Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights

Aya Gruber
University of Colorado Law School

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact erik.beck@colorado.edu.
ARTICLES

VICTIM WRONGS: THE CASE FOR A GENERAL CRIMINAL DEFENSE BASED ON WRONGFUL VICTIM BEHAVIOR IN AN ERA OF VICTIMS' RIGHTS

Aya Gruber*

I. INTRODUCTION

The suggestion of a criminal defense based on victim liability, or the victim's contribution to the crime, elicits shocked, horrified, even vitriolic responses. Blaming the victim is nearly universally considered wrong and inconsistent with criminal law theory and goals. The concept of victim blaming brings to mind horror stories of defense attorneys brutally cross-examining rape victims about their dress or past sexual habits, police officers ignoring battered women, or society blaming the Central Park jogger for her imprudent dusk exercising. Victim blaming conjures up images of political advertisement slogans criticizing the official who allows criminals to sue victims for injuries the criminals sustain during the commission of the crime.1

In addition to general objections to victim blaming,2 many are particularly

---

1. In the 2002 campaign for attorney general of Florida between Charlie Crist and Buddy Dyer, the Crist campaign ran an outraged television advertisement claiming that Dyer wanted to allow criminals to sue innocent victims. Joe Follick, Muddy Ads Run in Legal Job Race: Crist, Dyer Haven't Played Nice in Battle for Office, TAMPA TRIB., Nov. 1, 2002, at 4.

2. An explanation of the subject of this paper to one of my colleagues elicited the remark, “Why do I have such a violent reaction to any rule that focuses on the behavior of victims?” Others have made statements to the effect of, “That just seems wrong.” George Fletcher argues that victim blaming is a central problem of the modern criminal trial and supports an approach to criminal punishment that embodies “solidarity with victims.” GEORGE FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIAL 7 (1996). Fletcher advocates:

[A]n alternative way ... in the centuries-old debate between those who advocate deterrence of future offenders and those who yearn for retribution by making the punishment fit past crimes. Each of these traditional views has something to offer, but none adequately
disturbed by the negative gender implications. Feminists spearheaded reform of domestic violence and rape laws to recognize the illegitimacy of focusing on victim precipitation. Reformists observed:

One of the most repugnant characteristics of contemporary rape cases where the rapist is a person known to the victim . . . is an unspoken standard, enforced by legal arguments and believed by juries, of something like "contributory negligence" as negating the rapist's culpability. 3

I, myself, have argued elsewhere that the foremost error in the rape trial is the jury's illegal importation of tort defenses like contributory negligence, comparative negligence and assumption of risk, defenses based on victim behavior. I objected principally to a criminal system that allowed juries to base their acquittals not on whether consent existed, but rather on whether the complainant "asked for it." 4

The examination of victim liability, however, is an undeniable part of criminal law. It exists both in the doctrinal body of law, 5 though perhaps not

accounts for punishment in a time when deterrence seems not to work and the promise of abstract retribution rings hollow. The imperative of punishing the guilty springs not from our personal duties to high ideals but from our relationships with the humbled victims in our midst.

Id. This view, that criminal law should focus on duties to victims, is a benchmark of the modern victims' rights trend in criminal penology. To illustrate his point, Fletcher discusses several blaming-the-victim "horror stories," with a populist twist. The victims are themselves members of disempowered minority groups—homosexuals, African-Americans, Jewish people, and women. However compelling their stories of victimization, the insertion of the populist twist is indeed ironic, since a victims' rights penology will lead to more convictions and incarcerations, disadvantaging the most marginalized segment of society: poor minorities. In addition, the narrative of victimhood itself often embodies the very racist, paternalistic, mono-religious sentiments that Fletcher implicitly rejects. See infra notes 69-77 and accompanying text for a discussion of the narrative of victimhood.


4. Aya Gruber, Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape, 4 WM. & MARY J. WOMEN & L. 203, 211 (1997): This paper . . . identifies the foremost legal error in the rape trial as the "widespread bootlegging of the tort concepts of contributory negligence and assumption of the risk into the working law of rape." The importation of tort-type defenses into the criminal rape trial is a legal flaw within the trial process that calls for a legal solution. (quoting Terri Villa-McDowell, Privacy and the Rape Victim: The Inconsistent Treatment of Privacy Interests in Two Recent Supreme Court Cases, 2 S. CAL. REV. L. & WOMEN'S STUD. 293, 327 (1992)).

5. See infra Part II for a discussion of some existing victim liability doctrines.
named as such, and in actual practice.\textsuperscript{6} Justification defenses are the most obvious examples of formal victim blaming doctrines in criminal law. The doctrines of self-defense, defense of others, and defense of property base justification of an intentional killing exclusively on the victim's behavior.\textsuperscript{7} Other less obvious examples of victim liability in criminal law are the doctrines of provocation and entrapment and the use of battered woman syndrome evidence in self-defense cases.\textsuperscript{8} The introduction of battered woman syndrome evidence, for example, invites the jury to acquit the battered woman who kills precisely because the decedent was a bad actor. Despite the deep-rooted nature of victim blaming in criminal law, courts and theorists tend to avoid characterizing even the above defenses as examining victim liability. Rather, they frame the defenses as defendant \textit{mens rea} issues,\textsuperscript{9} adhering to the general principle that criminal law does not apportion blame among parties to a criminal transaction.

\textsuperscript{6} This happens informally as decisions not to prosecute, offers of plea agreements, and jury nullification, or more formally at sentencing. \textit{See, e.g.}, U.S. \textit{SENTENCING GUIDELINES MANUAL} § 5K2.21 (2002) ("The court may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as a part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement for any other reason; and (2) that did not enter into the determination of the applicable guideline range."). \textit{See also infra} Part IV.D discussing prosecutorial, juror, and judicial discretion.

\textsuperscript{7} Alternatively, the defenses are based on the defendant’s perception of the victim’s behavior. Part IV.E will discuss the issue of reasonable mistake of fact as it relates to victim liability defenses.

\textsuperscript{8} Provocation is often framed as a defendant’s \textit{mens rea} issue. Reduction of deliberate killing to manslaughter depends not so much on the victim’s bad acts as on the defendant’s mental state ("heat of passion") that negates specific intent to kill. \textit{See, e.g.}, People v. Maher, 10 Mich. 212, 217 (1862) (stating that killing is a manslaughter if "the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by adequate or reasonable provocation"). Self-defense cases have used battered women’s syndrome to explain why a battered spouse feared imminent bodily injury even though injury did not readily appear to be imminent. Alafair S. Burke, \textit{Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman}, 81 N.C. L. REV. 211, 242-43 (2002). This evidence may also explain why a battered woman might reasonably fear imminent bodily injury from her husband even when he is not currently attacking her, for example, when he is asleep. \textit{Id.} Entrapment becomes a victim liability defense in cases where, for example, agents pretend to be victims (fraud or sex crimes). Although the agents are not actually victims, as far as the defendant knows—they are. Yet, unlike actual victims, government agents’ precipitate behavior is grounds for a possible entrapment defense.

I deliberately refrain from characterizing consent defenses (like in rape law) as victim liability defenses because such defenses are less about the victim creating liability than about the role of free will (contract) in criminal sanctions. The defense of consent, as in rape law, is not about the complainant’s saying “yes” justifying a rape; rather, it is the idea that the existence of consent (contract) makes the ensuing sex not criminal.

\textsuperscript{9} For example, the commentary to the Model Penal Code states:

At most . . . provocation affects the quality of the actor’s state of mind as an indicator of moral blameworthiness. Provocation is thus properly regarded as a recognition by the law that inquiry into the reasons for the actor’s formulation of an intent to kill will sometimes reveal factors that should have significance in grading . . . a recognition of the fact 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.

Very little existing recent literature proposes victim liability rules or examines the role of victim liability in criminal law, perhaps due to the negative connotations of victim liability. In addition, the few articles that propose victim contributory liability in criminal law justify the proposal not on philosophical grounds, but rather on the basis of Coasian economic theory.

A critical examination of criminal law reforms over the past several years, however, reveals a general trend toward an increasing role of the victim in

10. This article contrasts the idea of a "general" victim liability defense with the existing specific victim liability defenses, which provide defenses to certain crimes when the victim has engaged in specific wrongful behavior. For example, self-defense provides a defense when the victim has engaged in imminently threatening behavior. State v. Norman, 378 S.E.2d 8, 12 (N.C. 1989). For a discussion of the imminence requirement in self-defense, see infra Part IV.E.

11. There is an older article that examines extensively victim precipitation in criminal law and advocates, to some extent, a non-specific victim liability defense. See James J. Gobert, Victim Precipitation, 77 COLUM. L. REV. 511 passim (1977).

12. This Article widely uses the term "victim liability" and, to a lesser extent, the terms "victim behavior," "victim contribution," and "victim precipitation." These terms are meant to denote broadly the concept of examining the victim's role in a crime, under certain conditions, as a basis to lessen the defendant's liability. When I talk about "victim liability" in criminal law, I mean that the victim may be assessed fault in a criminal transaction, and that this assessment can ultimately affect the culpability calculus (by reducing or eliminating the defendant's liability). The term "liability" is meant to indicate that the examination of the victim's role in the criminal offense occurs at the liability phase of the trial, as opposed to the sentencing phase.

13. The economic argument is that placing liability on the victim creates optimal incentives for the victim to exercise reasonable care in crime prevention. Consequently, society benefits because victims internalize the costs of protecting themselves from crime. See Omri Ben-Shahar & Alon Harel, Blaming the Victim: Optimal Incentives for Private Precautions Against Crime, 11 J.L. ECON. & ORG. 434, 452 (1995) (noting economic benefits of imposing contributory fault on victims); Alon Harel, Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault, 82 CAL. L. REV. 1181, 1193-97 (1994) (explaining that "efficiency requires the distribution of the costs of precautions between the state and potential victims . . . to minimize the total cost of the crime"). This author's search has uncovered no other law review articles primarily concerned with proposing a defense of victim liability in criminal law.

14. Complainant or alleged victim is a more accurate word, as the legal issues this paper addresses are for the most part at the pre-trial or trial phase prior to establishment of the guilt of the defendant (or sometimes the existence of a crime). Accordingly, there is, as of yet, no legal "victim." However, this article uses the word "victim" to denote the person involved in the criminal prosecution who is claiming to have suffered harm (or had a family member suffer harm from) the defendant. Victims' rights legislation generally does not distinguish between alleged victims and victims as proven after a criminal disposition. See, e.g., ARIZ. CONST. art. II, § 2.1 (Victims' Bill of Rights):

(A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:
   1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
   2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
   3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
   4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
   5. To refuse an interview, deposition, or other discovery request by the defendant, the
criminal prosecutions. With the rise of the victims' rights movement, the crime victim has gained near party status much like a tort victim, propelling the traditionally public criminal law toward privatization. The victim has emerged in modern criminal law as a major presence in all stages of a criminal prosecution, as well as having risen to prominence in legal theory and debate. The trend toward focusing on the victim's status, behavior, and desires, however, does not include a scrutiny of the victim's contribution to the crime. In fact, as mentioned before, the ideology of victim-centered prosecution is particularly unfriendly to the concept of victim liability.

The problem with the privatization trend is that it assumes the victim, who

---

6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition . . . .

Although the "rights" listed above are all conferred at the pre-trial or trial stage, the Arizona Constitution's treatment of the victim assumes occurrence of a criminal offense and proper identification of the victim. Even though the provisions empowering the victim plainly have effect prior to a finding of guilt, the Constitution nonetheless defines "victim" as "a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative . . . ." Id. § 2.1(C). Most U.S. states have passed similar Victims' Bills of Rights. E.g., OKLA. CONST. art. 2, § 34; S.C. CONST. art. I, § 24; TENN. CONST. art. 1, § 35; UTAH CONST. art. I, § 28 (1)(a).

15. Throughout the article, there are broad generalizations about the victims' rights movement. It is true, however, that the movement has a diversity of voices. See Vik Kanwar, Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 249 (2001-02) (noting "diversity in the movement"). This paper refers broadly to apparent trends in the movement in law and popular culture.

16. See Markus Dirk Dubber, The Victim in American Penal Law: A Systematic Overview, 3 BUFF. CRIM. L. REV. 3, 3 (1999) ("The victim plays a role in every aspect of American penal law, from the general and special part of substantive criminal law to the imposition of penal norms in the criminal process and, eventually, to the actual enforcement of norms upon suspects and convicts.").

17. See Elizabeth E. Joh, Narrating Pain: The Problem With Victim Impact Statements, 10 S. CAL. INTERD. L.J. 17, 17 (2000) ("The victims' rights movement has gained the status of a mini-discipline, complete with its own idiom of 'victimology."") (citing Martha Minow, Surviving Victim Talk, UCLA L. REV. 1411, 1416 (1993)); Cornelius Prittwitz, The Resurrection of the Victim in Penal Theory, 3 BUFF. CRIM. L. REV. 109, 111 (1999) ("It is obvious that crime victims have assumed a prominent place in the study of criminal law. We talk about victims in criminology and criminal justice policy; we talk about them in criminal procedure and in substantive criminal law.").

18. The term "privatization" in this article is meant specifically to describe the investment of prosecutorial powers, traditionally placed entirely in the hands of the government, in the private victim. It does not use privatization in a more expansive sense to mean "delegating norm-changing power to non-state forces." Robert Weisberg, Norms and Criminal Law, and the Norms of Criminal Law Scholarship, 93 J. CRIM. L. & CRIMINOLOGY 467, 517 (2003). Dan Kahan argues that the changing times dictate a broad move towards privatization of criminal law enforcement:

"We are accustomed to seeing criminal law enforcement as an exclusive state prerogative. When we feel like offering romantic apologies for it, we describe criminal law as an expression of community morality, something the state alone has the authority to voice. When we feel like broadcasting our liberal anxieties, we describe it as a species of "legitimate force," a good the state monopolizes and must therefore exercise with caution. But it's time to get over this way of thinking about the criminal law. We live in the age of deregulation. Just as air travel and telecommunications have been freed from inefficient"
now has what amounts to prosecutorial powers under the law, is an incontrovertibly truthful, moral, and irreproachable entity.\textsuperscript{19} Victimhood narratives, internalized in the victims’ rights movement, create the image of a fictional “blameless” victim. Moreover, victims’ rights reforms not only rely on the pre-supposed perfection of the victim, but assume \textit{a priori} that the victim’s wishes will be adverse to the defendant’s.\textsuperscript{20} The result is that most victims’ rights reforms increase the likelihood and severity of criminal punishment. The law, then, fails to account for the inevitable existence of victims who are themselves wrongful actors. Put another way, the current trend in the law cannot grasp situations in which inserting the victim into the criminal case should result in less rather than more severe punishment.

Consequently, the problem with the privatization trend in the criminal law is that it is based on a fiction. Its premises are faulty. The solution to this problem could be a general reversal of the victims’ rights trend. Certainly, many scholars have criticized the victims’ rights movement on a plethora of legal grounds.\textsuperscript{21} The broad topic of the propriety of the victims’ rights movement in general, however, is beyond the immediate scope of this Article. In addition, given the incredible political force of the movement, a trend toward decreased victims’ rights is unlikely to occur in the immediate future.\textsuperscript{22} Thus, rather than forms of centralized control, so punishment is due for a liberating dose of privatization. Indeed, privatization, I will argue, is essential to the future effectiveness of criminal law in our most crime-ridden communities, where it’s clear that the state has neither an authoritative moral voice nor a monopoly on force, legitimate or otherwise.


19. Lynne Henderson discusses the fiction of the blameless victim in popular ideology: “True” victims must remain always innocent and righteously angry at the same time. The rhetoric and images of victims’ rights proponents ignore the effects of violence on the victims themselves, and those effects include victims becoming perpetrators as a result of their experiences.

\textit{Lynne Henderson, Co-opting Compassion: The Federal Victims’ Rights Amendment}, 10 ST. THOMAS L. REV. 579, 587 (1998). Martha Minow further argues that the popular construct of the victim reduces all that is complex and individual about the human being to a single trait—victimhood:

\textit{Preoccupation with victimization works the same way, even when victim status is claimed by an individual in an effort to obtain sympathy or recompense. Here too, a limited slice of the individual becomes the focal point. Any richer sense of the person undermines the claim of victimhood, because victimhood depends on a reductive view of identity. Moreover, the language of victimization invites people to treat victimhood as the primary source of identity.}


20. \textit{See} Henderson, \textit{supra} note 19, at 587 (commenting that victimhood narratives portray victims as “righteously angry”). \textit{See also infra} notes 71-77 and accompanying text for a discussion of portrayals of victims as “innocent” and defendants as incapable of being victims.

21. \textit{See, e.g.,} James M. Dolliver, \textit{Victims’ Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come}, 34 WAYNE L. REV. 87, 90 (1987) (“By constitutionally emphasizing the conflict between the victim and the accused and placing the victim in the role of a quasi-prosecutor or co-counsel, the victims’ rights amendment represents a dangerous return to the private blood feud mentality.”).

22. \textit{See} Joh, \textit{supra} note 17, at 28 (“The victims’ rights movement, with its common idiom and
formulating a general argument against the victims' rights movement, this Article proposes an alternate solution to the privatization problem. It posits that the criminal law should incorporate a more complete and realistic view of the victim. The criminal law should account for the victim, not only as a wronged actor, but also as a wrongful actor where appropriate. The Article will show how the victims' rights trend logically dictates an increased focus on victim liability.

There is no general or non-specific victim liability defense in criminal law. In other words, there is no defense that generally exculpates a defendant, in a variety of factual situations, for crimes precipitated by wrongful conduct on the part of the victim. Rather, the existing victim liability defenses are offense-specific and victim conduct-specific. They serve to exculpate defendants only in extremely particular circumstances. The consequence is that the current victim liability law regime treats similarly situated defendants very differently.

Thus, the criminal law's failure to include a general or non-specific defense of victim liability has resulted in doctrinally disjointed and schizophrenic body of law:

[W]hile victim and third-party precipitation have a long history in criminal law, the non-recognition of them as valid formal considerations has resulted in their uneven application. Criminal law is riddled with analogous victim and third-party precipitation situations in which similar offenders are treated very differently.

Criminal law should not carve out very small classes of victims (i.e., imminent killers, harmers, or threateners of property) whose actions can formally justify otherwise criminal acts on the part of defendants. Many of the same considerations that underlie the current specific victim liability doctrines in criminal law could justify victim liability for other classes of victims engaged in wrongdoing. Other wrongful behavior on the part of victims (outside of those specifically recognized as bases for mitigation, justification, and excuse) could be useful meters with which to judge the moral responsibility of the defendant.

Despite the pervasiveness of specific victim liability defenses, there is a

values, constitutes a vital and powerful political community.

23. Martha Minow critiques the one-sided identity of victims:

[E]veryone I know actually negotiates [different] identities—navigating between assigned images and inner feelings, new and old contexts, experiences, and ideals. Yet this complexity is denied by the cramped view of identity. This complexity is denied by the notion of victimization that confines those who invoke it and seals the confinement with the promise of absolution and support. Minow, supra note 19, at 1434 (footnotes omitted).

24. See generally infra Part IV.A; MODEL PENAL CODE § 210.3 (commentaries).

25. Gobert, supra note 11, at 540.

26. George Fletcher contrasts "victim blaming" with "legitimate" defenses focusing on the culpability of the defendant. See generally Fletcher, supra note 2. However, he does not account for the possibility that the law may legitimately define a defendant's moral culpability with reference to the wrongful behavior of the victim, just as with the consenting behavior of the victim (which Fletcher would sanction as justifying what might be otherwise criminal behavior). In other words, the defendant who commits an act in response to a reprehensible action on the part of the victim may simply be less "immoral" than a defendant who commits the same act against a wholly innocent person.
general philosophical aversion in criminal law to apportionment of blame, unlike in tort law. Criminal law, for the most part, takes an injurious event and presumptively dictates that one party is blameworthy and the other is not, rather than looking at both parties’ contribution to the injury. Thus, tort law seems to account for the complexity of human transactions in a way unlike criminal law.\(^{27}\)

Moreover, because the laws governing victim liability have developed in such a disjointed and *ad hoc* manner, they are problematic in their current manifestations. The current victim liability doctrines are often unfair as applied. As constructed, they also are overinclusive in that they provide a defense to actors unworthy of exculpation.\(^{28}\) They are underinclusive in that they fail to provide a defense to actors worthy of exculpation.\(^{29}\)

As an alternative to the collection of specific victim liability defenses, this Article proposes a “non-specific” victim liability defense. “Non-specific” denotes a defense that will exculpate any criminal defendant, as opposed to just a murder or assault defendant,\(^{30}\) who responds to wrongful victim behavior under certain conditions. Non-specific also captures the idea that “wrongful” victim behavior can include more types of behavior than the current specific law takes into account.\(^{31}\) Briefly, the elements of the non-specific victim liability defense are as follows:

1. The victim of the crime engaged in sufficiently wrongful conduct;
2. The victim’s conduct caused the defendant to commit the charged offense;
3. The defendant was not predisposed to commit the charged offense; and
4. The defendant’s response balanced against the victim’s wrongful conduct dictates that the defendant should be exculpated or his punishment mitigated.

This Article is part of an ongoing project to develop the non-specific victim liability defense.

---

\(^{27}\) See Gobert *supra* note 11, at 513 (“A crime does not occur in a vacuum; numerous antecedent forces contribute to bring it about.”).

\(^{28}\) Feminists have lodged such a critique against the provocation defense. They argue that the provocation defense has been successfully utilized by abusive husbands who kill their wives for attempting to leave the relationship. Consequently, provocation is overinclusive because it offers mitigation to those defendants who do not deserve mitigation under the law. See generally Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L. J.* 1331 (1997) (arguing that reform of murder law to include a “heat of passion” defense “leads to a murder law that is both illiberal and often perverse”). See also *infra* Part IV.E for a discussion of provocation.

\(^{29}\) For example, the imminence requirement of self-defense, has prevented battered women who kill their sleeping abusers from prevailing on the defense. To the extent that justice requires that such defendants be exculpated, self-defense is underinclusive. See *infra* Part IV.E for a discussion of the imminence requirement in provocation.

\(^{30}\) See *infra* Part IV.A for a discussion of the specific crimes to which self-defense, provocation, defense of others, and defense of property apply.

\(^{31}\) For example, self-defense is predicated on the wrongful victim behavior of imminently threatening the life of another. Certainly, victims may undertake other wrongful actions—for example, threatening future injury, economic destruction, or other non-violent harms. See *infra* Part IV.A for a discussion of wrongful victim behavior not covered by existing victim liability law.
liability defense. It examines the relationship between the victim liability defense and the privatization trend in criminal law and analyzes ways in which the development of a singular defense will refine the current victim liability doctrines in desirable ways. Specifically, Part II of the Article examines the trend toward increased focus on the victim and the movement in criminal law toward privatization. Part III analyzes the problem with the victims' rights movement and discusses the need for a more complete picture of the victim. Part IV discusses how implementation of the non-specific victim liability defense remedies several problems with the current collection of specific victim liability defenses. Part V expounds upon the meanings of the elements of the defense and its practical application. I will more fully elucidate the parameters of the defense, as well as discuss its philosophical bases, in future papers.

II. THE VICTIM IN MODERN CRIMINAL LAW

The victim, in modern criminal law, has emerged as an undeniable presence in all stages of a criminal case, shifting the criminal paradigm away from simple government enforcement to increased privatization. While in past times the victim served little more function than an essential government witness, with the advent of the victims' rights movement, today's victim is a major focal point throughout the criminal process. Victims' Bills of Rights, victim impact statements, legislation named for victims and other new policies reflect the idea that a criminal prosecution is not just between the state and the defendant. Rather, there is an incredibly powerful and important third party involved who

32. See supra note 18 for a discussion of the term "privatization" in the context of this Article.
33. See Gessner H. Harrison, The Good, the Bad, and the Ugly: Arizona's Courts and the Crime Victims' Bill of Rights, 34 ARIZ. ST. L.J. 531, 533 (2002) ("Before the VBR [Victims' Bill of Rights] became law... [o]nce a crime had been committed, a victim's role in the typical criminal prosecution - if the victim would play any role at all - was to serve solely as a witness for the prosecution."); John W. Stickels, Victim Impact Evidence: The Victims' Right that Influences Criminal Trials, 32 TEX. TECH. L. REV. 231, 236-37 (2001) (noting that purpose of President Reagan's 1982 Task Force on Victims' Rights was to "change the status of the victim of a criminal act from a person who merely identifies the perpetrator and testifies in court to the role of an active participant in the criminal justice system").
34. See Alice Koskela, Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System, 34 IDAHO L. REV. 157, 158 (1997) ("During the past two decades, the victims' rights movement has dramatically expanded the rights of crime victims and restricted the rights of criminal defendants, causing a fundamental change in the justice system.").
35. E.g., ARIZ. CONST. art. II, § 2.1.
36. See infra notes 60-64 and accompanying text for a discussion of the increasing reliance on the effects crimes have on victims in sentencing.
38. Alice Koskela remarks on the role of the crime victim: Victims no longer are relegated to minor roles in the process: they are taking center stage in the courtroom, dramatically altering how justice is achieved. The aim of the victim's rights movement has been to give victims a "voice" in the process. But this understandably impassioned voice may drown out less popular calls for fairness and an objective search for
should not, and now cannot, be ignored. The heightening of crime victims to party participant status through state Victims' Bills of Rights and the call for a federal constitutional amendment creating federal victims' rights has concerned many legal theorists:

[T]he apparently unstoppable political force of the [victims' rights] movement has become unsettling to many legal scholars and practitioners. They fear that the public-prosecutor paradigm of American criminal justice, with its constellation of public safety, deterrence, rehabilitative, and retributive aims, will devolve into a private-prosecutor system, pitting victim against accused. In the process, our criminal law will become merely a mechanism for exacting a victim's personal vengeance.

Despite such concerns, the trend toward increasing the presence of victims in criminal prosecutions continues.

The role of the victim in the legal process starts at the beginning of a criminal case. Prosecutors generally take into consideration whether or not the

truth.

Koskela, supra note 34, at 163.

39. Lynne Henderson criticizes the logic behind victim's rights:

"Victims' rights" were—and are—used to counter "defendants' rights" and to trump those rights if possible. In an argument that traces back to at least the early 20th Century, people accused of crimes are probably "guilty as sin" and undeserving of so much legal protection. The argument continues that the constitution of a state, or of the United States, contains specific rights protecting those (accused) of crimes (and, in the case of (habeas corpus) and cruel and unusual punishments, those convicted of crimes). Victims of crimes, on the other hand, are blameless innocents far more "deserving" of rights, and they have absolutely no constitutional rights . . . . One fallacy in that argument immediately appears: Victims, as citizens, have many constitutional rights, regardless of the specific protections for defendants.

Henderson, supra note 19, at 582-83 (footnotes omitted). Victims' rights advocates, on the other hand, argue that the victim should naturally play a significant role in the criminal trial:

Logic certainly dictates that a crime victim has an "interest" in the criminal justice process to which he or she must respond when called. Logic tells us that something is not right when the victim is not consulted about what happens to the person who raped them, or killed their child while driving drunk, or left them wheelchair-bound after being shot during a robbery. After all, it is the victim who is raped, not the state; it is the drunk driving victim's family whose insurance rates go up, not the state's; and it is the paraplegic, not the state, who can no longer work as a mailman.


40. Koskela, supra note 34, at 158.

41. Jonathan Simon comments on the social importance of the victims' rights movement:

Victims' rights has emerged over the past 25 years as one of the most important social movements of our time, comparable in its influence on our political culture to the civil rights movement or feminism. In part because of the enormous appeal of victimization to television media, the victims' rights movement has been able to make visible a whole host of criminal justice decisions that until recently were made with little attention to public justification.

Simon, supra note 37, at 1136.
victim desires to "press charges," although they do not do so in every case and in fact cannot in some arenas like domestic violence. Prosecutors, as a matter of course, take the victim's wishes into consideration during the plea negotiation process. For example, as a public defender, I often encountered rejections of plea suggestions on the ground that "the victim would never accept such a plea agreement." Indeed, some jurisdictions require prosecutors to consult the victim during plea bargaining.

Turning to the trial phase of the prosecution, the victim participates in the

42. As one commentator noted, "[S]til another factor [in charging decisions] is the attitude of the victim. Victim attitude influences the availability of evidence, obviously so where a conviction can be obtained only if the victim will testify. But beyond this, the fact that the victim wants prosecution is morally and politically influential...." KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 3 (4th ed. 2000) (citing Geoffrey Hazard, Criminal Justice System: Overview, in 2 ENCYCLOPEDIA CRIMINAL JUSTICE 450). See also Dubber, supra note 16, at 17 ("[T]he victim can influence the process in various ways, such as by deciding whether or not to press charges."). However, the prosecutor enjoys discretion to prosecute even when the victim does not want to go forward. In my experience as a public defender, cases involving uncooperative, indeed recanting, victims sometimes ended in dismissals, but it also often ended in trials or pleas.

43. Interestingly, the victims' rights movement was intimately tied to the outcry against unfair treatment of battered women by the legal process. See Koskela, supra note 34, at 163 ("The origin of the modern victim's rights movement is difficult to pinpoint, but can probably be traced to several factors. The re-emergence of feminism in the 1960s and 1970s resulted in greater awareness of the problem of domestic violence and the creation of grassroots programs specifically for victims of domestic violence.") (footnote omitted); Stickels, supra note 33, at 236 ("[T]he lack of court protection for victims motivated several movements that increased awareness of the lack of protections for victims in the criminal justice system. One of these movements resulted in a greater awareness of the problems encountered by the victims of domestic violence and the lack of adequate response by the system.") (footnote omitted). The resulting reforms included mechanisms like mandatory arrests and "no-drop" policies, whereby police and prosecutors would proceed with cases even against the victim's wishes. See generally Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 HARV. L. REV. 1849 (1996) (advocating mandatory prosecution of domestic violence defendants including forced participation of domestic violence victims at trial). Ironically, such reforms have effectively undermined the goal of giving the individual victim a "voice." This author has experience practicing as a public defender in the Washington, D.C. Superior Court specialized "domestic violence" court. This court includes, at least informally, a prosecutorial "no-drop" policy. The result is that many "victims" beg the defense attorneys in the case to convince the prosecutor drop the case against their spouse, lover, mother, brother, child or other domestic relation. These cases are generally not dropped, and proceed to trial against the victims' wishes. The arguments from the prosecution side, that either the women are too scared to go forward with the prosecutions or they simply do not know what is good for them, may be accurate, but are also undeniably paternalistic. While "no-drop" policies arguably serve legitimate social interests, giving voice to the victim cannot be said to be one of them.

44. Perhaps, however, this was often simply a negotiation tactic, to which a defense attorney could freely reply, "my client would never accept your counter-offer." To be fully honest, more often than rejections based on the victim's desires, defenders hear, "My supervisor will never approve this plea agreement." Maybe it is simply the nature of negotiation to "pass the buck."

45. See, e.g., N.C. GEN. STAT. § 15A-832(f) (2003) ("Prior to the disposition of the case, the district attorney's office shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about the disposition of the case, including the victim's views about dismissal, plea or negotiations, sentencing, and any pretrial diversion programs.").
trial most importantly as an essential witness. Victims' rights advocates have successfully persuaded legislatures to exempt victims from rules that prohibit testifying witnesses from observing the trial. Indeed, some victims' rights advocates argue that the victim (or victim's family) should have an absolute right to testify during the guilt as well as sentencing phase of a trial, even if the testimony has little probative value and tends to prejudice the defendant. In addition, restorative justice and mediation programs offer opportunities for

46. See supra note 33 for a discussion of the victim's role as witness at trial.

47. The purpose for "the Rule of Witnesses," which prevents testifying witnesses from observing trials, is that their observation may prejudice their testimony. See Gore v. State, 599 So.2d 978, 986 (Fla. 1992) ("The rule of witness sequestration is designed to help ensure a fair trial by avoiding the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand.") (internal quotations omitted). Some jurisdictions provide an absolute exemption from the Rule to crime victims. E.g., ALA. R. EVID. 615(4); ARIZ. R. EVID. 615(4); ARK. R. EVID. 616; N.H. R. EVID. 615(1); OR. REV. STAT. § 40.385(4). Other jurisdictions provide for conditional exemption from the Rule. See, e.g., FLA. STAT. ANN. § 90.616(d) (West Supp. 1999) (stating that victims are exempted unless presence is prejudicial); OKLA. STAT. ANN. tit. 12 § 2615(5) (West Supp. 1998-99) (stating that victims are exempted unless exclusion is in interests of justice). See generally Robert P. Mosteller, The Unnecessary Victims' Rights Amendment, 1999 UTAH L. REV. 443 (1999) (discussing victims' rights and Rule of Witnesses).

48. John Stickels argues, "In Stahl, the Texas Court of Criminal Appeals found that crime victims did not have the right to testify if it infringed on the defendant's right to a fair trial .... Without a sound legal base, the defendant's rights automatically trump the victim's rights." Stickels, supra note 33, at 246 (discussing Stahl v. State, 749 S.W.2d 826 (Tex. Crim. App. 1988)). In Stahl, the victim's mother was called for the sole purpose of identifying a picture of the deceased. 749 S.W.2d at 828. The following exchanges occurred at trial:

THE COURT: Can you assure me that if you come in here to identify your son's picture, that you can do it without any emotion?
MRS. NEWTON: I can assure you I will try. I don't—
THE COURT: I know. I understand.
MRS. NEWTON: I can't say what's going to happen.

Id. The following is a transcript of Mrs. Newton's testimony:

[QUESTIONS BY THE PROSECUTOR]
Q: Mrs. Newton, I am going to show you State's Exhibit No. 25 [a full-faced morgue photograph of Arthur Newton], and I want you to take a look at State's Exhibit No. 25 and ask you if you can identify the person depicted in State's Exhibit No. 25?
A: Oh, my God.
Q: Can you identify that picture, Mrs. Newton?
[DEFENSE COUNSEL]: Can we have the members of the Jury go to the Jury room?
THE WITNESS: May he rest in hell. May he burn in hell. Oh, my baby.
(Whereupon the jury leaves the courtroom).

Id. The Court of Appeals reversed the murder conviction on the grounds that the outburst prejudiced the jury, noting that the prosecutor made references to the outburst in closing argument. Id.

Victims' rights advocates counter that testifying gives the victim or family necessary psychological closure. This claim, however, is not undisputed. Lynne Henderson observes that "[t]he persistence of the notion that testimony is cathartic is utterly unsupported by empirical evidence. In fact, some disagree that telling a trauma narrative aids victims of extreme trauma to heal at all." Lynne Henderson, Revisiting Victims' Rights, 1999 UTAH L. REV. 383, 408 (1999) (footnote omitted). See Prittwitz, supra note 17, at 128 ("There is little evidence that being victimized always means being traumatized, and there is no reason to believe that all traumas are equal.").
victims to participate fully as parties in the disposition of criminal cases.  

Other new reform laws represent the victim’s heightened pre-sentence role. For example, in many cases, victims receive legal or social worker advocates and even police representatives who can be present at all stages of a criminal prosecution. These advocates may attend trial, position themselves near the prosecution, show support for the victim, and comfort distraught victims after testifying, even in the presence of the fact finder. A victim may also apply for and receive money prior to the disposition of a case from victim-witness assistance funds and after a conviction from victim compensation funds.

49. Scholars argue, however, that these alternative dispute resolution programs have not been embraced universally by the victims’ rights movement. Markus Dubber observes:

Victim-offender mediation similarly will result in dismissal, or the decision not to initiate the criminal prosecution in the first place. The alternative disposition of facially criminal cases occurs rarely and unsystematically, even in minor cases. In the extremely punitive climate of the past decades, restorative justice programs have operated quietly on a small scale, even if the results have often been encouraging. They have not attracted much attention among policy makers beyond the local level or among criminal procedure scholars, with the exception of the occasional article sounding a cautionary note. Most important, they have not been embraced by the American victims’ rights movement. That movement instead has concentrated on converting defendants’ rights into victims’ rights in the formal criminal justice process and, in what is generally considered to be a related objective, increasing criminal punishment, including the more frequent use of the death penalty.

50. See, e.g., ILL. CONST. art. I, § 8.1(9) (stating victim has “[t]he right to have present at all court proceedings, subject to the rules of evidence, an advocate or other support person of the victim’s choice”). In Washington, D.C., the Superior Court domestic violence program provides victims “domestic violence advocates” who may be present at all stages of a prosecution. See supra note 43 for a discussion of the author’s experience as a public defender in Washington, D.C.

51. See, e.g., COLO. REV. STAT. § 24-4.2-105 (2002) (enacting victim-witness assistance program).

This author was involved in a domestic violence trial in District of Colombia Superior Court where the complainant alleged that her husband, the defendant, had engaged in acts of verbal and physical abuse against her. There were no recorded injuries and no physical evidence of abuse. The only other government witness was the nine-year-old daughter who testified at trial that she did not see any physical abuse. Essentially, the trial came down to the word of the complainant against the word of the defendant. During the time of the alleged abuse, the couple was in the process of divorcing. The defendant was arrested on the complainant’s allegations the day before he was going to leave her and move to Ohio. The government revealed through discovery that shortly after the defendant’s arrest, the complainant received over $1000 in victim assistance so that she could move to a new apartment. She spent this money entirely prior to the case going to trial.

An obstruction and murder case this author defended involved a victim-witness who was allegedly a victim of the defendant’s acts of obstruction and a witness to him confessing to the murder. The witness, who had a pending criminal case, a drug problem, and had been living with the defendant prior to his arrest, received thousands of dollars from the government for lodging, food, and other incidental expenses over the course of several months, all of which was spent prior to trial. The jury ultimately discredited the victim and acquitted the defendant of the murder. By that time, the witness had already spent the money. I do not relate these stories to say that victims and witnesses do not deserve assistance at any time. Rather, I related them to highlight some of the strange results of labeling an individual a “victim” with the panoply of rights and benefits that brings, prior to any adjudication of guilt.

Moreover, victims' personal attorneys appear to be playing increasingly important roles in criminal prosecutions.\textsuperscript{53} In addition, in the past several years, the trend in criminal law has been to define criminal liability in part by reference to the status or characteristics of the victim.\textsuperscript{54} Assault laws almost universally confer harsher penalties on those who assault members of law enforcement\textsuperscript{55} or particularly vulnerable victims.\textsuperscript{56} Hate crime legislation has put the race and ethnicity of victims in the spotlight.\textsuperscript{57} The status or characteristics of the victim may increase criminal liability or punishment even when the defendant is not aware of such characteristics.\textsuperscript{58}

In the post-conviction phase, the victim has become a major force during sentencing. In the landmark case of Payne v. Tennessee,\textsuperscript{59} the Supreme Court, overruling past decisions to the contrary,\textsuperscript{60} held that victim impact evidence, as

\begin{itemize}
\item compenable crimes perpetrated on or after July 1, 1982); D.C. CODE ANN. § 4-501, et seq. (2001) (creating compensation plan for victims of violent crimes).
\item See Henderson, supra note 48, at 429-32 (discussing case in which victim's personal attorney filed brief in support of motion in limine to preclude defendant from asserting defense of provocation).
\item See Dubber, supra note 16, at 15 (using hate crime legislation as example of how victim characteristics can define liability for criminal offense).
\item See, e.g., D.C. Code § 22-405 (2001) (providing 5-year penalty for assault on police officer), while D.C. Code § 22-404 (2001) provides for a 180-day penalty for assault on a civilian); FLA. STAT. § 921.141 (1999) (enumerating, as aggravating circumstances, that victim of homicide was governmental official engaged in official duties or especially vulnerable person).
\item See, e.g., TEX. PENAL CODE § 22.04, Injury to a Child, Elderly Individual, or Disabled Individual (1989) (providing higher penalties for assault on vulnerable person).
\item See, e.g., ILL. STAT. CH. 720 § 12-7.1 (2004) (defining "hate crime" as being motivated by reason of person's "actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability or national origin"); N.Y. CLS PENAL § 485.05 (2000) (noting that person commits a hate crime when she "intentionally selects crime victim based on race, color, gender . . . .").
\item Markus Dubber posits:
Whenever criminal liability – or at least the particular nature of the criminal liability – turns on the victim's characteristics, several difficult questions arise: (1) whether the victim in fact possessed these characteristics [intent or mere awareness] and (2) whether the perpetrator had the requisite mental state with respect to the victim's characteristics (intent or mere awareness) . . . . [A]n Illinois court recently unearthed a third question, namely (3) whether criminal liability requires affirmative answers to (1) or (2).
\item Dubber supra note 16, at 16 (citing In re B.C., 680 N.E.2d 1355 (Ill. 1997)) (footnote omitted). The issue of the admissibility of victim impact statements, which will be discussed later in this section, brought to light the problem with assigning a defendant blame for victim characteristics of which he had no knowledge. In Booth v. Maryland, a case which has since been overruled, Justice Powell, opined:
The focus of a VIS [victim impact statement], however, is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family.
\item See South Carolina v. Gathers, 490 U.S. 805, 811-12 (1989) (barring use of such evidence at sentencing); Booth, 482 U.S. at 504 (barring use of victim impact statements), overruled by, Payne v.
well as the prosecutor's sentencing allocution referring to the plight of the victim were not barred by the Eighth Amendment’s prohibition against cruel and unusual punishment. Writing for the High Court, Chief Justice Rehnquist opined:

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. “[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.” Booth, 482 U.S., at 517 (White, J., dissenting) (citation omitted). By turning the victim into a “faceless stranger at the penalty phase of a capital trial,” Gathers, 490 U.S., at 821 (O'Connor, J., dissenting), Booth deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.61

Justice O'Connor emphasized the restorative function of victim impact evidence, observing:

“Murder is the ultimate act of depersonalization.” Brief for Justice For All Political Committee et al. as Amici Curiae 3. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.62

Today, victim impact evidence is a significant part of sentencing, from minor offenses to capital murder cases.63 The victim's role does not end after sentencing. Victims also participate in probation and parole decisions.64 Consequently, the victim's presence is significant throughout the criminal prosecution, from its inception to the very decision to release the offender from prison.

Tracing the political and historical forces that led to the emergence of the victim as a major player in criminal prosecutions is a difficult and complicated task, which I do not undertake in this Article.65 This Article includes a

62. Id. at 832 (O'Connor, J., concurring).
63. The debate in legal academia over victim impact evidence and, particularly whether the possible gains to the victim outweigh the possible prejudice to the defendant, rages on. For a very insightful discussion of these issues, see generally Lynne N. Henderson, The Wrongs of Victim's Rights, 37 STAN. L. REV. 937 (1985).
64. See State ex rel. Hance v. Ariz. Bd. of Pardons and Parole, 875 P.2d 824, 830 (Ariz. 1994) (ruling “victim had a constitutional right to be informed that she was entitled to request notice of, and to participate in, any post-conviction relief proceeding”) (emphasis in original).
65. For a fuller discussion of the social, political, and historical forces behind the victims' rights movement, see generally Dubber, supra note 16 and Henderson, supra note 63.
discussion of the victims' rights movement to emphasize that the victim is a significant force, rising nearly to the status of a party, in a criminal case. From the above, it is clear that the victim's feelings, actions, characteristics, wishes, and even employment are now acceptable, even desirable, focal points in a criminal case. The focus on the victim, however, for the most part, serves the function of generally increasing liability and punishment for defendants. The trend toward inserting the victim into the culpability calculus clearly does not include scrutiny of victim behavior as a means to lessen liability or punishment for defendants.66

The problem with the trend toward privatization is that it fails to view the victim, who is the undeniable center of the reforms, in a full and fair manner. The next section will discuss victimhood narratives and explain how the victims' rights movement's one-sided view of the victim evidences the need for legal reform.

III. VICTIM TALK AND THE FICTIONAL VICTIM

While the victims' rights movement has boosted the victim to near-party status, this status elevation has clearly not coincided with a trend toward comparing the culpability of the parties in a criminal transaction.67 Instinct, however, may dictate that the trend should in fact include victim scrutiny. Instinctually, many would resist the idea of granting prosecutorial powers or victim's rights to victims who are themselves wrongful actors, such as robbers, drug dealers, or wife-beaters.68 President Clinton exemplified such ideology by stating, "we sure don't want to give criminals like gang members, who may be victims of their associates [any rights]."69

In addition, by allowing, for example, judges to take into account the character and feelings of the victim during sentencing, the criminal law has inserted an element of comparative blameworthiness into the criminal trial. As a matter of logic, such a comparative survey should include scrutinizing the victim's wrongfulness:

[I]mporting the victim into the blameworthiness calculus logically

66. By "victim scrutiny" I do not mean an unlimited examination of the character of the victim; rather, only the victim's wrongful behavior that relates to the crime could be grounds for lessening or absolving the defendant of liability.

67. In fact, many victims' rights advocates actively block perceived "victim blaming," relying on narratives of victim blaming horror stories. See supra note 2 and accompanying text for a critique of "victim blaming" as a criminal defense.

68. See Henderson, supra note 48, at 404 n.81 (discussing feminist criticism of victims' rights as empowering batterer in cases where battered woman fights back and is charged as a defendant).

69. Henderson, supra note 19, at 585 (quoting Clinton's Announcement in Support of a Victims' Rights Amendment (Online News Hour, June 25, 1996)) (footnote omitted). Here, however, Clinton is talking about victim character generally rather than wrongful behavior specifically as precipitating the crime. Id. In this paper, I do not advocate general scrutiny of victim character any more than I would advocate general scrutiny of defendant character. The debate over the propriety of character evidence in the criminal trial is interesting, but I do not undertake it here. See, e.g., Chris William Sanchirico, Character Evidence and the Object of Trial, 101 COLUM. L. REV. 1227, 1230-31 (2001) (using primary incentives framework to examine rules regarding admission of character evidence at trial).
requires courts to call into question the victim’s relative blameworthiness – to measure the offender’s actual moral culpability requires examining whether the victim “deserved” what he got and whether [the] harm the criminal does to society . . . could be insignificant in comparison to the benefaction . . . that would otherwise be left undone.70

And yet, the victim rights’ movement retains this idea that focusing on victim behavior as a means to absolving the defendant of liability is improper under most circumstances. An explanation for the aversion to assessing victim wrongfulness is that embedded in the narrative of victimhood is the idea that victims are a priori innocent and even beyond reproach and defendants are guilty.

Privatization efforts and the victims’ rights movement rely on the fiction of the blameless victim. The powerful narratives of victims’ rights portray the victim as an ultimately innocent party:

Popular culture and ideology construct an image of victims and violence that, tragic and terrifying as it is, is quite limited. “Victims” are “blameless,” innocent, usually attractive, middle class, and white. They are articulate and sympathetic. The image of victims appears to be confined to victims of particularly brutal homicides, often committed by repeat offenders, and the grieving families of those victims.71

Not only does this ideology consider the victim the quintessential “innocent party,” it also considers the victim beyond questioning or criticism:

There is a strong tendency for people to couple a claim of victimhood with a claim of incorrigibility – that the victim knows better than anyone else about the victimization, and indeed, the victim cannot be wrong about it . . . . This may reflect an almost religious view of suffering, empowering those who suffer with at least respect and perhaps reverence from others.72

The victim then ascends to the status of someone who is not only beyond reproach, but also beyond doubt. Reforms that assume, prima facie, that the victim is always credible reflect the acceptance of the absolute veracity of victims by the victims’ rights movement. Victims’ Bills of Rights and other reforms confer pre-trial rights to “victims” even in cases where the defense contests that any crime has occurred73 (i.e., non-injurious assault cases or rapes).74 By giving

70. Henderson, supra note 63, at 991-92 (internal quotations and footnote omitted).
71. Henderson, supra note 19, at 584.
72. Minow, supra note 19, at 1434 (footnote omitted). Minow goes on to say, “Especially where feelings of hurt are involved, victims assert authority on the basis of their experience and treat statements of that experience as conclusive and the end of the discussion.” Id.
73. See supra note 14 (examining victims’ rights legislation).
74. They also grant pretrial “victim’s” rights to families of decedents in cases where the defense asserts accident or self-defense. See ARIZ. CONST. art. II, § 2.1(C) (defining “victim” as “a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person’s spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused”).
these complainants rights as "victims," the law presupposes that the complainants' version of events is true (and by implication the defendants' is not true). From the beginning, then, the designated victim -- most likely designated by the prosecution -- is innocent beyond doubt, absolutely truthful, and even deserving of reverence. Juxtaposed with this the image of criminal defendants: "[d]efendants are subhuman; they are monsters. The criminal is Ted Bundy, Lawrence Singleton, Richard Allen Davis, Willie Horton -- criminals who seem to be the very embodiment of evil. Alternatively, the image of the criminal is the ominous, if undifferentiated, poor, angry, violent, Black, or Latino male." These images of defendants, as well as narratives of victimhood, are extremely complicated, bringing with them an array of social prejudices and presuppositions, impacting both race and gender. As a consequence, victim impact statements "may also draw impermissibly on images entwined with racism." 

75. In many cases, especially assault cases, the identity of the true victim is often in question. Consider the case of two people who get into a fight. Generally, the prosecution will designate either the person who reported the incident or the more injured party as the "victim" and confer upon him the panoply of rights that designation entails. One of this author's cases involved a third party who had called the police to report a fight. Both of the fighters were detained by police on the scene. Both claimed that they acted in self-defense. Police ran a background check on the two and designated the one with the criminal history as the defendant, and the one without a criminal history as the victim. In my experience with many domestic violence cases, when third parties call the police to the scene and both persons involved in the domestic dispute claim self-defense, the man is normally arrested and designated defendant and the woman is designated victim. In one case, the man was designated the defendant, even though the uninjured female "victim" had stabbed him.


The series, which featured reenactments of actual crimes followed by pleas to viewers to help catch the still-at-large perpetrators, was a success with audiences as well as the FBI, which worked with [John] Walsh on the series and welcomed his help in catching alleged criminals. But as Anna Williams explains in an article about the series, the format was not only sensational and melodramatic in form and style, it was explicitly oriented toward a view of crime as a family matter, for it invariably pitted victims of traditional nuclear families against the harrowing images of criminals as antisocial loners and lunatics preying on women and especially children. Michael Linder, one of the series producers, explained the criteria for choosing cases for the series in an issue of TV Guide: "A drug dealer who shoots another drug dealer is not as compelling as a child molester or murderer. . . . If a man brutalizes innocent children, that definitely adds points." Such a hierarchy of victimization is a mainstay of the Victims' Rights Movement, which plays upon notions of decent families besieged by violent amoral criminals.


The meaning of victimhood in our society is constructed by a dominant culture that often displays difficulty conceiving that important harms can come in varieties unlikely to afflict its
Nonetheless, the idea of viewing the victim as *prima facie* beyond reproach and the defendant as *prima facie* not only guilty but evil is seductive. It enables society to "purge [ ] itself of deviant elements and thereby heal itself as it salves the victim's pain" by "declaring the offender an outsider so alien to the community that identification is simply impossible." 78 The acceptance of victim impact evidence during sentencing, for example, signaled a marked shift in the systemic focus from offender identification, through mitigation evidence portraying the defendant as a human being, to victim identification, through powerful statements of rage and pain. Victim identification, Markus Dubber argues, carries with it a very persuasive force:

- The identification with the victim at the expense of identifying with the offender provides an additional benefit to the onlooker, which may well have contributed to the success of the victims' rights movement. By denying any similarities with the offender upon which identification could be based, the onlooker transforms the essentially ethical question of punishment into one of nuisance control. An ethical judgment is no longer necessary. . . . Once the offender is excluded from the realm of identification, the question 'how could someone like us (or, stronger, like me) have done something like this' no longer arises. 79

Consequently, a straightforward social explanation of why many consider victim liability an altogether immoral concept is that society embraces the image and rhetoric of the absolutely innocent victim and absolutely guilty defendant.

Although these victimhood narratives generally inure to the detriment of criminal defendant, under certain circumstances, defendants are able to co-opt the image of victimhood. 80 Battered wives who kill their abusers are the most obvious example of this. Arguably, we do not feel the same degree of moral revulsion at this class of killers as we do about other killers; nor does a moral reverence attach to the class of victims. 81 Some posit that the tendency to view women, especially abused women, as victims (even if they are in fact defendants) is itself a reflection of our stereotypical images of victims—"[t]he victim is helpless, decimated, pathetic, weak." 82 Other defendants who tend to benefit...
from such recharacterization as victims include vigilantes, like Bernard Goetz, who kill would-be “criminals.”83 People v. Goetz84 illustrates how victimhood narratives can call into play society’s racist undercurrents.85 Stephen Carter argues that Goetz’s trial strategy drew on racially charged images of the heroic vigilante killing the threatening, black criminals:

Blackness is noticed, and it can threaten simply by appearing unexpectedly, in a wealthy white suburb in the middle of the day, on a darkened sidewalk in the middle of the night, on the other side of the peephole in the door when no one is expected. Thus when Mr. Slotnick, the defense attorney, kept inviting the jury (and, by extension, the public) to imagine the atmosphere in the subway car, he conjured, whether he planned to or not, an image of innocent whiteness surrounded by threatening blackness. Those who endorse a vision of victimhood resting on the fact of racial oppression would here win a vital point: Emotive power would be lost were one to conjure instead an image of “innocent blackness” surrounded by “threatening whiteness.”86

Cases like Goetz’s illustrate the complicated nature of issues of race and gender as they relate to victims’ rights and victim liability. On the one hand, the victims’ rights movement empowers abused women, as victims, to see their abusers punished and African-Americans, as victims, to counter racist defenses or seek justice for hate crimes. On the other hand, the movement’s unfriendliness toward defendants and victim liability defenses, not only disadvantages all minority defendants, but could prevent battered women from seeking justification for killing their batterers and encourage victims who play upon racist stereotypes, whether consciously or not, in their victim impact statements.

Nonetheless, identifying defendants as victims is a favorite tactic of defense attorneys both at the liability level (recasting the homicide defendant as the victim of domestic violence) and sentencing level (recasting the defendant as a victim of a pernicious familial or social background). The viability and social popularity of this tactic, however, are questionable in this “tough on crime” era. Many feel that criminals use the “abuse excuse” as “a manipulative ploy . . . to avoid individual moral responsibility and free choice.”87 The defendant’s past or

---

83. See People v. Goetz, 497 N.E.2d 41, 43-41 (N.Y. 1986) (reinstating indictment against Bernard Goetz, a white man who shot and wounded four black youths on New York City subway train after one or two of them asked for five dollars, because he claimed they were going to rob him).
84. 497 N.E.2d 41 (N.Y. 1986).
85. See Carter, supra note 77, at 428 (discussing racial implications of Goetz case).
86. Id. (footnote omitted).
87. Henderson, supra note 19, at 588 (footnote omitted). See generally ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994) (discussing chronic “abuse excuses” used by criminal defendants such as Michael Jackson and
even current victimization is often neither a defense nor an excuse at sentencing. 88 Even when defendants can capture victimhood narratives, the success and pervasiveness of favorable defendant narratives is minor compared to that of favorable victim narratives. In the end, the characterizations of the victim as innocent and even saintly and the defendant as guilty and immoral are the ones that resonate most strongly. Consequently, embedded in the justification for giving victims' near prosecutorial power, at least implicitly, is an incomplete and one-sided characterization of the victim.

Not only is the privatization trend rooted in the presupposition that the victim is ultimately innocent, victims' rights reformers also assume that victims' interests are, or should be, adverse to defendants' interests. This is evidenced, for example, by the apparent failure of the movement to embrace those victims who wish to ask the court for leniency for the defendant or let the judge know that they do not believe in the death penalty. 89 In addition, the rhetoric of victims' rights revolves more often around vengeance and punishment than forgiveness and mercy. 90 The movement has succeeded in the institution of

---

88. Henderson notes that "there is no 'bad childhood' defense" and that "prosecutors routinely argue that evidence of the horrific abuse suffered by those who commit terrible murders is not true 'mitigating evidence.'" Henderson, supra note 19, at 589 (footnote omitted).

89. Popular forces were, in part, responsible for courts giving voice to outraged victims during sentencing. See Payne, 501 U.S. at 859 (stating "[t]oday's majority has obviously been moved by an argument that has strong political appeal") (Souter, J., dissenting). Justice Scalia dissenting in Booth v. Maryland, noted that "[r]ecent years have seen an outpouring of popular concern for what has come to be known as 'victims' rights.'" 482 U.S. at 520 (Scalia, J., dissenting). These same popular and political forces, however, failed to move the Tenth Circuit to afford the same participation rights to victim's families who did not wish for the defendant to receive the death penalty. See Robinson v. Maynard, 943 F.2d 1216, 1217 (10th Cir. 1991) ("Nothing said by the Court [in Payne] suggests the Court intended to broaden the scope of relevant mitigating evidence to include the opinion of a victim's family member that the death penalty should not be invoked."). This issue has not yet been addressed by the Supreme Court; however, the Supreme Court denied Robinson's request for a stay of execution. Elizabeth Joh observes: "neither the victims' rights (community) nor the Supreme Court generates or tolerates narratives in which victims' families can exercise mercy, kindness, or forgiveness towards defendants .... From the perspective of victimhood, the concept of mercy does not square with conceptions of helplessness and rage." Joh, supra note 17, at 28 (footnote omitted). But see Kanwar, supra note 15, at 249 ("Over the past several years, the 'voices' of murder victims have both promoted and opposed the death penalty with equal force.").

90. Victims right's advocates often prioritize punishment over forgiveness. Brown notes: The role of forgiveness in VOM [Victim-Offender Mediation] is complicated, and it is dangerous to assume that a victim necessarily wants to or can forgive an offender.... Although VOM promises such victims the opportunity to meet with their offenders in an atmosphere that might lead to apology and forgiveness, a necessary precondition for forgiveness and reconciliation is an expression of accountability on the part of the offender.

Jennifer Gerarda Brown, The Use of Mediation to Resolve Criminal Cases: A Procedural Critique, 43 EMORY L.J. 1247, 1277 (1994) (footnote omitted). Lynne Henderson counters that victims may benefit more from forgiveness than vengeance because, "Forgiveness alone retains the uncontested authorship essential to responsibility and resolution. Forgiveness, rather than vengeance may, therefore, be the act that eventually frees the victim from the event, the means by which the victim may put the experience behind her." Henderson, supra note 63, at 998.
prosecutorial "no-drop" policies,91 and has even sought the elimination of plea-bargaining. However, the movement does not seek to empower victims who do not wish to prosecute their cases and do not wish to testify in court or before grand juries.92

Critics contend that the victims' rights movement in fact focuses more on increasing punishment than on empowering victims. Some scholars theorize that the victims' rights movement was borne out of a prevailing penology of vengeance:

The deontological interlude [of the retributivist movement of the 1970s] . . . proved short-lived. Certainly in practice, if not in theory, retributivism quickly gave way to its consequentialist analogue, vengeance, and the crudest form of consequentialist penology, incapacitation. The rise of the so-called victims' rights movement in the United States formed an important part of this consequentialist (re)turn . . . . This movement, after all, began as and always remained a political movement, fueled by grassroots campaigns of concerned citizens backed by politicians eager to outdo their opponents in the tough-on-crime competition.93

Under this view, the victims' rights movement is more of an anti-crime, even anti-defendant movement, than a movement intended solely to give victims of crime more participation in the criminal process. As a result, the calls for the granting of party or near-party status94 are a means to empowering the victim only when the victim's interests are adverse to the defendant's.95 Given this

91. See supra note 43 and accompanying text, which discusses how prosecutors' offices institute policies that certain types of offenses, often domestic violence offenses, may not be dismissed prior to trial, even if the complainant does not wish to "press charges."

92. See supra note 42 and accompanying text for an examination of the issue of victim cooperation.

93. Dubber, supra note 16, at 6. Lynne Henderson similarly comments:

Recent victims' rights proposals appear to be driven more by the retaliatory view of retribution than by the moral aspect of retribution. The victim who participates in sentencing might further the ends of the retribution-as-vengeance theory by providing specific and graphic information about the crime—information that will provoke outrage.

Henderson, supra note 63, at 994.


Why, then, do we now find ourselves locked into a system in which a public prosecutor representing the state is the collective voice which speaks for crime victims in the criminal justice system? The answer is puzzling. Our legal heritage is derived for the most part from English common law, which has for centuries been firmly rooted in a process of private prosecution. This concept is based on the seemingly obvious premise that the victim is the person actually injured. This practice was prevalent as recently as the opening of the Western frontier. Somewhere between old England and modern America, something went awry.

Id. (footnotes omitted).

95. Turning crime into a quasi-private system like tort, as understood in the victims' rights movement, clearly does not include the tort concept of apportionment of blame like comparative fault and assumption of risk. The politics of the movement dictate that criminals should never "get a break." See supra note 4 for a discussion of these tort concepts.
philosophy, the victims’ rights movement certainly would not advocate an increased role for the victim in the criminal trial if doing so provided further defenses to the defendant.\textsuperscript{96} Ultimately then, it appears that the true end of privatization is increased punishment. In order to achieve this end, the movement empowers a fictional blameless victim who seeks vengeance rather than forgiveness. The movement has failed, however, to account for the blameworthy victim, the racist victim, and the wife-beating victim that receives “victims’ rights.”\textsuperscript{97}

There are many responses to the problem discussed above. One could simply advocate a general rejection of the victims’ rights movement. One might argue that the victim should go back to being a tangential player in the criminal process.\textsuperscript{98} While the general debate over victims’ rights is interesting and well taken, this project assumes the reality of the privatization trend\textsuperscript{99} and advocates an alternative response. The substantive criminal law should have a built-in mechanism that accounts for blameworthy victims. By doing so, the law will take a more realistic and fair view of the parties to a criminal transaction. In addition to providing a solution to the problem of the one-sided victim, the non-specific victim liability defense would refine the current legal regime in numerous desirable ways. The next section will analyze several doctrinal, practical, and social problems with the current collection of specific victim liability defenses and demonstrate how the problems can be addressed by adopting, as an alternative, the non-specific victim liability defense laid out in the introduction.

IV. PROBLEMS WITH CURRENT VICTIM LIABILITY DEFENSES

At this point, one might simply respond to my call for reform by stating that the law is already full of defenses and practices that scrutinize victim wrongdoing. Indeed, during initial discussions of this Article, many queried, “How would ‘your rule’ affect the law?”\textsuperscript{100} The question of why there is a need

\textsuperscript{96}. Victims’ Bills of Rights are careful to make sure that they create no new defenses. See, e.g., 42 U.S.C. § 10606(c) (2003) (“This section does not create a ... defense in favor of any person arising out of the failure to accord to a victim the rights enumerated”).

\textsuperscript{97}. See supra note 43 for an examination of how the victims’ rights movement was ironically tied to the unfair treatment of battered women.

\textsuperscript{98}. See supra note 40 and accompanying text for criticism by scholars of the “tough on crime” nature of the victims’ rights movement.

\textsuperscript{99}. This is due in part to the massive political force of the victims’ rights movement. See Henderson, supra note 63, at 952 (stating that “the symbolic strength of the term ‘victims’ rights’ overrides careful scrutiny: Who could be anti-victim?”); Joh, supra note 17, at 17 (stating that victims’ rights movement has gained multidisciplinary status “complete with its own idiom of ‘victimology’”); Kanwar, supra note 15, at 253 (discussing victims’ rights movement’s political force).

\textsuperscript{100}. This section will explicate why, as a practical reality as well as a matter of juridical consistency, the non-specific victim liability defense is desirable. However, a novel legal rule need not be justified solely by reference to its expediency in the area of the law. It may simply be the case that the rule refines the law in a logical way. For example, one may ask whether there was a “need” for the Model Penal Code at the time of its inception, given the existence of state laws that covered nearly exhaustively all areas of criminal law. Experts observe, however, that even apart from particular doctrinal gaps filled by the Model Penal Code, the Model Penal Code was important specifically
to reform existing victim liability doctrine is perhaps the most significant one this project addresses. In answering this question, this section will analyze several problems with the current collection of specific victim liability defenses and discuss remedying these problems by substituting the non-specific victim liability defense.

A. The Existing Law is Arbitrarily Incomplete

The current collection of victim liability laws applies only to designated crimes precipitated by designated victim behaviors. The body of law does not cover many crimes and many victim behaviors and provides no clear reason for distinguishing between the situations covered by victim liability law and those not covered. The criminal charges to which existing victim liability doctrines generally apply are assaults and killings. For example, the doctrines of self-defense, provocation, defense of others, and defense of property, provide exculpation exclusively to physically assaultive conduct. One might presuppose that when provoked by wrongful conduct, the natural human response will be an immediate attack against the wrongful actor. If it is the case that violence is the general response to the wrongful conduct of another, then one would consider the current law an accurate and complete account of human reaction. The presupposition that people generally react with violence, however, is not correct. People react in a variety of ways to wrongful conduct. One could respond to wrongful victim behavior by, for example, destroying property or stealing. The doctrines of self-defense, provocation, defense of others, and the like do not contemplate non-violent yet criminal reactions to wrongful conduct.

because it provided a coherent body of criminal law compared to the doctrinally disjointed status quo of state criminal laws:

The Model Penal Code was influential in a variety of different ways. First, the very notion of a systematic codification of criminal law received a dramatic boost from the Model Penal Code. Apart from the degree to which any particular state recodification resembled the Model Penal Code, the Code provided the impetus for undertaking new codifications in the first place, where many jurisdictions had previously been content with relatively loosely organized compilations of the accumulated criminal statutes passed over the years, many of which simply embodied or assumed traditional common law rules. Second, the specific form of codification developed in the Model Penal Code was powerfully influential.


101. See \textit{supra} notes 21-22 and accompanying text for a discussion of how criminal law has become disjointed and schizophrenic in its application of existing victim liability defenses.

102. For example, self-defense applies specifically to the crimes of homicide and assault and specifically to the victim behavior of engaging in conduct imminently threatening to another. See \textit{infra} Part V.E, for a discussion of the practical application of the non-specific victim liability defense as an alternative to self-defense.

103. See \textit{supra} note 29 and accompanying text for a discussion of the underinclusiveness of victim liability defenses.

104. See \textit{supra} note 24 for examples from the Model Penal Code Commentaries.

105. For example, Person A, through blackmail or embezzlement, economically destroys Person B, who later attempts to steal some money from Person A. Under current law, Person B does not have a defense to attempted theft.
Interestingly, the Federal Sentencing Guidelines do account for a greater range of reactions to wrongful victim conduct. United States Sentencing Guideline § 5K2.10, which provides for a downward departure based on victim conduct, states:

[The victim conduct] provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

Although the federal sentencing guidelines see fit to take into account victim precipitation in non-assault situations during the sentencing phase, there is no common law or legislative analog in the liability phase. The confounding result is that the current law treats those who react violently to victim precipitation as less blameworthy than those who react nonviolently to victim precipitation.

In addition to limiting victim liability inquiries to specific categories of crimes, the current law limits victim liability to specific victim wrongdoing. Self-defense, defense of property, and defense of others limit victim wrongdoing to imminently life-threatening and property-threatening behavior. Provocation is arguably more expansive in that it takes into account a wider range of provoking behavior. However, even provocation is limited in several important respects. For example, in many jurisdictions, a defendant may only assert provocation when the victim conduct falls into a pre-set category of "adequate" provocation. In addition, several jurisdictions place temporal limits on the length of time the defendant is entitled to be "provoked." The

---

106. A downward departure allows the judge to sentence a defendant below the applicable guideline range because of an extraordinary circumstance which takes the defendant outside the "heartland" of sentencing cases. See United States v. Middleton, 325 F.3d 386, 389 (2d Cir. 2003) (discussing how circumstances warranting downward departure must take defendant out of heartland of cases contemplated by Sentencing Commission in formulating the Guidelines).


109. See, e.g., FLA. STD. CRIM. JURY INSTR. 3.6(g) (2002) (stating requirements for justifiable use of force in defense of property).

110. Not all provocation law predetermines categories of adequate provocation. In this sense provocation law may encompass any provocative act. See, e.g., Forehand v. State, 171 So. 241, 243 (Fla. 1936) (stating provocation is that which moves defendant to heat of passion).

111. Illinois, for example, recognizes only a few categories of provocation, including "substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse." People v. Garcia, 651 N.E.2d 100, 110 (Ill. 1995). See Rogers v. State, 819 So.2d 643, 662 (Ala. Crim. App. 2001) ("Alabama courts have, in fact, recognized three legal provocations sufficient to reduce murder to manslaughter: (1) when the accused witnesses his or her spouse in the act of adultery, (2) when the accused is assaulted or faced with an imminent assault on himself; and (3) when the accused witnesses an assault on a family member or close relative.").

112. See, e.g., State v. Mauricio, 568 A.2d 879, 884 (N.J. 1990) (holding that jury charge of provocation manslaughter is not available if accused cooled off before killing).
non-specific victim liability defense can remedy situations in which it seems fair
to lessen or eliminate defendant liability but the provocation does not fit into a
technical category\textsuperscript{113} or the cooling off time is insufficient.\textsuperscript{114}

The non-specific victim liability doctrine is not limited to specific crimes or
specific subcategories of wrongful behavior. The defense provides more
flexibility in the law to lessen defendant liability in a wider range of victim
precipitation situations. For example, the non-specific victim liability defense
could address the following situations, which fall outside existing victim liability
doctrines:

1. The victim, an abusive boyfriend, hits the defendant and leaves. The
defendant, in response, throws his belongings out the window. The
defendant is charged with destruction of property.\textsuperscript{115}

2. The victim has extorted money from the defendant until he is
destitute. The defendant later attempts to steal some money from
the victim. The defendant is arrested for attempted theft.\textsuperscript{116}

3. The defendant, a serially abused wife, kills her sleeping husband.

\textsuperscript{113} For example, the non-specific victim liability defense would provide a defense where the
defendant responds, not to a sudden attack, but to a prolonged series of past mistreatments.

\textsuperscript{114} Provocation law is well-settled that the paradigmatic category of physical provocations consists of
sudden attacks that rouse angry passions. See, e.g., Commonwealth v. Peters, 361 N.E.2d 1277, 1280
(Mass. 1977) (stating voluntary manslaughter is killing in heat of passion based on sudden combat).

\textsuperscript{115} Feminists have suggested an alternative formulation of provocation that excuses force used in
response to prolonged past attacks that instill fear, rather than a sudden attack that instills rage:

To the extent that manslaughter law can accommodate emotions other than anger, it at least
can partially recognize that women who kill are more often targets than instigators of
violence. To use this mitigating defense, however, a woman will have to introduce evidence
that it was reasonable for her to react in terror to physical provocation. Those who have
been systematically abused will be required to demonstrate that their experience of past
abuse influenced their perception of future danger. They will be forced to strain the
temporal limits of provocation doctrine in order to admit the details of their lives. The
further back a woman goes in her experience, and the more apparently trivial the event that
triggered her response, the more she must persuade the court to recognize that terror and
fear can be cumulative.

Laurie J. Taylor, Comment, \textit{Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and

\textsuperscript{114} One could imagine a situation in which an ordinary, reasonable, law-abiding citizen is
provoked into killing his son's murderer long after the cooling off time has expired. This situation has
led some courts to develop the uncomfortable doctrine of re-triggered provocation. "A few States,
notably California and Pennsylvania, have apparently found sufficient provocation from what appears
to be 'the last straw' theory—a smoldering resentment or pent-up rage resulting from earlier insults or
humiliating events culmination in a triggering event that, by itself, might be insufficient." Dennis v.

\textsuperscript{115} Provocation does not generally mitigate punishment for destruction of property. Rather,
the existence of provocation is used nearly exclusively to reduce first degree murder to voluntary
manslaughter. See infra notes 131-43 and accompanying text for a discussion of provocation, its
elements, and when it mitigates.

\textsuperscript{116} No victim liability defenses apply to theft. If, however, the defendant is literally starving and
steals bread, he could possibly assert the defense of necessity. See WAYNE R. LAFAVE, CRIMINAL
LAW § 5.4 (3d ed. 2000) (discussing necessity defense). Necessity, however, is not a victim liability
defense.
The defendant is charged with murder.\textsuperscript{117}

4. The defendant lives in a bad neighborhood. He has been assaulted and threatened several times by the victim, a gang member. In an effort to prevent further attacks by victim, the defendant hires a person in the neighborhood to assault the victim. The defendant is arrested for assault and conspiracy.\textsuperscript{118}

Of course, one might respond that the above defendants should not be exempt from liability because they have committed harms. Fairness concerns, however, dictate that some individuals who commit harms should be exculpated because of attendant circumstances.\textsuperscript{119} Moreover, the existing law provides defenses to defendants who commit harms in response to victim precipitation in a variety of other situations. It is difficult to see a good reason why the above defendants should be more culpable than the following defendants who have colorable victim liability defenses under current law:

1. The victim, an abusive boyfriend, hits the defendant. The defendant, in response, stabs him. The defendant is arrested for aggravated assault and asserts self-defense and provocation.\textsuperscript{120}

2. The victim trespasses on defendant's lawn. The defendant comes out and hits him with a bat. The defendant is arrested for aggravated assault and asserts defense of property.\textsuperscript{121}

\textsuperscript{117} See, e.g., State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) (holding that battered woman who killed sleeping abuser could not prevail on self-defense because of imminence requirement). This scenario will be discussed in depth infra Part IV.E.

\textsuperscript{118} Again, the defendant will not generally have a valid self-defense claim because the harm is not imminent. See infra Part IV.E for how the non-specific victim liability defense will practically apply in this situation.

\textsuperscript{119} These concerns are at the heart of justifications and excuses. Burke, supra note 8, at 242-43 (describing justification versus excuse defenses). Justifications exculpate an individual when the harming of another produces a beneficial state of affairs. \textit{Id.} Excuses exculpate an individual when the harming of another does not produce a beneficial state of affairs but is otherwise pardonable under the circumstances:

Justification defenses operate when the defendant's act is the morally preferred option. Because justified acts are viewed as objectively preferable, the psychological, subjective peculiarities of the defendant are generally irrelevant to the application of the justification defense. In contrast, excuse defenses apply when the act itself is harmful, but when something about the actor relieves her of moral culpability for the wrongful act. \textit{Id.} (footnotes omitted).

\textsuperscript{120} Provocation mitigation may be predicated on a sudden attack. See Peters, 361 N.E.2d at 1280 (stating sudden combat is one of events that lead to provocation mitigation).

\textsuperscript{121} FLA. STD. CRIM. JURY INSTR. 3.6(g) states:

Defendant would be justified in using force not likely to cause death or great bodily harm against victim if the following three facts are proved:

1. (Victim must) have been trespassing or otherwise wrongfully interfering with land or personal property.

2. The land or personal property must have lawfully been in (defendant's) possession, or in the possession of a member of [his] [her] immediate family or household, or in the possession of some person whose property [he] [she] was under a legal duty to protect.

3. (Defendant) must have reasonably believed that [his] [her] use of force was necessary to prevent or terminate (victim's) wrongful behavior.
3. The defendant’s husband has hit her a couple of times in the past. The husband goes to hit the defendant, and she grabs a gun and shoots him. The defendant is arrested for murder and asserts self-defense.122

4. The defendant is a gang member who beats up and threatens all the children in the neighborhood. One of the children snaps and comes at the defendant with a knife. The defendant shoots the child. The defendant is arrested for murder and asserts self-defense.123

The non-specific victim liability defense crystallizes the unsystematic collection of victim liability laws that arbitrarily cover certain situations but fail to cover others into a coherent rule dictating the circumstances under which people are less culpable for their criminal acts because they have responded to wrongful victim behavior.

B. The Existing Law is Incoherent and Unfair

The purported legal justification for many of the specific victim liability defenses, most notably provocation, is that the existence of the victim wrongfulness reduces the defendant’s mens rea for the offense. To the extent that a defense like provocation focuses formulaically on the mental state of the defendant while at the same time manifesting in ad hoc categories of “adequate provocations,”124 which have little to do with subjective mens rea,125 a non-specific victim liability defense that explicitly recognizes victim conduct as part of the formula is a more intellectually honest legal doctrine.126 In other words, if

122. Self-defense may be asserted here because the defendant is in a confrontational situation where bodily harm to the defendant is imminent. See infra Part IV.E for a discussion of self-defense and its technical limitations.
123. The defendant in this case may assert self-defense because he is facing imminent bodily injury or death.
124. See supra note 111 for a discussion of categories of “adequate provocation.”
125. Reduction of provocation to categories of “adequate provocations” has little to do with subjective mens rea precisely because it categorically predetermines reasonable causes of heat of passion rather than looking at the defendant’s particular state of mind and whether he was reasonably moved to heat of passion. So, although courts give lip service to the idea that provocation is all about the defendant’s mental state, the categorical approach implicitly, although silently, considers whether the victim behavior was wrongful enough to justify at least in part the victim’s death. An ideological embracing of exclusionary categories of adequate provocation is evidenced in the movement to exclude a priori homosexual advances as adequate provocation. See Robert B. Minson, Comment, Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation, 80 CAL. L. REV. 133, 136 (1992) (arguing that adequate provocation should not include homosexual advance even if advance subjectively moved defendant to heat of passion and even if societal consensus determined advances to be sufficiently outrageous). One of Minson’s arguments is that provocation has become so problematic in this area because it is overly concerned with blaming the victim. Id. at 158. I would counter that it is problematic precisely because the current status of provocation law does not allow the law to dictate which victim behavior society ought to condemn. Thus, the current the law does not prevent the defense from being invoked where the victim has engaged in less than wrongful behavior.
126. See infra Part V, which examines the elements of the non-specific victim liability defense and how it focuses both on the culpability of the defendant and the culpability of the victim, rather
provocation is all about what goes on in the defendant's head, then logically the quality of the victim's conduct should be irrelevant, so long as it subjectively negates mens rea. The implication, then, is that courts should concentrate not on whether the provocation is categorically "adequate," but rather on whether it in fact negated the defendant's intent. As a mens rea issue alone, the focus on reasonableness or any other prescriptive element, is misplaced.

When viewed in this light, provocation unhappily straddles the line between operating as a way to negate an element of the crime (mens rea) and operating as a separate defense that lessens liability of the defendant because the existence of reasonable provocation shows the defendant to be less morally culpable. To illustrate, certain jurisdictions characterize provocation as reducing first degree murder to second degree murder precisely because the presence of passion negates the requisite intent for first degree murder, premaditation:

A sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment, and dominates volition, so as to exclude premeditation and a previously formed design, may not excuse or justify a homicide, but it may be sufficient to reduce a homicide below murder in the first degree, although the passion does not entirely dethrone the actor's reason.\footnote{127}

As a result, the presence of passion reduces the crime only to second degree murder.\footnote{128} This approach makes sense because the defendant may prove lack of intent through any competent evidence. For example, he may argue that the amount of time he deliberated over the murder was insufficient to show premeditation.\footnote{129} Likewise, he can argue that the existence of passion interfered with his ability to premeditate a crime.\footnote{130} A purposeful killing based on passion rather than deliberation is by definition, in many jurisdictions, a second degree murder.

Clearly, however, provocation is not always treated simply as a matter of negating premeditation. First, in many jurisdictions, provocation reduces first degree murder not merely to second degree murder but to manslaughter.\footnote{131} This reduction is often based on more than the fact that passion interferes with premeditation. In order to voluntary manslaughter, provocation must do more than just the mental state of the defendant.

\footnote{127}{Forehand, 171 So. at 243 (quoting Whidden v. State, 59 So. 561, 561 (Fla. 1912)).}
\footnote{128}{See ILL. COMP. STAT. § 5/9-2 (2003) (stating provocation mitigates first degree murder to second degree murder).}
\footnote{129}{See Bostic v. United States, 94 F.2d 636, 638 (D.C. Cir. 1937) ("Lapse of time is important because of the opportunity which it affords for deliberation.").}
\footnote{130}{As one court noted: Deliberation is proved by demonstrating that the accused acted with consideration and reflection upon the preconceived design to kill; turning it over in the mind, giving it second thought. Although no specific amount of time is necessary to demonstrate premeditation and deliberation, the evidence must demonstrate that the accused did not kill impulsively, in the heat of passion, or in an orgy of frenzied activity. Frendak v. United States, 408 A.2d 364, 371 (N.J. 1979) (internal quotations omitted).}
than merely negate *mens rea*. The provocation must show that the provoked defendant was less criminally culpable than a second degree murderer who acted out of passion. How then does homicide law distinguish between provocation as a *mens rea* issue, which should reduce first degree murder only to second degree murder, and provocation as a fuller defense, which can reduce first degree murder all the way to manslaughter? The answer is that provocation law, which reduces murder to manslaughter, inserts an element of prescription into the law. It not only requires that the defendant acted in the heat of passion, and thus without premeditation, but also requires that his heat of passion is reasonable: “*criminal homicide constitutes manslaughter when . . . 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.*”

Indeed, some courts go farther than reasonableness, requiring that the provocation fit into pre-determined categories of adequate provocation. It then becomes difficult to understand why provocation, incorporating a prescriptive or evaluative element, merely mitigates to manslaughter rather than excusing the conduct altogether. As a pure *mens rea* inquiry, it makes sense for provocation to reduce first degree murder only to second degree murder. When formulated as a defense incorporating legal prescription (the requirement that the actor be reasonable and that the provocation be in a legally pre-determined category), it is difficult to see why a person who complies with that prescription is nonetheless guilty of manslaughter. It seems that the defendant’s compliance with the legal prescription, which is based on sentiments regarding culpability, should fully exculpate him:

Why the [provocation] doctrine mitigates and does not fully exculpate might seem more difficult to explain under the evaluative view. If the defendant’s anger or rage embodies a morally appropriate evaluation of the victim’s provoking conduct, why does the law not fully immunize the defendant from condemnation? Indeed, in the not too distant past of homicide law, the existence of provoking adultery in some jurisdictions served as a justification for murder, rather than just a mitigating factor. The Article will take another look at the imprecise distinction between mitigation and exculpation in of Part V.

In addition to the lack of doctrinal coherence in the provocation doctrine, the law’s vacillation between a *mens rea* issue and a more prescriptive issue leads to unfair applications. For example, the provocation doctrine applies in every jurisdiction in some formulation to murder prosecutions. It does not, however, apply universally to assaultive conduct that falls short of killing. There is a

---

134. See, e.g., Reed v. State, 59 S.W.2d 122, 124 (Tex. 1933) (noting that penal code justified homicide committed by husband when he witnessed victim committing adultery with husband’s wife).
135. See, e.g., United States v. Ramirez, 460 F.2d 1322, 1323 (10th Cir. 1972) (“Provocation is ordinarily no justification for an assault.”); People v. Martinez, 83 Cal. Rptr. 914, 915 (Cal. Ct. App. 1970); see generally CORPUS JURIS SECUNDUM, ASSAULT § 86 Provocation (citing cases). To some
fairly straightforward doctrinal reason for this divergence. As a *mens rea* issue, provocation negates the necessary intent for first degree murder. The general intent\(^{136}\) required for assault,\(^{137}\) and even arguably the specific intent\(^{138}\) required for assault with intent to kill, is different from the intent required for first degree murder (premeditation).\(^{139}\) Consequently, the fact that adequate provocation negates premeditation does not mean it negates the requisite intent for assault.

Formulating provocation as a strict *mens rea* issue\(^{140}\) is therefore problematic because it leads to this unfair situation: a person provoked by seeing an assailant murder his daughter attacks and kills the assailant. That person avails himself of the provocation defense, is convicted of manslaughter, and receives a sentence of five years in jail.\(^{141}\) A person similarly provoked attacks

---

136. General intent, as used in this context, is an intent to do the criminally prohibited act without regard to a specific result. See *People v. Maynor*, 662 N.W.2d 468, 475 (Mich. Ct. App. 2003) ("In order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur, whereas in a general intent crime, the prohibited result need only be reasonably expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such a result.").

137. See *Smith v. United States*, 593 A.2d 205, 207 (D.C. 1991) ("We hold that the offense of assault, whether the 'attempted-battery' type or the 'intent-to-frighten' type, remains a general intent crime which may be proved by a showing that a defendant intended to do the acts which constitute the assault.").

138. Specific intent, as used in this context, is an intent to commit an act with a certain result in mind. *Maynor*, 662 N.W.2d at 476. In the case of assault with intent to kill, it is a specific intent to kill. See *Lefrwitch v. United States*, 460 A.2d 993, 994 n.1 (D.C. 1983) ("Assault with intent to kill require[s] the specific intent to kill.").

139. First degree murder requires premeditation. *State v. Thompson*, 65 P.3d 420, 424 (Ariz. 2003) ("[A] person commits first degree murder if...[i]ntending or knowing that the person's conduct will cause death, the person causes the death of another with premeditation") (internal quotations omitted). First and second degree murder require malice. *See People v. Jones*, 30 Cal. Rptr. 280, 283 (Cal. Ct. App. 1963) ("[T]he element of malice aforethought is present in both degrees of murder."). Assault requires neither premeditation, malice, nor specific intent. *See also People v. Williams*, 29 P.3d 197, 200 (Cal. 2001) ("[A] assault does not require the specific intent to cause any particular injury, to severely injure another, or to injure in the sense of inflicting bodily harm...Rather, assault required the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.") (internal quotations omitted). There is also a historical explanation for the unavailability of provocation defense in assault cases:

> [P]rovocation was given legal relevance because murder was traditionally punished by death, and society felt that the death penalty was too severe for a person who killed upon provocation. Since there was no death penalty for offenses less than murder, there was no need for the rule of provocation.

Gobert, *supra* note 11, at 535 (1977) (citing Peter English, *Provocation and Attempted Murder*, 1973 CRIM. L. REV. (ENG.) 727, 735 (Dec. 1973)). Gobert rejects the notion that the historical arguments continue to carry any weight by asserting, "[S]ociety's obligation to draw meaningful distinctions between offenders for punishment purposes, while of greatest consequence where death is a possible penalty, remains in all cases." *Id.* at 535.

140. This is accomplished by framing provocation as strictly about whether the defendant had the requisite mental state for the crime. *See State v. Oliver*, 321 N.W.2d 119, 121 (Wis. 1982) ("Heat of passion negates the distinct intent required for first-degree murder.").

141. For example, in the District of Columbia, a judge can sentence a person convicted of
but does not kill the assailant (and, in fact, only injures him superficially). That person may not avail himself of the provocation defense, is convicted of assault with intent to kill or attempted murder, and receives ten years in jail. Most would find it offensive to their sense of justice that the law treats the person who does not kill more harshly.

Similar to the above criticism, the Colorado Court of Appeals found unconstitutional a statutory scheme that allowed a provocation defense to second degree assault on an elderly person but disallowed the defense to third degree assault on an elderly person. The court described the operation of the classifications as follows:

As a result of the operation of § 18-3-209, however, a person who commits second degree assault on the elderly with provocation would be convicted of a class one misdemeanor, while a person who, also with provocation, commits third degree assault on the elderly—and thus who has acted less culpably and has caused less harm—would be convicted of a class 5 felony. This legislative scheme allows an irrational classification to occur.

The court found illogical the concept that, under the same circumstances, the law convicts a defendant who caused less harm of a greater offense. The court observed:

[T]he statutory scheme for assault as it is applied here allows a more severe degree of conviction and punishment to be based on a lesser degree of mental culpability and determined by the fortuity of having caused less serious harm to the victim. This is untenable and contrary

manslaughter to probation, to thirty years in jail, or to something in between. See D.C. ANN. CODE § 22-2105 (2001) (discussing penalty for manslaughter). Under the statute, "[w]hoever is guilty of manslaughter shall be sentenced to a period of imprisonment not exceeding 30 years." Id. Thus, a person convicted of manslaughter, depending on the judge presiding, could receive a five-year sentence.

For example, in the District of Columbia, the sentence for assault with intent to kill is between two and fifteen years. See D.C. ANN. CODE § 22-401 (2001). A judge can sentence a person convicted of this crime to two years in jail, fifteen years in jail, or something in between. Id. The judge may not, however, sentence the person to one year in jail or probation. Id. Thus, a person convicted of assault with intent to kill, depending on the judge, could receive ten years in jail.

Other rules attempt to address this problem, but are ineffective or unfair for other reasons. Gobert observes:

Some courts, perhaps swayed by this reasoning, will not convict a defendant of attempted murder or assault with intent to murder if the completed homicide would have been manslaughter. This response is really nothing more than a defense of impossibility, and, if based on a technical definition of murder, will be of limited utility, confined basically to the two aforementioned crimes. On the other hand, if intended as a more general defense, it transforms the role of provocation. Unlike in homicide, where provocation serves only to reduce the seriousness of the defendant's crime, when applied to lesser crimes against persons this approach would make provocation a complete defense.

Gobert, supra note 11, at 535.


Id. at 165.
to common sense.\textsuperscript{146}

The prosecution had argued that the provocation doctrine was applicable to second degree assault because the requisite mental state was intentional injury but inapplicable to third degree assault which required only a "knowing and reckless" mental state.\textsuperscript{147} The prosecution contended that provocation could reduce only the "intentional" mental state.\textsuperscript{148} In rejecting this argument, the court explicitly distinguished provocation law in assault from provocation law in murder, holding that the former was not strictly a \textit{mens rea} inquiry:

Thus, provocation, as it relates to the crime of assault, presupposes the required mental state, but provides that the circumstances involved may nonetheless reduce the severity of the penalty attached to the offense. In this respect, the treatment of provocation in the context of assault differs from provocation in homicide . . . .\textsuperscript{149}

By so holding, the court created within the context of assault, in effect, a victim liability defense. The court conceptualized provocation in the context of assault not merely as an issue of the defendant's mental state, but rather as an issue of the defendant's culpability in the context of the victim's behavior.\textsuperscript{150}

One might then say that there is no need for the non-specific victim liability defense because judges can create similar law in their decisions. Judges can remedy the incoherent and unfair situations through their judicial interpretations. The problem is that the court's framing provocation as a victim liability defense undermines the purported logic behind the provocation doctrine, namely, that provocation mitigates punishment because it negates intent.\textsuperscript{151} Consequently, the judge's reasoning amounted to a hidden revolution in the law of and reasoning behind the provocation doctrine. The law should, however, create new legal rules explicitly rather than hide them contradictorily in exceptional case law. The more concrete the legal rule, the more legitimate the attendant judicial interpretations of those rules:

\[\text{L}aw\ \text{is a process of elimination where a judge eliminates theories until he arrives at the appropriate solution. . . . [W]hen law is indeterminate, elimination is justification. Consequently, if judges eliminate theories on the basis of emotional attachments, they decrease the legitimacy of their legal analyses. Accordingly, if other judges have no way to know that the biased judge's reasoning is illegitimate, and adopt the same reasoning, the eventual judicial decision will be less}\]

\textsuperscript{146} \textit{Id.} at 167 (internal quotations omitted).
\textsuperscript{147} \textit{Id.} at 166.
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Suazo,} \textit{867 P.2d} at 166.
\textsuperscript{150} It was an explicit nod to the idea of liability based less on whether defendant had the requisite mental state and more on whether defendant's actions, given the entire transaction including the victim's behavior, were culpable. According to George Fletcher, "[t]he important lesson to be drawn from comparative negligence and from the history of provocation is that it is possible to distribute guilt among the parties to a criminal transaction." George P. Fletcher, \textit{The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt}, 111 \textit{Yale L.J.} 1499, 1538 (2002).

\textsuperscript{151} See \textit{supra} notes 125-130 and accompanying text for a discussion of provocation negating intent.
accurate.152

Without relying on hidden judicial revolutions, the non-specific victim liability defense properly frames the issue as one of the defendant's actions in the context of the victim's behavior. In this sense, the law is not merely about whether the defendant had the requisite mens rea for a particular crime. Rather, the law is about whether, regardless of the technicalities of requisite intent, the defendant should be exculpated for his actions. This is more fair because it does not arbitrarily penalize defendants who are charged under statutes requiring lower degrees of intent.

One might then say that the evaluative or prescriptive approach of provocation, which requires reasonableness, is adequate because it concentrates on the overall moral culpability of the defendant rather than formulaically on mens rea. Even the prescriptive approach of provocation law, however, is problematic. It ends up providing a defense to those the law should find morally culpable. The doctrine does so partly because it wavers between concentrating on subjective intent and applying inadequate reasonableness standards. The fact that the defendant is nonetheless guilty of manslaughter, rather than fully exculpated, does not adequately remedy the doctrinally flawed analysis.

A poignant example of this problem with provocation is the doctrine's ability to provide a defense to abusive husbands who kill their battered spouses. Often these killings depend on the wife's adulterous behavior or some other "provoking" conduct. Scholars note that the wife's adultery category in early provocation law was the paradigmatic case of provocation: "[t]he 'adultery category' was recognized in the earliest cases as the highest form of provocation. In fact, one of the earliest cases to delineate the various forms of 'adequate provocation,' notes that adultery is the 'highest invasion of property,' and thus represents the 'highest' form of provocation."153 Throughout the years, some courts have expanded the reach of the adultery category,154 to include situations

---


153. Donna K. Coker, Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 80 (1992) (footnote omitted). Other historical categories of provocation: (1) a violent assault; see, e.g., Sikes v. Commonwealth, 200 S.W.2d 956, 961 (Ky. 1947) (holding violent assault as basis for provocation defense), overruled in part by, White v. Commonwealth, 360 S.W.2d 198 (Ky. 1962); State v. Ponce, 19 S.E.2d 221, 223 (W.Va. 1942) (holding battery as basis for provocation defense); (2) an unlawful arrest; see, e.g., State v. Burnett, 188 S.W.2d 51, 54 (Mo. 1945) (holding unlawful arrest may be adequate provocation); and (3) mutual combat; see, e.g., State v. Inger, 292 N.W.2d 119, 122-24 (Iowa 1980) (acknowledging mutual combat as adequate provocation, but finding it not appropriate in present case).

154. Coker, supra note 153, at 81 observes:

Modern reformation of voluntary manslaughter doctrine has, if anything, tended to expand the circumstances under which the "adultery category" applies. While some jurisdictions have strict rules requiring that the act of adultery be actually witnessed by the defendant, or that the couple be married as opposed to unmarried lovers—the modern trend away from strict categories to a "reasonableness" standard has allowed wife killers to include a wider range of circumstances.
in which the killer does not directly view the adultery\textsuperscript{155} and other "reasonable" circumstances.\textsuperscript{156}

The criticism lodged by feminist scholars is that the adultery category of provocation serves as a vehicle to mitigate the punishment of abusive husbands who kill their wives. Statistics bear out that the vast majority of wife killings, including those purportedly premised on provocation, occur in the context of an already abusive relationship.\textsuperscript{157} The adultery category of provocation under current law is problematic not only because of its factual application in a patriarchal system, but also because its exposure of core defects in the doctrinal construction of provocation doctrine.\textsuperscript{158}

As a primary matter, there is the question whether adultery should justify\textsuperscript{159} killing at all, even if the husband was not previously abusive. There is no doubt that society, at the time of the initial development of the provocation doctrine, society was incredibly different from what it is today. Adulterous acts were arguably not as common, and certainly not as accepted or expected as they are in the United States today, especially if the adulterer was a woman.\textsuperscript{160} Some studies show that today adultery is quite common\textsuperscript{161} and the response of the overwhelming majority of those confronted with an adulterous spouse is to take action short of killing.\textsuperscript{162}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{155} "Admissions by wife to husband of adulterous relationship with another man, coupled with conduct, or conduct alone, may authorize the jury to find a voluntary manslaughter verdict." Vick v. State, 156 S.E.2d 125, 126 (Ga. Ct. App. 1967).
\item \textsuperscript{156} "[T]he modern trend away from strict categories to a 'reasonableness' standard has allowed wife killers to include a wider range of circumstances." Coker, supra note 153, at 81.
\item \textsuperscript{157} See generally id. (arguing that adultery gives wife-killers "wide range" of excuses).
\item \textsuperscript{158} The problem with the provocation doctrine cannot be rectified by mere external changes, like changing patriarchal belief systems in society. The way the law is structured is defective both practically and theoretically leading to unfair results, namely that those who ought to be punished are not punished. This evidences the additional need for internal reform.
\item \textsuperscript{159} "Justify" is used here in a non-technical sense to denote the judgment in provocation law that the existence of certain factors make the defendant less morally culpable for his crime. As a technical term, "justification" defenses are distinguished from "excuse" defenses. The term "justify" is used in a colloquial context and not to refer solely to situations in which a technical justification defense applies. This section does not seek to distinguish between justification and excuse.
\item \textsuperscript{160} Eighteenth century England considered adultery one of the highest invasions of property: [J]ealousy is the rage of a man, and adultery is the highest invasion of property . . . . If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law though it may seem hard, that the killing in the one case should not be as justifiable as the other. Regina v. Mawgridge, 84 Eng. Rep. 1107, 1115 (1707). In the history of adultery in American law, adulterous men and women were treated quite differently. See, e.g., Reed, 59 S.W.2d at 123 (holding wife who killed her husband's lover was not entitled to benefit of state statute justifying husband's homicide undertaken after wife's adultery).
\item \textsuperscript{162} In her new book, Living History, Hillary Clinton claims that when she found out the truth about Bill's affair with Monica, she wanted to "wring Bill's neck." HILLARY RODHAM CLINTON,
As a defense of intent negation, the provocation doctrine counsels that so long as the adulterous act in fact moved the defendant to act in the heat of passion, he may assert the defense. The implication of this, however, is that no matter what the defendant's anger is based on, whether racism, sexism, or something else, so long as the defendant was angered such that the crime was not premeditated, he has a defense to first degree murder. Remember, however, that as a mechanism of intent negation, the defendant should still be convicted of second degree murder, like any other heat-of-passion murderer. There is the issue of whether passion, which, though very real, is based on bigoted beliefs, should be permitted to negate intent or volition. To delve into this issue, however, requires an exhaustive analysis of the mens rea requirement in substantive criminal law, which is beyond the scope of this project. The argument here is that provocation should not allow an abusive wife-killer to have his first degree murder charge mitigated to manslaughter.

The feminist critique is that provocation law, as a prescriptive defense, should not absolve men whose anger is informed by patriarchal beliefs of liability. Now, one may respond that adultery would anger any man or woman, sexist or not. The operative issue, however, is whether it would anger a reasonable person enough to kill. Additionally, although adulterous wife killings arguably are not a product of sexist ideology, other kinds of wife-killings mitigated by provocation law definitely have patriarchal implications. The provocation defense has been premised not only on adultery, but also on completely legitimate if not encourageable victim behavior. Victoria Nourse observes:

A significant number of the reform cases I studied involve no sexual infidelity whatsoever, but only the desire of the killer's victim to leave a miserable relationship. Reform has permitted juries to return a manslaughter verdict in cases where the defendant claims passion because the victim left, moved the furniture out, planned a divorce, or sought a protective order. Even infidelity has been transformed under reform's gaze into something quite different from the sexual betrayal we might expect - it is the infidelity of a fiancée who danced with another, of a girlfriend who decided to date someone else, of the divorcee found pursuing a new relationship months after the final

---

163. See Forehand, 171 So. at 242-43 (requiring sufficient provocation to excite anger or create sudden impulse to kill in order to exclude premeditation).

164. See id. at 243 (stating heat of passion may reduce crime from first degree murder, not entirely excuse actor).

165. Whether the law should allow subjective intent negation premised on the existence of sexist, racist, homophobic, or other socially undesirable beliefs is another interesting issue that I will discuss later. See generally Jody D. Armour, Race Ipso Loquitor: Of Reasonable Racist, Intelligent Bayesians, and Involuntary Negrophobes, 46 STAN. L. REV. 781, 787 (1994) (commenting on racial beliefs and stereotypes negating subjective intent); Kyron Huijgens, Homicide in Aretaic Terms, 6 BUFF. CRIM. L. REV. 97, 132-45 (2002) (arguing that modern application of provocation defense is more sexist than traditionalist application).
decree. In the end, reform has transformed passion from the classical adultery to the modern dating and moving and leaving.\textsuperscript{166}

There can be little doubt that those men who kill women for attempting to leave them are moved to passion because of their internalization of chauvinistic and oppressive beliefs concerning the proper role of women. Thus, the problem with provocation law is that it does not provide an adequate mechanism for judging which types of victim behaviors the law should permit to excuse the defendant's act of killing.\textsuperscript{167} Rather than focusing on whether the provocation at issue was in fact adequate to move the defendant to kill, the law should concentrate on whether the victim's behavior is wrongful enough to permit people to indulge their passions and kill based on that behavior.\textsuperscript{168} In this sense,

\begin{itemize}
\item \textsuperscript{167} Kahan and Nussbaum argue that provocation law does, and historically has, embodied an "evaluative" view of emotion whereby legislatures and courts express, not only what provoking acts empirically move people to passion, but also which emotional responses to provocation are morally correct. They assert:

\begin{quote}
[Early] authorities clearly conceived of the categories in evaluative terms. The categories embody judgments about what kinds of goods are appropriately valued and by whom. The common law authorities, for example, viewed adultery as "the gravest possible offence which a wife can commit against her husband" and "the highest invasion of [his] property" by another man. The infidelity of an unmarried woman, however, was "entirely different," for "the man has no such right to control the woman as a husband has to control his wife The law must thus treat an enraged man who kills his girlfriend's lover differently from an enraged man who kills his wife's paramour (even if both men are to be punished), not because their emotions are different in intensity, but because their emotions reflect valuations of honor and dignity that it would be morally obtuse to equate.
\end{quote}

\begin{quote}
[W]hereas the early authorities constructed rigid legal categories to reflect what they perceived as objectively grounded evaluations, contemporary authorities make the adequacy of provocation an issue of fact for the jury so that the law may assess emotions against the background of community mores. Nevertheless, while many courts no longer purport to specify all the provocations that are adequate as a matter of law, they still occasionally identify particular ones that are not.
\end{quote}

Kahan & Nussbaum, \textit{supra} note 133, at 307-10. While it may be an accurate historical and contemporary observation that an underlying strain of logic in provocation law was to declare prescriptively what would and could not be grounds for provocation, there are nonetheless serious flaws in this approach. First, the express logic of provocation is that it is a \textit{mens rea} issue; that is, at least in part, a subjective rather than objective or prescriptive inquiry. Adhering to this explicit justification, many courts will not engage in the evaluative discourse suggested by Kahan and Nussbaum. This, in turn, leads to a disparate and arbitrary application of the provocation law. Second, as I have suggested before, legal rules should be expressed affirmatively rather than hidden contradictorily in case law. Finally, even if evaluative, the current evaluative mechanism in provocation law, namely reasonableness, is flawed for reasons I discuss below.

\textsuperscript{168} Thus, the law can express authoritative disavowal for certain wife-killings (premised on behavior which is not wrongful enough), but not for others. Joel Feinberg characterizes one of the purposes of punishment as allowing the state to express "authoritative disavowal" of the acts of those offending social norms. He states, "Punishing the [criminal] is an emphatic, dramatic, and well-understood way of \textit{condemning} and thereby \textit{disavowing}, his act." JOEL FEINBERG, \textit{DOING & DESERVING} 102 (1970) (emphasis in original). Feinberg characterizes such prescriptive determinations as part of the purpose of criminal punishment. He gives an example of the law
provocation law can be normative because it does more than merely reflect the passions of the defendant. Rather, it informs the defendant, and thereby society, as to what may and what may not legitimately arouse passion.169

At this point, defenders of the provocation doctrine could argue that the "reasonableness" requirement doctrinally addresses the problem of applying the defense to those defendants and acts that ought to be condemned. The reasonableness inquiry allows the law to exclude those whose reactions to adulterous behavior fall outside the norm.170 Depending on how subjectively the law defines them,171 reasonableness requirements offer more or less protection disavowing paramour killings even when the majority of society agrees with the practice:

In the state of Texas, so-called paramour killings were regarded by the law as not merely mitigated, but completely justifiable. Many humanitarians, I believe will feel quite spontaneously that a great injustice is done when such killings are left unpunished ... [They may feel] that paramour killings deserve to be condemned, that the law in condoning . . . them . . . expresses the judgment of the "people of Texas" in whose name it speaks, that the vindictive satisfaction in the mind of a cuckolded husband is a thing of greater value than the very life of his wife's lover. The demand that paramour killings be punished may simply be the demand that this lopsided value judgment be withdrawn and that the state go on record against paramour killings and the law testify to the recognition that such killings are wrongful.

Id. at 102-03.

169. This argument is an outgrowth of a certain deconstructive approach to the law most commonly associated with Critical Legal Studies. Critical theorists posit that law by and large reflects norms created by an entrenched majority. Thus, laws appearing on their face to be neutral both in substance and procedural enactment, are in fact borne out of a non-neutral power structure in society. See generally Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES (1987) (analyzing critical legal studies movement); The Politics Of Law: A Progressive Critique (David Kairys, ed., rev. ed. 1990) (examining law from viewpoints of class, race, and sex); Roberto Mangabeira Unger, The Critical Legal Studies Movement (1983) (criticizing institutional forms of democracy and economics). This Article recognizes that victim liability law, as currently formulated, necessarily leaves room for sexist, racist, and homophobic sentiments to enter the assessment of what constitutes adequate and reasonable provocation. Having so deconstructed the provocation law, my reconstructive aim is to propose a law which allows jurists to account for these sentiments and prevent them from entering the legal analysis.

170. This illuminates yet another tension in the criminal law. Some of our criminal law instincts, informed by our retributionist side, tell us that a person who acts out of passion and without deliberate forethought should be less culpable than someone who acts deliberately. But our other instincts, informed by our utilitarian side, tell us that those dangerous people who let the slightest provocation easily move them to rage and killing are precisely the type of people the criminal law should remove from society.

171. See State v. Leidholm, 334 N.W.2d 811, 816-17 (N.D. 1983):

Courts have traditionally distinguished between standards of reasonableness by characterizing them as either "objective" or "subjective." An objective standard of reasonableness requires the factfinder to view the circumstances surrounding the accused at the time he used force from the standpoint of a hypothetical reasonable and prudent person. Ordinarily, under such a view, the unique physical and psychological characteristics of the accused are not taken into consideration in judging the reasonableness of the accused's belief . . . . Under the subjective [reasonableness] standard the issue is not whether the circumstances attending the accused's use of force would be sufficient to create in the mind of a reasonable and prudent person the belief that the use of force is necessary to protect himself against immediate unlawful harm, but rather whether the circumstances are
against the "deviant" defendant.\textsuperscript{172} Defined subjectively, reasonableness depends more on the defendant's belief system and less on a fictional reasonable (non-deviant) person's belief system. Defined more objectively, reasonableness rests on the application of society-wide standards.\textsuperscript{173} Whether defined subjectively or objectively, there are problems with the reasonableness inquiry in provocation law.

First, it is difficult to conceptualize how adultery alone would move a "reasonable" person, under almost any standard, to take a life, no matter how egregious the circumstances.\textsuperscript{174} Thus, by carving out a category explicitly including adultery, the law of provocation is essentially self-contradictory. It counsels the jury to consider only reasonable provocations while formally recognizing a category that consists nearly exclusively of unreasonable provocations.

In addition, the fact that men prevail on provocation claims when they kill wives who attempt to leave them is strong evidence that the reasonableness requirement is not working. The reasonableness inquiry of provocation law has been unsuccessful in eliminating the "deviant" class of defendants, who are too easily inclined to kill. A simple extralegal analysis of provocation law might reveal that the problem is simply one of sexist juries ignoring the reasonableness prong and finding provocation where there is an unreasonable, easily-provoked defendant.\textsuperscript{175} Based on this, one might say an extra-legal solution is appropriate: that is, changing society's attitude towards domestic violence.\textsuperscript{176} One compelling response to this contention is that the law itself ought to affirmatively eliminate or at least police the borders of the operation of patriarchy in the criminal system.\textsuperscript{177}

\textit{Id.} (internal citations omitted).

\textsuperscript{172} The term "deviant" is meant to denote a defendant whose reaction is outside the norm.

\textsuperscript{173} See infra Part V.E for a further discussion of reasonableness and the distinction between objective and subjective reasonableness.

\textsuperscript{174} Interesting anecdotal evidence may be found from a recent survey of my Criminal Law class. I asked the students whether they thought it reasonable to kill an adulterous spouse. About half thought it was reasonable. I then asked whether under the most extreme circumstances any of them could imagine themselves killing an adulterous spouse. Only three answered in the affirmative. What this demonstrates is that the law and popular culture have sent a message that killing an adulterous spouse, and paradigmatically an adulterous female spouse, is reasonable. Our own internal moral meters, however, seem to counsel differently.

\textsuperscript{175} This could also be a problem of sexist juries believing that domestic violence and the behaviors attached thereto are reasonable. See Gena L. Durham, Note, \textit{The Domestic Violence Dilemma: How our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem}, 71 S. CAL. L. REV. 641, 647 (1998) ("When the police did make arrests, prosecutors would frequently drop domestic violence cases, sometimes because of their own ambivalence about domestic violence and sometimes because of their acknowledgment that juries, which reflect society's attitudes about domestic violence, might be reluctant to convict.") (footnotes omitted).

\textsuperscript{176} The argument is that the text of existing law does not create the problem, but rather its application by ordinary members of society in a patriarchal environment.

\textsuperscript{177} One can draw an analogy in the jury selection arena. Although, in a vacuum, the availability
A critical intra-legal examination of the reasonableness requirement compels another response. The problem goes deeper than mere jury nullification because it arises from the legal implications of the reasonableness standard in provocation law. Requiring people to act reasonably, even objectively reasonably, does not provide adequate protection against sexist defendants who kill their wives. This is because statistical typicality often defines objective reasonableness. Consequently, where racism or sexism is prevalent in society, a defendant can be a "reasonable" racist or a "reasonable" wife-killer. Jody D. Armour discusses the problem with victim liability law allowing defendants to rely on purportedly non-deviant racist beliefs:

[There is a] fallacy of equating reasonableness with typicality. With respect to race, prevailing beliefs and attitudes may fall short of what we can fairly expect of people from the standpoint of what Professor Eisenberg refers to as "social morality." If we accept that racial discrimination violates contemporary social morality, then an actor's failure to overcome his racism for the sake of another's health, safety, and personal dignity is blameworthy and thus unreasonable, independent of whether or not it is "typical." Although in most cases the beliefs and reactions of typical people reflect what may fairly be expected of a particular actor, this rule of thumb should not be transformed into or confused with a normative or legal principle. Nevertheless, this is precisely the error the "Reasonable Racist" makes in claiming that the moral norm implicit in the objective test of reasonableness extends no further than the proposition that "blame is reserved for the (statistically) deviant." 

The problem with reasonableness, then, is one of application. If reasonableness requirements do incorporate prescriptive notions of morality, then the concept of "reasonable" provocation would likely prevent mitigation for wife abusers or racists. Reasonableness, however, as Armour observes, is often equated with typicality or prevailing yet undesirable norms. In this circumstance, reasonableness devolves into the jury's assessment of a "typical" belief. The criticism then is that the law should not recognize killing as a reasonable response to adultery or attempting to leave one's husband, despite of peremptory challenges to parties in a prosecution appears to be fair and unbiased, racist sentiments in society cause racist application of this neutral tool. The legal doctrine set forth in Batson v. Kentucky policed the actual practice, rather than just the doctrine, of the peremptory strikes process to make it consistent with Equal Protection. 476 U.S. 79, 89 (1986).

178. See supra note 171 for a discussion of reasonableness in State v. Liedholm.

179. Subjective reasonableness offers less protection against the reasonable racist, because the jury is invited to determine whether the actions were reasonable "to the defendant."

180. According to Jody D. Armour, "The Reasonable Racist asserts that, even if his belief that blacks are "prone to violence" stems from pure prejudice, he should be excused for considering the victim's race before using force because most similarly situated Americans would have done so as well." Armour, supra note 165, at 787. Moreover, the ability to use such a defense exposes fundamental flaws in the legal construction of self-defense. Id. at 787-89.

181. Id. at 789-90 (quoting MELVIN EISENBERG, THE NATURE OF THE COMMON LAW 15 (1988)).
the purported empirical prevalence of the view that it is a reasonable response. This type of analysis is reflected in judicial decisions that refuse to allow jurors to consider certain legitimate victim behavior as provocation, even if that behavior is disfavored by society on bigoted grounds:

[W]hile many courts no longer purport to specify all the provocations that are adequate as a matter of law, they still occasionally identify particular ones that are not. Some (but not all) courts, for example, have refused to permit defendants to present voluntary manslaughter theories in cases in which their victims have made homosexual advances toward the defendant or engaged in similar behavior. These decisions...do not assume that the asserted provocations were insufficient to destroy the defendants' volition; indeed, many of these cases have excluded expert psychiatric testimony designed to show exactly that. Rather they deem the provocations insufficient because they conclude that the law should criticize rather than endorse the evaluation of the victim's identity implicit in the defendant's rage.

The fact, however, that some judges, in practice, read an element of wrongful victim behavior into the provocation law does not solve the problem. First, not all judges interpret provocation law this way, leading to disparate results. Second, if the law is to make an affirmative normative statement that it will only justify killing on the part of those defendants who responded reasonably to wrongful conduct, the law as explicitly formulated should reflect that statement. The law should authoritatively disavow killings predicated on less than wrongful conduct. The incorporation of the wrongfulness

182. An anti-majoritarian, positivist argument is that the law ought to dictate rather than merely reflect the prevailing mores of society.

183. Kahan & Nussbaum, supra note 133, at 310 (footnotes omitted). Some judges exclude homosexual advance from adequate provocation on the basis of "reasonableness." See, e.g., Commonwealth v. Carr, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990) (stating that "whatever a person's views about homosexuality, the law does not condone or excuse the killing of homosexuals any more than it condones the killing of heterosexuals"). Other courts determine that killing based on homosexual advance is per se unreasonable. See id. (stating that law does not recognize homosexual activity as sufficient provocation to reduce unlawful killing from murder to manslaughter). These courts do not leave it up to the jury to determine whether the killing was socially typical. Consequently, although these courts use the term "reasonable," in fact they are declaring that homosexual advance is not wrongful conduct such that it could ever justify killing. Id.

184. See infra Part IV.D for a discussion of judicial arbitrariness.

185. Again, a silent revolution is not enough. See supra note 151-52 and accompanying text for an advocacy of the explicit creation of new legal rules.

186. Under the law thus formulated, provocation would not be available to defendants even if they reasonably reacted to the provocation, so long as the victim's acts were not sufficiently wrongful. Consequently, this reflects the notion that law prescribes what people ought to do or value rather than merely reflecting what people in fact do or value. Being reasonable or within the statistical norm gives way to being legal in a way specified particularly by law.

A problem, however, remains: retroactivity. The reasonable yet illegally acting defendant can claim that he did not know that only certain reasonable provocations excused his conduct and that he was merely reasonably reacting to the circumstances. While compelling, in American law, the reasonable and good faith belief that your acts are legal is a mistake of governing law and generally no excuse. See, e.g., People v. Mayer, 133 Cal. Rptr. 2d 454, 459 (Cal. Ct. App. 2003) ("It is an emphatic
requirement in the victim liability defense will allow the law to be prescriptive. The law will be able to dictate presumptively those victim behaviors that legitimately reduce defendant culpability.

The critic may nonetheless object that even the requirement of "wrongfulness" rather than "reasonableness" may bring up the above problems. For example, a racist might believe that an interracial couple kissing in the park are behaving "wrongfully," and a homophobe could term a homosexual advance "wrongful" conduct. The fact is that defining right and wrong, like defining reasonable and unreasonable, is a tricky enterprise. If one defines wrongfulness completely objectively and without reference to any contemporary beliefs, it can seem hopelessly arbitrary. If one defines it with reference to prevailing norms, the definition is vulnerable to Armour's criticism of reasonableness standards. This does not mean, however, that the addition of the requirement of "wrongfulness" to the provocation equation is meaningless. By requiring that the victim has acted wrongfully, the law sends a powerful message that only bad acts on the part of the victim can trigger the legal mechanism which allows the defendant's behavior to be assessed in context. If the victim has not acted wrongfully, the defendant does not have a defense. It does not matter how reasonably the defendant has acted in response to the victim's non-wrongful behavior. This itself is a moral choice and a policy choice. One certainly could argue that if a defendant is reasonably provoked, he is less culpable, regardless of whether the victim acted wrongfully. Based on the foregoing arguments, however, this Article contends that lessening liability because of victim conduct only makes moral sense in cases where the victim has acted wrongfully.

Turning back to the adultery context, one might claim that adultery, in most cultures, is wrongfull. Thus, even with the wrongfulness requirement, the law may nonetheless permit batterers to kill their abused but adulterous wives. There are two immediate responses. First, the non-specific victim liability defense can define wrongfulness in such a way as to exclude adultery from its ambit.187 Second, critics of provocation in the adultery context contend that provocation law should only provide a defense to a person who uncharacteristically killed because of extraordinary circumstances.188 It should not provide a defense to men with previous histories of violence:

Homicide law divides sane individuals who intentionally kill into two major categories: those who premeditate murder and those who act in the heat of passion. Social stereotypes of wife-killing that characterize the killer as a previously non-violent man who "snapped" under

---

187. See supra Part V.A for an argument that the law is arbitrarily incomplete because the law does not cover many crimes and victim behaviors.

188. This contention is, of course, based on an assumption about the nature of criminal sanctions, namely, that only good, non-criminal people should receive the benefit of the provocation defense. The counterargument is that even provocation of the criminally predisposed is possible. This debate is most starkly exemplified by the arguments over the predisposition requirement in entrapment. See infra Part V.C for an argument that juries may synthesize victim precipitation unfairly.
pressure, roughly parallel the understandings which underlie heat-of-passion doctrine. However, this social stereotype is grossly inaccurate when applied to men who are identified as "batterers" and when applied to the general category of husband-wife killings. Violence perpetrated by abusive men is purposeful, not spontaneous; the majority of men who kill their wives have a documented history of violent assaults.\textsuperscript{189}

The current provocation law does not formally distinguish predisposed killers from those who kill uncharacteristically. The non-specific victim liability defense, by contrast, requires that the defendant not be predisposed to the criminal act. Thus, those husbands predisposed to violence against their wives would not be able to claim the defense. The decision to include a requirement of lack of predisposition has benefits and drawbacks. Part V.D will discuss these in detail.

Consequently, the non-specific victim liability defense is more coherent than existing law because it eliminates many of the irrational classifications that occur under current law. In addition, this defense is more desirable because it is more prescriptive than the existing law. The non-specific victim liability defense, which is based on wrongful rather than merely provoking conduct, sends the message that the government only permits private citizens to harm in response to legally sufficient wrongful conduct. In doing so, it allows judges and juries more room to take into account the fairness of the treatment of the victim (essentially, to what extent the victim deserved the defendant's conduct) and not just the \textit{mens rea} of the defendant.\textsuperscript{190} Interestingly then, as it impacts the preexisting law of provocation, the non-specific victim liability defense is in fact more victim-friendly. It affirmatively states that criminal responses to less than wrongful victim behavior are not tolerable.

\textbf{C. In the Current System, Juries May Synthesize Victim Precipitation Unfairly}

Even outside the self-defense and provocation context, victim behavior evidence is introduced into the trial in a variety of ways. For example, wrongful victim behavior evidence, brought into the trial as background evidence, evidence of intent, or evidence of credibility,\textsuperscript{191} is in fact assessed by juries,\textsuperscript{192} but

\begin{itemize}
  \item \textsuperscript{189} Coker, \textit{supra} note 153, at 93.
  \item \textsuperscript{190} The defendant who kills his wife for threatening to leave him could qualify for a provocation defense. See \textit{supra} note 166 and accompanying text for a discussion of how many spouse murders involve no infidelity, just the victim's desire to leave the relationship. A defendant in such a case would not, however, qualify for the victim liability defense because threatening to leave one's husband is not a wrongful act.
  \item \textsuperscript{191} Generally, prior wrongful behavior is inadmissible. However, it may be admissible if independently relevant in proving more than just the bad character of the witness. See FED. R. EVID. 404(b):
  \begin{quote}
    Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .
  \end{quote}
\end{itemize}
without guidance as to the proper assessment of that evidence. This evidence could include past victim behavior that has nothing to do with the instant crime, yet the jury will hold it against the government.\textsuperscript{193} Similarly, juries will take into account precipitate victim behavior that is not wrongful, but merely negligent, to acquit defendants often in a way that is disempowering to women and minorities.\textsuperscript{194} This is most starkly exemplified by jurors' syntheses of precipitate behavior in rape trials, but it can also happen with race and socioeconomic status.\textsuperscript{195} A non-specific victim liability defense would formalize doctrinally\textsuperscript{196}

\textsuperscript{192} See Gobert, supra note 11, at 538 (discussing how jurors take into account victim precipitation); see generally Harvey Kalven, Jr. & Hans Zeisel, The American Jury (1966) (discussing empirical study of juror attitudes).

\textsuperscript{193} In the rape context, shield laws emerged as a response to jurors engaging in this type of faulty analysis. Though past sexual conduct evidence had little, if anything, to do with consent, the jury would hold the evidence against the government's case. Martha Chamallas observes:

In the courtroom, the language of lawyers, judges, or even witnesses can highlight or "prime" familiar images in the mind of jurors and increase the chance that jurors will resort to biased prototypes in deciding whether a crime or injury occurred or whether legal protection is warranted. To prevent activation of biased prototypes, exclusionary rules such as rape shield laws are sometimes useful to prevent the jury from receiving information that might lead them to commit the fundamental attribution error and to ascribe the cause of the rape to the victim's character.


\textsuperscript{194} See supra note 3 for a discussion of the negative impacts of focusing on precipitate behavior.

A famous study of American juries in the 1960s revealed the following:

[The] rewriting of the law of rape to accommodate the defendant when the female victim has taken the risk is on occasion carried to a cruel extreme. There are cases in which the situation is clearly aggravated by extrinsic violence, but the jury is still lenient to the defendant. In one such case the judge tells us: This was a savage case of rape. Jaw of complaining witness fractured in two places. Nevertheless the jury acquits when it learns that there may have been intercourse with the complainant on prior occasions. In another case the jury's reaction is equally disturbing. Again the rape appears to have been brutal. Three men kidnap a girl from the street at 1:30 in the morning, take her to an apartment, and attack her. The judge states: It developed that the young unmarried girl had two illegitimate children; also defendant claimed she was a prostitute. No, evidence of prostitution was introduced except by defendant's testimony. He calls the [not guilty] verdict "a travesty of justice."

Kalven & Zeisel, supra note 192, at 251.

\textsuperscript{195} In the rape context, jurors focus on whether the victim "deserved" to be raped rather than whether there was consent:

Although the material fact to be decided is whether or not there was consent, the jury sets aside this inquiry and instead decides whether or not the complainant is "responsible" for or "deserves" the ensuing rape: In 1989, a circuit court jury in Florida acquitted [a] 26-year-old [defendant] of abducting a 22-year-old woman at knife point and repeatedly raping her. The jury based its finding partly on the fact that she was wearing a lace miniskirt without underwear. In explaining the decision of the three-man, three-woman jury, foreman Roy Diamond said: "We felt she asked for it for the way she was dressed."

Gruber, supra note 4, at 211 (quoting Lani Anne Remick, Comment, Read Her Lips: An Argument for a Verbal Consent Standard in Rape, 141 U. Pa. L. Rev. 1103, 1123 (1993)). In terms of race and socioeconomic status, experts claimed that the jury's acquitting of famed subway gunman Bernard Goetz was based, at least in part, on impermissible stereotyping and reliance on past criminal acts of
that which currently occurs on informal or less formal levels. By doing so, the defense could serve the purpose of policing the jury by telling jurors exactly what to do with evidence of victim wrongfulness, which particular evidence is relevant to the defense, and the parameters of the defense.\footnote{197}

\textbf{D. Victim Precipitation Evidence Currently Enters the Criminal Process on an Ad Hoc Basis}

Both prosecutors and judges take into account wrongful victim conduct to varying degrees depending on the facts of the case, the defendant, or their particular viewpoints and prejudices. Prosecutors account for victim precipitation at the charging and plea bargaining stages on an \textit{ad hoc} basis. As a consequence, victim wrongfulness lessens defendant liability to varying degrees, based not on any set of standards, but rather on the whim of the prosecutor. The most obvious problem with an unfettered exercise of prosecutorial discretion is that similarly situated defendants are treated differently. This, in turn, causes certain offenders to be punished too lightly and certain innocent defendants to forgo trial in fear of a harsher sentence if they are convicted by the jury.\footnote{198}

In addition, the existence of an abundance of discretion can also allow undesirable prejudices to enter prosecutorial decisions:

Prosecutors also rely on assumption of risk principles in their decisions to prosecute rape cases. Surprisingly, these principles often slip, perhaps subconsciously, into their arguments during trial. One prosecutor argued in closing: "You wouldn't let a burglar go free because the door was not locked. Don't let a rapist go free because [a

\footnote{196. Rather than existing as a silent revolution in the law by unlikely judicial interpretation, the victim liability defense will formulate doctrinally the boundaries of wrongful victim behavior that serve to limit defendant liability. See \textit{supra} notes 151-52 and accompanying text for the argument advocating explicit creation of legal rules.}

\footnote{197. This can be achieved both by lawyers arguments as to the relevance of evidence as well as the judge's instructions. The presumption then is that jurors follow instructions. See Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985) ("[W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."); Parker v. Randolph, 442 U.S. 62, 73 (1979) ("A crucial assumption underlying [the jury] system is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.").}

\footnote{198. Prosecutorial discretion has two main problems, which have been discussed exhaustively in legal literature: (1) punishing offenders too lightly in the name of convenience and, conversely, (2) creating a system in which innocents are compelled to declare themselves guilty so as to avoid harsher punishment in the event of an unsuccessful trial. These criticisms are made both by defendant and victim advocates. See Robert L. Misner, \textit{Recasting Prosecutorial Discretion}, 86 J. CRIM. L. & CRIMINOLOGY 717, 752 (1996) ("Until recent times, opponents of plea bargaining tended to view it as unnecessarily compromising rights of the defendant. Recently, however, plea bargaining has come under attack from those who believe it has resulted in insufficient punishment for offenders.") (footnote omitted).}
woman] is too dumb not to make herself an easy mark.”

There are circumstances in which legitimate predictions of the success of a self-defense claim lead a plea offer favorable to the defendant. Other times, however, prosecutors will make good plea offers, not for legitimate legal reasons, but rather based upon the presupposition that juror prejudice will lead to acquittal. A defendant accused of violently raping a prostitute, for example, may receive a better plea offer than a defendant who committed a less egregious sexual assault against a non-prostitute.

The non-specific victim liability defense could help police the boundaries of prosecutorial discretion by offering, at least, more of a basis for predicting what might happen at trial, thereby reducing arbitrariness. In addition, such a liability defense can help control prosecutors by sending a message that victim wrongfulness, rather than mere negligence, bad character, or imprudence, is at the heart of the defense.

Similarly, judges assess victim behavior during sentencing on an ad hoc basis. The problem here is that, much like prosecutorial discretion, judicial discretion as to victim precipitation inserts arbitrariness into the process. Judges will be moved to different degrees by victim wrongfulness and, especially without guidelines, will sentence similarly situated defendants vastly differently.

In modern criminal law, however, sentencing is regulated by guidelines in many jurisdictions. Some guidelines contemplate the assessment of victim conduct. For example, Guideline § 5K2.10 of the U.S. Sentencing Guidelines, “Victim’s Conduct (Policy Statement),” provides, “[i]f the victim’s wrongful conduct contributed significantly to provoking the offense behavior, the court


200. Arbitrariness is ultimately symptomatic of any system in which there is prosecutorial discretion and does not just specifically attach to victim precipitation cases. As a matter of my own experience and common sense, however, the more certain the results of the potential trial, the more uniform plea bargaining and charging decisions become. Thus, a law that makes the impact of victim conduct evidence at trial more uniform will also make plea bargaining and charging more determinate.

201. See Gobert, supra note 11, at 539 (discussing studies indicating ways in which judges incorporate victim behavior into sentencing).

202. Compare United States v. Volpe, 78 F. Supp. 2d 76, 93 (E.D.N.Y. 1999) (holding downward departure pursuant to U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (2003) not warranted based on victim Abner Luima’s alleged illegal conduct and resisting arrest as provoking violent police assault), with United States v. Koon, 833 F. Supp. 769, 786-87 (C.D. Cal. 1993) (holding downward departure pursuant to U.S SENTENCING GUIDELINES MANUAL § 5K2.10 (2003) warranted based on victim Rodney King’s alleged illegal drunk driving and resisting arrest as provoking violent police assault). Granted, these two cases are factually distinct both in the behavior of the victims and the assault committed by the police officers. Nonetheless, they illustrate the narrow or expansive treatment of § 5K2.10 based on the ideology of the judge. In the Volpe case, the court indicated that § 5K2.10 was inappropriate all together because of the sexual nature of the attack, thus giving § 5K2.10 a narrow interpretation. Volpe, 78 F. Supp. 2d at 93. In Koon, under the guise of § 5K2.10, the judge took into account not only Rodney King’s “wrongful” behavior, but also the fact that the state jury acquitted Koon and the “punishment” he received from massive media coverage. Koon, 833 F. Supp. at 785-86, 790-93. Thus, the court read § 5K2.10 in an incredibly expansive manner.
may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense.\textsuperscript{203}

It is true that guidelines like this standardize to some degree the judicial application of victim liability concerns. Pursuant to the federal sentencing guidelines, however, victim conduct manifests as a grounds for downward departure.\textsuperscript{204} Under federal law, departures are technically discretionary decisions by the judge.\textsuperscript{205} Thus, although the judges do have decisional appellate cases to guide their assessment of victim behavior, there is still an element of arbitrariness to the application of victim behavior to guideline sentences. Moreover, the practical reality is that downward departures were intended by the legislature to be, and in fact are, rare.\textsuperscript{206} To the extent that justice requires that defendants who respond to wrongful victim behaviors be treated differently than defendants who do not, downward departures are probably the least effective method of achieving just results.\textsuperscript{207}

In addition to arbitrariness and efficacy concerns, there are other practical and philosophical reasons why victim wrongfulness should properly be addressed at the liability phase of a criminal prosecution. As a practical matter, one can assert that the most important decisions regarding the effect of a penal law on the defendant should be made by juries. This Article does not necessarily endorse the concept that juries are universally better arbiters of fact than judges. Nonetheless, the contention is that our system assumes, arguably correctly, that juries are the most ideal fact-finders. They are chosen at random, do not have political or personal designs, and can most fairly decide the facts of a case.\textsuperscript{208} One could say, judges, especially in this victims' rights era, might be afraid to apply victim liability rules during sentencing in fear of the perception that they are not "tough on crime" or that they let the defendant go "on a technicality."\textsuperscript{209}

On a philosophical level, there is a difference between the facts of a criminal transaction that determine liability and those that guide sentencing.\textsuperscript{210} If

\begin{footnotes}
\footnotetext[203]{U.S. SENTENCING GUIDELINES MANUAL § 5K2.10.}
\footnotetext[204]{Id.}
\footnotetext[205]{See, e.g., United States v. Kelly, 329 F.3d 624, 630 (8th Cir. 2003) (deciding that trial court's discretionary denial of downward departure was not reviewable by Court of Appeals).}
\footnotetext[206]{See, e.g., United States v. Middleton, 325 F.3d 386, 389 (2d Cir. 2003) (noting that facts underlying downward departure must be "sufficiently extraordinary to take the defendant out of the heartland of cases contemplated by the Sentencing Commission in formulating the Guidelines").}
\footnotetext[207]{This is precisely because they are intended to occur rarely. See, e.g., United States v. King, 280 F.3d 886, 890 (8th Cir. 2002) (stating that downward departure is only warranted in "extremely rare cases") (quoting United States v. Contreras, 180 F.3d 1204, 1213 (10th Cir. 1999)).}
\footnotetext[208]{See Ronald J. Allen, Factual Ambiguity and a Theory of Evidence, 88 NW. U. L. REV. 604, 632 (1994) ("Juries are undoubtedly better fact finders than judges about conventional affairs . . . ").}
\footnotetext[209]{This problem is often encountered in the application of the exclusionary rule. According to Donald Dripps, "Exclusion, however, suffers a serious psychological problem. Judges are reluctant to free obviously guilty criminals. Trial judges, therefore, tilt fact-finding against exclusion, while appellate judges give constitutional rights crabbed and grudging interpretations. As a result, it is fair to say that the Fourth Amendment is still underenforced." Donald Dripps, The Case for the Contingent Exclusionary Rule, 38 AM. CRIM. L. REV. 1, 2 (2001).}
\footnotetext[210]{This idea, that certain factors properly belong at trial rather than sentencing, underlies the}
something negates or lessens criminal liability, that is, the moral and legal culpability of the defendant, it properly belongs at the liability phase. This is why lack of intent, self-defense, and provocation are all defenses to the crime, and not simply factors in sentencing. Sentencing arguably takes into account non-transactional factors, factors that generally speak to the defendant's (and victim's) character rather than specifically to what occurred between the defendant and the victim. It is true that sentencing guideline litigation, reflected by the Supreme Court decision in *Apprendi v. New Jersey* and its progeny, has highlighted that the line between liability factors and sentencing factors is quite blurry. Nonetheless, there is no good reason for insisting that the general assessment of victim liability should occur only at the sentencing level.

The non-specific victim liability defense will put the power to lessen the defendant's liability or punishment back in the jury's hands. The elements of the defense will be argued by counsel, and the judge will charge the jury with determining whether the elements were factually present. The decision will no longer be left to the caprice of the judge during sentencing.

**E. The Current Law Contains Technical Limitations that Unfairly Exclude Defendants**

Perhaps the most salient example of an existing defense in criminal law based solely on wrongful victim conduct is self-defense. Self-defense operates

---

Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court, noting the "Framers' fears that the jury right could be lost not only by gross denial, but by erosion," observed that "practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt . . . . [T]he reasonable doubt requirement has a vital role in our criminal procedure for cogent reasons." *Apprendi*, 530 U.S. at 483-84 (internal quotations omitted).

The disjunction here is that the Court's decision was specifically limited to purported "sentencing" factors that allowed the judge to increase the statutory maximum. One could find some connection between a factor that would allow punishment greater than the statutory maximum and factors, like victim wrong-doing, that would call for punishment under all statutory minimums (that is, no punishment at all).

211. See *supra* notes 59-64 and accompanying text for a discussion of the assessment of defendant and victim characters during sentencing.

212. The Federal Sentencing Guidelines explicitly recognize background and character as a basis for determining a sentence. According to the Federal Sentencing Guidelines, "[i]n determining the sentence to impose within the guideline range . . . the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2003).


215. See *supra* note 10 and accompanying text for a discussion of self-defense. The fact that victim behavior and even character is at the center of self-defense is evidenced in laws that permit "a person charged with homicide or assault to prove, in support of a self-defense claim, that the alleged
to absolve the defendant of liability when the victim has engaged in imminently life-threatening conduct, such that defensive force is necessary (or the defendant reasonably believes this to be the case). A reasonable mistake of fact defense (that is, the defendant may still avail herself of self-defense where there was actually no imminent threat but she was reasonably mistaken that there was) is built into the definition of self-defense. In its simplest form, as in jurisdictions where there is no duty to retreat, the self-defense rule is expansive, allowing for the use of deadly force even when retreating safely is an option. Some jurisdictions emphasize mainly the reasonableness of the defendant's belief that the danger is imminent, while others focus additionally on whether the amount of force employed was reasonable. Some self-defense formulations set forth victim had a bad general reputation for violence." Peraita v. State, No. CR-01-0289, 2003 WL 21246440, at *13 (Ala. Crim. App. May 30, 2003).


218. Some jurisdictions require retreat, see, for example, FLA. STANDARD CRIM. JURY INSTRUCTIONS. 3.6(f):

Retreat. Read in all cases:

The fact that the defendant was wrongfully attacked cannot justify [his or her] use of force likely to cause death or great bodily harm if by retreating [he or she] could have avoided the need to use that force. However, if the defendant was placed in a position of imminent danger of death or great bodily harm and it would have increased [his or her] own danger to retreat, then [his or her] use of force likely to cause death or great bodily harm was justifiable.

Others do not. See, e.g., ARIZ. REV. STAT. ANN. § 13-411(B) (West 2001 & Supp. 2003) ("There is no duty to retreat before threatening or using deadly physical force justified by subsection A of this section.").


220. See, e.g., State v. Smith, 807 A.2d 500, 508-09 (Conn. App. Ct. 2002) (describing North Carolina's imminent danger standard for assessing reasonableness of defendant's belief); see also LAFAVE, supra note 116, at § 5.7.5.7(b) ("In determining how much force one may use in self-defense, the law recognizes that the amount of force which he may justifiably use must be reasonably related to
concrete parameters of the defense. For example, certain self-defense rules predicate the duty to retreat on attendant facts such as who was the first aggressor,\textsuperscript{221} and whether the initial threatening act occurred inside a curtilage.\textsuperscript{222} These particular parameters, as well as the narrow nature of the wrongful behavior committed by the victim (imminently threatening behavior), serve to place limits on the criminal law's recognition of the right to use deadly force.\textsuperscript{223} The idea is that the criminal law countenances the private use of deadly force solely in the narrowest of circumstances.

The incredibly specific nature of self-defense has created difficult problems, as well as a vast collection of literature, regarding non-paradigmatic cases of self-defense.\textsuperscript{224} By this, I mean self-defense cases that do not neatly fit into the factual framework of warding off an immediate aggressor, for example, battered women who kill their sleeping abusers.\textsuperscript{225} While confrontational cases in which battered women ward off immediate attack are intuitively easier to fit into the

---

\textsuperscript{221} See, e.g., People v. Toler, 9 P.3d 341, 344 (Colo. 2000) (holding that "under Colorado law only an initial aggressor has a duty to retreat").

\textsuperscript{222} See, e.g., MASS. GEN. LAWS ANN. CH. 278 § 8A (West 1998 & Supp. 2003) ("There shall be no duty on said occupant to retreat from such person unlawfully in said dwelling.").

\textsuperscript{223} See Richard A. Rosen, \textit{On Self-defense, Imminence, and Women Who Kill Their Batterers}, 71 N.C. L. REV. 371, 378 (1993) (asserting that imminence requirement serves as condition precedent to self-defense with "goal of limiting self-defense only to those who act out of the most dire necessity").

\textsuperscript{224} The most problematic and controversial non-paradigmatic case of self-defense is arguably the battered woman who kills her sleeping husband. This situation is the subject of a near anthology of legal literature. \textit{See generally} David L. Faigman & Amy J. Wright, \textit{The Battered Woman Syndrome in the Age of Science}, 39 ARIZ. L. REV. 67 (1997) (providing that traditional criteria of self-defense may not be met in cases involving battered woman syndrome); Rosen, supra note 223 (analyzing imminence of danger requirement in context of battered women cases); Robert F. Schopp et al., \textit{Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse}, 1994 U. ILL. L. REV. 45 (1994) (arguing that use of battered woman syndrome may harm defendant's claim of self-defense).

\textsuperscript{225} Perhaps the most famous case of nonconfrontational self-defense is \textit{Norman}. The Supreme Court of North Carolina reversed the Court of Appeals's holding that the defendant, who had killed her sleeping batterer after suffering years of abuse and death threats, could not assert self-defense. \textit{Norman}, 378 S.E.2d at 13. The Supreme Court opined:

\textit{The evidence in this case did not tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm. The evidence tended to show that no harm was "imminent" or about to happen to the defendant when she shot her husband. The uncontroverted evidence was that her husband had been asleep for some time when she walked to her mother's house, returned with the pistol, fixed the pistol after it jammed and then shot her husband three times in the back of the head. The defendant was not faced with an instantaneous choice between killing her husband or being killed or seriously injured. Instead, \textit{all} of the evidence tended to show that the defendant had ample time and opportunity to resort to other means of preventing further abuse by her husband. There was no action underway by the decedent from which the jury could have found that the defendant had reasonable grounds to believe either that a felonious assault was imminent or that it might result in her death or great bodily injury. Additionally, no such action by the decedent had been underway immediately prior to his falling asleep.}

\textit{Id.} Quite clearly, the thrust of the holding is that the imminence requirement, when viewed as a condition precedent, precludes a self-defense claim in the nonconfrontation scenario.
traditional self-defense framework because they mirror paradigmatic self-defense scenarios,226 the same cannot be said of nonconfrontational situations.227

As the women's movement progressed in the last twenty years, domestic violence became a subject of legal and social interest and debate.228 Concurrent with the increasing awareness of domestic violence issues came the development of a legal debate over battered women who kill their batterers. Because of the technical requirements of imminence and necessity, jurors and judges had a difficult time fitting battered women, especially those who killed sleeping abusers, into the self-defense framework. Courts and juries struggled to see how a battered woman, whom they believed could have left the relationship, killed out of “necessity” or how a sleeping batterer or man or husband could be an “imminent” attacker.229 In addition, jurors doubted the veracity of the claims of abuse, believing that if abuse had occurred, the woman would have left.230 In

---

226. One expert has argued that the controversy over battered woman syndrome and all of its attendant problems has been quite overstated because, in fact, most battered women kill in confrontational situations:

Two hundred twenty-three cases were identified as meeting the definition established for battered women's homicide cases. These cases generated a total of 270 opinions. The incidents, rather than the opinions, were used as the base for this portion of the Article's analysis. Of the 223 incidents comprising the base, 75% involve confrontations. Twenty percent are nonconfrontational cases (4% “contract killings,” 8% sleeping-man cases, and 8% defendant as initial aggressor during a lull in the violence). In the remaining 5%, the appellate opinions did not include a discussion of the incident facts introduced at trial. As the breakdown indicates, the appellate opinions do not support the conclusion that most battered women kill during nonconfrontational situations.

Holly Maguigan, Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals, 140 U. PA. L. REV. 379, 396-97 (1991) (footnotes omitted). But see CHARLES P. EWING, BATTERED WOMEN WHO KILL 34 (1987) (asserting that two-thirds of such killings occur in nonconfrontational situations). The obvious response to Professor Maguigan is that even if only comprising 20% of the total killings, there must be some analysis of whether the law treats this 20% in a logical, consistent, and coherent manner.

227. See Norman, 378 S.E.2d at 12 (describing battered wife who killed sleeping husband); see also Ex Parte Haney, 603 So.2d 412, 416-17 (Ala. 1992) (alleged battered wife ordered hit-man killing of husband); People v. Yaklich, 833 P.2d 758, 759-60 (Colo. Ct. App. 1991) (finding battered woman hired hit-man to kill husband); Lentz v. State, 604 So.2d 243, 245-46 (Miss. 1992) (illustrating battered woman shot decedent in two physical locations and decedent had tried to retreat); Leidholm, 334 N.W.2d at 813-14 (describing battered woman killed sleeping husband).

228. Richard D. Friedman and Bridget McCormack observe, “Over the last decade, legislatures, courts, law enforcement authorities, and the public have shown an increased awareness of the extent and seriousness of domestic violence. Efforts to curb this terrible problem have intensified at the national, state, and local levels.” Richard D. Friedman & Bridget McCormack, Dial-in Testimony, 150 U. PA. L. REV. 1171, 1181 (2002). For an excellent discussion of domestic violence, feminism, and law, see generally ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000).

229. See supra note 224 and accompanying text for a discussion of battered woman's syndrome, self-defense, and imminent danger.

230. Schopp et al. describe how juries synthesize a woman's failure to leave as relevant to her credibility:

Some advocate expert testimony as relevant to the credibility of the defendants' testimony. Many cases involve such intense and prolonged patterns of abuse that many jurors might doubt the defendants' credibility. These jurors might conclude that the defendants must be
response, defense attorneys began to offer expert psychological evidence to show the jury why a battered woman would reasonably believe that she faced imminent danger such that killing was necessary. Such evidence could also show why the battered woman stayed in an abusive relationship.\textsuperscript{231}

This evidence, known as "battered woman syndrome" evidence, was developed by studies performed in the 1970s and 1980s by Dr. Lenore Walker.\textsuperscript{232} Dr. Walker hypothesized that women in battering relationships exhibited correlative factors such as traditional attitudes toward the role of women, external locus of control, low self-esteem, and depression.\textsuperscript{233} Dr. Walker also contended that battered women suffered from "learned helplessness," a condition whereby the subject having been repeatedly exposed to adverse stimuli later fails to take advantage of apparent opportunities to escape the adverse situation.\textsuperscript{234} As a result of these factors and conditions, battered women remain in abusive relationships and suffer reduced motivation to escape from them.\textsuperscript{235}

exaggerating the abuse because no one would have remained in the relationship if such abuse had actually occurred. Such doubts might then lead the jurors to generally discount the defendants' testimony.

Schopp et al., \textit{supra} note 224, at 52 (footnote omitted). Some experts contend that the focus on the woman's obligation to separate is, indeed, misplaced. This uninformed focus underpins many of the problems that have arisen concerning the stereotypical views of the battered woman. Martha Mahoney observes:

\begin{quote}
Law assumes—pretends—the autonomy of women. Every legal case that discusses the question "why didn't she leave?" implies that the woman could have left. We need to challenge the coercion of women's choices, reveal the complexity of women's experience and struggle, and recast the entire discussion of separation in terms of the batterer's violent attempts at control. Although it is still focused on successful and final separation as the key event, the recently developed term "postseparation woman abuse" begins to grapple with the problem of revealing the issue of power and control in women's experience of violence.

\end{quote}

231. Experts remark:

Courts and commentators contend that expert testimony regarding the battered woman syndrome in general and learned helplessness in particular can correct this tendency to discount the defendants' testimony by enabling the jurors to understand that the defendants could have remained in these relationships for extended periods despite severe and frequent abuse. These witnesses explain that defendants who suffer learned helplessness either fail to perceive available alternatives to the relationships or are unable to exercise these options. Thus, learned helplessness supports the credibility of these defendants by rendering plausible their testimony that they remained in battering relationships for extended periods despite enduring severe abuse.

Schopp et al., \textit{supra} note 224, at 52-53 (footnote omitted).


233. \textit{Id.} at 75-85.

234. \textit{Id.} at 86 ("The theoretical concept of 'learned helplessness' has been adapted to this research to explain why women find it difficult to escape a battering relationship.").

235. Dr. Walker explains:

[T]he women's experiences of the noncontingent nature of their attempts to control the violence would, over time, produce learned helplessness and depression as the "repeated batterings, like electrical shocks, diminish the woman's motivation to respond." (Walker,
Resorting to syndrome evidence to solve the difficulties in the nonconfrontation scenario, however, is a sub-optimal evidentiary solution to a doctrinal problem. The introduction of battered woman syndrome evidence is problematic for several reasons. First, it does not logically make the nonconfrontational killing scenario fit the imminence and necessity requirements. Because of this, critics argue that introduction of syndrome evidence is a clever yet impermissible way to get evidence of the victim's prior crimes in front of the jury.236 Second, there are problems inherent in the reliance on a psychological condition to justify the defendant's behavior. Some experts argue that the science itself is flawed,237 while others point out that characterizing abused women as suffering from a "syndrome" has a socially stigmatizing effect.238 Third, because of these doctrinal and practical problems, battered woman syndrome evidence is treated vastly differently from jurisdiction to jurisdiction and even from judge to judge in similar factual scenarios.239 As a

1979). If a woman is to escape such a relationship, she must overcome the tendency to learned helplessness survival techniques—by, for example, becoming angry rather than depressed and self-blaming; active rather than passive . . . .

Id. at 87.

236. Critics claim that the criminal trial is no place to advance even a socially-desirable agenda: Domestic violence is appalling and each member of this Court empathizes with the victims of this degrading conduct. However, our empathy and distress with the violence which affects our society cannot be substituted for a rule of law which limits the scope of appellate review to the facts presented by the case. In addition, any rule of law must be applied equally to each citizen, regardless of gender.


237. See Faigman & Wright, supra note 224, at 106-07 (footnote omitted): The sine qua non of the scientific enterprise is testability. Importantly, however, Sir Karl Popper, the philosopher of science most closely associated with this insight, originally described it as "falsifiability." The main point, he urged, was that scientific hypotheses gain strength and are corroborated through their ability to withstand attempts at falsification. This failure to subject syndrome research to falsification attempts is perhaps the greatest weakness of the battered woman syndrome theory. The researchers have ceased to be scientists, if they ever were, for they are not interested in truly testing their hypotheses. They merely want to obtain some confirmation in order to fulfill a political agenda. The difficulty in conducting social science research, therefore, does not lie in the subject's complexity, but rather in the condemnation that would result from unpopular findings. Legal scholars can be sympathetic to this difficulty, but they should not succumb to the mistaken belief that these politically motivated observations are valid in any empirical sense. (citing KARL POPPER, CONJECTURE AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 33-59 (1963)).

238. See Mahoney, supra note 230, at 4 (footnotes omitted): Psychological analysis, in particular, has responded to the sharp demand for explanation of women's actions in the self-defense cases. Yet the sociological and psychological literature still reflect some of the oppressive cultural heritage that has shaped legal doctrines. Even when expertise is developed by feminists who explain that women act rationally under circumstances of oppression, courts and the press often interpret feminist expert testimony through the lens of cultural stereotypes, retelling a simpler vision of women as victims too helpless or dysfunctional to pursue a reasonable course of action.

239. Compare Robinson v. State, 417 S.E.2d 88, 90-91 (S.C. 1992) (holding self-defense may be satisfied when battered woman believes she is in imminent danger, even though there is no imminent
result, focusing on battered woman syndrome evidence is a misplaced focus. Rather than using syndrome evidence to try to make the facts of the battered woman's case fit the technicalities of self-defense, the focus should be placed on a critical analysis of the technicalities of self-defense that prevent the battered woman from successfully utilizing the defense.

While battered woman syndrome evidence would be less controversial if it actually did make the nonconfrontational killing situation compatible with the imminence and necessity requirements, the syndrome does not logically do so. Turning to imminence first, self-defense often requires as a condition precedent to the use of deadly force that grievous bodily injury to the defendant be "imminent."240 "Imminence" is defined by courts as denoting a temporal relationship between the defensive force and the attack by the victim. Thus, harm to the defendant is "imminent" when, at the time the defendant used the deadly force, there was an "immediate, real threat to one's safety,"241 or "some act menacing present peril."242 Scholars observe:

A standard allowing defensive force only when necessary to prevent an

threat present), with State v. Anderson, 785 S.W.2d 596, 599 (Mo. Ct. App. 1990) (holding battered woman syndrome is insufficient to sustain claim for self-defense when there is no imminent serious physical injury from husband).

240. See, e.g., People v. Williams, No. 238124, 2003 WL 1985255, at *1 (Mich. App. Apr. 29, 2003) ("A person is acting in justifiable self-defense if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force."). The requirement that harm to the defendant be imminent is similar to the requirement that that the use of deadly force be "immediately necessary." See, e.g., State v. Faust, 660 N.W.2d 844, 873 (Neb. 2003) (footnote omitted) ("To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances."). However, they are not the same thing. "Immediately necessary" means that the defensive force necessarily must be used in temporal proximity, but it does not imply that the attack on the part of the victim is to occur in temporal proximity. In other words, although defense force is necessary now, the victim's attack may be set to occur at a later date. See Schopp et al., supra note 224, at 67-68 (footnote omitted):

The central question involves the appropriate relationship between the necessity and imminence requirements. A standard allowing defensive force only when immediately necessary to prevent unlawful harm treats imminence of harm as a factor regarding necessity. That is, the defensive force is justified only if necessary to prevent an unlawful harm, and the imminence of that unlawful harm contributes to, but does not completely determine, the judgment of necessity. In unusual circumstances such as those confronted by the desert hiker or by some battered women, defensive force may be immediately necessary to prevent unlawful harm, although that harm is not yet imminent. In these cases, imminence of harm does not serve as a decisive factor in the determination of necessity.

Thus, the requirement that force be immediately necessary does not appear to pose significant problems in the nonconfrontation scenario. It may be the case that a battered woman needs to use force immediately against her sleeping abuser because this is her only opportunity to prevent undeniable yet delayed bodily injury or death. See Jeffrey B. Murdoch, Comment, Is Imminence Really Necessity? Reconciling Traditional Self-defense Doctrine with the Battered Woman Syndrome, 20 N. ILL. U. L. REV. 191, 209-10 (stating that "necessity is not logically dependent on imminence").


imminent harm... treats imminence of harm as an independent requirement for justified force in that the force must be necessary and the unlawful harm must be immediately forthcoming. Such a standard does not allow defensive force necessary to prevent delayed unlawful aggression, even if the present situation represents the last opportunity to prevent such harm. 243

This temporal denotation comports with the plain meaning of the term imminent. 244 What is clear from the legal and literal definition of "imminent" is that it denotes some specific length of time, 245 which openly excludes delayed attacks. Thus, a defendant is justified in resorting to deadly force to prevent current (or very near future) but not deferred attacks.

The problem in the nonconfrontation scenario is that the attack the battered woman seeks to prevent is to occur at some future time. The idea is that introducing battered woman syndrome will bridge the gap by showing either that the attack is in fact imminent or that the battered woman reasonably believed that an attack was imminent. Obviously, the victim's psychological condition cannot make the perceived attack factually imminent. The question then is whether the psychological condition can show that the battered woman reasonably believed the attack was imminent. Battered woman syndrome simply cannot lead to the logical conclusion that the battered woman reasonably believed an attack from her sleeping husband was immediately forthcoming. Battered woman syndrome is purportedly a psychological condition that creates a barrier to a battered woman's ability to utilize non-violent avenues of escaping an abusive relationship. 246 However, battered woman syndrome does not indicate that syndrome sufferers entertain the general perception that an attack from their batterer is continuously imminent, even when the batterer is sleeping. It may be the case that the defendant's past experiences inform her belief that attacks are constantly forthcoming, but this has little relationship to psychological battered woman syndrome evidence:

[A] defendant has experienced an extended pattern of battering and puts forward a plausible claim of reasonable belief that an attack was forthcoming, but her evidence for this claim makes no reference to the battered woman syndrome or any of its components.... Expert testimony regarding the syndrome, however, would not necessarily support the defendant's story. As described, this defendant does not suffer from the battered woman syndrome. If she did, an expert could testify that she suffered depression, decreased self-esteem, and learned

243. Schopp et al., supra note 224, at 67-68 (footnote omitted).
245. Although there is some line drawing to be made, imminent implies at least within a matter of minutes, if not seconds. It certainly would not encompass an attack that is to come later in the day or week from someone who is currently asleep.
246. See Schopp et al., supra note 224, at 54 (stating that "both learned helplessness and the cycle of violence affect the battered woman's decision to remain in the battering relationship and reduce her motivation to escape") (footnote omitted).
helplessness, but this testimony would not support the contention that she reasonably believed an attack forthcoming because these characteristics do not increase the reliability of her beliefs or the accuracy of her predictions.\textsuperscript{247}

Consequently, the existence of battered woman syndrome does not appear to be relevant to the issue of whether the defendant reasonably believes the attack is imminent. As a result, even the legitimate introduction of battered woman syndrome on other grounds,\textsuperscript{248} would not have helped Judy Norman\textsuperscript{249} satisfy the imminence requirement. Ms. Norman, after years of horrific abuse, shot her sleeping husband.\textsuperscript{250} Even if the jury, taking into account battered woman syndrome, were to conclude she was generally reasonable in her use of deadly force, it could not fairly conclude that she reasonably believed the attack was “imminent.” The only way that the jury could come to such a conclusion would be if its members misunderstood battered woman syndrome to mean they could ignore the imminence requirement all together.\textsuperscript{251} In fact, experts argue

\textsuperscript{247} Id. at 71-72. Courts, however, have precisely interpreted battered woman syndrome evidence to mean that the battered woman reasonably believes a non-imminent attack is imminent. See Bechtel, 840 P.2d at 12 (“For the battered woman, if there is no escape or sense of safety, then the next attack, which could be fatal or cause serious bodily harm, is imminent.”).

\textsuperscript{248} For example, courts have deemed battered woman syndrome as relevant to whether or not the defendant reasonably believed she could safely retreat. See Leidholm, 334 N.W.2d at 821.

\textsuperscript{249} See Norman, 378 S.E.2d at 12 (discussing concerns with imminence requirement and rejecting defendant’s arguments).

\textsuperscript{250} The following testimony was adduced at trial:

The defendant testified that her husband had started drinking and abusing her about five years after they were married. His physical abuse of her consisted of frequent assaults that included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her. The defendant described other specific incidents of abuse, such as her husband putting her cigarettes out on her, throwing hot coffee on her, breaking glass against her face and crushing food on her face. Although the defendant did not present evidence of ever having received medical treatment for any physical injuries inflicted by her husband, she displayed several scars about her face which she attributed to her husband’s assaults.

The defendant’s evidence also tended to show other indignities inflicted upon her by her husband. Her evidence tended to show that her husband did not work and forced her to make money by prostitution, and that he made humor of that fact to family and friends. He would beat her if she resisted going out to prostitute herself or if he was unsatisfied with the amounts of money she made. He routinely called the defendant “dog,” “bitch” and “whore,” and on a few occasions made her eat pet food out of the pets’ bowls and bark like a dog. He often made her sleep on the floor. At times, he deprived her of food and refused to let her get food for the family. During those years of abuse, the defendant’s husband threatened numerous times to kill her and to maim her in various ways.

\textsuperscript{251} The fear critics have expressed is that any time battered women syndrome evidence is put forth, the jury will acquit without regard to the law of self-defense and without correctly analyzing the role of the syndrome evidence. Such evidence likely describes severe and repetitive abuse. Thus, it “would elicit highly emotional reactions from many ordinary people, including jurors.” Schopp et al., supra note 224, at 74 (footnote omitted). In Leidholm, another case involving the killing of a sleeping batterer, the court appears to completely side-step the imminence issue and view battered woman syndrome as indicating the reasonableness of the killing generally, without regard to the particular
that this is precisely how battered woman syndrome is used, that "the battered woman syndrome theory has been used to carve out an exception to the traditional self-defense requirements for a class of sympathetic defendants who used force when it was necessary to prevent an inevitable, although not imminent, attack."  

The problem again is that by interpreting syndrome evidence in this manner, judges and jurors are waging a legally underhanded revolution against the imminence requirement in self-defense. Certainly, our system of criminal justice should not rely on a plainly incorrect application of scientific evidence to legal standards to achieve a desired result. In addition, not all courts and juries will synthesize battered woman syndrome evidence in this manner. For example, Judy Norman was convicted of manslaughter after a jury trial in which the judge did not instruct the jury on self-defense. The North Carolina Court of Appeals reversed, holding that Ms. Norman could avail herself of self-defense, notwithstanding the imminence requirement. The Supreme Court reversed the appellate decision, ruling that the imminence requirement prevented the judge from instructing the jury on self-defense in Ms. Norman's case. To the extent that society believes that Judy Norman, who suffered terrible abuse at the hands of her husband and faced near certain, although not imminent death, should not be branded a murderer and face years in jail or worse, the law ought to reflect that belief. The reliance on an evidentiary misapplication to achieve a just end has compelled critics to argue that "battered woman syndrome illustrates all that elements of self-defense. The court required the use of an instruction on battered woman syndrome, without particular attention to its relation to the specific elements of self-defense:

The instruction on battered woman syndrome was designed to support Leidholm's claim of self-defense by focusing the jury's attention on the psychological characteristics common to women who are victims in abusive relationships, and by directing the jury that it may consider evidence that the accused suffered from battered woman syndrome in determining whether or not she acted in self-defense.

Id. at 819.

252. Burke, supra note 8, at 275.


254. In other words, if it is not an immoral act when the battered woman kills the sleeping batterer, then the law must affirmatively express that a defendant may have a justification or excuse in the situation where she reasonably kills an eventual but non-imminent attacker.

255. Norman, 378 S.E.2d at 10-12.

256. Lynne Henderson expresses the frustration of the feminist movement over Judy Norman's situation: "One need not be a complete determinist to recognize that Judy Norman had no more escape than a prisoner held by terrorists. Indeed, such victimization can and does deprive individuals of autonomy and condemns them to terror and hypervigilance." Lynne Henderson, Whose Justice? Which Victims?, 94 MICH. L. REV. 1596, 1620-21 (1996).

257. See Mira Mihajlovich, Comment, Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense, 62 INDIANAPOLIS L.J. 1253, 1282 n.162 (1987) ("If the requirements of imminence, necessity and proportionality are to be abandoned for battered women defendants, then legislatures, not courts, should address the situation by drafting statutory definitions of self-defense that encompass the plight of the battered woman.").
is wrong with the law's use of science." The non-specific victim liability defense eliminates the problem of fitting the nonconfrontation scenario with the imminence requirement because imminence is not an element of the defense. In this sense, the defense protects defendants who respond to both imminent threats of harms and delayed threats of harm.

Turning to necessity, courts generally require that the defendant's use of deadly force be necessary to prevent the injury. Whether or not the nonconfrontation situation fits with the necessity requirement depends on whether "necessary" is given a strict or expansive definition. The strictest definition of a necessary act would be that the act is the sole way to achieve the desired result—that is, the act is a necessary precondition of the result. Under this definition, the defensive act of the battered woman must have been the absolute sole method of saving her life. This incredibly strict definition, however, would likely undermine the bulk of self-defense claims, not just those in the battered woman scenario. Even when someone is staring down the barrel of a gun, there is at least a possibility that she could survive by utilizing other methods than defensive attack, such as hiding or running. Richard Rosen observes "[i]n fact, the law never requires the necessity to be absolute before allowing self-defense. The possibility always exists that a person attacking another with a gun will change his mind, or miss, or have a heart attack before pulling the trigger." Thus, it seems untenable to define necessity in the self-defense context in such a strict manner.

Necessity, in the context of self-defense, however, must have some meaning. Perhaps it means that the deadly force is "necessary" when killing the victim is the most effective method of saving the defendant's life. This definition,  

258. Faigman & Wright, supra note 224, at 68.

259. See supra note 220 and accompanying text for a discussion of use of deadly force.

260. This is a common understanding of "necessary condition". If X is a "necessary condition" of Y, then Y cannot hold unless X occurs. In the self-defense context, then, defensive force is only necessary if there is no other way to achieve the result of self-protection. The definition of necessity can be even stricter. For example, regarding the formal necessity defense, there is a strain of thought that even when a reasonable person would have engaged in the conduct under the circumstances, it is not thereby necessary. Pursuant to this logic, even preventing your own starvation by killing another is not "necessary." See The Queen v. Dudley & Stephens, 14 Q.B.D. 273, 288 (1884) ("We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it . . . .")

261. Rosen, supra note 223, at 396.

262. In addition, self-defense doctrine may give more leeway to the defendants for another reason. It would be an onerous burden in the highest extent to expect a defendant facing an attack, with emotions running high, to sort out what her alternatives are. There is a heat of passion strain in self-defense. The law recognizes that the defendant is not in a condition to assess whether defensive force is the sole alternative. Rather, she is forced to quickly react on instinct to a volatile situation that she did not create. The interesting issue then becomes: Can this heat of passion type argument justify the use of deadly force in non-heated, non-confrontational situations where alternatives are available? Certainly, one could argue that a battered woman who kills her sleeping husband has a higher obligation to think through all the alternatives than one facing an immediate attack.

263. This idea seems to underpin some of the judicial analyses refining the duty to retreat. For
however, seems to give license to kill when there is a mere shadow of a threat. Consequent ly, necessity must speak not only to the relationship between the defensive force and preventing death or harm, but also to the likelihood that the harm would occur in the absence of the defensive force.

So where is the line? No future result is 100% certain. Even when a person is staring down the barrel of a gun and the gunman pulls the trigger, there is a remote possibility that the bullet will miss all together. If there is a 51% chance that in the absence of deadly defensive force, the defendant will die at the victim's hands, is the defensive force then "necessary?" A sensible definition of "necessary" is that an action is necessary simply when it is reasonable given the circumstances. Necessity can then be assessed in terms of a "practical lack of alternatives." As a result, the most logical and fair definition of necessity ultimately devolves into a reasonableness requirement.

The problem is that judges leave it up to the jury to determine the meaning of necessity, generally only requiring that the deadly force be necessary to a reasonable person in the defendant's position. Jurors are then free to apply their own determinations of what "necessary" means. It makes sense that jurors

example, the Leidholm court observed:

If the facts and circumstances attending a person's use of deadly force against an assailant who is a cohabitant are sufficient to create in his own mind an honest and reasonable belief that he cannot retreat from the assailant with safety to himself and others, his use of deadly force is justified or excused, and his failure to retreat is of no consequence. 334 N.W.2d at 821. Thus, although Leidholm had an alternative to using deadly force—retreating—she need not resort to the alternative if it was not a "better" alternative to her than killing. See Burke, supra note 8, at 284 ("The duty to retreat does not require the actor to retreat at all costs.") (footnote omitted).

264. This would, of course, depend on how bad the alternatives must be in order to resort to deadly force. In the Leidholm case, the court never addressed whether retreat would have to pose some danger, substantial danger, or near certain death. 334 N.W.2d at 820-21. Certainly, if retreat only posed a remote possibility of a future attack (whereas killing the husband eliminated the possibility of future attack), even though retreat would be arguably more dangerous to Leidholm than killing, it likely should be considered a viable alternative.

265. There must be a balance between the risk of harm to the defendant (and along with it society's disapproval of unchecked aggression) and the value of the life of the attacker. See David A. J. Richards, Symposium, Rights, Resistance, and the Demands of Self-Respect, 32 Emory L.J. 405, 425-26 (1998) (suggesting self-defense represents "a fair balance of interests of both parties in basic physical integrity: the substantial interests of the unjustly attacked to repel the attack by force necessary in the circumstances, and the interest of the aggressor by requiring necessity and a degree of proportionality").

266. See FLA. STANDARD CRIM. JURY INSTR. 3.6(f) ("The defendant cannot justify the use of force likely to cause death or great bodily harm unless [he/she] used every reasonable means within [his/her] power and consistent with [his/her] own safety to avoid the danger before resorting to that force.").

267. Under this definition, whenever someone reasonably resorts to the use of deadly force, the deadly force is deemed necessary. Thus necessity is not a total lack of alternatives, or even a severe lack of alternatives. Rather, necessity is formulated as a "practical lack of alternatives." Murdoch, supra note 240, at 217-18.

268. See CAL. JURY INSTR. CRIM. § 5.12 ("[T]he killing must be done under a well-founded belief that it is necessary to save one's self from death or great bodily harm.").
will apply a plain meaning of necessary as being “compulsory” or “required.” They can then conclude that the defendant has no other alternative than to kill. When assessing a situation like Judy Norman’s, the jury could reason that because Mr. Norman was asleep, leaving was an alternative to killing. Consequently, the killing was not necessary. The question then becomes whether the defendant was reasonable in her mistaken belief that killing was necessary. Relevant to this very question, defense attorneys introduce battered woman syndrome. They argue that a battered woman believes that it is necessary to kill when others would not reasonably so believe. As with imminence, this is a misplaced focus. The concentration should be on the proper definition of necessity rather than using battered woman syndrome to make the nonconfrontation scenario compatible with a strict necessity requirement.

The problem with the use of battered women syndrome here is that it does not logically show that killing was the battered woman’s sole alternative or that she reasonably believed it was her sole alternative. While learned helplessness purportedly explains why the battered woman does not take advantage of available alternatives, it does not indicate that the battered woman reasonably believes that no alternatives exist. Nothing about the battered woman syndrome demonstrates that battered women are deluded into believing it is physically impossible to leave the home. Rather, the syndrome explains why learned helplessness causes battered women to stay, despite the possibility that they could leave.

269. See MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 776 (10th ed. 1993) (“necessary: 1 a: of an inevitable nature: inescapable b: (1) logically unavoidable (2): that cannot be denied without contradiction c: determined or produced by the previous condition of things d: compulsory 2: absolutely needed: required.”).

270. There is evidence that this is exactly how jurors reason. When assessing the battered woman who kills, they often focus on why she did not exercise the alternative of leaving. For example, in Leidholm, the Supreme Court of North Dakota distinguished between a defendant who was actually in danger (justification) and one who was not actually in danger but reasonably thought she was (excuse), stating:

A defense of excuse, contrarily, does not make legal and proper conduct which ordinarily would result in criminal liability; instead, it openly recognizes the criminality of the conduct but excuses it because the actor believed that circumstances actually existed which would justify his conduct when in fact they did not. In short, had the facts been as he supposed them to be, the actor’s conduct would have been justified rather than excused.

334 N.W.2d at 814-15. The court assumed a priori that defendant Leidholm, who killed her sleeping batterer, could only prevail under an excuse theory. Id. The court thereby presumed that Leidholm was mistaken and that defensive force was not actually necessary.

271. See supra note 246 for an explanation of learned helplessness.

272. This is a subtle, but important difference. The difference is between someone who falsely believes that killing is the sole method of saving her life and the person who knows that there are alternatives to killing but just cannot take advantage of them. Let me illustrate this in the non-abuse context. Take two people suffering from different psychological conditions: the first is delusional and the second suffers from severe agoraphobia. The first person actually believes that there is no world outside of his house. He thinks that if he steps out his front door he will fall into nothingness. Thus, the first person never leaves his house. The second person knows that there is a world outside his house, but because of his psychological condition, he cannot get himself to leave the house. The battered woman, if the syndrome is to be believed, is more analogous to the second person. She
This is not to say factors other than the existence of battered woman syndrome, for example, whether the defendant had had a prior bad experience with an attempt to leave, could explain the belief that killing is the only reasonable choice:

Expert testimony regarding depression, decreased self-esteem, learned helplessness, or other psychological characteristics of the defendant does not show the defendant's 'reasonableness' [as to the necessity of her actions] .... The evidence required to establish the defendant's reasonable belief in the necessity of deadly force must demonstrate the pattern of battering and the lack of available legal alternatives to defensive force, rather than the presence of the battered woman syndrome.\(^2\)\(^7\)\(^3\)

Indeed, when discussing the battered woman's reasonable mistake as to necessity, domestic violence advocates point to the lack of resources for battered women, poor police response, and the like to conclude that battered women in fact do not have reasonable alternatives.\(^2\)\(^7\)\(^4\) This may be true, but it does not really relate to the abused woman's mistaken perception. In fact, such arguments make reasonable mistake beside the point.\(^2\)\(^7\)\(^5\) The lack of viable social responses to domestic violence indicate that the battered woman's defensive force was actually necessary, when necessity is defined in terms of reasonableness. This evidence relates to whether the defendant chose a reasonable or viable alternative and not to whether she mistakenly believed that killing was the only alternative.

Thus, necessity is defined in terms of reasonableness or as a practical lack of

knows that it is possible to leave the home, but because of her condition she will not do so. See supra note 235 and accompanying text for a description on how learned helplessness may prevent a battered woman from taking advantage of possible alternatives. Does the second person's situation make it the case that he believes that staying in the house is necessary? In a sense, both no and yes. He knows it is not "necessary" because he knows he can leave the house at any time. On the other hand, he is in a psychological state where he cannot leave the house. In this sense, staying in the house may be deemed to be "necessary." It can be deemed a necessary act if "necessary" is defined as an act which, because of a psychological predisposition, the person must do. If, however, necessity is defined in this manner, how can the jury be expected to distinguish between a reasonable person who is psychologically predisposed to kill, even though there are other options, and an unreasonable person who is psychologically predisposed to kill, even though there are other options? Because of this problem, the better way to define a "mistaken belief of necessity" is a belief that no other alternatives exist. Battered woman syndrome does not inform the issue under this definition of necessity.

Understand, however, that I am purposely not arguing that there are, in fact, good alternatives for battered women. I understand that social services, legal recourse, and the like are lacking. This underscores even more the need for a definition of necessity that allows for the existence of alternatives, albeit poor alternatives. Under such a definition of necessity, it may be absolutely true that given the lack of programs for abused women, resorting to deadly force is a good, reasonable, or effective option, thereby making it necessary. Again, however, under a strong definition of necessary, it cannot be said that killing is the sole option.

\(^2\)\(^7\)\(^3\) Schopp et al., supra note 224, at 87 (footnote omitted).

\(^2\)\(^7\)\(^4\) See id. at 76-87 (discussing lack of alternatives).

\(^2\)\(^7\)\(^5\) This is because the lack of viable alternatives explains not simply why the battered woman thought defensive force was necessary, but why defensive force was actually necessary. Thus, the focus need not be on a purported mistake of fact.
alternatives under the circumstances, the relevant inquiry is whether the choice to kill was a reasonable alternative. The jury is then directed to consider whether, given the lack of resources for battered woman and the history of abuse and threats, the battered woman had a practical lack of alternatives to killing. The jury need not find that there were no other alternatives to killing. Consequently, the jury can more easily decide that the killing was necessary because of the facts of the situation. The jury does not have to analyze the issue as one of mistake of fact. Rather than forcing the jury to conclude that the battered woman was mistaken as to the necessity of her actions, the flexible definition of necessity allows the jury to determine that the battered woman was correct in her assessment of the necessity of her actions under the circumstances. The more flexible definition of necessity allows the focus to be on the behavior of the abuser and whether, without defensive force, there was a real possibility that he would kill the battered wife, rather than on the psychological deviance of the defendant.

One may at this point contend that the law need not change because battered woman syndrome evidence, even if misapplied, has the practical effect of allowing battered women in the nonconfrontation scenario to avail themselves of self-defense. The response is first that law and society cannot allow a just result to rest on misuse of scientific evidence. Second, there are the problems with battered woman syndrome mentioned earlier, which merit further discussion here. Experts argue that the science underlying the syndrome itself, including the methods of gathering and analyzing the data, is methodologically unsound. Even a cursory examination of Dr. Walker's conclusions reveal that they are almost oxymoronic. If the battered woman suffers from learned helplessness, external locus of control, and traditional attitudes, then it is difficult to understand how this woman ends up committing the ultimate untraditional, self-controlled act of self-help: homicide.

Moreover, battered woman syndrome evidence is stigmatizing because it shifts the jury's focus from the reasonableness of the defendant's response to wrongful conduct to the battered woman as a psychologically impaired being.

276. There is a difference between saying that deadly force was "reasonably necessary" (and defining necessity strictly) and defining a necessary choice as a "reasonable choice under the circumstances." The former means that a reasonable person would consider killing the sole alternative. The latter means that the deadly force was a reasonable choice, although not the sole alternative.

277. See Mihajlovich, supra note 257, at 1282 n.162 (arguing that legislatures, not courts, should create laws that account for battered woman killing situation).

278. See Faigman & Wright, supra note 224, at 76-78 (observing that "Walker's methodology, unfortunately, contains at least five readily identifiable flaws [which] are blatant violations of some of the most elementary aspects of the research method" and describing flaws).

279. See Schopp et al., supra note 224, at 58:
It would be more consistent with the theoretical and empirical foundations of learned helplessness theory to contend that battered women who do not kill their batterers suffer learned helplessness and that battered women who kill their batterers differ from those who do not precisely because those who kill do not suffer learned helplessness.

280. See, e.g. Mo. ANN. STAT. § 563.033 (West 1999) (equating battered woman syndrome with
By pointing to psychological differences between battered women and "normal" women, defense attorneys make an incorrect assumption about the way jurors reason. It is unlikely that the jury, in acquitting the defendant, found the battered woman's acts to be "reasonable" because she is psychologically deviant from the average woman. More likely, jurors acquit a battered woman precisely because they can identify with her thought processes given her unique set of circumstances, which were created by the victim's own wrongful conduct. The problem with battered woman syndrome then is that it stigmatizes the battered woman in an effort to justify her acts, when her acts could be otherwise justified as reasonable.

Our moral sensibilities dictate that a person who responds to a delayed, yet undeniable, attack should be protected from criminal liability. The technical requirements of self-defense exclude such a defendant from its protective wing. Thus, the non-specific victim liability defense, which eliminates imminence and replaces necessity with a balancing test, is a better alternative. The defense focuses on the severity of the defendant's conduct in the context of the victim's wrongful behavior and takes away the stringent imminence and strict necessity requirements that seem logically to exclude battered women from self-defense. Battered women who kill are not the only recipients of the defense's benefits. The defense can also apply to defendants who respond to continued patterns of harassment and threats at the hands of gang members, bullies, drug dealers, or

---

281. Consequently, they take into account her subjective experiences of being battered, but not necessarily her deviant psychological state in determining her actions to be reasonable. By this, I give credit to jurors for doing precisely what Schopp et al. claim should be the analyses behind necessity. They are assessing the battered woman's situation rather than her psychological state. Critics of the battered woman syndrome have advocated an approach whereby jurors view battered women as "rational actors." See id. at 290 (predicting that use of rational actor approach would ensure proper application of self-defense to only those situations where "a reasonable person would have believed that defensive force was necessary"). I am arguing here that jurors who acquit do so despite evidence of psychological deviance and because they can identify with the woman as a rational actor.

282. By focusing on wrongful victim behavior rather than psychological deviance, the law can avoid stigmatizing women by branding them with a "syndrome." Martha Mahoney observes:

Expert testimony, designed to overcome these stereotypes and help show the context for the woman's actions, has through the pressures of the legal system contributed to a focus on victimization that is understood as passivity or even pathology on the part of the woman. This image further promotes many cultural stereotypes, and may contribute to further stigmatizing of battered women and further denial by women of the dangers they face through domestic violence.

Mahoney, supra note 230, at 42 (footnote omitted).
other criminals.

A critic could argue that requirements like imminence and necessity should not be abandoned because they are effective gatekeepers. The first response to this contention is that a balancing of interests justifies the elimination of these requirements. Simply, the costs of keeping strict imminence requirements in self-defense (people who reasonably use force to prevent near-certain but not imminent death are prosecuted to the full extent of the law) outweigh the benefits (self-defense remains a narrow defense and self-help is discouraged). The imminence requirement’s tendency to exclude those defendants who kill in justified but non-imminent situations makes it a technical requirement that should be abandoned. This Article is certainly not the first to advocate eliminating imminence as an independent requirement of self-defense. Alafair Burke observes:

Because the requirement of imminenc[e] is an imperfect proxy to ensure that a defendant’s use of force is necessary, a better standard would require that the use of force be necessary. Requiring that the defendant have a reasonable belief that the use of force was necessary for self-protection avoids by definition the extension of the defense to unnecessary and therefore unjustified uses of force.\footnote{Burke, supra note 8, at 279-80 (footnotes omitted). See Rosen, supra note 223, at 404 (footnotes omitted):}

Professor Burke, however, points to the gate-keeping functions of necessity as adequate limitations. Thus, the contention may be that the non-specific victim liability defense should contain a provision that the crime committed by the defendant be a “necessary” response to the wrongful victim behavior. Ridding victim liability law of the necessity requirement seems by all appearances to be extremely radical in that it hopelessly delimits the defense. It gives the impression that it invites vigilantism. As I have shown above, however, only under the most severe and strained definitions of necessity\footnote{That is, necessity as denoting that the defendant’s acts are the only available response to the victim’s conduct. In other words, there is an absolute lack of alternatives. See supra note 266 and accompanying text for this stricter definition of necessity which takes reasonableness into account.} can one distinguish a necessary action from a reasonable, prudent, or desirable action.\footnote{See supra notes 266-67 and accompanying text for an alternative definition of necessity which takes reasonableness into account.} In fact, where self-defense is purely subjective, necessity can mean even less than objective reasonableness \(i.e.,\) defensive force was necessary “in the defendant’s mind”).\footnote{See, e.g., State v. Thomas, 468 N.E.2d 763, 764-65 (Ohio Ct. App. 1983) (entitling “paranoid” defendant to assert self-defense based on subjective honest belief of necessity of using

\begin{itemize}
\item Using a necessity rule instead of an imminence rule imports no new norms into the law of self-defense; it merely changes the locus of decision making. Under the current criminal justice scheme, the legislature, or, in common-law jurisdiction, judges, already have decided that a killing to prevent a non-imminent threatened harm can never be a necessary killing . . . . Removing or modifying the imminence rule shifts the locus of decisionmaking to jurors, allowing them to weigh the evidence and make their own decision on necessity in a suitable case.
\end{itemize}
force does not have to be "absolutely necessary," in the sense that it must be the defendant's only alternative and harm to the defendant in the absence of the force must be certain. The current law accounts for metaphysical contingencies and existing alternatives. The fourth element of the non-specific victim liability defense comprises a balancing test that allows the jury to weigh the defendant's response against the victim's conduct and assess whether the existence of alternatives to the criminal response makes the defendant culpable of some offense. As a result, the defense practically captures the often-applied (and most sensible) meaning of necessity.

As an alternative to limiting the defense through imminence and necessity requirements, the non-specific victim liability defense will be self-limited in other ways. It requires that the victim has engaged in objectively wrongful behavior rather than subjectively provoking conduct,\(^{287}\) to which the defendant must respond in an appropriate and non-culpable manner. The defense also requires that the defendant demonstrate a lack of predisposition to commit the crime.\(^{288}\) The predisposition requirement serves a gate-keeping function to ensure that the defendant's criminal act was truly induced by wrongful victim behavior, rather than emanating from criminal inclination.\(^{289}\)

Consequently, the non-specific victim liability defense can refine self-defense law in such a way as to provide a logical legal remedy to some tricky gender-related problems involving domestic violence victims. It can do so by concentrating on those elements that relate more sensibly to the moral culpability of both the defendant and victim than more arbitrary and problematic elements, like imminence, contained in the existing victim liability doctrines.

V. THE NON-SPECIFIC VICTIM LIABILITY DEFENSE

The non-specific victim liability defense consists of the following four elements:

1. The victim of the crime engaged in sufficiently wrongful conduct;
2. The victim's conduct caused the defendant to commit the charged offense;
3. The defendant was not predisposed to commit the charged offense; and
4. The defendant's response balanced against the victim's wrongful conduct dictates that the defendant should be exculpated or his punishment mitigated.

This section will discuss each element in turn.

---

\(^{287}\) See supra Part IV.B for explanations of the drawbacks to the provocation requirement.

\(^{288}\) See infra Part V.C for a discussion of the predisposition requirement in the non-specific victim liability defense.

\(^{289}\) See infra Part V.C for a fuller discussion of predisposition in the context of the entrapment defense.
A. The Victim of the Crime Engaged in Sufficiently Wrongful Conduct

Premising victim liability on "wrongfulness" inevitably requires an inquiry into the legal meaning of the term "wrongfulness." The near-impossible task is to define with precision the contours of the term. How are legislatures, courts, and jurors to judge wrongfulness in the context of the non-specific victim liability defense? This inquiry is essential if the non-specific victim liability defense is to provide more social control over the "provoked" abusive spouse than existing legal doctrine. Tautologically, one could say that wrongful behavior is conduct a reasonable person would consider to be wrongful. To engage in such reasoning, however, would be ultimately self contradictory, as only a purely prescriptive definition of wrongfulness can overcome the "reasonable racist" and provoked abuser problems.

Implicit in the criticism of provocation law in Part IV.B is the contention that wrongful victim behavior denotes something stronger than merely sub-optimal, negligent or even undesirable behavior. Through a strong wrongfulness requirement, the victim liability defense can be more prescriptive than current provocation doctrine, which makes the defense contingent on the defendant's a posteriori reaction to the victim's acts. Those victim acts, themselves, often range from merely negligent or sub-optimal behavior (a verbal argument with a spouse) to encourageable behavior (attempting to leave an abusive spouse). Even defining "wrongfulness" as "bad" or "immoral," however, is not necessarily sufficiently prescriptive. It is true that defining wrongful as bad or immoral would tend to solve both the reasonable racist problem, because it is not bad to be African-American, and the problem of the batterer who kills his wife who attempts to leave him, because it is not bad to attempt to leave your abusive spouse. There is still, however, a problem with the provocation category of adultery. This is because adultery, as a matter of common sense and current social belief, is a bad act. One certainly could not identify adultery as good or even neutral. Thus, in order to overcome the adultery problem, "wrongful" must have a more stringent technical meaning.

Perhaps we should define a "wrong" as an intentional violation of a legal norm. Indeed, under current law, courts and theorists define "wrongful" simply as something that is contrary to law. Contrary to law is, in turn, defined

290. George P. Fletcher observes that the meaning of wrongdoing must be something more than merely a breach of legal or moral rights:

It is unclear, however, what constitutes wrongdoing. Defining wrongdoing as the violation of rights is unhelpful, for that definition only raises other questions: Who has rights and what is their content? Therefore, to understand the nature of wrongdoing, we should seek a substantive theory of wrongdoing—an account of what is wrong and why it is wrong.


291. See supra Part IV.B for a discussion of how the non-specific victim liability defense improves upon the provocation requirement.

292. This would exclude adultery from wrongdoing in many jurisdictions where adultery is not a legal violation sanctionable in itself by law, but merely a moral violation. But see Commonwealth v. Stowell, 449 N.E.2d 357, 360-61 (Mass. 1983) (affirming conviction under criminal adultery statute).

293. See, e.g., State v. Campos, 921 P.2d 1266, 1277 n.5 (N.M. 1996) (defining "conscious
as a breach of a legal obligation. Consequently, a “wrongful” death is one in which the person who caused the death breached a legal standard of care. Under such a reading of wrongfulness, a defendant could avail herself of the non-specific victim liability defense only when the victim engaged in illegal conduct. There is then the further question of whether the defense may be premised on illegal tortious conduct that is not criminal.

An argument for limiting the defense to situations in which the victim has committed a crime is that if the defense is premised on anything less than criminal behavior on the part of the victim, then there likely would be a proportionality problem. The defendant will be excused for responding to non-criminal behavior with a criminal act. One could respond, however, that the lack-of-predisposition and balancing requirements provide sufficient safeguards against the proportionality problem. The argument is that legally-disposed, appropriate actors will not act disproportionately harmfully even when they respond to bad yet legal victim behavior. Moreover, one could argue that proportionality is beside the issue. As long as the defendant is responding to wrongful behavior and acting morally appropriately, he is absolved of liability. One might contend that requiring people to act proportionally in all situations is too much of an onus.

There are, however, other arguments in favor of a narrow definition of wrongfulness beside the proportionality argument. When wrongfulness is defined as a breach of a non-legal norm (moral, religious, or social norms, for example), a bright-line test is abandoned in favor of a definition which is flexible, yet extremely difficult to administer. Several questions arise, the most obvious being: Which norms should apply? May the defendant respond to conduct that

---

294. See, e.g., MD. CODE ANN., CTS. & JUD. PRO. § 3-901(e) (2003) (Wrongful Death Definitions) (defining “wrongful act” as “act, neglect, or default including a felonious act which would have entitled the party injured to maintain an action and recover damages if death had not ensued.”).

295. An example of this might be negligent conduct which results in a harm that may be sanctioned civilly but constitutes no crime. For example, a patron of a restaurant might sue for a slip and fall caused by the restaurant's wet floor. Although the patron could very well prevail on the tort action, there is no recognizable crime of negligently leaving a restaurant floor wet. The criminal law has no general negligence prohibition although negligence may be the specified mens rea in designated offenses, for example, negligent homicide.

296. This, however, depends largely on the meaning of appropriate and disproportionate. One could say that morally appropriate actions are always proportionate. Conversely, one could argue that some reasonable acts are not proportionate. Take the case of State v. Norman, where the court held that a battered wife who shot her sleeping husband was not entitled to a jury instruction regarding self-defense because there was no evidence she had reasonable fear of imminent death or great bodily harm. 378 S.E.2d 8, 9 (N.C. 1989). One could easily make the argument that one who responds to past beatings by killing the batterer does not act proportionally because she is responding to acts that fall short of killing with a killing. Consistent with this characterization, one could also claim that it was perfectly appropriate, on balance, for Ms. Norman to kill in order to save herself from future death.

297. See supra note 262 for an explanation of why such a requirement is so unreasonable.

is wrongful in his culture or must it be the prevailing culture?  

Merely being contrary to law may not even be strong enough to capture the essence of wrongfulness. Indeed, many extremely petty and hardly harmful actions are made illegal by some criminal code. Part IV argued that the concept of victim wrongfulness must not derive from the defendant's subjective moral code or even from majoritarian sentiments, but rather be declared affirmatively by law. The definition of "wrongful" for the purposes of the defense must reflect some idea of that which ought to be discouraged because of some innate immoral character, rather than that which is merely unpopular. This brings up the following prickly question: If not from society's pre-existing notions of right and wrong, from what source should lawmakers and legal decision-makers derive the definition of wrongful behavior? Perhaps the

299. See infra notes 363-68 for a discussion of cultural defenses.

300. There are some obvious objections to definitions of wrong-doing based merely on the preexisting legislative declarations. See Russell L. Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, 96 NW. U. L. REV. 843, 966 (2002) ("Though the defendant has not engaged in morally culpable wrongdoing, she has nonetheless committed a legally defined criminal offense and has violated the legal rights (even if not moral rights) of another."); see also William J. Stuntz, Christian Legal Theory, 116 HARV. L. REV. 1707, 1735-36 (2003) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001)) ("Notice what happens when the law goes farther than it should down the road of equating wrongdoing with illegality: we give police officers and prosecutors the power to define illegality. Positive law no longer equals moral law—on the contrary, the positive law disappears, replaced by official whim.").

The difficulty of equating wrongdoing and illegality is illustrated in the Supreme Court case, Atwater v. City of Lago Vista, 532 U.S. 318 (2001). In that case, Atwater was driving a truck with her two children beside her. Neither she nor her two children were wearing seatbelts. A police officer pulled Atwater over for the seatbelt violation, a misdemeanor traffic offense for which the maximum penalty was a $50 fine. Atwater, 532 U.S. at 324. He then subjected Atwater to verbal insults, refused to allow her to drop her children off at a friend's house, and placed her under full custodial arrest. Id. at 323-24. Writing for the majority, Justice Souter held that the arrest did not violate the constitution because Atwater had violated the seatbelt laws. Id. at 354. Souter saw no reason to designate that certain petty crimes should not subject the perpetrator to full custodial arrest. Id. in essence, Souter put all criminal acts, from the pettiest to the most serious, on the same moral and procedural footing for the purposes of Fourth Amendment analysis. Justice O'Connor's dissent advocates a balancing approach, distinguishing between the types of crimes that do not entitle the police to engage in a full custodial arrest (fine-only traffic offenses where the officer has no articulable reason for a full arrest) and crimes that entitle the police to engage in a full custodial arrest (all other crimes). Id. at 365-67 (O'Connor, J., dissenting).

301. See supra Part IV.B for further insight concerning this argument.

302. This is especially important if there are racist or patriarchal dispositions in society informing the majorities desire to discourage minorities from participating in acceptable if not legitimate behavior. Some men feel that adultery is acceptable if perpetrated by men but wrong if perpetrated by women. For example, a survey of college students revealed that "male respondents found betraying a lover more acceptable than betraying a friend, but only when the perpetrator of the betrayal was male." Kristina M. Wasson, Young Men, Women Show Different Attitudes Toward Sexual Infidelity, Scholar Finds, Stanford Online Report (May 17, 2000), at http://news-service.stanford.edu/news/may 17/feldman-517.html (last visited Feb. 21, 2004).

303. Here one confronts the ever-present philosophical problem of first principles. Ultimately, one can formulate either a consequentialist contingent meaning of wrong (society determines what is or is not wrong), or one can base criminal prohibitions on first principles (the law declares a priori that which is wrong). The problem is that either the basis of the definition is contingent or arbitrary.
answer lay in some formulation of illegality "plus." "Wrongfulness" for the purposes of the victim liability defense could be defined as conduct both contrary to the law and "shocking to the conscience" or "inherently harmful."304

A quick-witted critic is undoubtedly ready to respond that this definition merely begs other questions. What is "inherently harmful?" What is "shocking to the conscience?" Whose conscience is involved? Can one bring in majoritarian sentiments? The question of the definition of a term like wrongfulness is capable of infinite reduction. This does not mean, however, that it is a fruitless task to define it. The term "wrongful" has a venerable place in many areas of American law.305 A multitude of statutes, torts, criminal offenses, and defenses utilize the term "wrong" or its derivatives. This Article suggests that to begin the journey of legal definition of wrongful conduct, one should start

Richard Ned Lebow describes the tension as follows:

Philosophers from Kant on struggled to build an alternative metaphysical foundation for ethics; they failed because there are no incontrovertible first principles. Attempts to base such systems on feeling and customs are all open to the challenge of being arbitrary and culturally biased.

Richard Ned Lebow, Ethics and Interests, AM. SOC'Y INT'L L. PROCEEDINGS 75 (2002). The tension between the arbitrary nature of first principles and the contingent nature of consequentialist justifications has led some reformers, most notably the pragmatists, to reject this particular justificatory enterprise all together. Thomas Grey observes:

[Charles Sanders] Pierce reversed the Kantian hierarchy, and assimilated all human science, speculative philosophy, and moral inquiry into the category of the pragmatic. All judgments—scientific and moral as well as prudential and technical—were contingent, probabilistic, relative to a situation and to the interests of an agent or a community of agents. Thought was no longer to be conceived as something distinct from practice, but rather it simply was practice, or activity, in its deliberative or reflective aspect.


In Kant's defense, he probably would not agree that the basis for his moral theory, the categorical imperative, is completely arbitrary. Kant premises his moral theory on non-contradiction (logic). Non-contradiction is at once a necessary and contingent part of the human conditions (both a priori and synthetic). In over-simple terms, Kant postulates that human beings must engage in logical constructs and thus non-contradiction is a priori or prior to experience. However, it is contingent in the sense that human beings did not have to be "hard-wired" in such a manner. Thus, Kant's moral first principles comes from the a priori conditions of human cognition.


with the concept of an illegal act that shocks the conscience. Legislatures, courts, and the public can further define the term in context over time.

B. The Victim's Conduct Caused the Defendant to Commit the Charged Offense

In order to assert the victim liability defense, there must be some ontologically significant connection between the wrongful behavior of the victim and the otherwise criminal behavior of the defendant. The connection must be more than purely a temporal one. Saying that the victim’s wrongful behavior caused the defendant’s criminal act means more than merely saying that the victim’s behavior preceded the defendant’s act in time. Thus, a defendant who planned to assault a victim and was screamed at in a provoking manner by the victim just prior to the planned assault cannot avail herself of the defense. In the above example, the provoking conduct of the victim is not a but-for cause of the defendant’s assault, although it may be a simultaneously sufficient cause. The defendant would have committed the assault regardless of the victim’s actions, so one could not say that “but-for” the victim’s acts the crime would not have occurred. The provoking act, however, was sufficient to cause the assault even in the absence of the defendant’s pre-existing inclination to commit the crime. The question is why require that the wrongful victim conduct be a but-for cause of the defendant’s crime? The reason for requiring but-for causation is that the law should only reduce liability for those acts that are truly consequences of victim wrongfulness. A person should not be acquitted if he acted on internal criminal inclinations, even if, in fact, a non-disposed person would have been justified in committing the crime.

One might respond that if part of the purpose of victim liability is to differentiate good victims from bad victims, then why not sanction the wrongful victim behavior by application of the victim liability defense even where the wrongful behavior is not the but-for cause of the defendant’s act? The answer is

306. Under most legal formulations of proximate cause, which include but-for cause, the screaming did not cause the assault. See CAL. JURY INSTR. CRIM. § 8.55 (5th ed., West 1988) (defining “proximate cause of a death” as “a cause which in the natural and continuous sequence produces the [result] and without which the [death] would not have occurred”).

307. But-for causation refers to the concept that “a defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct but is not a cause of the event if the event would have occurred without it.” 65 C.J.S. Negligence § 194 (2000).

308. A rare exception to most formulations of causation, which require some but-for connection, is the doctrine of simultaneously sufficient causation:

[An exception for cases of multiple causation has to be inserted into the definition of causation. It is possible for two sufficient causes, C1 and C2, to be present together, so that E follows both, when usually it follows only one or the other. Both C1 and C2 are causes, even though in the particular situation one or other (as the case may be) was not necessary to be present. An example is where two fatal wounds are given independently at the same time.

GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 380-81 (Stevens & Sons 2d ed. 1983). Under this formulation if it is the case that the screaming would have provoked the defendant in the absence of his predisposition to assault, then it is a simultaneously sufficient cause.

309. See supra note 307 for a discussion of but-for causation.
that requiring but-for causation strikes a balance between the interests of the defendant, the victim, and society. In terms of the defendant, the premise of the victim liability defense is that those who merely respond to harmful victim behavior by committing crimes are less culpable than those who act criminally for other impermissible reasons. When a defendant acts based on impermissible impulses, like his own criminal inclinations, rather than the wrongful victim behavior at hand, he is not less criminally culpable. In terms of society, the premise is that society has an interest in punishing those who are truly dangerous rather than those who respond to extraordinary circumstances. Even current victim liability law distinguishes reasonably provoked (good) defendants from unreasonably provoked (bad) defendants who are dangerous to society. By doing so, the provocation doctrine can protect against unreasonably provoked, dangerous defendants asserting provocation. By requiring but-for causation, the victim liability defense can protect against dangerous, criminally predisposed defendants who seek to assert the defense.

As for victims, the premise of the defense is that the wrongful victim does not have a legitimate interest in the punishment of criminal conduct that her own wrongful actions caused. This principle does not necessarily mean that the wrongful victim does not have an interest in punishing crimes perpetrated on her that were not caused by her wrongfulness. It is true that by allowing the defense in the absence of but-for causation, the defense may serve an interest in reducing victim wrongfulness in the sense that victim wrongfulness is punished, whether or not it truly induced the criminal act. Eliminating the but-for causation requirement, however, would prioritize punishing the victim's wrongful act over punishing the defendant's criminal act. Consequently, the victim liability defense properly distinguishes between dangerous (and arguably immoral or bad) defendants who would commit bad acts regardless of the victim's conduct, and those who commit bad acts only when sufficiently provoked.

---

310. See supra note 26 for the distinction between a defendant's culpability for harming an "innocent victim" and his culpability for harming a "reprehensible" victim.

311. This is the case even though reasonable provocation and unreasonable provocation can equally interfere with the defendant's mens rea.

312. The victim can be wrongful in her actions and yet wronged in that the crime perpetrated on her had nothing to do with her wrongful actions.

313. The defendant is released and potential victims are encouraged not to engage in wrongful behavior.

314. One might then bring up a hypothetical case where a victim's wrongdoing, although it did not induce the defendant's criminal act, was more immoral and severe in degree than the defendant's crime. Shouldn't this victim be discouraged? The answer is that if the victim's act is worse than the defendant's criminal act, then most likely the victim would be subject to separate criminal penalties himself. Releasing the defendant in this case will serve only to encourage the defendant's criminal behavior.

315. A parallel can be made in the provocation. Theorists observe that it should only apply to men who uncharacteristically kill. See Coker, supra note 153, at 93 (characterizing violence by "abusive men" as "purposeful" and violence by "previously non-violent [men]" as "spontaneous").
This distinction is important for retributive\textsuperscript{316} and utilitarian\textsuperscript{317} reasons. On the retributive side, the motivations for committing an act are important. An actor is not morally culpable when he committed the act for justified or excused reasons. On the other hand, an actor may be morally culpable when, despite the fact that justifying reasons exist, he acted on other non-justifying reasons.\textsuperscript{318} Turning to the utilitarian arguments, a utilitarian would say that criminal law is about deterring, reforming, or incapacitating those who pose a danger to society. Those people whose criminal acts are premised solely on the wrongfulness of another party are arguably less dangerous and less likely to re-offend than those whose criminal acts are premised on a violent propensity.\textsuperscript{319}

The inquiry then turns to whether the wrongful behavior of the victim should be more than merely a but-for cause of the defendant’s criminal act.\textsuperscript{320} Say, for example, a burglar robbed a man’s house. Based on this robbery, the man became very disgruntled with the degradation of modern society. The man began reading extremist separatist literature and refining his skills as a sniper. The man decided that his first victim in a string of undesirables he sought to eliminate would be the burglar, who had just completed a two-year sentence for the burglary. The man stakes out the burglar and shoots and kills him. It is true in this case that the burglar’s wrongful and criminal act was a but-for cause of the

\textsuperscript{316} Retributivism is most often associated with the work of Immanuel Kant, who opines: Juridical punishment can never be administered merely as a means of promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another purpose . . . .


\textsuperscript{317} A utilitarian doctrine, “in its purest and simplest form is a moral doctrine which says that the right act in any given situation is the one that will produce the best overall outcome.” Samuel Scheffler, \textit{Consequentialism and its Critics} 1 (Oxford University Press Samuel Scheffler ed., 1988).

\textsuperscript{318} Take for example a hit-man who sets out to kill a victim. The hit-man enters the victim’s house. The hit-man sees the victim and takes out his gun to shoot. The hit-man then notices that the victim is, herself, pointing a gun at him. At this point the hit-man has two reasons in his mind for killing the victim: (1) to finish the job, and (2) to protect his life. Reasonably fearing imminent death, the hit-man shoots and kills the victim. Can it then be said that the hit-man has acted justifiably merely because the second condition was present? As a practical reality, in most courts, the defendant hit-man would not be able to avail himself of self-defense. \textit{See}, e.g., State v. Richardson, 462 S.E.2d 492, 499 (N.C. 1995) (“[T]he purpose of the felony murder rule is to deter even accidental killings from occurring during the commission of a dangerous felony. To allow self-defense, perfect or imperfect, to apply to felony murder would defeat that purpose . . . .”).

\textsuperscript{319} See \textit{supra} note 26 for the distinction between a defendant’s culpability for harming an “innocent victim” and his culpability for harming a “reprehensible” victim.

\textsuperscript{320} But-for causation alone is rarely adequate in the law. There must be proximate causation or legally significant causation. \textit{See}, e.g., Tenn. Corp. v. Lamb Bros. Constr. Co., 265 So.2d 533, 536 (Fla. Dist. Ct. App. 1972) (refusing to apply “but-for” standard of causation because in any sequence of events first act could be considered “but-for” cause, yet not actually be proximate cause).
defendant's commission of murder. Clearly, however, the defendant in this case deserves punishment and should not be able to use the victim liability defense. Now, one might point out that the defendant in this case will fail the third and fourth requirements: lack of predisposition and the balancing test. Even so, the causal connection between the wrongful act of the victim and the criminal act of the defendant seems quite remote. The question is, if temporal remoteness is the concern, what additions must be made to but-for causation? One answer might be to put a "cooling time" limit on the proximity of the wrongful victim behavior to the criminal response. "[C]ooling time," as noted before, is problematic in that it seems to arbitrarily exclude those who should be able to prevail on victim liability defenses. Consequently, it may be more useful to look at the above problem not as one of temporal proximity, but one of intervening cause. In the above scenario, one could argue that the defendant's own free will, as evidenced by all the actions undertaken in between the burglary and the murder, broke the necessary chain of causation.

As a result, inherent in the victim liability defense is a certain concept of proximate cause whereby the wrongful act of the victim causes the defendant's criminal conduct, unbroken by an intervening event. Admittedly, this is quite conceptually prickly when the intervening event is the operation of the defendant's own free will, because it can slip down a slope into speculative arguments about the operation of the human mind and the human will. One is forced to confront the issue of whether one human being's act can truly ever

---

321. Another example is an abusive husband who beats his wife so badly that a high probability exists that he will kill her one day. He gets in a verbal argument with his wife. During the argument, she throws a knife in his direction, but it does not hit him. On this particular occasion, absent the knife throwing, he may or may not have decided to beat her up. Because she threw the knife, however, he decides to beat her up and, in fact, kills her. In this instance, the wife acted wrongfully by throwing the knife, and that wrongful conduct was a but-for cause of the killing. Yet it seems that the defendant should not be off the hook in this case. Distinguishing this defendant from others more deserving of the defense could be accomplished through the lack-of-predisposition requirement. See infra Part V.C for a discussion of the lack-of-predisposition requirement. It can also be achieved, in part, through the definition of causation as something more than mere but-for causation.

322. One might argue that the defendant has become predisposed to commit murder through his reading of extremist literature. Although, on the flip side, this predisposition predates the murder but not the wrongful act of the victim. Clearly, however, it is not, on balance, an appropriate reaction to hunt down and kill a burglar two years later. Admittedly though, many prosecutors would cringe at the thought taking such a defendant to trial and letting a jury decide whether or not his actions were appropriate, in light of the hatred most people bear for criminals.

323. Many formulations of proximate cause involve a requirement that the result must not be too remote from the initiating action. See, e.g., Getreu v. Lebowitz, 556 N.Y.S.2d 771, 772 (N.Y. App. Div. 1990) (requiring "direct and proximate link" as opposed to "one that is indirect and remote" in order to establish causation).

324. See supra notes 113-114 and accompanying text for a criticism of "cooling time" requirements.

325. Courts often hold that an intervening act breaks the chain of causation. See, e.g., Herzberg v. White, 66 P.2d 253, 257 (Ariz. 1937) (citing RESTATEMENT (SECOND) OF TORTS § 441 ("An intervening force is defined as being one that actively operates in producing harm after the original actor's negligent act or omission has been committed.").
"cause" another person to do anything. More confounding is the question of whether a person's own free will can interfere with the causal connection between his own actions and another's provocation. What is clear, however, is that inherent in the idea of a causal link between the victim's wrongful behavior and the defendant's response is that, due to the victim's behavior, the defendant's will was overborne to the extent that he acted uncharacteristically criminal—that he acted in a manner he otherwise would not have.

C. The Defendant Was Not Predisposed to Commit the Charged Offense

The non-specific victim liability defense incorporates a requirement that the defendant not be predisposed to commit the crime. This requirement has been added by virtue of some of the concerns addressed above in the context of proximate causation. Namely, the victim liability defense is meant to protect only those whose acts are truly caused by victim wrongfulness and not by the defendant's preexisting criminal inclinations. The requirement of lack of predisposition has many other benefits, but it also has serious drawbacks.

On the benefits side, the lack-of-predisposition requirement serves a very important gate-keeping function in that it narrows the field of defendants to which the defense applies by drawing a clear line between dangerous, easily-provoked defendants and those who responded uncharacteristically to harm. Thus, the same retributivist and utilitarian arguments underlying the proximate cause requirement apply here. From a retributive perspective, the lack-of-predisposition requirement acts as a safeguard to ensure that the defendant in fact acted from justified motives rather than from his own evil inclinations. From a utilitarian perspective, the requirement ensures that dangerous people are not

326. This is clearly assumed in many cases where the criminal act is a predicate for a resulting harm, but there is some operation of free will in between. See United States v. Hamilton, 182 F. Supp. 548, 551 (D.D.C. 1960) (assuming arguendo that shooting victim freely pulled out his breathing tubes thereby causing death, but finding no intervening cause of death). It is not without controversy, however.

327. It appears to be at the heart of the cooling time requirement that there comes a point in time where the operation of the defendant's rational mind should intervene against his provoked mind. See Gresham v. State, 115 S.E.2d 191, 193 (Ga. 1960) (reasoning that "sufficient cooling time" allows "for the voice of reason and humanity to be heard").

328. In the entrapment context, predisposition is described as follows:

A predisposition inquiry focuses on when the defendant made the decision to commit the criminal act, which hopefully will provide a reliable indication of whether she made that decision of her own free will. This, in turn, is presumed to be evidence of whether the defendant poses a danger to society. If the defendant made the decision prior to the government's inducement, then she is considered to have had the requisite mens rea and is culpable for her criminal conduct. Conversely, if she made the decision to participate after the government induced her to act, then the inducement is presumed to have been the causal source of her decision and she is not held culpable. The most compelling justification for this distinction is that the principal purpose of a legal penalty is to protect society from those who would harm it, not from those whose wrongful conduct consists solely of a failure to exercise self-restraint in the face of government-generated temptation and encouragement.

given a free pass based on the defense. Only those who are not dangerous by nature, but merely reacted to extraordinary circumstances, can benefit from the defense.

There are, however, several negatives to the lack-of-predisposition requirement. First, there is the issue of whether predisposition to commit crimes should have any philosophical significance to punishment. To fully comprehend this question, one must wade into the murky waters of the nature of human actions and, indeed, whether certain empirical indices can specify who is "bad" and who is "good." More importantly, there is the issue of whether an administrable and fair definition of predisposition can be laid out. In addition, from a very practical perspective, one might argue that the predisposition requirement might undermine the whole of the defense in that defendants who might otherwise avail themselves of the defense would be afraid to assert the defense because of its potential to make admissible otherwise irrelevant prior crimes evidence. The most persuasive argument against the predisposition requirement is that it unfairly punishes a defendant not for his criminal actions in the instant case, but rather, merely because of character.

329. Some theorists advocate foregoing the existential question of who is and who is not predisposed to commit crimes and, instead, adopt a market-inducement analysis of predisposition:

There is a deeper difficulty with the controversy over the two tests for entrapment. The controversy is premised on the existence of a real something—state of mind, character, whatever—that is referred to as "predisposition." This assumption is false. We assume that there are a few people who would not commit any criminal acts no matter what the provocation or enticement. We will not refer further to such saintly, or misguided, individuals. Everyone else, we assume, has a price. That price may be quite high, for example because a person puts a high value on her good name, but it exists. If this assumption is true, then everyone except saints is predisposed to commit crimes. But, that in turn means that "predisposition" cannot usefully distinguish anyone from anyone else. The only salient question is whether a person's price has been met, not whether he has one, since by hypothesis everyone but the saintly does.

The real point is that talk of "predisposition" is meaningless and commits an existential fallacy. A person who takes the bait has had his price met; a person who does not, has not. But, the person who does not take the bait almost surely would take a higher, even if greatly higher, bait. The failure to take this one is evidence of his price, but not of predisposition.

330. Justice Frankfurter observed in Sherman v. United States:

The danger of prejudice [from predisposition evidence], particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged.

331. Essentially the issue is to what extent the defendant's character as a human being should play a role in whether or not he deserves punishment. Justice Frankfurter criticized such a consideration as follows:

[Predisposition evidence has often been admitted to show the defendant's reputation, criminal activities, and prior disposition . . . . Furthermore, a test that looks to the character
Prior to further discussing the benefits and drawbacks of including a lack-of-predisposition requirement in the victim liability defense, it is necessary to attempt to define specifically the meaning of predisposition. The most logical place to look is the doctrine of entrapment. Under the subjective approach to entrapment, which is the dominant approach today, in order to assert successfully the defense, a defendant must show not only that she was induced by government conduct to commit the crime, but also that she was not predisposed to commit the crime. The controversy over the subjective approach to entrapment versus the objective approach, which looks to the outrageousness of the government conduct rather than the predisposition of the defendant, has a

and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant’s past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.

Id. at 382-83 (Frankfurter J., concurring).

332. Entrapment is a defense based on improper government conduct which induces the defendant to commit the crime. There are two approaches, objective and subjective. The objective view of entrapment frames the defense as a way to control outrageous conduct of the government. Consequently, under the objective view, the particular frame of mind of the defendant is not as important as the objective conduct of the government:

The objective test recognizes that the true foundation of the entrapment doctrine rests in a public policy which protects the purity of government and its processes. According to the objective test, if the method of encouragement used was likely to induce an ordinary law-abiding citizen to commit the offense, then the case should be dismissed. This holds true even if the defendant was a hardened criminal ready and willing to commit the offense at any opportunity.

Fred Warren Bennett, From Sorrells to Jacobsen: Reflections on Six Decades of Entrapment, and Related Defenses, in Federal Court, 27 WAKE FOREST L. REV. 829, 836 (1992) (internal citations omitted). This approach is currently followed by a minority of states and the Model Penal Code. Id. at 835.

Conversely, the subjective approach frames the entrapment defense as a question of the defendant’s mindset. The essential issue is whether the defendant was a willing participant in the crime or an unwilling innocent ensnared in the government’s plan. As a result, the subjective view focuses on the predisposition of the defendant:

The subjective test of entrapment thus focuses exclusively on the defendant’s predisposition; the nature of the police conduct involved is irrelevant. Hence, though an otherwise innocent defendant who the police lead into crime is entitled to the defense because he is not blameworthy, a predisposed defendant is considered blameworthy if led into the same criminal act. This approach bases the entrapment defense on a core principle of criminal law—that defendants who are not culpable should not be punished. Because entrapment bears on the guilt or innocence of the accused, the issue must be submitted to the jury.

Id. at 834 (internal citations omitted). The academic debate over which approach should reign continues, although a divided Supreme Court adopted the subjective approach in Sorrells v. United States, 287 U.S. 435, 451 (1932). The Court reaffirmed the subjective approach in Jacobson v. United States, 503 U.S. 540, 542 (1992) and Sherman, 356 U.S. at 382.

333. See Lord, supra note 328, at 470 (“The gravamen of the subjective approach to entrapment is not the amount of government participation, but rather the defendant’s willingness to commit the crime.”).

334. See id. at 492 (“The gravamen of the objective view of entrapment is whether the police conduct falls below standards, to which common feelings respond, for the proper use of governmental
long history rooted partially in divided Supreme Court jurisprudence.\textsuperscript{335}

As with the victim liability defense, predisposition in entrapment jurisprudence allows juries and courts to distinguish between people who uncharacteristically committed crimes based on government inducement and those who would have committed the same or similar crime even if inducement had not been present at all. Explaining the predisposition requirement, the Supreme Court declared in \textit{Sherman v. United States}, "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."\textsuperscript{336} Predisposition evidence was used as a tool to show that law enforcement targeted, and even induced a criminally-inclined person to commit a crime, but did not create an extraordinary situation that would have induce an innocent person to commit a crime.\textsuperscript{337}

The main criticism of the subjective approach to entrapment concerns the nature of the entrapment doctrine. Critics argue that the doctrine derives not just from a concern over the defendant's culpability, but rather from a concern about government overreaching. Whereas the subjective approach centers on the issue of whether or not the defendant is culpable for his crime, the objective approach centers on the quality of the government's conduct in achieving an arrest, regardless of whether the person targeted turns out to be a criminal.\textsuperscript{338} In this sense, the objective approach adopts a means-based perspective (outrageous government conduct is not justified even when the end result is that a criminal has been caught) and the subjective approach adopts an ends-based perspective (outrageous government conduct is justified when a criminal is caught). Thus, the objection to the subjective approach is that when the criminal is predisposed, the government gets a free pass to engage in conduct that should be actively discouraged by the law.\textsuperscript{339} The objective approach to entrapment, then, is

\textsuperscript{335} See supra note 328 for a discussion of the predisposition inquiry.

\textsuperscript{336} \textit{Sherman}, 356 U.S. at 372.

\textsuperscript{337} Justice Hughes, writing for the plurality in \textit{Sorrells}, opined:

\textit{[T]he issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it. The government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.}

\textit{287 U.S. at 451.}

\textsuperscript{338} See supra note 331 for a discussion of how prior criminal conduct of a defendant does not excuse police conduct.

\textsuperscript{339} Justice Roberts explained in his dissent in \textit{Sorrells}:

\textit{Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. He has committed the crime in question, but, by supposition, only because of instigation and inducement by a government officer. To say that}
analogous to the exclusionary rule. Its practical effect is to allow a defendant to go free, not because the defendant is not culpable, but rather to discourage the government from engaging in undesirable, even unconstitutional, behavior. The objective approach serves primarily as a government incentive-fixing function.

On this point, however, there is a significant disjuncture between the entrapment scenario and the victim liability defense scenario. In a subjective entrapment jurisdiction, if the induced defendant is predisposed to committing the crime at issue, the government gets its conviction and receives absolutely no sanction for its wrongful overreaching. Thus, the government has no incentive to discontinue the undesirable actions. In the victim liability scenario, the induced but predisposed defendant is also convicted. The difference, however, is that the victim has suffered a harm at the hands of the defendant, which is itself incentive to discontinue the wrongful behavior. Consequently, the victim liability defense has more leeway to focus on the moral culpability of the defendant. The victim liability defense need not have the same incentive-fixing concerns as the entrapment doctrine. It can be more fully centered around defendant culpability.

Aside from the distinction between objective and subjective entrapment, there is still the question of the meaning of “predisposition.” Some theorists suggest that predisposition is merely a function of inducement. In other words, a person is predisposed to commit a crime if it took very little inducement to cause the person to commit the crime. Under this approach, predisposition in the victim liability defense scenario would merely be a function of the first, second, and fourth elements of the defense. Thus, a person is not predisposed when the victim acted sufficiently wrongfully, the victim’s behavior caused the crime, and the defendant acted appropriately on balance. The inquiry becomes more complicated, however, considering the above discussion of causation.

such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. It is to discard the basis of the doctrine and in effect to weigh the equities as between the government and the defendant when there are in truth no equities belonging to the latter, and when the rule of action cannot rest on any estimate of the good which may come of the conviction of the offender by foul means.

287 U.S. at 458-59 (Roberts, J., dissenting).

340. See Arizona v. Evans, 514 U.S. 1, 10 (1995) (“The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule’s general deterrent effect.”).

341. Louis Michael Seidman observes:

[S]o long as one equates “predisposition” with a readiness to commit crime, no definition of “predisposition” can be complete without an articulation of the level of inducement to which a “predisposed” defendant would respond. Furthermore, the “predisposed” cannot be distinguished from the “nondisposed” without focusing on the propriety of the government’s conduct—the very factor that the subjective approach professes to ignore.

Predisposition must have some meaning apart from the other elements in order to inform whether or not the victim's behavior indeed caused the criminal act. In other words, the defendant's predisposition, or lack thereof, helps determine whether the victim's acts truly induced the behavior or whether some other factor (the defendant's pre-existing behavioral dispositions) induced the behavior. In this sense, predisposition is less defined by inducement as inducement is defined by lack of predisposition.

If not a function of inducement, then, what is predisposition? Some theorists suggest that predisposition to commit a crime does not really exist. Rather, in the entrapment context, emphasis should be placed on whether the defendant has committed the crime in response to market or extra-market forces, which is essentially the difference between responding to every-day situations and extraordinary situations. Under this definition, the touchstone of "predisposition" is that it "identifies reliably those who are and are likely to be involved in criminality under real conditions." This definition, however, seems to further beg the question. Whenever outrageous government conduct or wrongful victim behavior exists, the defendant has been placed in an extraordinary or extra-market situation to which he responded. The relevant question is whether the extra-market force was a critical factor in the defendant's decision to engage in a crime. What informs this inquiry is whether or not the defendant acted uncharacteristically.

Consequently, the touchstone of predisposition seems to be the character of the defendant. Evidence that a defendant acted uncharacteristically criminally or characteristically criminally can come in many forms. Most commonly, predisposition evidence takes the form of evidence of similar past crime. But other evidence might suffice, for example, a confession that the defendant would have commit the crime in the absence of the inducement, statements to others that indicate the defendant was predisposed to commit the crime, or other circumstantial evidence.

---

342. See Allen et al., supra note 329, at 413 who discussed:

The real point is that talk of 'predisposition' is meaningless and commits an existential fallacy. A person who takes the bait has had his price met; a person who does not, has not. But, the person who does not take the bait almost surely would take a higher, even if greatly higher, bait. The failure to take this one is evidence of his price but not of predisposition.

To some extent, the above argument is simply a game of semantics. Predisposition to commit crime may be nothing more than a person's psychological state of willingness to engage in illegal behavior in conditions under which most people or most reasonable people would not. Allen et al. would say that the difference is predispositions focus on the past behavior of the defendant, whereas a market test focuses on whether the bait used was ordinary or extraordinary. If it was ordinary, then even a first time offender poses a continuing threat. Id. at 419. Not to belabor the issue, but in this day, predisposition inquiries may focus on the past acts of the defendant, but they may also focus on the defendant's instant behavior, for example, whether he exhibited willingness or enthusiasm for the criminal plan.

343. Id. at 417-20.

344. Id. at 419.

345. See supra note 191 for a discussion of the admissibility of evidence of prior crimes.
The obvious criticism is that criminal law should not punish for character.  
Imagine a defendant who, though predisposed to commit the crime, in fact acted solely in response to wrongful victim behavior and not from his criminal disposition. In this scenario, there is both justification and predisposition.

Indeed, there may be situations in which a criminally-inclined person did not in fact act on his criminal inclinations when responding to wrongful victim behavior, but rather on his reasonable inclinations. It does seem, at first blush, ultimately unfair to exclude this person from the class of defendants to which the victim liability defense applies simply because of his past behavior. This perception, that to exclude the above defendant is unfair, however, is itself based on a significant assumption about the nature of criminal prohibitions and punishment. The assumption here is that criminal law and punishment is about punishing a "bad act" rather than a "bad person."

If the predisposition prong of the victim liability defense is interpreted as excluding reasonably induced yet predisposed defendants, then the defense applies only to "good" induced defendants as opposed to "bad" induced defendants. This may seem like an unusual concept. One would have a hard time imagining a self-defense rule that excluded defendants who were predisposed to kill from the defense, even when they killed because they reasonably feared imminent bodily injury. However, even apart from entrapment, there are existing defenses that distinguish between bad defendants and good defendants who respond to similar stimulus in committing their crimes.

The insanity defense, particularly as defined by the M'Naghten rule, requires not only that the defendant suffer from a disease of the mind but also

346. See supra note 339, quoting Justice Roberts's dissenting opinion in Sorrells that the "demerits" of a defendant alone do not justify punishment.

347. This puts retributive and utilitarian sentiments at war with each other. In the retributive sense, the defendant is not culpable because he would not have committed the crime in this particular instance without the unfair governmental influence. Utilitarian concerns, however, are furthered by the defendant's punishment because his predisposition indicates that he is a danger to society.

348. Allen et al. observe that "[e]ntrapment could mean, but does not in the cases so far as we can tell, something about character," but this idea "falls under the weight of the general disinclination to punish for character alone." Allen et al., supra note 329, at 414.

349. Some theorists posit that, although arguably it should not be, criminal law has become all about managing types of people. See Jonathan Simon, Managing the Monstrous: Sex Offenders and the New Penology, 4 PSYCHOL. PUB. POL'Y & L. 452, 456 (1998) (describing Kansas's Violent Sexual Predator Act as a tool for managing sexual predators). One argument holds that:

[All]entrapment in an important sense involves punishment for character. It almost invariably involves governmental activity whose explicit purpose is social hygiene—to clear the streets of individuals who have and will commit crimes—and is usually targeted at types of criminality that cannot easily be prosecuted in other ways . . . .

Allen et al., supra note 329, at 419. The ultimate question of the extent to which criminal character has a place in the penal law is well beyond the scope of this article.

350. There are, however, a multitude of ways a clever prosecutor can get the evidence of the defendant's violent propensity in front of the jury. For example, it might come in as evidence of intent, motive, or absence of mistake. If the defendant testifies, it might be used as impeachment evidence. See supra note 191 for a discussion of past crimes evidence.
that the defendant be unable to distinguish right from wrong.\textsuperscript{351} This latter requirement has been interpreted to mean that because of the defendant’s mental defect, the defendant thought her conduct to be morally right.\textsuperscript{352} Moreover, courts have defined this idea of morally right as objectively morally right, the operative issue being whether society would agree with the delusional defendant’s assessment of morality.\textsuperscript{353} Take then, for example, two defendants who both suffer from diagnosed schizophrenia and commit murders during schizophrenic delusions. In Defendant 1’s delusion, God tells him to build a church. Defendant 1 feels his wife is undermining God’s plan so he kills her.\textsuperscript{354} In Defendant 2’s delusion, his business partner is stealing from him. Defendant 2, in response, kills his partner. Both defendants suffer from the same mental defect (schizophrenia) that caused both to engage in the same conduct (killing).

Under the \textit{M’Naghten} rule, however, Defendant 1 could likely be acquitted as insane and Defendant 2 determined sane and convicted. The difference between Defendant 1 and Defendant 2, under \textit{M’Naghten} and its progeny, is that Defendant 1’s actions can be seen as objectively moral because, within his delusion, they were sanctioned by God. One could say that it is objectively moral to obey God. Defendant 2’s actions, though delusional, were based on anger, greed, or revenge. It is not objectively moral to kill based on anger, greed, or revenge. Thus, even if Defendant 2 honestly believed his actions to be moral, they were not objectively moral. As a consequence, although both killers are equally mentally diseased, and both killings occurred because of the disease, Defendant 1 is declared insane and Defendant 2 is declared sane.

In the above hypothetical, there is no medical difference between the diseased minds of both defendants, and no psychological reason to call one insane and the other sane. The difference at the heart of the insanity doctrine is that Defendant 1 has a correct internal moral meter whereas Defendant 2 does not. The insanity doctrine is a legal, not a medical concept. As a legal precept, insanity, as defined by \textit{M’Naghten} and its American progeny, acquits defendants, not simply because insanity interferes with \textit{mens rea} and volition, but because within the defendant’s delusion, the defendant makes correct moral choices. Essentially, the \textit{M’Naghten} rule will only allow “good” insane killers off the hook. It will not allow the “bad” insane killer to go free. Consequently, implicit in the \textit{M’Naghten} rule is the idea that criminal law is not only about punishing acts, that is, determining whether, in the instant situation all the elements of the

\begin{footnotes}
\item[352] See People v. Serravo, 823 P.2d 128, 135 (Colo. 1992) (construing \textit{M’Naghten} to require that insane defendant believe that her acts are “morally” right).
\item[353] See \textit{id.} at 139 (stating that “the phrase ‘incapable of distinguishing right from wrong’ refers to a person’s cognitive inability, due to a mental disease or defect, to distinguish right from wrong as measured by a societal standard of morality”).
\item[354] These facts closely mirror those of \textit{Serravo}, except that instead of killing his wife, Serravo stabbed her, and she survived. \textit{Id.} at 130-31. The court ruled that such facts could support a conclusion that because of the defendant’s mental disease he lacked the ability to distinguish right from wrong. \textit{Id.} The court opined that Serravo’s belief that God ordered him to build the complex could show that he believed stabbing his wife to be morally correct. \textit{Id.} at 130.
\end{footnotes}
criminal act were present. Rather, criminal law additionally takes into account the nature of the actor. Like the insanity defense, the victim liability defense can seek to distinguish between good (non-disposed) people who respond criminally to wrongful victim behavior and bad (criminally disposed) people who respond criminally to wrongful victim behavior.

Consequently, there are two possible responses to the objection that the lack-of-predisposition requirement unfairly punishes defendant for past acts and character: (1) The fact that some predisposed yet induced defendants may be eliminated from the defense is simply an unavoidable cost of narrowing the defense; and (2) it is legitimate for defenses to distinguish, as the insanity doctrine does, between good people who commit criminal acts in response to extraordinary stimuli and bad people who similarly commit criminal acts.

D. The Defendant's Response Balanced Against the Victim's Wrongful Conduct Dictates that the Defendant Should be Exculpated or Punishment Mitigated

The final element of the non-specific victim liability defense requires the judge or jury to balance the defendant's criminal conduct against the victim's wrongful conduct to determine the appropriate level of liability. A critic may be quick to point out that this requirement seems to undercut some of the benefits of the defense by reintroducing the reasonable racist and provoked abuser problems discussed in Part IV. The argument is that in balancing the conduct of the defendant and victim, the jury could take into consideration racist, homophobic, or patriarchal norms.

Turning to the issue of reasonable racists, the problem of reasonable racists, provoked abusers, and homophobic killers occurs because provocation and self-defense allow the defendant's "reasonable" assessment of the victim's behavior to control whether the defense is applicable. Thus, the homophobe's action of killing a man who makes a pass at him could be considered "reasonable provocation" even under an objective reasonableness standard if the jury determines that it is statistically typical to be provoked by a homosexual advance. The action could be considered reasonable provocation under a subjective reasonable analysis if the jury determines it is reasonable for someone with the homophobe's background to be provoked by a homosexual advance. Either way, the law is left little room to dictate that certain victim behaviors should not provoke a criminal response, even if the defendant or society believes they should. The wrongfulness requirement allows the law to dictate presumptively that only certain victim behaviors allow the law to assess the defendant's criminal act in the context of the victim's conduct. Thus, the reasonable racist problem is solved on the front end by dictating that only wrongful behavior is grounds for the defense.

Applying the non-specific victim liability defense to People v. Goetz

355. See supra Part IV.B for a discussion of the victim liability defense.
356. See supra notes 125 and 183 and accompanying text for a discussion of the view that homosexual advances constitute per se inadequate provocation.
provides an example of the role of wrongfulness. In that case, if victim wrongdoing was a predicate to Goetz’s defense, Goetz would have to show that the boys in the subway were acting contrary to law in a way that shocked the conscience. Because the victims did not do anything illegal that was shocking to the conscience, Goetz would not be entitled to assert the non-specific victim liability defense. The question of whether Goetz reasonably feared the victims because he was brought up racist would never even arise.

The question then becomes whether incorporating a balancing test on the back end reintroduces the problem. Perhaps, one could imagine a situation in which an African-American man committed the “wrongful” act of punching a white man who in turn shot him. The white man then argues that he “reasonably” responded to the victim’s wrongful conduct because, according to his racist upbringing, it is an act worthy of death for a black man to punch a white man. The jury is then charged with balancing the action of the defendant against the harm committed by the defendant. Obviously, most juries would find the response so disproportionate as to warrant severe punishment. One might, however, be able to imagine a jury willing to acquit because it is either itself racist or extremely sympathetic to the subjective mental state of the defendant. While the aforementioned situation is unfortunate, it is not a problem endemic to the non-specific victim liability defense. First of all, the problem of jurors relying on racist belief systems in their decisions is one that can occur in any area of the law. The non-specific victim liability defense’s incorporation of “wrongfulness” and elimination of reasonableness at least does not allow a legal mechanism for introducing racist or patriarchal norms into a trial. As for jurors who are moved by the subjective beliefs of the defendant, this is not necessarily a problem with the defense. The struggle over how objective or subjective the law should be is not new and perhaps insoluble.

357. 497 N.E.2d 41, 47-48 (N.Y. 1986).
358. Evidence revealed that the boys, one or two of the victims, “approached Goetz . . . and stated ‘give me five dollars.’” Goetz, 497 N.E.2d at 43.
359. See Carter, supra note 77, at 421 for a discussion of the racial implication of Goetz’s defense.
360. Technically, this is a simple battery. There is a real question of whether this would qualify as “wrongful” conduct when “wrongful” is defined as illegal and shocking to the conscience.
Purely objective standards require defendants to conform with standards of morality completely independent of any of the individual defendant's characteristics, beliefs, or background. Objective standards require the defendant to act like a fictional reasonable man who acts neither in accordance with culture nor with past personal experience.\textsuperscript{362} Plainly, the more objective the standard, the clearer the line between criminal and non-criminal behavior. Objective standards presuppose a uniform logical construct that can be applied universally to all actors. The problem with objective reasonableness standards is that this uniform logical construct simply does not exist. What is reasonable to an Anglo-American, Christian woman may be very different from what is reasonable to a Saudi Arabian, Muslim man.\textsuperscript{363} Those opposed to so-called "cultural" evidence in criminal trials would respond that those not from the "culture" of the United States are on notice of the criminal standards embedded in the culture and should conform to them, even if to do so is against their culture.\textsuperscript{364}

This response may seem inadequate for several reasons. First, it requires a precise determination of the culture of the United States.\textsuperscript{365} Implicitly, also, the prevailing culture is assumed to exclude rather than incorporate foreign cultures.\textsuperscript{366} Second, even if the defendant is on notice of American culture,

\textsuperscript{362} See State v. Leidholm, 334 N.W.2d 811, 816-17 (N.D. 1983) (noting objective reasonableness is based on fictional reasonable man).

\textsuperscript{363} Not only is it a fact that the United States contains a diversity of cultures with a diversity of social norms, Multiculturalists contend that the law should not reflect ethnocentric values but rather should ensure that "each [culture] has the right to form its own identity and nourish its own sense of what is rational and humane." Doriane Lambelet Coleman, \textit{Individualizing Justice Through Multiculturalism: The Liberals' Dilemma}, 96 COLUM. L. REV. 1093, 1119 (1996) (quoting Stanley Fish, \textit{Boutique Multiculturalism or Why Liberals Are Incapable of Thinking About Hate Speech} 1, 8 (unpublished manuscript, on file with the Columbia Law Review)). \textit{See also} Anita Christina Butera, \textit{Assimilation, Pluralism, and Multiculturalism: The Policy of Racial/Ethnic Identity in America}, 7 BUFF. HUM. RTS. L. REV. 1, 8 (2001):

From the Multicultural approach, each racial/ethnic group gives its specific and unique contribution to the ongoing evolution of the larger national culture. There is no implicit assumption of superior/inferior cultures and/or racial/ethnic groups. In this sense, the contributions of the specific groups to the national societal 'mosaic' is greater than the sum of its individual racial/ethnic components.

\textsuperscript{364} See Coleman, \textit{supra} note 363, at 1098: [T]he use of cultural evidence risks a dangerous balkanization of the criminal law, where non-immigrant Americans are subject to one set of laws and immigrant Americans to another. This is a prospect that is inconsistent not only with one of the law's most fundamental objectives, the protection of society and all of its members from harm, but also with the important human and civil rights doctrines embodied in the Equal Protection Clause. Thus, society as a whole is best served by a balance that avoids the use of discriminatory cultural evidence.

\textsuperscript{365} In the case of Coleman's argument, the law assumes that the existing law and jurors' predispositions regarding the term "reasonable" are adequate reflections of the prevailing culture. \textit{Id.} at 1155 n.293.

\textsuperscript{366} Leti Volpp argues that not only is it racist to assume that the dominant European culture is superior, but also that culture must take into account the effect of dominant cultures on the development of subordinate cultures:
foreign cultural norms appear to be relevant still when, for example, heat of passion is the benchmark of the defense. In this case, despite outward assimilation, the defendant may have been moved to passion based on the culture ingrained in the sub-conscious for years. Imposing an objective standard does not account for the effect of culture on mens rea. Thus, it seems then that the more subjective standard has many benefits it allows for more flexibility and takes into account the diverse nature of our society.

On the other hand, subjective standards of conduct carry with them several problems. One problem is the possible stigmatizing affect that cultural evidence may have on members of diverse cultures. Based on the application of this evidence in high profile criminal trials, society members might begin to identify, for example, Asian culture with wife-beating or baby killing.

Thus, it seems then that the more subjective standard has many benefits: it allows for more flexibility and takes into account the diverse nature of our society.

On the other hand, subjective standards of conduct carry with them several problems. One problem is the possible stigmatizing affect that cultural evidence may have on members of diverse cultures. Based on the application of this evidence in high profile criminal trials, society members might begin to identify, for example, Asian culture with wife-beating or baby killing.

The assumption that people of color are governed by cultural dictates is not only dehumanizing, it is also depoliticizing because such thinking often leads us to neglect the power of "noncultural" forces in shaping reality.
The most difficult problem with subjective standards is the problem of reasonable racists discussed above and in Part IV. In Bernard Goetz's case,\textsuperscript{369} the New York Court of Appeals invited the jury to take into account the defendant's "circumstances," which:

encompass more than the physical movements of the potential assailant. . . . [They] include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.\textsuperscript{370}

Goetz became the "reasonable" frightened, gun-toting, disgruntled subway-rider. Critics characterized this invitation as authority for the jury to take into account Goetz's racist perceptions. While the judge in this case did not, nor would any judge, explicitly ask the jury to think about the case from the perspective of a "reasonable racist," subjective standards allow such an inquiry to occur implicitly:

To many, allowing the reasonableness of Goetz's actions to be judged in light of his past "victimization" by black youth is tantamount to saying that individuals should not be legally required to avoid being racist.\textsuperscript{371}

Thus, the basic criticism of subjective standards is that the law is inadequately equipped to prescribe appropriate moral norms. Jody Armour asserts:

[T]he concrete reality of racially charged self-defense arguments is readily apparent, and the legal propriety of such strategies must be evaluated. I contend that even though a supposed assailant's race may be formally relevant under self-defense doctrine, courts must refuse to allow race-based claims of reasonableness—whether explicit or covert—to figure in self-defense cases.\textsuperscript{372}

There must be some mental dispositions which courts and legislatures declare as \textit{per se} criminal regardless of the defendant's particular background. I will admit that this line is difficult to draw, especially in cases where defendants are raised in foreign cultures, which appear to some extent to the Western eye to be racist, sexist, and/or classist, and have incorporated these belief systems into their lifestyles.\textsuperscript{373} These are tough cases because, on the one hand, their culture

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{369} People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).
\item \textsuperscript{370} \textit{Id.} at 52.
\item \textsuperscript{371} Heller, \textit{supra} note 361, at 88 (citation omitted).
\item \textsuperscript{372} Armour, \textit{supra} note 165, at 785.
\item \textsuperscript{373} Sherene Razack recognizes the difficulty of these issues: Culture talk is clearly a double-edged sword. It packages difference as inferiority and obscures gender-based domination within communities, yet cultural considerations are
\end{itemize}
\end{footnotesize}
truly does dictate these beliefs, on the other hand, there is a very good argument that our law ought authoritatively disavow these beliefs. In the end, the victim liability defense, like any defense, will be thrown into the objective-subjective debate. The victim liability defense, at least on the front-end, eliminates the reasonable racist problem when the defendant has committed a criminal act against a non-wrongful victim.

The importance of the flexibility given to the jury by the balancing test should not be understated. One of the most salient fears and pervasive criticisms of the non-specific victim liability defense is that it will invite vigilantism. The concern is that the defense will encourage people to choose criminal retaliation rather than rely on law enforcement for vindication of criminal laws. The balancing test allows the jury to take into account, for example, the legal options available to the defendant, the extent to which the defendant planned the criminal behavior, and other factors that brought about the crime. If the jury determines that the defendant responded to wrongful victim conduct, but should have chosen an alternative action, the jury could find the defendant liable for a crime, but less liable than a defendant who committed similar criminal behavior not in response to wrongful victim conduct.

E. The Practical Application of the Non-Specific Victim Liability Defense

Having elucidated to some degree the meanings of the elements of the defense, the issue becomes how the defense will operate. The defense will operate as an alternative to existing specific victim liability defenses. The difficulty here is that some of the defenses, like provocation, merely mitigate punishment while others, like self-defense, result in total exculpation. Even among the current victim liability defenses that result in total exculpation, there are doctrinal differences. Some of the defenses serve to “justify” the defendant’s actions, while others merely “excuse” it.

In determining whether the non-specific victim liability defense should mitigate or exculpate, I find the distinction between excuse and justification unhelpful in two ways. First, both excuse and justification serve as complete


374. See Coleman, supra note 363, at 1138 (arguing that by allowing cultural evidence in domestic violence cases “a message is sent to the affected communities that men can continue to subordinate women and children as they allegedly were accustomed to doing in their country of origin”).

375. One possible resolution to the objective/subjective divide is found in the Model Penal Code. In the context of self-defense, under the Model Penal Code, a reasonable mistake as to the need to use deadly force will exculpate the defendant. An unreasonable but honest mistake will exculpate the defendant on charges requiring an intent of knowledge or purpose. If the defendant’s honest mistake was reckless or negligent, however, then she can still be guilty of a crime with the requisite intent of recklessness or negligence. MODEL PENAL CODE § 3.04(2)(B) (1962).

376. Kahan & Nussbaum similarly observe that the justification/excuse distinction does not
defenses to criminal liability. Second, a critical examination of the distinction between justification and excuse reveals a very unclear and tenuous divide. In

operate as a neat divide, or a conceptually important one regarding the defense of provocation:

It is widely assumed that “justification” and “excuse” embody normative distinctions that generalize across criminal defenses. Justifications are said to identify acts that produce morally preferred states of affairs. When complying with the law would result in greater harm than would breaking it, for example, a defendant may assert the justification of “necessity”; an individual who kills another to protect his own life may assert the justification of self-defense, because the law prefers the death of the wrongful aggressor to the death of the law-abiding citizen. In addition, justifications are said to be “universal” and “objective”; because they single out acts that produce superior states of affairs, justifications are indifferent to the identity of the actor or her motive for doing the act.

Excuses, in contrast, are said to identify circumstances in which an act is wrongful but the actor blameless. For example, a person whose will is overborne by a threat may be able to assert the excuse of “duress” even if her act imposes a greater harm than is threatened to her. Moreover, excuses are said to be “subjective” and “individualized.” They are concerned with how the defendant’s particular circumstances affected her capacity or opportunity to obey the law.

The common law formulation of voluntary manslaughter does not fit neatly into either of these categories. Consider again the parent who is convicted of manslaughter after killing a man who has abused her child. By mitigating her punishment, the law presumably does not imply that the man’s death, by itself, produces a better state of affairs. Moreover, application of the doctrine to the angry parent does not satisfy the objectivity and universality conditions of justification: it was necessary for the parent to show that she killed out of anger and not for some other reason; and certainly no other person could have killed on the parent’s behalf and still have been entitled to present a manslaughter theory. Nor does voluntary manslaughter appear to satisfy the conditions of “excuse” in this setting. It would not be necessary for the parent to show that her anger deprived her of the capacity to obey the law; but even if she could, that would not be sufficient unless she could also establish that the victim’s acts were adequate to provoke a reasonable person.

Kahan & Nussbaum, supra note 133, at 318-20 (citations omitted).

377. See Kaplan et al., supra note 42, at 567 (“Justifications exonerate conduct as right, and excuses exonerate persons as blameless for wrongful conduct”). Thus, the appeal to the distinction between justification and excuse will not ultimately resolve whether the victim liability defense should be mitigation or a complete defense.

378. Identifying a singular strain of logic underlying the categories of mitigation, justification, and excuse defenses is incredibly difficult. Under the most simplistic view, justification defenses “are said to identify acts that produce morally preferred states of affairs” whereas excuse defenses “are said to identify circumstances in which an act is wrongful but the actor blameless.” Kahan & Nussbaum, supra note 133, at 318-19. Thus, a person acting in self-defense is said to be justified because she has prioritized her own innocent life over the life of the wrongful aggressor. A person acting under duress who, threatened with death, kills an innocent is merely excused because her life was not necessarily worth more than the innocent decedent’s life. The categories get much more complicated when mistake of fact is put into the situation. Is the defendant who mistakenly but reasonably believed that he killed a wrongful aggressor justified or excused? Does it matter that the relevant fact distinguishing between justification and excuse is unknown to the defendant? Also confounding is the fact that justification and excuse are treated, for the most part, alike under the law in that they both result in total exculpation. Provocation, on the other hand, is treated as a lower level of excuse because the defendant is still punished. Thus, the parent who kills her child’s murderer is in fact more culpable than the person who kills the innocent because she is under duress or the person who kills upon the reasonably mistaken belief that another is about to kill him. The question is why this ordering makes sense? It cannot really be said that the latter two defendants have produced a consequentially better state of affairs in society than the former. As a result, the distinction between justification and excuse
addition, in one sense, the victim liability defense appears as justification because the harm befalls a wrongful victim and not merely a negligent or unwitting victim. On the other hand, the defense can seem like excuse because the defendant asserting the defense may have engaged in reasonable but not optimal or even encourageable behavior. The critical point is that under either a traditional justification or excuse analysis, fulfilling the elements of the defense would make the defendant not guilty of any crime.

Thus, the most important question regarding the practical effect of the defense is whether it will exculpate or mitigate. Like the line between justification and excuse, the division between exculpation and mitigation as it exists now is quite convoluted and imprecise. As mentioned before in Part IV.B, the provocation doctrine itself straddles the line between being a method of negating intent, thereby reducing the level of the homicide offense, and being an independent reason to determine that the defendant has acted in a less morally culpable manner. As a defense of intent negation, provocation is straightforward. It operates like any other evidence the defendant can use to show he lacked the required intent for first degree murder. This is not to say that the presence of passion actually negates pre-meditation. Certainly, one versed in the understanding of human cognition could determine that a person can be both passionate and pre-meditate a murder. The fact is, however, that the distinction between first-degree and second-degree murder assumes to some degree that passion and pre-meditation are mutually exclusive. Thus, as an intent inquiry, provocation is not a special doctrine. It operates like any other

is not helpful to this project.

379. See Burke, supra note 8, at 242-43:
Justification defenses operate when the defendant's act is the morally preferred option. Because justified acts are viewed as objectively preferable, the psychological, subjective peculiarities of the defendant are generally irrelevant to the application of the justification defense. In contrast, excuse defenses apply when the act itself is harmful, but when something about the actor relieves her of moral culpability for the wrongful act. (internal quotations omitted).

380. This may be in the case where a killing was a reasonable response to wrongful victim behavior, but other reasonable alternatives were available. This scenario seems to fit excuse better than justification. Excuse, however, is not often defined this way. Rather, excuse is often confounded with reasonable mistake. In other words, if the world were as the defendant had believed, the defendant's acts would have been justified, but the defendant was reasonably mistaken. See Leidholm, 334 N.W.2d at 816 (noting that conduct is not excused if person's actual belief is unreasonable). Thus, excuse is not necessarily the use of reasonable but sub-optimal methods to achieve an ends. If it were defined in such a manner, many instances of self-defense, though technically termed "justification, would have to be re-organized as excuse. See supra note 231 for a discussion of necessity and the inclusion of viable alternatives.

381. See supra notes 124-31 and accompanying text for a discussion of the duality of the provocation defense.

382. See supra note 127 for a description of how evidence of provocation may negate premeditation.

383. See State v. Frendak, 408 A.2d 364, 371 (N.J. 1979) (noting that to prove premeditation evidence must show that killing was not done in "heat of passion"). The issue of whether the law should draw such an important distinction between premeditation and passion, I leave for another day.
evidence negating intent. Provocation, in this sense, does not require separate treatment under the law as a victim liability defense.

As a prescriptive or evaluative defense, the doctrine is more problematic. As a prescriptive defense, provocation does more than seek to show that the defendant lacked the requisite pre-meditation for first-degree murder, it seeks to show that the defendant made a "reasonable" evaluation of the circumstances. This type of provocation doctrine carries with it an element of prescription. Consequently, the provocation doctrine does more than reduce first-degree murder to second-degree murder because of lack of mens rea. It operates more independently as a mitigating defense and reduces first-degree murder to manslaughter. However, if the existence of adequate provocation shows that the defendant truly comported with moral norms and acted morally appropriately under the circumstances, it seems arbitrary that provocation mitigates murder to manslaughter, rather than mitigating to a lesser charge or exculpating.

Perhaps the reason why provocation merely mitigates is that it is inadequately prescriptive, as argued in Part IV.B. It does not limit its protective ambit to those people who truly acted morally appropriately. It provides a defense to those who acted out of passion but made morally inappropriate judgments. Thus, in discussing why provocation mitigates rather than exculpates, theorists often refer to the law recognizing "human weakness" and "loss of self-control" but not endorsing acts premised on such weakness.

There are then three types of defenses implicit in current victim liability law. The first type serves only to negate intent, like any other factor used to negate intent. On the other end of the spectrum are defenses that truly require the defendant to comply with prescriptive dictates of morality, for example, self-defense. These defenses, when met, show that the defendant made morally appropriate choices under the circumstances and is therefore not morally culpable for a crime. Somewhere unhappily in between is provocation as a mitigation doctrine. It seeks to be more than just a pure mens rea issue, and in fact lessens liability more than pure mens rea negation does, but it does not go so far as to require that the defendant act morally correctly. The problem is that the mens rea requirement in criminal law already accounts for loss of self-control. It is not clear why the existence of passion should reduce liability even more, and why manslaughter is an appropriate level of reduction. Conversely, if the defendant acts fully in compliance with prescriptive moral norms, by responding reasonably to provocation, there is no reason to nonetheless impose a sentence on him. As with perfect self-defense, the defendant should be fully exculpated. Perhaps, the reason provocation mitigates to manslaughter is that if

384. See supra note 132 and accompanying text for a definition of manslaughter.
385. See supra note 133 and accompanying text for a discussion of provocation and exculpation.
387. See supra notes 384-86 for a discussion of three forms of provocation defenses. I cite self-defense here which is a justification defense, but the same statement applies to excuse defenses. While justification defenses are said to create a better state of affairs in society, excuse defenses equally show the defendant to be not morally culpable, although a better state of affairs was not produced.
a critic of the provocation rule were to point out that it provides a defense to a bad people (i.e., abusive wife-killers), then the proponent could simply reply, "it is not a total defense but just mitigation." This is obviously an unsatisfactory explanation of the provocation doctrine. Consequently, provocation, as currently formulated, is problematic in two ways: first, it can unfairly mitigate punishment of those who should be punished fully by the law; and second, it can mitigate punishment of those who should be exculpated or receive a greater liability reduction.

The wrongfulness requirement in the victim liability defense takes care of the first problem by ensuring that only those defendants who respond to wrongful victims are eligible for the defense. Perhaps, then, every defendant who meets the first three requirements of the victim liability defense should be fully exculpated, and there is no room for mitigation in the law. The complexity of human behavior and moral norms, I believe, indicates that there must be some mechanism in the non-specific victim liability defense to grade defendant behavior. Even when a non-disposed defendant responds to wrongful victim behavior, there may, nonetheless, be aspects of his conduct that make him culpable. For example, the defendant may have responded disproportionately harshly to the wrongful victim conduct. Alternatively, the defendant may have responded proportionally to the victim conduct but chose the criminal option when many other viable legal options were available to her. In addition, there is the issue of mistake of fact, in which the defendant reasonably but mistakenly believes that the victim has engaged in wrongful conduct and acts based on this misperception. In each of the above scenarios, as well as others unmentioned, the jury could conclude that the non-disposed defendant's crime was caused by wrongful victim conduct (or the perception of it), but that the defendant should nonetheless be guilty of something. The last prong of the victim liability defense allows the jury to balance the defendant's conduct against the victim's wrongful conduct to determine whether and to what extent the defendant is liable for a crime.\(^{388}\)

388. Administration of the victim liability defense would be through a jury instruction, much like self-defense or entrapment. The proposed jury instruction might appear as follows:

**1.1 Victim Liability Defense**

*Read in all cases:*

A defense based on the wrongful conduct of the victim has been raised in this case. The defendant is eligible for this defense if:

1. The victim's conduct was wrongful;
2. The victim's wrongful conduct caused the defendant to commit the [crime charged]; and
3. The defendant was not predisposed to commit the crime.

*Give if predisposition has been alleged:*

The defendant is not eligible for this defense if he/she was predisposed to commit the [crime charged]. The defendant was predisposed if, before the victim's wrongful conduct, the defendant had a readiness or willingness to commit the [crime charged].

*Give in all cases:*

If you find that the [crime charged] was caused by the victim's wrongful conduct and that the defendant was not predisposed to commit the [crime charged], you must balance the defendant's conduct against the victim's wrongful conduct. Based on your assessment of the defendant's and
This Part has defined to some extent the parameters of the victim liability defense and illuminated some of the issues that will arise in applying and refining the defense. Many of the issues discussed in this section, for example, the meaning of reasonableness, are age-old antimonies in the law.\textsuperscript{389} As with any defense or any legal term, legislatures, judges, and juries will participate in the struggle to define with precision and fairness the meaning and application of the non-specific victim liability defense.

VI. CONCLUSION

Criminal law pedagogy has changed over the years. While in past times criminal law courses and writings centered on the relationship between state and defendant, today, criminal law, in practice and academia, consists in large part of policy and jurisprudence concerning victims. Victims' rights have come to the forefront of criminal law and criminology, propelling the once very public area of criminal law towards privatization. The victim participates in all aspects of the criminal prosecution, and oftentimes, takes the role of a party more than a witness. Implicit in the victims' rights phenomenon is a trend toward a comparative moral assessment of victims and defendants.\textsuperscript{390} The problem is that there is no real comparison. The victims' rights movement has relied on an incomplete and one-sided picture of the victim. Sentencing allocutions present to the jury the image of the innocent, hurt, damaged victim juxtaposed with the cold-hearted, unremorseful, animal-like defendant. In society, "victim-talk" pits victim character against offender character, nearly exclusively to the detriment of the defendant.\textsuperscript{391}

This trend towards the "party-victim" and comparative blameworthiness, ends, however, when it comes to comparing the fault of the victim with the fault of the defendant in the criminal transaction. The same victims' rights movement that has elevated the victim to a party, does not look kindly upon any criminal defense that "blames the victim." The law, in its present form, determines

---

\textsuperscript{389} Certainly, the meaning of reasonableness has been debated exhaustively throughout legal history. See generally Fletcher, supra note 361, at 953 (theorizing that common law reliance on reasonableness leads to "flat" legal thinking and an ignorance regarding criminal law distinctions); Gilles, supra note 361, at 816 (evaluating reasonable person standard under Restatement tort law analysis); Heller, supra note 361, at 88-90 (criticizing objective reasonableness standard in criminal law); Robinson, supra note 361, at 229 (articulating differences between justification and excuse defenses for criminal conduct); Schwartz, supra note 361, at 242 (critiquing objective reasonableness evaluation as unfair to those who generally fail to take proper care).

\textsuperscript{390} This is most starkly exemplified during sentencing allocation when juries and judges are invited to compare and contrast the characters of the victim and criminal. See supra notes 60-64 and accompanying text for a discussion of victim impact statements and the Eighth Amendment.

\textsuperscript{391} Victim talk characterizes the defendant as an ultimately evil, abnormal person and the victim as a person beyond reproach and doubt. See supra notes 70-79 and accompanying text for a discussion of the less than fair portrayal of both victim and defendant through victim talk.
presumptively who is to blame in a criminal transaction and who is not. The party deemed the victim a priori enjoys a panoply of victims’ rights and moral sanctity conferred by society. The party deemed defendant falls into the amalgamated collection of undesirables that we ought to be “tough on.”

The response to the problem of the one-sided victim is to require the law to take a more complete view of the victim. Specifically, the law should examine the victim’s contribution to the crime at the liability level.

The current criminal law does account, in specific situations, for the complexity of fault and behavior contributing to crimes and carves out discrete areas in which the law may “blame the victim.” There is no consistent ordering principle, however, explaining why certain victim behaviors are grounds for defense and other are not or why certain crimes are ones to which the defenses apply and others are not. In addition, there is a tendency in the criminal law to view everything as a defendant mens rea issue and not a question of comparative fault, unlike tort law. This tendency leads to several problems discussed in Part IV. As I illustrate, the focus on victim liability as a defendant mens rea issue can negatively impact disempowered groups as victims, precisely because it makes criminal law a mere reflection of the defendant’s or even society’s current predilections, which are influenced by the existence of patriarchal, racist, and homophobic “norms.”

By engaging in comparative blameworthiness analyses, the law can act in a more prescriptive manner and determine not so much whether the defendant, based on wrongful or legitimate victim behavior, was subjectively or even objectively moved to commit a crime, but rather whether the victim’s behavior was sufficiently wrongful to excuse the defendant’s actions. Finally, certain technical requirements of self-defense arbitrarily exclude those defendants, like battered women, who respond to delayed yet inevitable attacks from wrongful victims. The non-specific victim liability defense remedies this problem by eliminating imminence and strict necessity requirements and replacing them with more logically sound requirements.

As a consequence, the non-specific victim liability defense is justified on dual grounds. It allows the criminal law to take a more complete view of the victim, thereby countering the problem inherent in the privatization trend. In addition, the defense refines the current law in desirable ways. This Article is

392. Politics and media in no small part have added to society’s tough on crime sentiments. Gerald Uelmen comments: “[P]olitical leaders with ambitions for higher office become so obsessed with maintaining a ‘tough on crime’ image they measure every decision in terms of media labels that might be hung around their necks.” Gerald F. Uelmen. Victims’ Rights in California, 8 St. John’s J. Legal Comment. 197, 203 (1992) (footnote omitted).

393. See Gobert, supra note 11, at 540 (discussing inconsistent nature of victim precipitation defenses).

394. See Ahmed A. White, Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective, 38 Am. Crim. L. Rev. 111, 117 (2001) (“There certainly is good reason to be circumspect about the ultimate value of the rule of law to the quest for a truly rational social world and good reason as well to be aware of the connections between existing rule of law norms and exploitation, patriarchy, and so forth.”).
the first of an on-going project to construct and refine the non-specific victim liability defense. The last section of this Article began the process of defining the contours and applications of the defense. Unavoidably, many questions remain. Left to further discussion are the meanings of various requirements of the defense and the operation of the defense in the criminal law. In addition, the issue of the penological bases for the defense, that is, whether the defense is based in retributive concerns, utilitarian goals, or something else remains to be examined. Also to be explored are the similarities and differences between the non-specific victim liability defense and victim liability defenses in tort law. I look forward to discussing these issues and further refining the meaning of the defense's terms in future papers. What this Article has demonstrated is that comparative fault has a definite place in the criminal law and is a logical response to the trend toward criminal law privatization. The reluctance of the law to embrace a singular concept of comparative blame has led to some tricky practical, doctrinal, and social problems. This Article is a step in the direction of the criminal law honestly and logically recognizing comparative blame and beginning to formulate doctrines that more accurately represent our moral sensibilities.