “Observing that men and women differ . . . is not the same as explaining *why* they differ.”¹³³ This underlying explanation can lead to a better understanding of the legally unrecognized states of mind that would lead to passion killing outside of the sexual infidelity paradigm. Due to the different biological designs and required investments in reproduction, the sexes have faced different evolutionary pressures over thousands of years that shaped their experiences of mating and jealousy.¹³⁴

The most biologically obvious difference between the sexes is the required investment for each to reproduce.¹³⁵ To successfully pass on her genes to offspring, a woman invests nine long, energy-depriving months to carry a child, and after birth, she will engage in years of child-rearing which also requires an incredible amount of time and energy that could be used for her own benefit and survival.¹³⁶ Men must only invest minutes, or even just seconds, to complete their role in the reproductive process.¹³⁷ Women do not

¹³² See, e.g., *Andersen v. United States*, 170 U.S. 481, 510 (1898) (“The law, in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offen[s]e of a less heinous character than murder.”); *Maher*, 10 Mich. 212.

¹³³ BUSS, *supra* note 105, at 16.

¹³⁴ See, e.g., *id.* (“An ancestral woman, in contrast, could have had sex with hundreds of partners in the course of a single year and still have produced only a single child. Unless a woman’s regular partner proved to be infertile, additional sex partners did not translate into additional children. As a consequence, men evolved a more powerful craving for sex with a variety of women.”); Daly et al., *supra* note 116, at 18 (“But although both sexes experience jealousy, just what they experience evidently differs.”).

¹³⁵ See, e.g., Schmitt, *supra* note 117, at 269 (“[M]en incur much lower levels of obligatory or ‘minimum’ parental investment in offspring than women do. Women are obligated to incur the costs of internal fertilization, placentation, and gestation in order to reproduce.” (citations omitted)).

¹³⁶ See BUSS, *supra* note 105, at 16; Schmitt, *supra* note 117, at 269. Also note the strong incentive that the mother care for her child; other mothers who did not were less likely to pass their apathetic emotional drives on to the next generation, so it is much more likely that a mother feels compelled to raise her child. For a summary on the evolution of parenting, see David C. Geary, *Evolution of Parental Investment*, in *THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY*, *supra* note 85, at 483.

¹³⁷ BUSS, *supra* note 105, at 16 (“To produce a single child, women bear the burdens and pleasures of nine months of pregnancy—an obligatory form of parental investment that men cannot share. Men, to produce the same child, need only devote a few hours, a few minutes, or even a few seconds.”).

have the option of quickly reproducing; their reproductive success is usually limited to one child per nine months and the survival of that child.¹³⁸ Thus, the gene pool has been saturated with women who vigilantly guard their reproductive capabilities by allowing access to only those men with whom they deliberately choose to engage in sexual activity, often because the man has indicated an interest in staying around.¹³⁹

Jealousy is a human adaptation with manifest sex differences. It increases fitness by contributing to reproductive success, and it adds texture to the passions in human nature.¹⁴⁰ Our ancestors who engaged in jealous behavior out-reproduced those who did not because that kind of behavior encourages fidelity on the part of the mate.¹⁴¹ That is to say, jealous behaviors “incentivize” the mate to be faithful, and those who did not care about fidelity had their genes removed from the population.¹⁴² Because jealous ancestors out-reproduced and dominated the gene pool, non-jealous humans had their psychological traits removed from the evolutionary pedigree.¹⁴³ However, “[d]espite its value for people past and present, jealousy is an emotion that exposes partners to extreme danger” because it can produce a very volatile state of mind.¹⁴⁴

¹³⁸ *Id.* (“An ancestral woman, in contrast, could have had sex with hundreds of partners in the course of a single year and still have produced only a single child. Unless a woman’s regular partner proved to be infertile, additional sex partners did not translate into additional children.”) *But cf.* Symons, *supra* note 117, at 271 (“A key caveat, though, is that women’s psychology of short-term mating appears to center more on obtaining men of high-genetic quality rather than numerous men in high-volume quantity.” (citations omitted)). Studies have shown that, for most mammals, the female is the parent more invested in offspring. *See* T.H. CLUTTON-BROCK, *THE EVOLUTION OF PARENTAL CARE* 151–52 (1991) (explaining the costs and benefits of bi-parental and uni-parental models for endotherms).

¹³⁹ Schmitt, *supra* note 117, at 268 (explaining parental investment theory and how the sex with heavier investment in offspring will approach mating in certain distinct patterns from the other sex).

¹⁴⁰ BUSS, *supra* note 105, at 5; Buss et al., *supra* note 116, at 251 (“Jealousy is defined as an emotional state that is aroused by a perceived threat to a valued relationship or position and motivates behavior aimed at countering the threat.” (internal quotation marks omitted)); *see also* Daly et al., *supra* note 116, at 18 (“But although both sexes experience jealousy, just what they experience evidently differs.”).

¹⁴¹ *See* BUSS, *supra* note 105, at 5 (“Nonjealous men and women, however, are not our ancestors, having been left in the evolutionary dust by rivals with different passionate sensibilities.”).

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *Id.* at 6.

B. Male Mating Interests and Jealousy

As the less-investing sex, men developed different mating and relationship interests than those that women developed,¹⁴⁵ and these differences play out significantly in manslaughter doctrine. David Buss and David Schmitt identified five problems that our ancestral fathers faced when engaging in long-term mating: paternity confidence, female reproductive value, commitment, good parenting skills, and gene quality.¹⁴⁶

Sexual infidelity may inflame homicidal passion because of paternal confidence¹⁴⁷: the evolutionary problem that the ancestral father could never know whether the child born by his mate was actually his biological child.¹⁴⁸ In other words, a man can never determine whether the child born by his mate is genetically his because impregnation occurs inside the body of the female.¹⁴⁹ The risk of cuckoldry was significant because it could result in a man investing years of time and resources into offspring who were not carrying his genetic material, which was detrimental to his overall evolutionary success.¹⁵⁰ Thus, men evolved psychological mechanisms to address the problem of paternal confidence.¹⁵¹ Buss and Schmitt predicted that “[m]en’s jealousy will be activated strongly by cues to sexual infidelity because that is the act that would have been reproductively damaging to ancestral men.”¹⁵² Because a man cannot tell whether his wife cheated on him and was impregnated by another

¹⁴⁵ Schmitt, *supra* note 117, at 268–69 (explaining the different patterns in the less-investing and more-investing sex for animal species in general, as well as male humans as the less-investing sex for homo sapiens).

¹⁴⁶ David M. Buss & David P. Schmitt, *Sexual Strategies Theory: An Evolutionary Perspective on Human Mating*, 100 PSYCHOL. REV. 204, 207 tbl.1 (1993). For an explanation of how men have addressed each of these challenges over evolutionary history, see *id.* at 216–18. This is, of course, before modern paternity testing procedures. Because the human psyche was selected and designed over thousands of years before any modern technology, humans today still possess psychological mechanisms to cope with evolutionary problems despite the novelty of today’s technologies.

¹⁴⁷ See BUSS, *supra* note 105, at 17; DAVID M. BUSS, THE MURDERER NEXT DOOR: WHY THE MIND IS DESIGNED TO KILL 55–56 (2005) [hereinafter BUSS, THE MURDERER NEXT DOOR].

¹⁴⁸ BUSS, THE MURDERER NEXT DOOR, *supra* note 147, at 55–56; Buss et al., *supra* note 116, at 251 (explaining the issue presented by internal impregnation); Buss & Schmitt, *supra* note 146, at 216–18.

¹⁴⁹ Buss & Schmitt, *supra* note 146, at 215 (“Indeed, women are at least somewhat unique among primates in that ovulation is cryptic, or concealed . . .”).

¹⁵⁰ BUSS, *supra* note 105, at 4 (“From an ancestral man’s perspective, the single most damaging form of infidelity his partner could commit, in the currency of reproduction, would have been a sexual infidelity. A woman’s sexual infidelity jeopardizes a man’s confidence that he is the genetic father of her children. A cuckolded man risks investing years, or even decades, in another man’s children.”).

¹⁵¹ Buss & Schmitt, *supra* note 146, at 216–18.

¹⁵² *Id.* at 216 (citations omitted); see also Daly et al., *supra* note 116, at 18.

man, he adapted strong interests to monitor his mate and ensure sexual fidelity.¹⁵³

It is because of paternity uncertainty that we see such strong passions from men regarding the sexual infidelity of their partners.¹⁵⁴ The most damaging thing that can happen to a man's reproductive fitness is to be cuckolded and unwittingly expend time and resources on the offspring of another man.¹⁵⁵ It is no surprise that psychological, physiological, and cross-cultural studies have repeatedly demonstrated that men exhibit jealousy for sexual infidelity systematically and significantly more than women.¹⁵⁶ The following anecdote about a reunited married couple illustrates a predictable emotional response to sexual infidelity that is also quintessential manslaughter:

Then she said that since she came back in April she had fucked this other man about ten times. *I told her how can you talk about love and marriage and you been fucking this other man. I was really mad.* I went to the kitchen and got the knife. I went back to our room and asked: Were you serious when you told me that? She said yes. We fought on the bed, I was stabbing her. Her grandfather came up and tried to take the knife out of my hand. . . . *I don't know why I killed the woman, I loved her.*¹⁵⁷

Regarding heat of passion manslaughter, the parallel seems evident between finding one's partner *in flagrante delicto* and sexual infidelity invoking strong passions due to paternal uncertainty. Because men have traditionally been in power in Western culture throughout the development of the common law,¹⁵⁸ (male) lawmakers would have been cognizant of the enormous distress caused by sexual unfaithfulness in the confines of

¹⁵³ BUSS, THE MURDERER NEXT DOOR, *supra* note 147, at 55–56 (“Men who were indifferent to the sexual contact that their wives might have with other men ended up raising their rival's children more often than men who didn't tolerate their mates' indiscretions.”).

¹⁵⁴ See Daly et al., *supra* note 116, at 11. Indeed, the King's Bench might have been correct in asserting that, with sexual infidelity, “there could not be greater provocation.” See Manning's Case, (1617) 83 Eng. Rep. 112 (K.B.).

¹⁵⁵ BUSS, *supra* note 105, at 4.

¹⁵⁶ Buss et al., *supra* note 116, at 251; Edlund et al., *supra* note 116, at 467. However, there has been critique of these studies on methodological grounds, suggesting that men and women might experience the same amount of distress over both sexual and emotional infidelity. See David DeSteno et al., *Sex Differences in Jealousy: Evolutionary Mechanism or Artifact of Measurement?*, 83 J. PERSONALITY & SOC. PSYCHOL. 1103, 1103 (2002) (arguing that the perceived sex difference from studies indicating a sex difference is derived from a methodological issue in research from a forced-choice response measure).

¹⁵⁷ BUSS, *supra* note 105, at 7 (emphasis added).

¹⁵⁸ See Miller, *Inherent (Gender) Unreasonableness*, *supra* note 13, at 253–56 (explaining the male-oriented development of the common law).

relationships.¹⁵⁹ That distress and shared sense of understanding find their roots in evolution.¹⁶⁰ As a universal challenge faced by all men over the course of thousands of years, evolutionary principles predict that this extreme jealousy response is present in most men. Thus, in a male-dominated legal system, mitigation for the frailty of human nature or the laws upon which human nature is constituted would incorporate male frailties but not necessarily female ones.

C. *Female Mating Interests and Jealousy*

“No woman ever gave birth and, watching the child emerge from her womb, wondered whether the child was really hers.”¹⁶¹ Thus, it is not surprising that women did not evolve similar extreme jealousy responses like men regarding sexual infidelity: a child a woman bears is obviously hers and carries her genetic material.¹⁶² However, given the required investment in reproduction, our ancestral mothers faced their own set of evolutionary problems.¹⁶³ Of interest to manslaughter doctrine is the problem of identifying men who are willing to invest. Our ancestral mothers faced the risk of losing time, resources, and commitment from a mate toward her and her offspring if he abandoned her or diverted resources to other partners.¹⁶⁴ For that reason, women will experience greater jealousy responses to emotional infidelity than will men.¹⁶⁵

Indeed, women have reported significantly greater distress in response to emotional infidelity than to sexual infidelity in numerous studies.¹⁶⁶ The

¹⁵⁹ See, e.g., *R v. Mawgridge*, (1707) 84 Eng. Rep. 1107, 1115 (Q.B.) (“[J]ealousy is the rage of a man, and adultery is the highest invasion of property. . . . [A] man cannot receive a higher provocation.”). This issue of men’s mate-guarding passions also seems related to the old common law that viewed women and their sexual access as property of the man. Cf. Miller, *(Wo)manslaughter*, *supra* note 13, at 686.

¹⁶⁰ Cf. HENDRIK GOMMER, *A BIOLOGICAL THEORY OF LAW* 131 (2011) (“Our standards of what is wrong and what is right have to be consistent with basic biological mechanisms.”).

¹⁶¹ BUSS, *supra* note 105, at 4.

¹⁶² *Id.*

¹⁶³ Buss & Schmitt, *supra* note 146, at 207 tbl.1 (summarizing mating challenges as identifying men who are able to invest, willing to invest, offer physical protection, willing to commit, have good parenting skills, and have good gene quality).

¹⁶⁴ Buss et al., *supra* note 116.

¹⁶⁵ *Id.* at 251. This disturbance over emotional infidelity plays out significantly in the Moriarty homicide, described above. See *supra* notes 48–55 and accompanying text.

¹⁶⁶ Buss et al., *supra* note 116, at 254–55; Edlund et al., *supra* note 116, at 462; Achim Schützwohl, *Which Infidelity Type Makes You More Jealous? Decision Strategies in a Forced-Choice Between Sexual and Emotional Infidelity*, *EVOLUTIONARY PSYCHOL.* 121 (2004), <http://www.epjournal.net/wp-content/uploads/ep02121128.pdf>. However, note that a methodological dispute has been advanced that affects this data. See

greater distress is predictable because emotional attachment serves as an indication of resource allocation.¹⁶⁷ A mate's development of an emotional attachment to another person serves as a signal that the mate will provide fewer resources to the primary individual.¹⁶⁸ Those women who developed jealous traits to pick up these cues and engage in activities that elicit greater mate investment would have successfully reproduced more than those who did not, and thus their genes and psychological traits would have spread throughout the population.¹⁶⁹ Consider the following anecdote about a woman's emotional response to her boyfriend's affair:

My boyfriend was cheating on me with this girl. She was a real bitch to everyone. My boyfriend was going to dump me for her. I hated her for taking my boyfriend, plus she treated him like crap. I thought about strangling her or chopping her head off.¹⁷⁰

She fantasized of homicide because she was distressed about the fact that her boyfriend might leave her for someone else—*not* that he was engaging in sexual relations when cheating.¹⁷¹

Feminine passion over emotional infidelity may be ignited by indicators that resources are being diverted; this is parallel to a man's distress over sexual infidelity.¹⁷² Both are threats against the individual's reproductive fitness. Ancestral mothers may have developed psychological mechanisms to key in on emotional infidelity in their mates as a way to protect against the disastrous loss of investment from those mates with whom they have decided to reproduce.¹⁷³ The loss of investment harms the woman's fitness by reducing

DeSteno et al., *supra* note 155, at 1103 (arguing that the perceived sex difference from studies indicating a sex difference is derived from a methodological fault in the research).

¹⁶⁷ Lorne Campbell & Bruce J. Ellis, *Commitment, Love, and Mate Retention*, in *THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY*, *supra* note 85, at 419, 434 (explaining that emotional infidelity is tied to resource allocation—resulting in an evolutionary challenge for the woman—because “[i]f a man falls in love with another woman [sic] and subsequently leaves the relationship to form another, his resources will be largely directed away from the abandoned woman”).

¹⁶⁸ Buss et al., *supra* note 116, at 251 (“[W]e hypothesize that cues to the development of a deep emotional attachment have been reliable leading indicators to women of potential reduction or loss of their mate's investment.”).

¹⁶⁹ Campbell & Ellis, *supra* note 167, at 434.

¹⁷⁰ BUSS, *THE MURDERER NEXT DOOR*, *supra* note 147, at 31.

¹⁷¹ *See id.*; Schützwohl, *supra* note 166, at 126.

¹⁷² BUSS, *supra* note 105, at 4–5; Schützwohl, *supra* note 166, at 121–22.

¹⁷³ *See* BUSS, *supra* note 105, at 4 (“Because emotional involvement is the most reliable signal of this disastrous loss, women key in on cues to a partner's feelings for other women. A husband's one-night sexual stand is agonizing, of course, but most women want to know: ‘Do you love her?’”).

available resources for the survival of her and her young.¹⁷⁴ It also decreases her chances of reproductive success by finding another mate because a man would be less willing to invest in a woman *and* her children if the children were not his.¹⁷⁵

At this point, one can see the inadequacy of manslaughter as applied to Moriarty's homicidal rage.¹⁷⁶ She decided to "mate" with Shehan and he impregnated her.¹⁷⁷ It was important to her that they be married to ensure his continued commitment to supporting her and their new child; but instead, he clearly indicated that he was leaving her.¹⁷⁸ From an evolutionary perspective, she discovered that she had been fooled and was now carrying a child whose father would not help support her, so she was pushed into a wild panic that resulted in homicide. This emotional response is just as predictable as a man's response to sexual infidelity.¹⁷⁹ In both situations, the individual's overall fitness (as illustrated by his or her biological makeup and different survival and reproductive interests) was severely threatened by the actions of his or her romantic partner. Killing might not be the most advantageous response in most situations,¹⁸⁰ but these kinds of threats move the ordinary person closer to a state of mind in which homicide is a possible solution.¹⁸¹

¹⁷⁴ Campbell & Ellis, *supra* note 167, at 434 (explaining that loss of paternal investment would be detrimental to the woman's ability to raise her offspring to reproductive age).

¹⁷⁵ *See id.*

¹⁷⁶ *See* JONES, *supra* note 12, at 184.

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See* BUSS, *supra* note 105, at 52 ("A woman's desire for emotional involvement . . . will be violated when a potential partner treats her as a one-night stand. A man's desire for a partner's sexual fidelity will be violated when his partner has sex with another man.").

¹⁸⁰ This might explain Susan Rozelle's assertion that most people who discover adultery do not kill their spouse. *See* Rozelle, *supra* note 7, at 220–26. However, this Comment disagrees with the conclusion that, therefore, all people should be assumed to be able to control passions because that is not in accordance with the evolutionary perspective.

¹⁸¹ It is important to remember that manslaughter doctrine does not assume that the ordinary person kills; rather, it is a concession that an ordinary person could be pushed into a state of mind in which he or she might kill. *See, e.g.,* Carter v. State, 505 A.2d 545, 548 (Md. Ct. Spec. App. 1986) ("For a provocation to be 'adequate,' it must be 'calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason.'" (quoting ROLLIN M. PERKINS, CRIMINAL LAW 56 (2d ed. 1969))); MODEL PENAL CODE § 210.3 cmt. 5(a), at 54 (Official Draft and Revised Comments 1980) (explaining that the mitigation is a "concession to human weakness" and that "one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence").

III. THE EVOLUTIONARY SOLUTION

This Part offers an evolutionary solution that replaces sexual infidelity as the basis for manslaughter mitigation with a standard of mitigation based on threats to reproductive fitness. The first section outlines the relevant philosophical theories explaining the use of manslaughter mitigation and their relation to the evolutionary solution. After developing an understanding of the mitigation's philosophical justifications, the following section weaves evolutionary theory into manslaughter doctrine and discusses how it will affect the landscape of mitigation.

A. *The Evolutionary Union of Partial Excuse and Partial Justification*

Scholars have debated the continued purpose of manslaughter mitigation under a number of different rationales: partial excuse,¹⁸² partial justification,¹⁸³ a combination thereof,¹⁸⁴ and “akrasia.”¹⁸⁵ While this Comment does not seek to join that conversation, it does support a combination of partial excuse and partial justification in cases of infidelity. A threat to reproductive fitness must come from a particular person, and the threat engages the emotional response that provokes the homicidal response. It is worth discussion here because it will play a large role in the scope of mitigation advocated by this Comment in the subsequent section.

¹⁸² Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 467 (1982); Timothy Macklem & John Gardner, *Provocation and Pluralism*, 64 MOD. L. REV. 815 (2001).

¹⁸³ See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 4, 73–75 (2003) (“A justified action is not *criminal*, whereas an excused defendant has committed a crime but is not *punishable*.”); see also Finbarr McAuley, *Anticipating the Past: The Defence of Provocation in Irish Law*, 50 MOD. L. REV. 133, 150 (1987).

¹⁸⁴ Berman & Farrell, *supra* note 31, at 1047–55.

¹⁸⁵ Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1683–84 (2005). Stephen Garvey took an entirely different approach to heat of passion manslaughter that jettisoned the distinction between partial excuse and partial justification as important. *Id.* at 1683. Rather, he argued that the law separates those who kill in defiance of the law and those who kill under the momentary belief that the act would be legal or from the weakness of will. *Id.* at 1683–84. He used the Greek term “akrasia” to make the distinction: defiance and akrasia are two different levels of culpability, the latter of which is less deserving of reprimand than the former. *Id.* at 1684. Essentially, the defendant becomes unable to obey the law because of emotional pressures and weakness of will. See Berman & Farrell, *supra* note 31, at 1060 (summarizing this culpability advocated by Garvey as “despite wanting to obey the law, he succumbs to temptation”). However, this approach has been strongly criticized as a gateway for mitigating all crimes in which a defendant was simply unable to resist temptation. *Id.* at 1061–62.

The most prominent explanation for manslaughter mitigation emphasizes that the homicide occurred while the defendant's reasoning capacity was diminished, and thus the defendant is less deserving of reprimand and partially excused.¹⁸⁶ The rationale concludes that, according to common experience, individuals in states of extreme rage or under the influence of extreme emotional disturbances are unable to make "appropriate choices."¹⁸⁷ The emotion itself is either understandable or justified according to law, and thus the homicide is partially excusable.¹⁸⁸

There are two branches of partial excuse theory: excused emotion and justified emotion. Under an excused emotion rationale, the defendant is thought to have been placed in a state of mind that was not voluntary, and thus the defendant cannot be blamed for his anger that diminished his reasoning capacity.¹⁸⁹ This can be contrasted with voluntary intoxication, when crimes committed during the state of diminished reasoning capacity are not as excusable because of the defendant's involvement in creating that diminishment.¹⁹⁰ From the evolutionary perspective, when the defendant is responding to a threat against reproductive fitness, the threat was likely not induced by the actions of the killer. She is reacting to decisions made by other free agents to commit adultery or to seduce and abandon, which means the threat comes from an outside source.¹⁹¹

Additionally under the partial excuse theory, some theorists argue for mitigation under a justified emotion rationale.¹⁹² The emotion that led to the impassioned homicide was itself justified in light of the surrounding

¹⁸⁶ See Dressler, *supra* note 182, at 464; Macklem & Gardner, *supra* note 182, at 819.

¹⁸⁷ Berman & Farrell, *supra* note 31, at 1047.

¹⁸⁸ *Id.* at 1047–55 (discussing how the partial excuse rationale has been thought of as either an excusable emotion or a justified emotion).

¹⁸⁹ See Dressler, *supra* note 182, at 463–64.

¹⁹⁰ See *id.* (“[P]rovocation is an excuse premised upon involuntariness based upon reduced choice-capabilities. If the doctrine is to be defensible, however, it must follow that the anger which undermines choice-capability is itself formed under circumstances in which the actor cannot be fairly blamed for his anger. Otherwise, we have a case of voluntary anger, no more morally deserving of mitigation than voluntary intoxication.”).

¹⁹¹ Indeed, there but for the grace of God, go I.

¹⁹² Berman and Farrell make this distinction between “excused emotion” and “justified emotion.” Berman & Farrell, *supra* note 31, at 1052 (“Some commentators who claim that provocation is a partial excuse explain the adequate provocation requirement by arguing that the defendant’s heat of passion is *justified* rather than excused. . . . Despite the element of justified emotion, advocates of this approach characterize their accounts as excuse theories.” (footnote omitted)).

circumstances.¹⁹³ Because the emotion is justified (i.e., a cognitively appropriate response), the acts derived from these emotions are less deserving of blame. And from the evolutionary perspective, this brings in the issue of predictability. When the emotion is expected given known psychological propensities, it can be said to be justified because it is a cognitively appropriate response.¹⁹⁴

It is important to note that the crime is not mitigated because the defendant lost self-control; the terms “loss of self-control” and “diminished reasoning capacity” are not synonymous. Indeed, some scholars have argued that because the defendant still maintains an extent of self-control during the altercation, she does not deserve mitigation for the mental disturbance.¹⁹⁵ The main point is that the defendant was not automatically pushed into committing homicide; rather, she was placed in a state of mind in which passion clouded her judgment and killing became an acceptable course of action.¹⁹⁶ And indeed, this is the case from the evolutionary perspective; homicide is rarely the best solution for a problem, but nonetheless it can be used to solve it.¹⁹⁷

The other major school of thought—partial justification—holds that a defendant who kills in the heat of passion should receive mitigation for the homicide because she was provoked in a manner that partially warranted a response against the provoker.¹⁹⁸ This school focuses on the circumstances surrounding how the defendant is provoked rather than the emotional state of mind the defendant experiences.¹⁹⁹ If a justified action is not a criminal action, then a partially justified action is less criminal than one not justified at all.²⁰⁰ It has been argued that the defense should only be implemented in circumstances

¹⁹³ Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 305 (1996) (indicating that this approach also compensates for the problem in ensuring that the provocation came from the appropriate source—the victim). Dan Kahan and Martha Nussbaum took a more cognition-sensitive approach and argued that a homicide is mitigation-worthy when the defendant makes a “cognitive appraisal[]” that is appropriate given the circumstances. *Id.* at 273, 306–07.

¹⁹⁴ *Cf. id.*

¹⁹⁵ See, e.g., Rozelle, *supra* note 7, at 199 (arguing that we should expect people to fully control their actions when faced with an unfaithful spouse).

¹⁹⁶ See *Carter v. State*, 505 A.2d 545, 548 (Md. Ct. Spec. App. 1986) (“For provocation to be ‘adequate,’ it must be ‘calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason.’” (quoting PERKINS, *supra* note 181, at 56)).

¹⁹⁷ See *supra* Part II.A.

¹⁹⁸ See Rozelle, *supra* note 7.

¹⁹⁹ *Id.*

²⁰⁰ Berman, *supra* note 183, at 4 (“A justified action is not *criminal*, whereas an excused defendant has committed a crime but is not *punishable*.”).

where the defendant was partially justified in responding in a homicidal manner regardless of the diminished reasoning capacity, which would effectively reduce the number of times in which mitigation is applied.²⁰¹ This theory emphasizes the circumstances of the killing and what pushed the defendant to act, rather than the defendant's diminished capacity to reason.²⁰² Of course, this theory has been criticized because it suggests killing a person may be justified and does not adequately explain the heat of passion or extreme emotional disturbance requirement of manslaughter.²⁰³

Evolutionary theory also finds relevance under this philosophy. A threat against an individual's reproductive fitness comes from another individual.²⁰⁴ Thus, in a sense, the victim committed a "natural crime" against the defendant's interests. To mitigate under this philosophy seems to partially validate an individual's homicide against another person who was not exactly innocent in her own right.

But, overall, the evolutionary solution operates as a union of both partial excuse and partial justification. Indeed, even outside of an evolutionary context, Andrew Ashworth argued that the entanglement of the two rationales is no accident and that it is a necessary combination for the functionality of the mitigation.²⁰⁵ His union of the two rationales has been expanded by two other proponents of the same combination.²⁰⁶

²⁰¹ Rozelle, *supra* note 7, at 200 (arguing that, by limiting the use of this doctrine to justified situations, the defense will be closer to its beginnings and original rationale).

²⁰² See, e.g., Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 414 (2005) ("The fact that the law asks not only how badly the actor was distressed but also *why* he was so badly distressed implies that the rationale for the defense lies in the *source* of provocation, not merely the actor's disturbed state of mind." (footnote omitted)).

²⁰³ Indeed, if the only issue to consider is whether the circumstances surrounding provocation of the homicide are justifiable, then the issue of the defendant's state of mind becomes irrelevant. Garvey, *supra* note 185, at 1691. Thus, the rationale cannot adequately explain each requirement for the defense to be satisfied. Berman & Farrell, *supra* note 31, at 1065.

²⁰⁴ Cf. Joshua D. Duntley, *supra* note 85, at 225 (explaining that humans evolved the propensity to inflict costs on others "as a strategy to outcompete rivals, leaving the winner in control of the reproductively relevant resources").

²⁰⁵ A. J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 317 (1976) ("Provocation mitigates moral culpability to the extent that a person acted in a less-than-fully-controlled manner in circumstances in which there was reasonable justification for him to feel aggrieved at the conduct of another.").

²⁰⁶ Berman & Farrell, *supra* note 31, at 1058–59 (explaining that this needs to be expanded because "[d]espite his endorsement of a dual rationale, . . . Ashworth does not give a detailed theoretical framework for the defense as both partial excuse and partial justification").

These theorists argue that partial excuse and partial justification are both necessary—but not sufficient—to explain the mitigation.²⁰⁷ Neither rationale is able to serve as the foundation of the mitigation on its own because neither can account for the dual requirements of the doctrine—passion *and* legal provocation.²⁰⁸ Rather, the defendant must be partially excused because of her distressed state of mind and partially justified in reacting to the circumstances.²⁰⁹ They also argue that the two rationales are not mutually exclusive, despite this belief in mutual exclusivity being the main reason that many criminal law scholars are reluctant to consider the two approaches as compatible.²¹⁰

This combination theory seems to be a natural fit to bring in evolutionary analysis as the best background method for fair adjudication. In any case involving the nineteenth century four,²¹¹ some kind of threat is made against the defendant's interest.²¹² In the case of sexual infidelity, a threat is made against the defendant's reproductive fitness from actions independent of the defendant: e.g., the sexual activity of the spouse and a paramour or the seducer who abandons. The defendant is partially justified because of the threat's "natural criminality" against the defendant, and the defendant is partially excused because of the evolutionarily installed mechanisms in his or her brain to respond in an emotionally volatile state of mind.

B. The Evolutionary Solution Explained

Heat of passion manslaughter mitigates for the frailty of human nature; this is a clear endeavor by the law to look into the natural world for guidance. The discipline of evolutionary psychology seeks to explain what human nature is by examining the psychological adaptations that the human species has evolved over the course of thousands of years.²¹³ Who else could the

²⁰⁷ *Id.* at 1065–66.

²⁰⁸ *Id.*

²⁰⁹ *Id.* (“Hence the provocation defense’s dual requirements of heat of passion and adequate provocation: they ensure the defense is available only to those defendants whose killing was both partially excused—because it occurred in heat of passion—and partially justified—because it was in response to adequate provocation.”).

²¹⁰ *Id.* at 1079 (“A great deal of mistaken thinking about provocation has flowed from insufficient attention being paid to the difference between the claim that the *complete* defenses are mutually exclusive and the claim that the *partial* defenses are mutually exclusive.”).

²¹¹ See Note, *supra* note 6, at 1024.

²¹² *Id.*

²¹³ PINKER, *supra* note 104, at 107; John Tooby & Leda Cosmides, *Conceptual Foundations of Evolutionary Psychology*, in THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY, *supra* note 85, at 5, 5.

(universally) reasonable person be but a person responding in predictable ways by engaging psychological programming that is shared by humanity?

If the law mitigates for homicidal rage that manifests from one evolutionary adaption that addresses a severe threat to reproductive fitness for one sex, then it should mitigate for all adaptations that are a member of that set of threats because the law professes to apply equally to all persons.²¹⁴ The male's strong jealousy response to sexual infidelity is one of several strong emotional responses evolved by humans—of both sexes—over the course of thousands of years to avoid severe damage to fitness.²¹⁵ To apply fairly to all individuals, the law should mitigate murder to manslaughter whenever a defendant is provoked by a severe threat to his or her reproductive fitness. It is very predictable which fact patterns would fit within the evolutionary standard; thus, the evolutionary solution remedies the problem of normativity in the MPC and alternative approaches²¹⁶ because the court can determine, in advance, which situations confronted the defendant with a severe threat to reproductive fitness. It has already done so in the case of sexual infidelity, and it should expand its mitigation to the entirety of the set of threats against reproductive fitness. When a woman is seduced by a lover and then abandoned (e.g., Moriarty), her fitness is greatly damaged by the seducer because he took advantage of her reproductive capability without providing the support she is wired to desire. That deserves mitigation—but not exoneration—which this standard would provide.

The Moriarty scenario is certainly not limited to the 1800s. In a recent incident, a woman killed a romantic rival while confronting her ex-boyfriend for not helping raise their baby.²¹⁷ The Chicago Tribune reported that the suspect confronted her ex-boyfriend as he left a convenience store and sprayed him with mace.²¹⁸ Because the ex-boyfriend could no longer drive, his current girlfriend got out of the car to move to the driver's seat.²¹⁹ The defendant began fighting with her as well and stabbed her several times, killing her.²²⁰ The influx of emotion in this tragic scenario is not surprising: the woman, abandoned with her offspring by the man, was amidst her deserting lover and

²¹⁴ Cf. 16B C.J.S. *Constitutional Law* § 1139 (2005).

²¹⁵ See *supra* Part II.B.

²¹⁶ See *supra* Part I.B–C.

²¹⁷ Christy Gutowski, *Woman Charged in Stabbing Death*, CHI. TRIB., Sept. 12, 2011, at C5.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

his new girlfriend. Under an evolutionary scheme, the question of manslaughter mitigation would certainly go to the jury in this case.

By looking at damage to one's fitness under the partial excuse perspective, we can determine how cognitively distressing the specific provocation was to the defendant and whether it actually pushed the defendant into a predictably volatile state of mind. And under the partial justification aspect of the mitigation, the court can determine which individuals will fall within the range of potential victims that would allow mitigation because of their involvement in the provocation (e.g., adulterers, paramours, and seducers). Beyond these categories, homicides against other victims will not be mitigated (e.g., bystanders). For example, exiting a marriage that did not produce children would not be as distressing to the reasonable man as walking in on his spouse engaging in sexual infidelity. Looking at the number of evolutionary challenges faced by the defendant at the time of the homicide can create a normative and systematic test with a clear scope. It permits the court to determine whether the individual killed under the heat of passion and whether the deceased falls within the range of "acceptable" victims.²²¹

One issue that arises with evolutionary analysis is the apparent sexism permeating this formula. Evolutionary theory embraces sex differences in a way that the law usually wants to avoid.²²² The immediately obvious problem is that men will tend to have homicides mitigated for one set of circumstances (e.g., sexual infidelity) while women will have homicides they commit mitigated for other circumstances (e.g., seduction and abandonment or stalking). The sociological level of analysis that invokes a difference among the sexes in the actual application is inappropriate and is not the standard advocated by this Comment. The different sexes will have their homicides mitigated for the same reason under the same standard—the defendant experienced a severe threat against his or her reproductive fitness. The crimes are mitigated when they result from the same *set* of threats; because the formula is the same and simply invoked by different trends in maleness and femaleness, it should not be regarded as sexist. Both sexes are provided the same opportunity for mitigation that the other has. A woman who kills as a response to sexual infidelity should still receive mitigation, even though that may not be a quintessentially female response, and vice versa for men.

²²¹ This Comment readily admits that victimization is never actually acceptable.

²²² Cf. 16B C.J.S. *Constitutional Law* § 1139 (2005) (“[I]n the absence of some valid reason to the contrary, men and women similarly situated must be treated equally under the law.”).

This solution confronts the issue of suddenness. At common law, the homicide must have been committed suddenly “before a reasonable time for the passion to cool;”²²³ the Model Penal Code does not have such a requirement.²²⁴ The evolutionary solution does not seem to have an obvious answer to this question. However, it seems that a standard incorporating a suddenness requirement would be preferable. The longer the time between provocation and killing, the more difficult it will be to determine whether the defendant acted while in a volatile state of mind or whether the defendant deliberately acted retributively against the provoker. While the evolutionary solution advocates that the crime should be mitigated because it falls within the scope of threats against reproductive fitness, it still maintains that the defendant must have acted while in a volatile state of mind. The reaction just has to be predictable under evolutionary analysis.

Along the same vein is the issue of homosexual relationships. Threats against reproductive fitness seem inapplicable because homosexual activity cannot result in reproduction. However, this is rather easily addressed. Homosexual individuals still possess the same neurological machinery as their heterosexual counterparts, and thus the law should treat homosexual relationships the same way.²²⁵ This issue opens up the distinction between proximate cause and ultimate cause. The proximate cause of an organism’s adaptation is the reason that organism behaves in a certain way (e.g., the sex drive causing sexual behavior); the ultimate cause of an adaptation is the evolutionary reason the organism adapted at all (e.g., evolving the sex drive to encourage activity that leads to successful reproduction). The ultimate cause is

²²³ *Williams v. State*, 675 So. 2d 537, 541 (Ala. Crim. App. 1996) (quoting ALA. CODE § 13A-6-3(a)(2) (1975)). Related to imminence, a major roadblock experienced by defendants committing homicide related to the battered woman’s syndrome is that the killing did not occur while the defendant was under an imminent threat. The evolutionary solution does not speak to the issue of homicides related to battered woman’s syndrome. This analytical approach addresses psychological mechanisms present in human nature for universal situations that can befall any person at any time because of the machinery making up the psyche. The battered woman’s syndrome is derived from a special kind of relationship that results in the dynamics between two specific people and the particular interaction between them and their social situation. See John W. Roberts, Student Article, *Between the Heat of Passion and Cold Blood: Battered Woman’s Syndrome as an Excuse for Self-Defense in Non-Confrontational Homicides*, 27 LAW & PSYCHOL. REV. 135, 138–42 (2003) (explaining the nature of battered woman’s syndrome).

²²⁴ See MODEL PENAL CODE § 210.3(1)(b) (Official Draft and Revised Comments 1980).

²²⁵ DONALD SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* 292 (1979). But see Christine R. Harris, *Sexual and Romantic Jealousy in Heterosexual and Homosexual Adults*, 13 PSYCHOL. SCI. 7, 7 (2002) (comparing heterosexual and homosexual jealousy while also critiquing previous methodological approaches to discover gender differences in jealousy).

not the thought present in the human's mind²²⁶ (e.g., Moriarty did not first think about her reproductive fitness and *then* decide to become impassioned). Rather, it is the proximate causation, such as a man reacting passionately because his spouse committed adultery. He does not reason into being angry due to the risk of cuckoldry; he is reacting because the mind is designed to react that way in those circumstances.

Cultural defenses may be inapplicable under this standard, although this Comment does not take a position. The notion behind a cultural basis for provocation manslaughter is that the defendant should have his or her homicide charge mitigated if it was committed in the course of a cultural norm.²²⁷ Take *People v. Kimura* as an example.²²⁸ When the culturally Japanese defendant learned of her husband's infidelity, she took her children, clutched in her arms, and walked into the sea to drown both of them and herself in accordance with Japanese custom.²²⁹ Her children died, but she was rescued; she was charged with murder.²³⁰ This homicide would not be mitigated under an evolutionary scheme, but perhaps it would be if legislatures enacted cultural protections. Evolutionary analysis assumes a transcendence of cultures. No matter what culture a human might be a part of, that person still maintains all of the same psychological mechanisms that are present in humans everywhere. Cross-cultural studies demonstrate the universality of evolutionary adaptations.²³¹ Under an evolutionary standard, culture would not be considered a factor for mitigation.

The most difficult aspect for the evolutionary perspective is that men are generally more violent than women,²³² so there could likely remain an unequal frequency in which the mitigation is sought. The question remains whether this status is desirable, which is not argued here. This Comment posits a fair and responsive solution to manslaughter mitigation that can apply appropriately to both sexes and seeks to remove the gender bias from the law by taking the full range of impassioning circumstances into account.

²²⁶ B. Thierry, *Integrating Proximate and Ultimate Causation: Just One More Go!*, 89 CURRENT SCI. 1180, 1180 (2005).

²²⁷ Sing, *supra* note 18, at 1844–46.

²²⁸ Paul Feldman, *Mother Pleads No Contest in Drowning of 2 Children*, L.A. TIMES, Oct. 19, 1985, Metro pt. 2, at 1.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Buss & Schmitt, *supra* note 146, at 216–18.

²³² See Wilson et al., *supra* note 118, at 431.

CONCLUSION

Manslaughter doctrine is neither precise nor concise enough to mitigate the passionate homicides that it seems to have been designed to address. The common law is too rigid and reflects only a masculine jealousy response that evolved to address men's evolutionary pressures without giving any credence to the evolutionary challenges of women. The MPC has allowed for an unwieldy expansion of manslaughter mitigation that would apply to an enormous range of circumstances with no real systematic approach or normativity.²³³ It also permits mitigation for a wide range of provoking circumstances that would never even be considered by the common law—perhaps for good reason.

Looking at crimes of passion through the lens of evolutionary psychology, one can better determine whether a passionate homicide was the result of an ordinary mechanism installed in the psyche or an aberration based on the individual's own personality, preferences, or pathologies.²³⁴ Evolutionary theory predicts that the sudden, visual discovery of sexual infidelity would provoke a homicidal rage in an ordinary person while it would not likely predict that an ordinary person who was promised sex one afternoon and then denied that intercourse would lash out in rage and kill.²³⁵ Similarly, the standard would predict that a woman who is seduced and abandoned would experience extreme emotional distress that comes from similar evolutionary concerns that a man does in *in flagrante delicto*. Utilizing evolutionary theory—the very discipline that explores the principles of human nature—to recalibrate manslaughter doctrine will provide the law with a way to adequately tailor manslaughter to demonstrate the law's respect for the frailty of human nature. Indeed, this is because evolutionary theory seeks to

²³³ Nourse, *supra* note 11.

²³⁴ While the law does recognize individual frailties, that is not the purview of manslaughter mitigation. *See supra* Part I.C. This Comment argues for a manslaughter standard applicable to all persons for their common humanity.

²³⁵ *See* *People v. Fardan*, 592 N.Y.S.2d 162 (N.Y. App. Div. 1992), *aff'd*, 628 N.E.2d 41 (N.Y. 1993) (allowing the question of manslaughter to go to the jury). While it would cause some distress to have one's hope dashed, violent aggression would carry too much cost for the reasonable person to be thrown into a homicidal rage.

explain “the laws upon which human nature is constituted.”²³⁶ If the law is reaching into the world for guidance, evolutionary theory can speak to how to fairly mitigate.

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²³⁶ *Maher v. People*, 10 Mich. 212, 219 (1862).

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