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Elizabeth Rapaport

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CAPITAL MURDER AND THE DOMESTIC DISCOUNT: A STUDY OF CAPITAL DOMESTIC MURDER IN THE POST- *FURMAN* ERA

*Elizabeth Rapaport**

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* Associate Professor of Law, University of New Mexico. B.A., 1965, City College New York; Ph.D., 1972, Case Western Reserve University; J.D., 1987, Harvard University. This Article grew out of a paper first presented at Columbia Law School, Conference on Domestic Violence in April 1992 and subsequently at the Law & Society annual meeting in May 1992. I would like to thank David Baldus and Kate Bartlett for reading earlier drafts of this Article and Karla Fischer for sharing her knowledge of psychology literature. Elizabeth Hudgins and Anna Tefft of Duke University's Department of Public Policy and Theresa Montoya of the University of New Mexico School of Law provided valuable research assistance. Infelicitous of any description are mine. Copyright 1996 by Elizabeth Rapaport. All rights reserved.

I. INTRODUCTION

OUR law of homicide generally exhibits a bias against treating domestic homicide as seriously as some other categories of arguably no more reprehensible homicide, notably predatory crime. The killing of kin and sexual intimates tends to be read by the law as mitigated by the stresses of domestic life; in contrast, predatory homicide, killing in pursuit of illegitimate gain, whether pecuniary, sexual, or otherwise, tends to enhance the grade of offense seriousness assigned to a homicide. A domestic homicide tends to become eligible for processing as an extremely aggravated crime not because of the relationship between killer and victim, but because the case possesses other features normally associated with predatory crime, such as a defendant with a prior felony history.

In this Article I will challenge the tendency to discount the severity of domestic homicide, a phenomenon I call "the domestic discount." I will argue against automatic mitigation—the imputation of provocation or diminished capacity—simply or merely because the relationship between victim and defendant is domestic or sexually intimate. In the worst cases of domestic murder, cases of retaliatory post-separation executions and of the last beating, the domestic relationship should, if anything, serve to aggravate murder. Such murders are not merely among the worst expressions of domestic violence but also among the worst forms of lethal violence. They exploit the vulnerability and trust inherent in family life. Automatic mitigation in such cases reflects an ancient but hardy patriarchal value orientation: a value orientation in which masculine rage at women who reject or challenge their household authority is legitimate and greeted with empathy. The pro forma discounting of the seriousness of such crimes reveals the ambivalence of society toward recent reforms of marriage aimed at achieving equality of marital partners and the incompleteness of their success.

In this Article I will focus on capital domestic murder, those relatively rare cases where domestic murders are accorded the most severe treatment. First, I will report and analyze the results of a study of domestic killers on death row.¹ I undertook this study to answer the following questions: What does it take for a man or woman to be sentenced to die for domestic killing, killing which is rarely regarded as sufficiently reprehensible to merit the death penalty? What are the characteristics of capitally sentenced domestic killers and their crimes? What are the gender-specific differences between the male and female domestic killers on death row? Second, I will subject the time-honored homicide doctrine, which enjoys the status of intuitive legal truth, to critical inquiry: It is virtually always less reprehensible to kill in anger than in cold blood. I will argue that the traditional hot blood/cold blood dichotomy is an im-

1. See *infra* part III.

perfect guide to the moral grading of homicide offenses. In particular, reliance on it has led to the underevaluation of the seriousness of some domestic homicides.

It is my contention, or hypothesis, that the conclusions I draw from the study of capital domestic cases can be generalized to the entire domain of domestic homicides: If homicide laws were purged of patriarchal values, the remaining principles that underlie our grading of homicide offenses would be consistent with the rejection of a domestic discount; the worst domestic murders like the worst predatory murders would rank among the most reprehensible crimes. However, confirmation of the generalizability of these results will require research that reaches beyond the relatively small universe of capital cases.²

The moral coherence of the law of homicide requires parity of offense seriousness between the worst predatory and the worst domestic murders; a noncapital regime could certainly fulfill this requirement. I focus on capital sentenced killers because it allows the study of what we as a society regard as the most reprehensible killing; my interest in isolating those domestic killings which rank among the most egregious offenses in contemporary American society should not be confused with advocacy of capital punishment. *Furman v. Georgia*³ condemned the former capital punishment regime for sending a few arbitrarily and capriciously selected wretches to die while the no less guilty received lesser sentences; the successor system retains many of the flaws condemned in *Furman*.⁴ Further, I make no brief that criminal law is either the best or the only means of combatting domestic violence—or other forms of violence—much less that capital punishment enhances the efficacy of our homicide law. Nonetheless, the criminal law has didactic as well as other powers that can be deployed to control domestic violence, but the law itself must recognize the severity of domestic violence before it can best serve to combat it.

This challenge to the domestic discount in the law of homicide is offered as a contribution to the feminist critique of criminal law. Feminist activism has succeeded in making a “social issue” of domestic violence over the last couple of decades; domestic violence has emerged as endemic, thus far obdurately resistant to remedial efforts as it looms larger as a “problem.” Although there are competing analyses of the origins and causes of domestic violence, feminist legal analysis begins with two reasonably noncontroversial propositions. First, the problem of domestic violence is lopsidedly the problem of male domestic violence.⁵ Second,

2. See *infra* note 108 and accompanying text.

3. 408 U.S. 238 (1972).

4. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 151-57 (1990); SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 3-27 (1989).

5. Ninety-five percent of domestic violence victims are women. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983).

the law has, with largely unsuccessful reform efforts, at best ignored or condoned and at worst supported the reproduction of domestic violence.⁶ Feminist analyses of domestic violence differ from others in denominating domestic violence a political and, specifically, a patriarchal phenomenon, a method of enforcing male control over the household sphere, of exercising power over women and children. In this Article I will assume the validity of, rather than defend, feminist analyses of domestic violence.

I note that even with respect to the limited project of studying capital domestic cases from a feminist point of view this Article is not exhaustive. The main focus is on men who have been capitally sentenced for domestic murder. This work complements my previous studies of female capital murderers.⁷ Other topics, notably murder visited on children by parents, must await another day.

II. WHAT MAKES A HOMICIDE A DEATH PENALTY OFFENSE?

This question will be approached by examining the legal requirements imposed in the post-*Furman* era by the Supreme Court and by the states which employ capital punishment; a brief statistical sketch of death row in the United States serves as an introduction: Of the approximately 20,000 homicides in the United States each year, perhaps 300 result in a capital sentence.⁸ The great majority of those sentenced to die in the United States, at least seventy-five percent, are killed in the course of committing another serious felony.⁹ Approximately eighteen percent of the total number of annual homicides are predatory killings of stranger victims, the type of crime most likely to lead to a death sentence.¹⁰ Approximately twenty-eight percent have close kin and sexual intimates as victims.¹¹ My study of domestic death row, reported in Part III of this Article, revealed that approximately twelve percent of those under a death sentence killed intimates.

After a flirtation with abolitionism that culminated in *Furman* in 1972, the Supreme Court firmly set the United States on a retentionist course.

6. See *infra* notes 118-22 and accompanying text.

7. See sources cited *infra* note 18.

8. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1991 (1992).

9. According to the NAACP Legal Defense and Education Fund, which monitors death row, in 1986 more than 75% of death row cases nationwide involved felony murder. See BALDUS ET AL., *supra* note 4. Gross and Mauro report that in 1976-80 over 80% of the death penalties in Florida and Georgia were in felony murder cases, as were 75% in Illinois. See GROSS & MAURO, *supra* note 4, at 45-46. Ekland-Olsen reports that from 1974-83 in Texas 72% of death sentences involved the felonies of robbery, burglary, and sexual assault. S. Ekland-Olsen, *Structured Discretion, Racial Bias and the Death Penalty*, 69 Soc. Sci. Q. 853 (1988).

10. These statistics were developed from the FBI's Supplementary Homicide Reports [hereinafter SHR] data for a twelve year period, 1976-87. I would like to thank James Alan Fox of the National Crime Analysis Program at Northeastern University for supplying me with the SHR data.

11. SHR, *supra* note 10.

The majority in *Furman* held that the law of capital punishment was marred by lack of standards for its imposition: A few hapless individuals were selected for death while a far larger number of no less reprehensible defendants were sentenced to prison.¹² The remedy for these flaws, we learned in 1976 from *Gregg v. Georgia* and two companion cases,¹³ was not abolition of the death penalty, but a set of constitutionally mandated reforms designed to purge the administration of capital punishment of arbitrariness and capriciousness. The intent of these reforms was to limit the use of the death penalty to a small number of the most reprehensible crimes and to require consistent and defensible standards for its imposition. These measures, announced in 1976 and in subsequent cases, included the following: (1) special procedural requirements to safeguard the rights of those eligible for imposition of this unique and irrevocable penalty;¹⁴ (2) the circumscription of the range of crimes which may be capitally punished;¹⁵ and (3) the placing of jurisdictions wishing to retain capital punishment under an obligation to guide the discretion of the sentencing authority in imposing the death penalty.¹⁶

The post-*Furman* reforms have led both the Supreme Court and capital punishment jurisdictions to articulate the qualities that make a crime or a criminal eligible for death sentencing. A profile of capital offenses in the contemporary United States emerges from an analysis of the statutes enacted to satisfy novel constitutional requirements. At present forty states and the federal government make statutory provision for capital punishment. Thirty-seven of the forty states which allow capital punishment have followed the Model Penal Code in enumerating a list of aggravating factors, one or more of which must be found to be present in order that the imposition of death be possible and legitimate.¹⁷ An analysis of statutes patterned after the Model Penal Code reveals three kinds of murders or murderers eligible for capital punishment in contemporary American society: (1) predatory murder; (2) murder that hinders or threatens law enforcement or other operations of government; and (3) murder which evinces extraordinary violence or brutality.¹⁸

12. *Furman*, 408 U.S. at 241.

13. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

14. These requirements have been called "super due process." See Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). Both supporters and critics of reform have challenged the continuing vitality of the Court's reform impulses. See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305; *The Supreme Court, 1989 Term: Death Penalty—Aggravating and Mitigating Circumstances*, 104 HARV. L. REV. 139 (1990). But see Louis D. Billionis, *Legitimizing Death*, 91 MICH. L. REV. 1643 (1993).

15. Nonfatal crimes may not be capitally punished. See *Coker v. Georgia*, 433 U.S. 584, 585 (1977); *Zant v. Stephens*, 462 U.S. 862, 863 (1983).

16. *Zant*, 462 U.S. at 879-80.

17. See MODEL PENAL CODE § 210.6 (Official Draft and Revised Comments 1980) (adopted May 24, 1962).

18. See Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 L. & SOC'Y REV. 367 (1991) and Elizabeth Rapaport, *Some Questions about Gender and the*

With respect to predatory murder, all but one capital punishment state treats murdering for pecuniary gain and murdering for hire as factors in aggravation. The great majority of death penalty states treat murder in the course of a predatory felony, such as rape, robbery, kidnapping, or arson, as factors in aggravation.

With respect to murder that hinders or threatens law enforcement or other government operations, a large majority of capital punishment jurisdictions treat killing a police officer, firefighter, or corrections officer who is engaged in the duties of his or her office as a factor in aggravation. Likewise a majority of these states treat killing to prevent arrest or effect escape from custody as aggravating factors. Almost half treat killing a witness, judge, or prosecutor as a factor in aggravation. A few treat killing any government official as an aggravating factor.

With respect to murder which evinces extraordinary violence or brutality, the capital statutes condemn extreme or copious violence. Murderers who kill with exceptional brutality, murderers who kill more than one victim or who place others in addition to their victim at risk, and murderers who have killed before or who have a prior history of violence or convictions for violent felonies are deemed worthy of death in the majority of death penalty states.

From a feminist perspective it is notable that the most reprehensible murders as depicted by the capital statutes do not include domestic murder. Protection of the hearth does not rank with protection from predation and protection of the state as a fundamental rationale for assigning the highest grade of criminal blame and liability. In a world in which women—or women and children—wrote criminal statutes, domestic murder might trigger the possibility of capital prosecution.¹⁹ Such a re-orientation would reflect the fact that women and children are far more likely to be homicide victims at home than are men.²⁰ Attaching society's extreme disapprobation to the worst of these crimes would perhaps afford some measure of greater protection to potential victims of all kinds and degrees of domestic violence: Just as death is the worst outcome of predatory crimes such as robbery—so feared and loathed by the legislators who enact our actual capital statutes—death is the worst outcome of domestic violence crimes. The draftsmen of existing capital statutes clearly did not have domestic murders in view when they specified the selection criteria to be used in culling out the worst first degree murders and murderers. If domestic killers are selected for capital prosecution in

Death Penalty, 20 GOLDEN GATE U. L. REV. 501, 526-27 (1990), for a detailed content analysis of the statutes in the 33 states then adopting the aggravator-mitigator format.

19. Or perhaps in a world in which women wrote the criminal statutes, there would be no death penalty; please recall that I am not advocating the death penalty, but rather a reconsideration of the moral grading of homicide offenses.

20. Almost half of female homicide victims, but less than 12 percent of male homicide victims, are killed by close kin and sexual intimates. Child victims are even more likely to be victims of members of their family than are adult females. SHR, *supra* note 10.

our system it is, or should be, despite, not because of, their relationship to their victims.

III. WHAT MAKES A DOMESTIC HOMICIDE A CAPITAL OFFENSE?

In order to answer this and allied questions, I studied all women sentenced to death in the United States over a twelve year period, 1978-89, and all men sentenced to death in six states, Arizona, Georgia, Illinois, North Carolina, Ohio, and Pennsylvania, whose cases had been heard on direct appeal from 1976-91.²¹ Because the number of women sentenced to death is so small—there were fifty-four women sentenced to death in the United States from 1978-89—it was necessary to assemble information about the women sentenced to death from every available source.²² Because the number of men sentenced to death is so large—there were 699 men who were sentenced to death and whose cases had been heard on direct appeal in the six states studied from 1976-91—the study was limited to six states and to cases in which information could be obtained from reports of appealed cases.

The study includes the cases of men and women sentenced to die regardless of whether the sentences have been carried out, the convictions have been subsequently reversed, the sentences have been subsequently reduced or commuted, or the men and women remain on death row.²³ The fate of the condemned remains uncertain for many years in the post-*Furman* capital punishment system.²⁴ Only 3.8% of those on death row from 1977-91 have actually been executed.²⁵ The majority of those on

21. The names of persons sentenced to death in each of the six states were obtained from the Office of the Attorney General in each state. My sample consisted of all men sentenced to death in the six states whose cases have been subject to appellate review, provided that (1) the appeal had been filed after *Gregg v. Georgia*, 428 U.S. 153 (1976), was handed down on June 29, 1976; and (2) their names appeared on the lists provided by the respective Attorneys General. These lists covered largely overlapping but slightly different periods of time. Thus, my sample of appellate cases was drawn from men sentenced to death in Arizona, Oct. 18, 1976 to Dec. 5, 1991; in Georgia, July 19, 1976 to Mar. 30, 1991; in Illinois, Dec. 4, 1981 to Feb. 21, 1991; in North Carolina, Feb. 5, 1979 to July 26, 1989; in Ohio, Apr. 16, 1982 to Mar. 28, 1991; and in Pennsylvania, Nov. 19, 1979 to Feb. 15, 1991. The number of men in the sample was 699 (nationally, death row housed approximately 2,500 men by year-end 1991). I would like to thank the Attorneys General in each of the above six states for their cooperation. I owe Assistant Attorney General Joan Byers of North Carolina a special debt for her assistance in obtaining the data for the six-state study.

22. These sources include appellate reports; personal communications with prosecutors, defense attorneys, court officials, and corrections officials; and newspaper accounts. I would like to thank Leigh Dingerson of the National Committee to Abolish the Death Penalty for giving me access to the Committee's clippings file of newspaper accounts of the 1988 and subsequent death row cases involving women.

23. Of the 4101 persons sent to death row from 1977-91, 35.6% had their death sentences removed, 2% met death other than by execution, and 3.8% were executed. The rest remained on death row. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1991, at 13 (1992).

24. The average time spent on death row for those executed from 1977-91 was seven years and one month. *Id.*

25. *Id.*

death row have had no final resolution of their condemned status.²⁶ The most productive approach, therefore, was to include in the study any case in which a trial court pronounced a death sentence, regardless of the subsequent, and likely as yet unwritten, history of the case.

The cases in this study are evaluated and discussed from the point of view of the legal and narrative construction that the sentencers and appellate courts put upon the cases. It may be that from the point of view of justice (or at least one of the possible views of justice) the blameworthiness or deathworthiness of some of these defendants was ill understood by those who decided their legal fates. The purpose of this Article is nonetheless not to retry these cases, but rather to learn something about the way in which the law in force understands and responds to domestic homicide. This goal requires that the courts' accounts of the crimes and the defendants be taken as true.

The post-*Furman* capital punishment system remains a highly discretionary system for at least two reasons: First, the Supreme Court has insisted that jurors retain the power to deny the state's bid for death if sufficiently moved by evidence mitigating blameworthiness. Thus, jurors retain the power to grant mercy. Second, not all sources of illegitimate arbitrariness have been wrung out of the system by reform. Yet, some regularities have been established.

All domestic death row cases, in virtue of statutory definitions of capital murder, share some features with nondomestic death row cases; that is, they must be, at least in the great majority of capital punishment states, first degree murders aggravated by factors or circumstances enumerated in the capital murder statute. Some domestic killers are clearly at risk for a capital sentence regardless of the nature of their relationship with their victims. Sometimes intimates are killed for pecuniary gain and other predatory purposes picked out by the statutes, rendering a killing or a killer especially reprehensible—mothers and fathers have been victims of armed robbery; sisters and stepdaughters have been killed to conceal their rapes and prevent their bearing witness. Virtually every type of kin has been killed for economic gain, although spouses dominate this latter category. Sometimes intimates are killed in quantity, either for profit or from a motive. An Ohio man, for example, denied a request for drinking money by the woman with whom he lived, returned to the household later that day, sober, to shoot and beat to death the woman and four of her grandchildren.²⁷ The killing of more than one victim in a single criminal episode is among those circumstances most likely to result in a capital sentence.²⁸

Those aggravating factors highly correlated with a death penalty result across the entire range of victim-defendant relationships, predominate in

26. Of those under a death sentence from 1977-91, 60.5% remained on death row at year-end 1991. *Id.*

27. *Moreland v. State*, 552 N.E.2d 894, 896 (Ohio 1990).

28. GROSS & MAURO, *supra* note 4, at 48-50.

domestic death row cases as well. Researchers have found that extreme brutality, commission during another violent felony, and multiple murder were among the circumstances most highly correlated with capital sentences.²⁹ Another factor which appears in a large majority of statutes as an aggravating factor, a prior record of violence, is consistently linked to more severe sentencing outcomes in contemporary research.³⁰ Among male capital domestic killers the four most common aggravators in descending order of frequency are as follows: extreme brutality (48%); commission during another felony (35%); multiple murder (20%); and prior record of violence (16%). Table 1 reports the aggravating circumstances found in the domestic cases studied.

Table 1

Four most common aggravating circumstances found in a post-*Furman* domestic row study of seventy-nine men in six states:

	Number	Percentage
Extreme Brutality	38	48%
Commission During Another Felony	28	35%
Multiple Murder	16	20%
Prior Record of Violence	13	16%

It is possible, at least for some prosecutors deciding whether to seek a death sentence and for some juries deliberating life or death, that a domestic relationship to the victim or victims enhances the likelihood of a death penalty outcome. Although there are almost no aggravating factors in the statutes which could be organized under a rubric such as "killing violates familial trust,"³¹ the killer who exploits the vulnerability of intimates (e.g., for financial gain) or who kills in reaction to one of the small but stinging defeats intimate life regularly doles out—such as being

29. Baldus, Woodworth, and Pulaski's study of Georgia revealed that extreme brutality and commission during a contemporaneous felony were the factors that most often resulted in a death penalty. BALDUS ET AL., *supra* note 4, at 56. Gross and Mauro found three case characteristics that were most likely to lead to death sentences (their study was not keyed to statutory aggravators): multiple victims, felony murder, and stranger murder. GROSS & MAURO, *supra* note 4, at 45. Note that summarizing the results of recent research as well as comparing the sentencing outcomes across states is complicated by the differences in the states' enumerations of aggravating circumstances and by the differences in the statutory definitions of similar aggravators in the statutes of some states. For example, Georgia for some years qualified the multiple murder aggravator by requiring that the killing be *in a public place* for the circumstance to apply.

30. See 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 70 (Alfred Blumstein et al. eds., 1983) (discussing determinants of sentences).

31. Although no state places the mantle of capital protection over family relationships per se, Mississippi and Utah now include felony child abuse among the felony circumstances that render homicide eligible for capital punishment. MISS. CODE ANN. § 99-19-101(5)(d) (1994) and UTAH CODE ANN. § 76-5-202(1)(d) (Supp. 1994). Montana includes incest-murder among capital offenses. MONT. CODE ANN. § 46-18-303(9) (1995). Five states treat the murder of a child as an aggravating factor, while seven states, including some abolitionist states, have elevated child abuse homicide to first degree murder. Delaware treats the murder of any defenseless person as a factor in aggravation.

denied beer money—may appear more deathworthy to sentencers absent substantial credible mitigation. Thus, for example, the Arizona Supreme Court affirmed the proportionality of a death sentence for a convicted felon who made use of a three-day compassionate leave furlough from prison to kill his seventy-four-year-old mother for pecuniary gain.³² The court noted, “Matricide is above the norm of first degree murders”³³ The North Carolina Supreme Court noted in a proportionality review of a patricide case, “In the final analysis, the present case is distinguishable from other robbery-murder cases primarily because the victim was defendant’s father. This relationship between defendant and victim ‘in itself rendered the offense dehumanizing beyond the normal.’”³⁴ Judges and juries, respectable law abiding representatives of the community, we cannot empathize with either the failure of love or duty to master such impulses towards intimates, or (perhaps) the impulses themselves. The majority of women sent to death row were sentenced for the predatory killings of intimates, chiefly husbands and lovers. Unfortunately, at this time the research has not been done which would allow us to determine how likely it is that a potentially death-eligible killer of either sex whose victim is an intimate will be capitally sentenced.

There is a second type of domestic capital case, however, whose narrative structure resembles the mass of less heavily penalized domestic homicides rather than the robbery and rape murders that dominate on death row. In these cases, the killers acted under the influence of powerful and painful emotions, out of hurt and anger of the sort that respectable people, ourselves, recognize as normal experience (the feelings, not the lethal action). The law is disposed to treat killing motivated by such emotions as deserving of some degree of mitigation of blame and punishment. The paradigm example is the partial defense of heat of passion, which if made out, reduces murder to manslaughter; so, famously, the man who is suddenly and unexpectedly confronted with the sight of his wife in the arms of another man and kills one or both in an immediate paroxysm is guilty of the crime of manslaughter, not murder. At classical common law, the heat of passion defense was stringently defined to limit its availability, but other doctrines and devices also shield domestic killers burdened with painful emotions from the most profound censure of the law.³⁵ Yet, as we shall see, the majority of male domestic death row were put there for killing women, wives and lovers, who angered them. The law selects a few men who kill under these normally mitigating circum-

32. *State v. Moorman*, 744 P.2d 679, 681-82 (Ariz. 1987).

33. *Id.* at 688.

34. *State v. Greene*, 376 S.E.2d 430, 445 (N.C. 1989) (quoting *State v. Blalock*, 334 S.E.2d 441, 444 (N.C. Ct. App. 1985), *vacated and remanded*, 494 U.S. 1022 (1990), *vacated and remanded*, 408 S.E.2d 185 (N.C. 1991) (death sentence vacated and remanded for a new capital sentencing proceeding)).

35. See *infra* part V.C. regarding the heat of passion and other doctrines which shield the passionate killer.

stances as the worst domestic killers, worthy of the law's most extreme penalty.

As Table 2 shows, there are striking differences between the male and female domestic killers who have been selected for the most extreme criminal sanction. First, while nearly half of the women on death row killed family or intimates, a far smaller proportion of death-sentenced men are domestic killers. In the six states studied, male domestic killers comprised slightly less than twelve percent of death-sentenced men, while female domestic killers comprised almost half of all death-sentenced women in the United States from 1978-89. Female domestic killers comprise a much larger fraction of the total death row population of their sex than do male domestic killers. Second, men and women are sent to death row for different sorts of domestic crimes: Nearly one-half of the men killed in retaliation for a woman's leaving a sexual relationship,³⁶ but this pattern was quite rare among the women; more than two-thirds of the women killed family and sexual intimates for pecuniary gain, a motive which was rare among the men.

Table 2

Domestic death row by gender and type of murder. Men sentenced to death in Arizona, Georgia, Illinois, North Carolina, and Pennsylvania from 1976-91; women sentenced to death, nation-wide, from 1978-89:

	Number MEN	Percentage	Number WOMEN	Percentage
Total Number of Death Sentences	699		54	
Total in Which Victim and Killer Were Intimates	83	12%	26	48%
Of Those:				
Pecuniary Motive	11	13%	18	69%
Retaliatory Motive	40	48%	2	8%
Other	32	39%	6	23%

Women who have killed for economic advantage, then, dominate the female domestic death row. Here is the most abhorred female domestic crime: Dependence turned to gall and greed; trust betrayed; love and duty mocked. The case of a North Carolina woman illustrates the female domestic capital murderer of this type. Barbara Stager was capitally sentenced for shooting her sleeping husband to prevent him from discover-

36. Under the rubric "sexual relationship," I group spouses and ex-spouses, couples who lived together without marriage, and couples who did not share a household but had a durable relationship. Both hetero- and homosexual relationships are included.

ing her bad debts and to regain her financial poise.³⁷ Evidence was heard at her trial from which it could be readily inferred that she had killed her first husband in substantially the same way. While 69% of the women on domestic death row killed for profit, only 13.3% of the men on domestic death row killed for economic gain.

Almost one-half of the men killed in retaliation for a wife or lover leaving them, although the victims of these killings were sometimes the children and relatives of the women as well as, or in place of, the women themselves.³⁸ These separation cases differ from stereotypical domestic killings that flow out of arguments in that they are planned and followed the dissolution of a household or relationship by weeks or months.³⁹ The killer, having failed by threats or entreaties to dissuade a spouse or lover from leaving, executed her. Unlike the predatory killer sentenced to death row, these men killed out of consuming emotion. Many such killers show little interest in concealing their crimes or avoiding arrest; often the killer is so focused on his mission that he is indifferent to witnesses, unprepared for or uninterested in flight. There is a coda frequently heard in these cases, a statement to the arresting officer along the lines of, "I'm glad I killed her," or "I'd do it again." Only two of the female death row cases, or eight percent, conformed to this separation type, one being the crime of a deeply disturbed teenager⁴⁰ and the other being the killing of two sons by a mother who had just lost custody.⁴¹

If the object in view is to understand domestic violence and the law's role in defining, censuring, preventing (and perpetuating), and punishing domestic violence, then the men's cases, the separation cases, are of considerably more theoretical interest than the women's cases, the murdering for money cases. The men are failed and defied patriarchs who have been publicly condemned, literally, for exacting retribution. The bulk of the women's domestic death row cases are not properly classified as crimes of domestic violence within the relevant meaning of the term; they are economic crimes with intimate victims. It is of course possible, harking back to the ancient crime of petty treason (*i.e.*, the murder of a man by his wife, child, or servant), to read these crimes by women as political acts, as acts of rebellion and usurpation of both the power and substance of men. In my view, however, the cases with political significance are the men's cases because the women's cases are "common" crimes made spectacular by the sex of their perpetrators—women are supposed to nurture and support, not destroy and despoil—and by the intimate bond between the unfemale female killer and her prey—here are women who are pred-

37. *State v. Stager*, 406 S.E.2d 876, 879, 886 (N.C. 1991).

38. Perhaps the old adage, "Hell hath no fury like a woman scorned," is in need of revision.

39. Separation has been identified as a dangerous passage in domestic relations. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

40. *Cannaday v. State*, 455 So. 2d 713, 716 (Miss. 1984), *cert. denied*, 469 U.S. 1221 (1985).

41. *State v. Wacaser*, 794 S.W.2d 190, 191 (Mo. 1990).

atory towards those who have most deeply engaged them as women, whether as wives, lovers, mothers, or in other familial roles.⁴² Domestic murder proper, passionate rather than predatory murder of sexual intimates, will be the exclusive focus of my analytic efforts in what follows.

There is resistance in the law, in the theoretical fabric of the law of homicide and in legal institutions, to treating any sort of non-predatory domestic homicide as of the first rank of offense seriousness. Resistance can be found in the opinions of some appellate courts reviewing death sentences meted out to men who have killed because women have left them. These courts have created doctrines and standards which discourage the future capital prosecution of domestic separation cases as capital murder. For, however cold-blooded or premeditated the execution of a defecting spouse may be, such crimes are also passionate, and by definition, time-honored and pervasive, passion mitigates. The next section of this Article explores the work of some appellate courts in creating doctrines and standards which discourage future capital prosecution of domestic separation murder. The final section attempts a feminist critique of the hot blood/cold blood distinction in homicide law.

IV. THE DOMESTIC DISCOUNT IN APPELLATE REVIEW

A. *GODFREY V. GEORGIA*

The best known domestic separation death penalty case in the United States is *Godfrey v. Georgia*.⁴³ In *Godfrey*, the Supreme Court amplified and confirmed central tenets of its post-*Furman* capital jurisprudence: The Court again insisted that the death penalty must be reserved only for especially egregious murders and that states wishing to impose death must announce explicit and clear standards of selection for death.⁴⁴ At issue in *Godfrey* was whether the Supreme Court of Georgia in affirming Godfrey's death sentence had relied on an overly broad and vague construction of an aggravating circumstance found in the Georgia capital statute, requiring that the offense was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim."⁴⁵ Justice Stewart, writing for the Court's plurality, concluded that the Georgia Supreme Court had indeed so lapsed in affirming Godfrey's sentence. Although the Georgia Supreme Court had prior to its consideration of Godfrey's case construed the outrageously or wantonly vile factor so that it applied only when

42. Judi Buenoano was convicted of killing her husband in a case in which evidence was heard of her poisoning two other men, one fatally. Her case illustrates the way in which the female gender makes domestic murder for profit appear both banal and terrible: A friend testified at her trial that Buenoano had advised her to take out more insurance on her husband and then poison him, as a preferred alternative to divorce. *Buenoano v. State*, 527 So. 2d 194, 199 (Fla. 1988).

43. 446 U.S. 420 (1980).

44. *But see Zant v. Stephens*, 462 U.S. 862, 879-80 (1983).

45. GA. CODE ANN. § 27-2534.1(b)(7) (1988).

there had been torture or serious physical abuse of the victim,⁴⁶ it did not adhere to its own limiting construction of the statute in *Godfrey*'s case. Justice Stewart held that the facts in *Godfrey* did not support the conclusion that *Godfrey*'s crime exhibited exceptional vileness as the factor had been construed by the Georgia Supreme Court.⁴⁷ Without a limiting construction of the vileness factor, juries could reasonably find virtually any murder to be vile enough to be worthy of a death sentence. As Justice Stewart noted, "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman,'"⁴⁸ thus defeating the purpose of restricting the use of the death penalty to the most egregious cases.

Godfrey is a classic separation murder case. *Godfrey*'s wife had left the marital home several weeks prior to her death at her husband's hands. She had filed for divorce and resisted repeated efforts on *Godfrey*'s part to promote reconciliation. When persuaded that his wife would not reconcile, *Godfrey* went to his mother-in-law's trailer where his wife was living, armed with his shotgun. He shot his wife through the window, entered the trailer, swatted his fleeing eleven-year-old daughter with the barrel of his gun, and then shot his mother-in-law. Both women were shot in the head and died instantly. The police found *Godfrey* waiting for them. *Godfrey* told an officer that he had "done a hideous crime" and that he would "do it again."⁴⁹ *Godfrey* was sentenced to death, the sole aggravating circumstance was that the murder was outrageously wanton or vile.⁵⁰

Godfrey is best known for establishing that the much criticized exceptional vileness factor, which in substantially equivalent formulations—the language may invoke "cruelty," "heinousness," or "brutality"—is found in the statutes of the majority of death penalty states, has withstood concerted challenges from its critics. Its critics share Justice Stewart's concern that jurors will find it impossible to distinguish between ordinarily and extraordinarily vile or brutal murders, but are unpersuaded that the factor's invitation to uncontrolled discretion can be cured by any limiting construction such as that elaborated by the Georgia Supreme Court.

Justice Stewart's opinion in *Godfrey* also puts prosecutors on notice that the tactic of relying on the especially vile or brutal factor as a handy catch-all vehicle for bringing a domestic case forward capitally in the absence of evidence of other aggravating circumstances is problematic. Additionally, in a passage whose logic and intent are somewhat cryptic,

46. *Godfrey*, 446 U.S. at 431-32.

47. *Id.* at 432-33.

48. *Id.* at 428-29 (quoting GA. CODE ANN. § 27-2534.1(b)(7)).

49. *Id.* at 426.

50. In other states, the fact that two people were killed and a third assaulted would have undoubtedly made it possible to capitally sentence *Godfrey* on the strength of a multiple murder/risk-to-lives-in-addition-to-that-of-the-victim(s) factor. But in Georgia the multiple murder/risk-to-others factor is qualified so that it only applies to murders occurring "in a public place," rendering the statute inapplicable to the trailer home setting of the murders in *Godfrey*. See GA. CODE ANN. § 27-2534.1(b)(3) (1988).

Justice Stewart appears to go further, suggesting that domestic murder cases are inherently run-of-the-mill rather than capital murders. Having noted that there is nothing in the record that suggests that Godfrey had either tortured or committed aggravated assault upon his two victims, Stewart considers and dismisses the last remaining basis for sentencing Godfrey to death on the strength of Georgia's extreme vileness factor, that the murders demonstrated "depravity of mind." Justice Stewart understood the Georgia Supreme Court to have construed "depravity of mind" in the capital statute to mean uniquely "the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim."⁵¹ Justice Stewart writes:

The petitioner's crimes cannot be said to have reflected a consciousness materially more depraved than that of any person guilty of murder. His victims were killed instantaneously. *They were members of his family who were causing him extreme emotional trauma.* Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. These factors certainly did not remove the criminality from the petitioner's acts. But, . . . it 'is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than emotion or caprice.' That cannot be said here. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.⁵²

Of the three reasons cited by Justice Stewart in the above quoted passage, only that of not causing prolonged suffering to his victims seems to be closely responsive to the question of whether Godfrey evinced depravity of mind (*i.e.*, acted out of the desire to cause great pain). Both Justice Stewart's references to Godfrey's acknowledgement of responsibility and to the provocation of being caused extreme emotional trauma by his wife's departure seem to address the overarching question of whether the murders were reprehensible enough to merit death; they do not speak to the specific issue of whether Godfrey was willfully brutal. There is after all no incompatibility between a subsequent admission of guilt, or killing in reaction to trauma, and killing out of a depraved mind-set. A defendant who owns or repents a reprehensible action or character may deserve less harsh punishment as a result of his admissions and perhaps his subsequent moral improvement following his admissions. But the moral quality of his past conduct is not thereby retroactively transformed. The fact that the killer himself was suffering does not preclude that he wished to inflict pain; his suffering may have given rise to the wish to inflict not only death but retaliatory suffering. Justice Stewart seems to be sketchily advancing the thesis that killing when in the grip of separation trauma is ordinary, not death penalty calibre, murder because there is an element of mitigation in the suffering from which the killer seeks relief.

51. *Godfrey*, 446 U.S. at 431. See *Blake v. State*, 236 S.E.2d 637, 641-42 (Ga. 1977).

52. *Godfrey*, 446 U.S. at 433 (emphasis added) (citation and footnote omitted).

B. *GODFREY* IN NORTH CAROLINA: THE *STANLEY* CASE

*State v. Stanley*⁵³ is a capital domestic separation case whose facts are similar to those in *Godfrey*. As in *Godfrey*, the sole aggravating circumstance was extreme brutality or, in its North Carolina variant, that the murder was "especially heinous, atrocious, or cruel."⁵⁴ In an opinion which emphasizes that the underlying murder is of the domestic separation type, the North Carolina Supreme Court held that the case was controlled by *Godfrey*. The passage from *Godfrey* quoted above in which Justice Stewart situates *Godfrey* as a killer responding to "extreme emotional distress" caused by his victims is quoted in *Stanley* in support of the parallels between the fact patterns in the two cases.⁵⁵ The North Carolina Supreme Court forbade submitting the "especially heinous" factor to the jury in cases with fact patterns like *Godfrey* or *Stanley*.⁵⁶ It held that such evidence could not support the conclusion that the extent of brutality exceeded that considerable quantum present in any first degree murder.⁵⁷

Stanley is notable because it goes further than *Godfrey* in excluding domestic separation cases in which there are no traditional public enemy indicia of extreme reprehensibility, such as a record of prior felony convictions—which sometimes do encumber domestic killers as well as armed robbers—from capital adjudication and, therefore, from the ranks of the most reprehensible murders known to our society. *Stanley* is more explicit than *Godfrey* in making domestic separation murder the paradigm case of the constitutionally improper punishment of ordinarily brutal murder as a death penalty offense.

There were vigorous dissents in both *Godfrey* and *Stanley*. Justice White offered a dissenting reading of the facts in *Godfrey* in support of his conclusion that *Godfrey's* crimes were exceptionally brutal within the meaning of the Georgia statute. To make his case Justice White called upon *Godfrey's* "cold-blooded executioner's style," the messy damage wrought by *Godfrey's* selection of weapon, the gratuitous blow to the head of *Godfrey's* daughter, and the anticipatory terror of *Godfrey's* mother-in-law as she awaited her turn for destruction.⁵⁸

Justice Martin of the North Carolina Supreme Court emphasizes that North Carolina's especially heinous factor is established by psychological as well as physical torture.⁵⁹ In *Stanley*, as in *Godfrey*, the defendant's wife had left him and was seeking a divorce. Some six months after the

53. 312 S.E.2d 393 (N.C. 1984).

54. N.C. GEN. STAT. § 15A-2000(e)(9) (Supp. 1995).

55. *Stanley*, 312 S.E.2d at 395.

56. *Id.* at 401.

57. *Id.*

58. *Godfrey*, 446 U.S. at 449.

59. In cases subsequent to *Godfrey*, the Georgia Supreme Court also interprets torture within the meaning of the statutory aggravator to include psychological torture. See *Phillips v. State*, 297 S.E.2d 217 (Ga. 1982), a domestic separation capital case with facts similar to *Stanley* in which the Georgia Supreme Court held that the facts did not support submission of the exceptional brutality aggravating circumstance to the jury. *Id.* at 222.

couple separated Joyce Stanley was shot by her husband under the following circumstances: She had gone to her mother's home for Sunday dinner with members of her family. Stanley drove back and forth in front of the house five or six times. When the victim and some members of her family went outside to note Stanley's license plate number, Stanley drove up and shot her nine times from his car at close range. After Stanley was disarmed by two of his wife's relatives, he remarked, "That's all right. I killed the bitch,"⁶⁰ and he then drove to the police station and surrendered.⁶¹

In his dissent, Justice Martin insists that there was sufficient evidence in Stanley's case to submit the especially heinous factor to the jury for consideration. Justice Martin emphasizes the following aspects of the case as presented by the prosecution: First, when she realized her husband had a gun, Joyce Stanley said, "Please, Stan," begging him not to shoot; Stanley shot his wife despite her plea to be spared. Second, she was shot in various parts of her body and lingered for several agonizing minutes, conscious of both her pain and impending death. Third, after the shooting, Stanley laughed as he told his wife's son and sister, "That's all right. I killed the bitch."⁶²

The elastic extreme brutality aggravating circumstance, which encompasses psychological as well as physical suffering, is certainly copious enough to permit the development of an interpretation of the facts in cases like *Stanley* or *Godfrey* which find the basis of extreme brutality precisely in their being separation murders. The victims in each of these cases had been harassed and threatened by their respective husbands in incidents involving weapons. In *Godfrey*, the incident precipitating the wife's departure had been her husband's cutting some of the clothes she wore off her body with a knife;⁶³ while in *Stanley*, Joyce Stanley observed her estranged husband, some six weeks before the murder, parked in front of her home, and she later saw him standing in her yard with a rifle.⁶⁴ Each of these wives had found it necessary to obtain warrants against her husband.⁶⁵ The record also reveals that *Godfrey* had been a violent husband.⁶⁶ These women may have lived and died with intense, well-founded fear of their husbands after separation. But, as it happens, the imaginations of the authors of *Godfrey* and *Stanley* were attentive not to the experience of the victims but to the rejection suffered by their killers.

It is possible to argue—I have just done it—that the experience of the victim in a separation murder can be one of painful suspense and intense suffering. There are certainly separation murders that qualify as excep-

60. *Stanley*, 312 S.E.2d at 402.

61. *Id.*

62. *Id.* at 401-02.

63. *Godfrey*, 446 U.S. at 424.

64. *Stanley*, 312 S.E.2d at 394.

65. *Godfrey*, 446 U.S. at 424; *Stanley*, 312 S.E.2d at 399.

66. *Godfrey*, 446 U.S. at 424.

tionally brutal crimes by any measure of brutality. However, it obscures rather than captures the moral basis of ranking separation murders among the most reprehensible types of murders—where they may well deserve to be ranked—to focus exclusively on their degree of brutality.

If the capital murder statutes or, alternatively, a noncapital homicide law regime reflected a feminist sensibility, the murder of defecting spouses, lovers, and their surrogates might be ranked among the most reprehensible crimes, crimes as reprehensible as predatory murder. From a feminist perspective separation murder can be seen as the extreme of domestic tyranny—the refusal to acknowledge the independence of a woman from the will of her husband or lover at any price. If consuming a human life in appropriating the property of another is ranked among the most reprehensible murders, then deliberate destruction of another's life that can no longer be controlled otherwise is no less reprehensible.

Of course the law of homicide does not encode the just stated feminist insight, if it is insight. Indeed, current law tends, when it focuses on separation murder as a distinct category of crime, to interpret it not from a feminist perspective but from a perspective of empathy with the pain caused the defendant by the defection of his spouse or lover. This is illustrated by *People v. Carlson*,⁶⁷ a case in which the death sentence was set aside and remanded with instructions to impose a sentence other than death; the Illinois Supreme Court saw Carlson's crime as one mitigated by the tragedy of his loss rather than aggravated by the enormity of his executing a woman who chose no longer to be his wife.⁶⁸

C. TRAGEDY IN ILLINOIS

Robert Carlson hoped to remarry the wife who had divorced him after nineteen years of marriage; they had actually set a date for remarriage some four months after their divorce. The record reveals a man who was assiduously courting his ex-wife, running her errands, giving her money and gifts—there is no hint of abuse or intimidation—until the point at which he learned that another man was replacing him and that there would be no remarriage. The apparently callous and obtuse Rosemary Carlson rubbed salt in Carlson's wounds by complacently showing him her new diamond engagement ring and other gifts from his rival and enthusiastically describing her new lover's generous plans for her future. Two days after Carlson was told there would be no remarriage he bought a gun, and the following day he bought two cans which he filled with gasoline and stowed in the trunk of his car.⁶⁹ The next day, the day on which Rosemary displayed her diamond engagement ring and other symbols of her transfer of loyalties, Carlson shot her ten times, soaked three rooms with gasoline, and set fire to the house.⁷⁰ He then went to a bar

67. 404 N.E.2d 233 (Ill. 1980).

68. *Id.* at 245.

69. *Id.* at 236.

70. *Id.*

where he met a co-worker whom he asked to forward some money to his daughter for the education of his teenage son; he was preparing to flee to California.⁷¹ When police officers came into the bar to arrest him, he shot and killed one of the officers. The two murder charges were consolidated. Carlson's unsuccessful defense was insanity as to the charge of murdering his wife and that he killed the officer inadvertently in a struggle in which he had drawn his gun to shoot himself. Carlson was actually sentenced to death for the murder of the officer and for fifty to one hundred years for the murder of his former wife.⁷² Carlson fared better on direct appeal to the Supreme Court of Illinois.⁷³

Writing for the Illinois Supreme Court, Justice Ryan is critical of the trial court's giving short shrift to two mitigating factors which in the majority's view should have protected Carlson from a death sentence: (1) the defendant had no prior criminal history; and (2) the defendant was under the influence of extreme mental or emotional disturbance.

The trial judge had concluded that the mitigating value of Carlson's lack of criminal history was "diminished greatly, if not totally extinguished, by the fact that a few hours before the murder of [the police officer], the defendant had with malice aforethought brutally murdered his wife and committed arson of the house in which her body lay."⁷⁴ The Illinois Supreme Court held this was error. The court described the arson and two murders as "a part of one unfortunate and tragic event precipitated by the events leading up to the killing of Rosemary."⁷⁵ Carlson was entitled to mitigating credit for the conduct of his life prior to the tragedy. The trial court also erred in dismissing Carlson's claim to have been under extreme mental or emotional disturbance. The trial judge did not credit the defense's claim that Carlson was trying to kill himself rather than to shoot the police officer; all of the psychiatrist's testimony was apparently received by the trial judge with the same skepticism with which he regarded the suicide theory. The testimony of Carlson's personal physician influenced the appellate court more than the defense psychiatrist's endorsement of the attempted suicide theory:

The doctor testified that for a year or two prior to [the murder] the defendant had deteriorated physically and emotionally. . . . [T]he doctor had counseled both Rosemary and the defendant concerning their marital difficulties. . . . [T]he defendant's two heart attacks had left him "partly disabled and really incapable of leading a complete and fulfilling life for a man in his early forties." He stated that the

71. *Id.* at 237.

72. With the *Carlson* case I have made an exception to my otherwise strict policy of counting a murder as a capital domestic case only if the death sentence is pronounced for the murder of an intimate. I do so because the issues on which the appellate review of Carlson's sentence turn, and the reasons why the Illinois Supreme Court reduced the death sentence concern the domestic murder. The Illinois Supreme Court treats *Carlson* as a domestic capital case precedent in *People v. Buggs*, 493 N.E.2d 332 (Ill. 1986).

73. *Carlson*, 404 N.E.2d at 235-37.

74. *Id.* at 244.

75. *Id.*

defendant, during this time, was undergoing a slow grieving process related to the loss of the affection of his wife.⁷⁶

Having noted that Carlson had shown himself to be a concerned father, leaving money for his son's education even as he fled, Justice Ryan concludes his sympathetic recasting of Carlson's story with these words:

These mitigating circumstances do not bespeak a man with a malignant heart who must be permanently eliminated from society. . . . [W]e see an individual with no past criminal record who would in all probability be leading a life acceptable to our society had not his unfortunate marital affair triggered this tragic sequence of events.⁷⁷

In 1986 the Illinois Supreme Court vacated the death sentence in another domestic murder case, *People v. Buggs*,⁷⁸ holding that the mitigating circumstances in that case "twin" those in *Carlson*, entitling Buggs to similar sentencing relief.⁷⁹ With the *Buggs* decision, the Illinois Supreme Court creates an exemption from capital punishment for non-predatory spouse killers.

Buggs is not a separation murder case. As presented by the Illinois Supreme Court's majority opinion, it fits the pattern of what most people think of when they conjure up domestic homicide. The murder followed another three a.m. argument between Buggs and his wife about her infidelity—the fight was precipitated by a phone call from one of Loretta's boyfriends. The crime does, however, have some separation-like motifs. It was preceded not only by confirmation of his wife's extramarital interests but also by Loretta flinging at Buggs that the two sons he thought were his were not, in fact, fathered by him. Buggs responded by pouring gasoline over Loretta and elsewhere in his home. As a result, Loretta and one son were killed, and a daughter was severely burned. Several children who had been asleep when the fire started escaped the burning house.⁸⁰

Although the majority opinion painted Buggs' crime as a lethal outburst, the spontaneous escalation of an argument between a faithless wife and an alcoholic husband, Justice Miller's dissent adduces parts of the record which cast the crime in a different light. Buggs had prepared for the confrontation by bringing gasoline into the house and hiding it in a closet.⁸¹ The trial judge who sentenced Buggs had concluded that while Buggs did indeed have a drinking problem, he was not drunk on the night he set fire to his home. Apparently, Buggs did not strike out in reactive anger, but executed a plan of action.⁸²

The Illinois Supreme Court set aside Buggs' death sentence because the tragic circumstances which led to it, as well as a life blameless, even

76. *Id.*

77. *Id.* at 245.

78. 493 N.E.2d 332 (Ill. 1986).

79. *Id.* at 336.

80. *Id.* at 333.

81. *Id.* at 338.

82. *Id.*

admirable, in the world of men, precluded classifying Buggs among the worst murderers. The majority emphasizes that Buggs like Carlson was a middle-aged man with a history of military service and no criminal record.⁸³ Like Carlson, Buggs was in decline, drinking heavily enough to cause blackouts. Like Carlson, but for "marital disharmony" and "a dispute which triggered this tragic sequence of events," Buggs would presumably still be living "a life acceptable to our society."⁸⁴

Writing in dissent, Justice Miller distinguished the cases of the two domestic killers.⁸⁵ Unlike Carlson, rather than show regard for his children, Buggs killed one, severely injured another, and put the lives of several others at risk. Unlike Carlson, there was evidence that Buggs had a prior history of violence: Buggs had fired a gun between his son's legs some six months before the offense, and he had at one time stabbed a woman (his relationship with that woman was not clarified). To treat *Buggs* as a "twin" of *Carlson* renders the protection from capital punishment for domestic murderers more expansive than that provided by *Carlson* standing alone.

A survey of the capital jurisdictions not among the six states studied exhaustively for this Article identified one additional state, Florida, with a judicially created exemption from capital punishment for domestic separation murderers.⁸⁶ The absence of such doctrine in the remaining capital punishment states is by no means a clear indication that the domestic discount is recognized only in North Carolina, Illinois, and Florida. The domestic discount may well operate tacitly, and the evolution of contemporary capital punishment law, a regime not yet twenty years old, may see additional states develop formal domestic discount doctrines.

The Florida Supreme Court may have best articulated why some appellate courts resist the capital sanction for domestic murder: It exempts separation murderers from capital punishment because separation murders lack the cold-bloodedness requisite for the highest grade of homicide offense seriousness. The final section of this Article is devoted to a critical examination of the propriety of treating cold-bloodedness as requisite for capital murder. Let us first take note of the logic of Florida's domestic discount before leaving the subject of appellate review of capital separation murder for that of homicide theory.

D. PASSION AND PREMEDITATION IN FLORIDA

The Florida capital statute includes as an aggravating circumstance that "the murder was committed in a cold, calculated, and premeditated man-

83. *Id.* at 336.

84. *Id.*

85. *Id.* at 338.

86. This survey was done by means of a Westlaw search for keywords likely to appear in capital domestic murder cases; given the variability of judicial and statutory terminology in the thirty states canvassed, it is possible that some relevant cases did not come to light.

ner without any pretense of moral or legal justification."⁸⁷ In 1991 the Florida Supreme Court held that this aggravator cannot be applied to murders performed in the grip of "heated passion" and arising from a "domestic dispute," regardless of the extent or strength of indicia of preplanning and calculation.⁸⁸ Prior to 1991, it was well established in Florida that domestic strife was a nonstatutory mitigating factor that could outweigh factors in aggravation, thus shielding a defendant from a death sentence.⁸⁹ But in *Santos v. State*⁹⁰ and *Douglas v. State*,⁹¹ the Florida Supreme Court enlarged its protection of domestic murderers from the death penalty: It held that domestic heat and cold deliberation were antithetical and, thus, that this aggravator was unavailable as a basis of capital prosecution in domestic murder cases.

The cold, calculated, and premeditated aggravator had been a convenient vehicle for the capital prosecution of domestic murder cases, although the factor was typically applied to executions and contract murders.⁹² Arguably, domestic separation murder could aptly be described as a species of execution, in retaliation for the pain of abandonment or the ultimate transgression against customary authority. However, as the Florida Supreme Court reasoned, domestic murders are not cold, but passionate or hot.

Carlos Santos' case was well suited for the development of Florida domestic discount doctrine. His mental condition and personal history rendered him a sympathetic defendant, at least to the extent of making the "cold, calculated, and premeditated" aggravator seem incongruous and inapposite. Evidence was heard during the penalty phase of Santos' trial that Santos was vulnerable to being propelled into psychosis by stress, was probably psychotic when he killed Irma and their daughter, and was plainly psychotic from the trauma of the loss and the crime after he killed them.⁹³

Irma, with whom Santos had lived for many years, left him. She avoided him after the breakup. He found Irma and threatened to kill her. Two days later Santos accosted her on the street and shot Irma and their daughter in the head at point blank range with a gun bought for that purpose.⁹⁴

The Florida Supreme Court castigated the trial court for failing to credit Santos with the statutory mitigating factors that he was suffering from extreme mental and emotional disturbance and that his capacity to

87. FLA. STAT. § 921.141(5)(i) (Supp. 1996). The "cold, calculated, and premeditated" factor requires a heightened level of premeditation beyond that needed to convict for first degree murder. *Preston v. State*, 444 So. 2d 939 (Fla. 1984).

88. *Santos v. State*, 591 So. 2d 160, 162-63 (Fla. 1991); *Douglas v. State*, 575 So. 2d 165, 169 (Fla. 1991).

89. See *Fead v. State*, 512 So. 2d 176 (Fla. 1987) and cases cited therein.

90. 591 So. 2d 160 (Fla. 1991).

91. 575 So. 2d 165 (Fla. 1991).

92. *Id.* at 167.

93. *Santos*, 591 So. 2d at 161-62.

94. *Id.* at 161.

conform his conduct to the requirements of the law was substantially impaired. There was also evidence in the record that Santos had as a child suffered extreme physical and emotional abuse at the hands of his father, further mitigation unacknowledged by the trial court. This evidence lent further credibility to Santos's claim that he was vulnerable to passages of derangement and had killed Irma and their child in the grip of such an episode.⁹⁵

The court concluded that a killing arising from a domestic dispute which in turn gives rise to "violent" and "wild" emotions and then to "mad acts" is neither cold nor genuinely premeditated.⁹⁶ The court analogizes the facts in *Santos* to those in *Douglas*,⁹⁷ another 1991 case which also involved the rejection of the application of the cold, calculated, and premeditated aggravator.

Douglas was a lovers' triangle case which was also, in the terminology of the Florida court, a "domestic dispute" case. The victim was Douglas's rival. Douglas had lived with Helen, but lost her when she married Atkins. Within a year, Douglas agreed to take Helen back—Helen, at that point, was destitute and pregnant with her husband's child. Shortly after the birth of the child, Helen reunited with Atkins; eleven days later Douglas shot Atkins in an exceedingly brutal crime. Douglas kidnapped the Atkinses, forced them to have sex, and then bludgeoned and shot Atkins before Helen's eyes.⁹⁸

In 1992, the Florida Supreme Court applied the doctrine developed in *Santos* and *Douglas* in a prosaic separation murder case, *Richardson v. State*.⁹⁹ Tommy Richardson shot the woman with whom he had lived for some years several days after she had broken off their relationship and insisted he leave her trailer home. He killed her with a shotgun that he had concealed ready-at-hand for that purpose, having threatened to kill her the day before.¹⁰⁰ Again, the Florida Supreme Court held that this was a case of wild emotion in the context of a domestic dispute. The court concluded that "the element of coldness, i.e., calm and cool reflection, is not present here. The factor of cold, calculated premeditation thus is not permissible."¹⁰¹

These three "domestic dispute" cases have in common the fact that a woman's decision to leave is unacceptable to the defendants. The Florida Supreme Court held that "heated passion" immunized the defendants against the highest grade of criminal liability and punishment. The question I would like to address next is whether pain and anger kindled by the hazards of sexual love ought to be legally sufficient to reduce the grade of offense seriousness in domestic murder cases. Should loss and separation

95. *Id.* at 163-64.

96. *Id.* at 162-63.

97. 575 So. 2d 165 (Fla. 1991).

98. *Id.* at 166.

99. 604 So. 2d 1107 (Fla. 1992).

100. *Id.* at 1108.

101. *Id.* at 1109.

immunize defendants who are in a normal range of vulnerability (unlike in *Santos*) even when their pain, heat, and anger are accompanied by strong evidence of premeditation and deliberation?

V. HOT BLOOD/COLD BLOOD

A. TWO ILLUSTRATIVE CASES

I ask my readers to consider two murders: The first murder involves a killing arising out of friction between a couple who lived together. The killer received a life sentence. The second murder involves a robbery-murder that resulted in a death sentence.

First consider the case of Michael Quesinberry.¹⁰² One day he took a break from work and drove up to a rural grocery store. Quesinberry sat there for a while, thinking about his money troubles. He then put a hammer in his pocket, walked into the store, and asked the owner, a seventy-one-year-old man, for a Pepsi. Quesinberry then asked for some cigarettes in order to induce the storekeeper to turn around and make himself vulnerable to attack. When the storekeeper turned, Quesinberry struck him once on the head with a hammer. After the owner fell, Quesinberry struck him on the head once more and then took money from the till and left.¹⁰³

Now consider the case of Bige Hamby.¹⁰⁴ Hamby killed his girlfriend. She had lived with him on an erratic basis, reflecting the ups and downs of their relationship. Bige and Margaret fought often and had called the law on each other; he had beaten her many times, but she had always returned to him. The killing occurred in his trailer home under the following circumstances: Margaret was drinking at the next-door trailer. The neighbor asked Bige to make Margaret leave her trailer because Margaret was falling down drunk and making a nuisance of herself. He dragged the resisting woman out of the trailer by the leg, hitting her head on the concrete step. Bige kicked Margaret's side with his booted foot as she lay on the ground. She was then unable to walk unsupported. He took her to his trailer and threw her inside at approximately 4:30 p.m. Bige called the police in the morning when Margaret failed to revive after a prolonged beating. Her entire body was covered with bruises and abrasions; she had been beaten with fists, a Pepsi bottle (the marks of the crimped cap were clearly visible on her chest), the end of a belt buckle, and she had been kicked or stomped. Her death was probably caused by the particularly severe beating administered by fist to her head and face. Her face was one large, undifferentiated bruise. There were cigarette burns on her inner thighs and the backs of her legs, and her vagina had been lacerated.¹⁰⁵

102. *State v. Quesinberry*, 354 S.E.2d 446 (N.C. 1987).

103. *Id.* at 448.

104. *State v. Hamby*, No. 3478 (Ga. Super. Ct. filed Apr. 12, 1978).

105. Transcript at 55-124, 307, *Hamby* (No. 3478).

I do not recite these cases to point out that the crime for which Hamby drew a life sentence is morally as bad or worse than Quesinberry's robbery-murder, although I believe this comparative statement to be true. Anyone familiar with the operation of the criminal law can easily produce pairs of cases which reflect haphazard and morally incoherent justice. My thesis rather is that the juxtaposition of these two cases illustrates a general proposition about the moral gradations embedded in our law of homicide and the sentencing policies that follow from those moral judgments. Both Hamby and Quesinberry drew relatively stiff sentences for crimes of the type they committed. Both men could realistically have hoped to have been more fortunate, but neither should have been surprised by the severity of his sentence. Yet, arguably crimes of Hamby's type are as reprehensible as Quesinberry's. Why then do the Hambys escape being treated as severely as the Quesinberrys? Also, why are the Hambys, who kill women with whom they are living, at less risk of the most severe sentence than men who kill because women have left them? I will address the latter question first.

B. THE SIGNIFICANCE OF THE THRESHOLD IN DOMESTIC HOMICIDE:
THREE EXPLANATIONS

A man who kills a woman who lives with him is likely to be less severely sanctioned than one who kills a woman who has left him. The explanation for the significance of the threshold (of the dwelling in which the couple live or lived) in domestic homicide cases is less straightforward than it may appear to be at first blush. The expected explanation, which I would like to challenge, goes something like the following:

Explanation I. The worst homicides are premeditated crimes; common or garden variety domestic homicides in which the killer lashes out at his partner-antagonist in explosive anger are the antithesis of premeditated murders.

The above explanation of the moral and legal basis for regarding murderous rage as less reprehensible than cold-blooded execution is unsatisfactory. Not all murder eligible for capital sentencing is premeditated. Michael Quesinberry, on the facts of his case, could have been prosecuted for capital murder in North Carolina on either a premeditation and deliberation theory or a felony murder theory. In most capital jurisdictions, robbery-murders are eligible for capital prosecution as felony murders, murders committed in the course of another violent felony, regardless of whether the killing was premeditated. Unlike robbery, wife beating is not treated as a violent felony capable of elevating a homicide to capital murder. Admittedly, the offense seriousness ranking which treats robbery as more reprehensible than serious spouse battery is so familiar as to escape notice. Whether or not this ranking of domestic violence and predatory crime is defensible, it reflects our disposition to take predatory crime more seriously than domestic violence.

It is fair to conclude—regardless of whether one regards punishing lethal or other domestic violence more heavily as either morally justified or sound policy¹⁰⁶—that there is no wall between premeditated and unpremeditated murder that shelters domestic killers from capital responsibility; rather, our ranking of domestic violence as less serious than predatory crime reflects the moral grading embedded in our law of homicide. Were wife beating as disapproved as robbery, fatal wife beating could be capitally prosecuted on a felony murder theory. More needs to be said about the problematic concept of premeditation; however, my argument at this stage hinges on nothing more than the proposition that in our law of homicide, premeditation is not a necessary predicate of capital murder. We must seek explanations of the relatively low grade of offense seriousness assigned unpremeditated domestic murders elsewhere.

Explanation II. A second possible explanation of the reluctance to assign the highest degree of offense seriousness and punishment to (the worst) domestic homicides is that these crimes are thought to be difficult or impossible to deter;¹⁰⁷ hence, the deterrence rationale for the *in terrorem* penalty—death—is unavailable. Recent research challenges three myths associated with the traditional view that domestic violence generally and domestic homicide in particular are not significantly deterrable:

(1) *The “out of control” domestic killer.* The image of the enraged domestic killer as “out-of-control” and hence beyond the reach of deterrent messages of the criminal law has been rejected by researchers who argue that domestic violence generally is instrumental or purposive conduct. Batterers use violence because it works, because through it they achieve their objectives. These objectives include household dominance in general and the specific demands to which their victims accede under violent attack or threat.¹⁰⁸

One who launches a strategic assault, however, may yet find that he is not thoroughly in control of himself, the situation, or the extent of damage done. Many lethal attacks should be understood as ill-calibrated, extremely reckless domestic violence in which death is risked by employing lethal weapons or severe beatings without firm determination to kill.¹⁰⁹

106. Please recall that I am not advocating that every domestic homicide be treated as aggravated first degree murder. In a regime in which there was parity of offense seriousness between predatory and domestic homicide, a small minority of domestic crimes would lend themselves to processing as aggravated first degree murders, just as a small minority of predatory crimes are in fact so processed in the current regime.

107. See Jeffery Fagan, *Cessation of Family Violence: Deterrence and Dissuasion*, in *FAMILY VIOLENCE* 377-425 (Lloyd Ohlin & Michael Tonry eds., 1989).

108. This conclusion has been reached by researchers using a range of disparate methodologies, including traditional clinical psychology, socio-biology, and phenomenological sociology. See Donna Coker's review and assessment of recent literature on the psychology of batterers and her exploration of the psychology of heat of passion wife killers. Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 *S. CAL. REV. L. & WOMEN'S STUD.* 71 (1992). Jack Katz's analysis of domestic homicide also finds it to be purposive, although not instrumental in the manner of the rational utility maximizer. See JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 12-51 (1988).

109. See KATZ, *supra* note 108, at 32-33, and works cited therein.

(2) *Domestic killers tend to be otherwise peaceable men who, having killed their provokers, pose little threat of future dangerousness.* Evidence is mounting that domestic killers have a very high incidence of prior assaults on their victims,¹¹⁰ have histories of assaults on other women with whom they were sexually intimate,¹¹¹ and may beat their children as well as their wives and lovers.¹¹² Far from posing no threat other than to their deceased victims, such men are dangerous in the domestic sphere regardless of how peaceable they may appear outside the home.¹¹³ The emerging revisionist profile of male domestic killers as men who are habitually violent in the home suggests that deterrent criminal law strategies might aptly be applied in the domestic arena.

(3) *Domestic violence is pathological or deviant behavior.* Recent research has reported that domestic violence is far more prevalent in all social classes than previously supposed.¹¹⁴ These findings, if accurate, call for the reassessment of the image of batterers as either in the grip of psychopathology or members of deviant subcultures. Plausibly, a cultural transition is underway in which rejection of domestic violence is replacing acceptance of it. If this is so, then unambiguous stigmatization of such conduct by the criminal law may well prove an effective avenue of reform. If the target population includes significant numbers of normal individuals who are, or should be, absorbing new rules of family conduct, unambiguous and strong criminal law signals may prove a significant deterrent.

In sum, if typical hot-blooded domestic homicides grow out of habitual, instrumental, and socially tolerated violence, the deterrence rationale for upgrading offense seriousness and severity of penalty needs to be revisited.

Explanation III. From a feminist perspective a third explanation for the greater vulnerability to the extreme sanction of separation killers relative to killers as hot and hotter than Bige Hamby is discernable. A possible explanation of the lesser severity of the law's response to spousal, as distinct from what might be called "post-spousal," homicides is the continued influence of traditional patriarchal doctrines. Patriarchal law re-

110. *Id.* at 31-39. A study of Kansas City found that police had intervened in domestic disturbances at the address of a suspect or victim in 90% of domestic homicide cases and had done so more than five times for approximately half the cases. See Breedlove et al., *Domestic Violence and the Police: Kansas City*, in *DOMESTIC VIOLENCE AND THE POLICE* (1977).

111. See Coker, *supra* note 108.

112. See Gerald T. Hotaling & Murray A. Straus, *Intrafamily Violence and Crime Outside the Family*, in *CESSATION OF FAMILY VIOLENCE: DETERRENCE AND DISSUASION* 315-75 (Lloyd Ohlin & Michael Tonry eds., 1989).

113. Researchers observe that there are two types of batterers, those who confine their violence to the home and those who are violent outside the home as well. See *id.* at 357, tbl. 10 (compilation of statistics reported in research on the proportion of domestic batterers who are also violent outside the home).

114. According to Bureau of Justice Statistics, a woman is beaten in the United States approximately every 52 seconds. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *FEMALE VICTIMS OF VIOLENT CRIME* 13 (1991). Hotaling & Straus, *supra* note 112, at 336-37 (report based on a 1985 national survey of family violence that child or spousal abuse occurs in over 30% of American homes in any year).

gards women as property of their husbands and defers to male rule in the household.¹¹⁵ These doctrines offer less protection to men who have lost the status of husband of their victims. Bige Hamby killed a woman who was socially recognized as his wife or wife equivalent; men like Godfrey killed women who had asserted their independent status—at least until death reversed their apparent success.

At common law, under the feudal doctrine of coverture, “the very being or legal existence of the woman is suspended during marriage. . . .”¹¹⁶ In addition to the suspension of her independent civil identity, a married woman could not appeal to the law for protection from acts on the part of her husband that would otherwise be criminal. A husband had a right to force sexual intercourse upon his wife, to beat her, and to confine her.¹¹⁷ In the nineteenth century the married women’s property acts improved the civil status of women,¹¹⁸ but the criminal law continued to defer to the authority of men in the domestic sphere. It has continued to do so, although with abating force, into the contemporary era of sexual equality. Although the common law marital exemption from rape prosecution has been significantly curtailed by contemporary statutes, the exemption is far from a dead letter.¹¹⁹ Until the mid-1980s, domestic violence was treated by the police as a private matter; non-arrest of batterers and ignoring or delaying response to domestic violence calls were standard practices.¹²⁰ It is hardly surprising that domestic violence, not long recognized as crime, much less serious crime, is not found on statutory lists of felonies so reprehensible that death dealt during their commission can sustain a charge of capital murder.

C. BLOODHEAT

The question, why are cold-blooded killings more reprehensible than hot-blooded crimes, is also less easily disposed of than it may at first appear. If taken superficially as a question about traditional homicide doctrine, it is easily answered. The answer is that killing out of anger or other strong emotion tends to decrease the degree of moral blameworthi-

115. See Isabel Marcus, *Reframing “Domestic Violence”: Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 11 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994), on the continuing survival of patriarchal legal doctrine in contemporary homicide law.

116. 2 WILLIAM BLACKSTONE, *COMMENTARIES* *443. Blackstone elaborates about the legal relationship of wife to husband, “[U]nder whose wing, protection and cover, she performs everything; and is therefore called in our law-french a *feme-covert*, *foemina viro coperta*; is said to be *covert baron*, or under the protection of her husband, her *baron*, or lord; and her condition during her marriage is called *coverture*.” *Id.*

117. *Id.* at *444-45; see also Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN’S RTS. L. REP.* 175 (1982).

118. See Williams, *supra* note 117.

119. Anne L. Buckborough, *Family Law: Recent Developments in the Law of Marital Rape*, 1989 *ANN. SURV. AM. L.* 343 (1990).

120. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence 1970-1990*, 83 *J. CRIM. L. & CRIMINOLOGY* 46 (1992); EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE: STUDIES IN CRIME, LAW & JUSTICE* 31 (1990).

ness attributed to the defendant, hence lowering the rank of offense seriousness assigned to the defendant's crime along the entire scale of homicide offenses from capital murder to manslaughter. The law of homicide conceives that bloodheat undermines or destroys an actor's rational capacity to deliberate and plan his actions; anger dethrones judgment. The actor is imagined to lose control of his actions to his anger. Especially if the defendant is not wholly responsible for the situation that gave rise to his anger, his moral culpability is mitigated because his powers of agency, specifically self-restraint, are reduced by his passion and the circumstances inciting his passion.

Bloodheat is a relative matter, ranging from the utter indifference that Quesinberry evinced towards his prey to the passionate wrath of the cuckold; it varies inversely with the degree of that elusive quality, premeditation. The cuckold who kills his wife or her paramour may be entitled to the maximum mitigation. The man who, for example, kills his wife in the heat of an argument, but lacks sufficient provocation to reduce murder to manslaughter, may yet be provoked and passionate enough, in a sufficiently warm state of blood, to qualify for reduction from first to second degree murder. Bige Hamby may have been too methodical and too far outside the pale of a reasonable level of response to intimate discord to qualify for reduction from first degree murder to second, but Hamby may be given sufficient credit for the heat of his blood to avoid being tried for his life or to avoid a death sentence.¹²¹ There may be sufficient evidence of premeditation in a domestic murder case to prove the element of premeditation; yet, the anger or the pain out of which the defendant acted, the heat of his blood, may result in the killer being accorded less severe treatment than someone who was a cold-blooded predator.¹²²

I will argue that serviceable as the hot blood/cold blood distinction may be for some purposes of moral grading in homicide law, it has supplied a specious basis for the underevaluation of the seriousness of some classes of domestic homicides.

The history of the grading of homicide offenses in Anglo-American law has been that of successive attempts to align punishments meted out with notions of moral culpability and in particular to avoid imposing capital punishment on insufficiently culpable killers. The first and most consequential innovation was the distinction between murder and manslaugh-

121. This is not an issue in the Hamby case because Georgia does not recognize degrees of murder; the Georgia statute preserves the common law definition of murder.

122. See *State v. Huffstetler*, 322 S.E.2d 110, 130-31 (N.C. 1984) and the citations to law therein. Chief Justice Exum argued in his dissent that a death penalty in a domestic murder case ought not to survive proportionality review. *Id.* See *Preston v. State*, 444 So. 2d 939 (Fla. 1991), distinguishing between the heightened level of premeditation necessary to elevate murder to the death penalty range of crimes and ordinary first degree murder calibre premeditation and the Florida domestic capital cases. See *supra* notes 87-101 and accompanying text.

ter.¹²³ The common law courts of the seventeenth century developed the distinction between capital murder, committed with malice aforethought, and noncapital criminal homicide.¹²⁴

Homicide committed upon a sudden quarrel or in the heat of passion upon adequate provocation was recognized as a defense or partial defense to murder and was a less grave homicide offense.¹²⁵ These voluntary manslaughter doctrines are grounded in the hot blood/cold blood distinction; the same conceptual framework was the basis for the subsequent grading of murder offenses.

1. *Heat of Passion*

The manslaughter doctrine matured in the nineteenth century into the form in which it is preserved in most American jurisdictions. To qualify as heat of passion manslaughter, a killer must act out of anger induced by provocation which would move a reasonable man to lose his self-control within the space of time before a reasonable man's passion would have cooled. From the inception of the defense, the most important types of provocation held to be adequate to support heat of passion have included violent blows and assaults inflicted upon self or relatives, mutual combat, and the sight of a wife taken in adultery.¹²⁶ In addition to fulfilling the objective test of provocation sufficient to induce a reasonable man to lose self-control, the killer must actually be aroused to a pitch of anger or other violent emotion capable of overmastering the self-control of a reasonable man. This sudden emotion, rather than some antecedent plan, such as to take revenge, must actually supply the impetus for the crime.¹²⁷

Commentators agree that the heat of passion defense functions to both partially excuse and partially justify the conduct of the provoked killer¹²⁸—both aspects are critical to the operation of the defense. The passionate killer is partially excused because he is less blameworthy than

123. A series of statutes, the first in 1496, denying the benefit of clergy for "murder upon malice prepensed" introduced the distinction between murder and less grave homicide offenses. MODEL PENAL CODE § 210.6 commentary at 121 (Official Draft and Revised Comments 1980) (adopted May 24, 1962).

124. See A. J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292 (1976) [hereinafter Ashworth I]; J. M. Kaye, *The Early History of Murder and Manslaughter*, 83 L.Q. REV. 365 (1967); see also A. J. Ashworth, *Sentencing in Provocation Cases*, 1975 CRIM. L. REV. 553.

125. Ashworth I, *supra* note 124; Kaye, *supra* note 124; Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982). A second type of manslaughter was recognized which need not concern us here: involuntary manslaughter. See W. LAFAYE & A. SCOTT, JR., *Criminal Law* §§ 7.12, 7.13 (2nd ed., 1986) [hereinafter LAFAYE]. Provocation is a partial defense in that if the defendant is exonerated as to the offense of murder, the defendant may still be guilty of the lesser criminal homicide offense of manslaughter.

126. The common law categories of adequate provocation are summarized by Lord Hale in *Regina v. Mawbridge*, (1707) Kel. J. 119, 130-37. See LAFAYE, *supra* note 125, § 7.10(b)(1)-(7).

127. LAFAYE, *supra* note 125, § 7.10(a).

128. See Ashworth I, *supra* note 124, arguing that the mixture of justification and excuse is a virtue of the law of provocation; Dressler, *supra* note 125, arguing that heat of passion should be reformed to make it a pure excuse doctrine.

the cool killer for one or more reasons: either passion renders him incapable of premeditation; the killer's passion renders his action less than fully voluntary; or because, while restraint is required by the law, the law also recognizes that the ordinary law-abiding actor would find it difficult or impossible to conform his actions to the law were he subject to the provocation.¹²⁹ Bloodheat clouds and overmasters judgment under circumstances which render the actor a suitable candidate for sympathy as well as blame.

Essential to the heat of passion defense is that the killer acts from moralized rage in circumstances in which his peers endorse his moral views, sympathize with his anger, and recognize that they might well prove no more equal to the law's demand for self-control if similarly situated. The defendant's lethal rage is rendered sympathetic, rather than, let us say, a symptom of a bullying temperament, by the serious injustice done to him by his provoker. Under common law rules, no lawful action can be adequate provocation to sustain the defense of heat of passion.¹³⁰ Further, if the defendant provoked his provoker, if he brought his tormenter's affront upon himself, he could not establish the heat of passion defense.¹³¹ The victim of a heat of passion killing shares the blame for the lethal outcome and may be more at fault than the provoked killer who dispatched him.¹³² The heat of passion defense requires that the defendant acted under a claim of moral justification to reduce murder to manslaughter.

There is a built-in tension in the doctrine between the pull of sympathy for the wronged killer and the need to impose social control in the form of sanctions against lethal self-help. Where the moral justification has seemed especially strong—as notoriously in cases in which a husband kills his wife's paramour—juries have refused to convict for the offense of manslaughter as well as murder; a few American jurisdictions formerly treated such actions as justifiable manslaughter.¹³³

A substantial minority of American jurisdictions have adopted the Model Penal Code proposal that greater subjectivity be introduced into the test for provocation.¹³⁴ The Model Penal Code defines intentional homicide as manslaughter when it is "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."¹³⁵

129. Dressler, *supra* note 125, at 442.

130. Ashworth I, *supra* note 124, at 295; Dressler, *supra* note 125, at 439.

131. See Ashworth I, *supra* note 124, at 295.

132. *Id.* at 292. This invokes Aristotle, who says that "it is apparent injustice that occasions rage." ARISTOTLE, NICHOMACHEAN ETHICS.

133. See LAFAVE, *supra* note 125, § 7.10(b)(5) (reporting that New Mexico, Texas, and Utah by statute and Georgia by decisional law formerly exonerated the killing of a wife's paramour).

134. Dressler, *supra* note 125, at 431.

135. MODEL PENAL CODE § 210.3.

The Model Penal Code commentators explain that the relaxation of the objective reasonable man standard is intended to allow persons who are permanently or temporarily incapable of exercising the degree of restraint available to the normal person to be accommodated by the defense.¹³⁶

Thus, persons suffering from "blindness, shock from traumatic injury, and extreme grief" are to be assessed against a laxer standard suitable to their condition rather than that which would be applied to the average person.¹³⁷ Although the term "situation" is left purposefully vague so as not to crimp the inquiry of the trier of fact, the commentary notes that "idiosyncratic moral values are not part of the actor's situation."¹³⁸ The Model Penal Code partial defense, like its common law antecedent, requires that the killer be motivated by moral values and reactions shared by those who sit in judgment of him.

The scope of the provocation defense has expanded with the introduction of further gradations of homicide offenses in modern law. "Imperfect provocation,"¹³⁹ provocation insufficient to merit reduction to manslaughter, may yet suffice to avoid capital responsibility for death eligible murder or reduce first degree to second degree murder. Provocation mitigates blame to the extent that the victim shares responsibility for his or her demise with the killer. At one end of the scale is cold-blooded murder: No morally cognizable provocation on the part of the victim is responsible for the lethal attack. The victim is wholly innocent. At the other end of the scale is manslaughter; the victim is at least as responsible for his or her demise as the provoked killer.

As the moral justification for killing weakens, so does the excuse value to be derived from the provocation; mitigation varies inversely with the extent of moral wrong attributable to the victim. The degree of provocation necessary for manslaughter is that quantum of moral injury which would push the average law-abiding person to the brink of homicidal rage. If the moral equation, as it were, is solved for any lesser value of injury, then reduction to second degree murder is the best result the defendant should have. Thus, insulting words are not considered injurious or threatening enough to reduce murder to manslaughter because our society rejects the culture of honor which ranks insult morally with injury or threat of injury.¹⁴⁰ The individual who explodes when insulted has a moral shortfall and cannot sufficiently justify his reaction to avoid a murder conviction. But, if the trier of fact concludes that but for the victim's

136. LaFave notes the conservatism of even some Model Penal Code jurisdictions that have been unwilling to subjectivize to the extent recommended by the Code. LAFAVE, *supra* note 125, § 7.10(b)(10).

137. MODEL PENAL CODE § 210.3.

138. *Id.*

139. This felicitous phrase is used by the Model Penal Code commentators. MODEL PENAL CODE § 210.6 commentary at 138.

140. See LAFAVE, *supra* note 125, § 7.10(6).

willful insulting of the defendant there would have been no attack, first degree murder may be avoided.

The killer whose culpability is mitigated by imperfect provocation must, however, be in the same moral universe as ordinary law-abiding citizens. What injures and provokes him, whether or not it rises to the level required for manslaughter, must be of a nature and quality to injure and provoke the ordinary run of people. The provocation must be capable of engaging common sympathy. Thus, the Illinois Supreme Court sympathized with the tragic "twins," Carlson and Buggs, who killed in response to the taunting and exploitative behavior of their wives. The Illinois Supreme Court saw these crimes as "ignited by a flare-up of long lasting marital discord."¹⁴¹ Because they were suffering humiliation and rejection, their rage and their inability to master it were less blameworthy in the eyes of the court than would have been the case if they had not been emotionally assaulted by their wives. These men killed under the influence of extreme mental and emotional disturbance brought on, at least in part, by the morally repugnant conduct of Rosemary Carlson and Loretta Buggs.

2. *Diminished Responsibility*

Diminished responsibility is a novel basis for grading offenses recently introduced into the law of homicide.¹⁴² Like provocation, diminished responsibility provides a basis for diminution of moral culpability and hence of the grade of offense seriousness along the entire range of homicide offenses. Persons suffering from mental disease or defect, but not entitled to exoneration by reason of insanity, may be entitled to have charges reduced from first to second degree or from murder to manslaughter. A death penalty may likewise be avoided by the mitigation of mental disease or defect. The reason of the mentally impaired killer is overwhelmed. But unlike in the case of the (normal) provoked killer, it is overwhelmed because the structures of self-control are abnormally weak or because internal upheavals are abnormally powerful.

A substantial minority of jurisdictions allow expert testimony on the question of whether mental disease or defect prevented a defendant from forming the mental state requisite for first degree murder.¹⁴³ This reform allows the reception of psychiatric testimony on whether the defendant was capable of premeditated killing. The majority of states do not permit psychiatric evidence about the defendant's state of mind unless he is

141. *Buggs*, 493 N.E.2d at 336. See *supra* notes 78-82 and accompanying text for a discussion of *Buggs*.

142. See Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977); George E. Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 313 (1971); Travis Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975).

143. MODEL PENAL CODE § 210.3 commentary at 70 & n.75.

mounting an insanity defense. A few states permit murder to be reduced to manslaughter on the strength of psychiatric testimony that the defendant's mental condition rendered him incapable of the impulse control the law expects of the normal actor.¹⁴⁴

The Model Penal Code blurs the distinction between diminished capacity and provocation as a basis for mitigating murder to manslaughter. The very formula which the Code employs to denominate hot-blooded manslaughter expresses this evolution: Manslaughter is styled homicide that is "committed under the influence of extreme mental or emotional disturbance."¹⁴⁵ The commentary notes that the Code's approach, which asks the trier of fact to inquire into the reasonableness of the defendant's explanation or excuse from the viewpoint of the defendant's situation, could and perhaps should be interpreted to include mental abnormality as part of "the situation" as well as such conditions as blindness and grief.¹⁴⁶

The Model Penal Code commentators discuss the merits of expanding diminished responsibility as a grounds for mitigation to manslaughter, but stop short of endorsing the expansion. Expansion has appeal in so far as criminal liability should be predicated on the capacity to conform to the law's requirements.¹⁴⁷ But the commentary also notes the wisdom of the law's longstanding policy of promoting social control by providing "incentives" (*i.e.*, fear of sanctions) for the weak as well as the strong willed or minded to avoid harming others.¹⁴⁸ The commentary in effect recommends an era of experimentation with diminished capacity mitigation to manslaughter.

While very few states have followed this suggestion, the majority of death penalty states allow mental disease or defect which impairs the defendant's ability to restrain his murderous impulses to mitigate capital liability even in cases of premeditated murder. The great majority of death penalty states also follow the example of the Model Penal Code in creating a statutory mitigating circumstance permitting leniency when the defendant was subject to imperfect provocation (*i.e.*, killed "under the influence of extreme mental or emotional disturbance").

The combination of imperfect provocation and diminished responsibility is a potent and protean basis for mitigation of domestic murder. There are certainly cases, like *Santos v. State*,¹⁴⁹ where both types of mitigation appear amply supported.

Santos had been sentenced to death on the strength of the "cold, calculated and premeditated" aggravator. The Florida Supreme Court held

144. The Model Penal Code lists five jurisdictions which have permitted murder to be mitigated to manslaughter. *Id.* § 210.3 commentary at 70 n.77.

145. *Id.* § 210.3.

146. *Id.* § 210.3 commentary at 73.

147. *Id.* § 210.3 commentary at 71.

148. *Id.*; Arenella, *supra* note 142.

149. 591 So. 2d 160 (Fla. 1991). See *supra* notes 93-96 and accompanying text, for a discussion of *Santos*.

that the aggravator was inapplicable: Santos was driven into psychosis by the loss of Irma and their daughter. Santos felt deeply threatened and aggrieved by Irma and her family's rejection of him. The injury to him was epitomized by their unwillingness to give the child his surname. Santos came looking for Irma with a gun, ran the fleeing woman down in the street, and shot Irma and the child she carried in her arms at point blank range. The Florida Supreme Court concedes that there were indicia of premeditation in Santos's actions. But the court distinguishes between cold murder and murder committed out of the pain and anger which consumed Santos. Santos, far from being able to control these emotions, was driven into psychosis by them. Santos could not subsequently understand that he had killed Irma nor could he accept her death.

In *People v. Buggs*¹⁵⁰ and *People v. Carlson*,¹⁵¹ the Illinois Supreme Court fuses imperfect provocation ("extreme mental and emotional disturbance" in the language of the widely adopted Model Penal Code formula) and diminished capacity to create a plausible rationale for sentence reduction in domestic capital cases: Carlson and Buggs were both men in decline. Carlson had suffered two heart attacks and in his physician's words was "'partly disabled and really incapable of leading a complete and fulfilling life for a man in his early forties.'"¹⁵² Buggs was a severe enough alcoholic to have suffered blackouts.¹⁵³ Ill health and ill fortune had deprived these men of the fortitude to endure blatant infidelity or callous abandonment for a more virile partner. They could not muster the self-control upon which normal, more fortunate men would be able to call.

The impairments attributed to Carlson and Buggs are tenuously linked to the excusable absence of moral judgment and restraint; they hardly rise to the level of Santos's psychosis. It is certainly plausible, however, that declining men find rejection harder to bear than men secure in their social status and confident of their future prospects with women. In the eyes of the Illinois Supreme Court, decline in combination with the provocation to which these men were subjected adds up to sufficient domestic mitigation to ward off capital liability.

In Florida, the "cold, calculated and premeditated" aggravator cannot be applied to retaliatory domestic murder. A mitigating degree of impairment-provocation is ascribed to retaliatory domestic homicides. Murder of a wife or lover is itself taken as evidence that rational restraints were overwhelmed by mitigating rage. Rejection is taken as sufficient to impair the self-control of the average law-abiding man. The Florida Supreme Court sums up its approach in *Maulden v. State*: "In a domestic setting, however, where the circumstances evidenced heated

150. 493 N.E.2d 332 (Ill. 1986).

151. 404 N.E.2d 233 (Ill. 1980). See *supra* notes 67-85 and accompanying text, for a discussion of *Buggs* and *Carlson*.

152. *Carlson*, 404 N.E.2d at 244.

153. *Buggs*, 493 N.E.2d at 336.

passion and violent emotions arising from hatred and jealousy associated with the relationships between the parties, we could not characterize the murder as cold even though it may have appeared to be calculated."¹⁵⁴

The domestic discount of capital culpability is a post-*Furman* variant of the familiar syllogism: Hot-blooded killing is a less serious grade of offense than killing in cold blood. Domestic killing is heated; therefore, domestic killing is mitigated.

The automatic mitigation of domestic killing should be rejected. Homicide law should reject the automatic imputation of diminished capacity or the moralized rage of provocation—simply because the relationship between victim and defendant is domestic or sexually intimate. In the worst cases of domestic murder, cases of retaliatory post-separation executions and of the last beating, the domestic relationship should, if anything, serve to aggravate murder. All domestic violence exploits the vulnerability and trust which accompany intimacy; the mere fact of intimacy ought not to limit the accountability of those who take life in betrayal of that trust.

I will argue that if the law were purged of patriarchal values, the remaining principles that underlie our grading of homicide offenses would be consistent with the rejection of a domestic discount; the worst domestic murders, like the worst predatory murders, would rank among the most reprehensible crimes.

3. *Cold Blood*

The division of murder into degrees as well as the most recent reform of capital punishment law can be understood as an effort to reserve the highest grades of offense seriousness and highest degrees of culpability for cold-blooded murder. Let us briefly recall the history of the grading of homicide offenses and then turn to the question: What makes cold-blooded murder more reprehensible than hot-blooded crime?

All criminal homicide not manslaughter was murder at common law, defined as unlawful killing with malice aforethought.¹⁵⁵ Early common law probably understood "malice aforethought" to mean a preconceived intention or plan to kill.¹⁵⁶ "Malice aforethought" lost the exclusive connotation of executing a preconceived plan as common law developed; none of the four types of common law murder, express or implied, required that the defendant have a preconceived plan of killing his victim.¹⁵⁷ Any criminal homicide which failed to qualify as manslaughter under the rigid requirements of provocation doctrine was capital murder. Intentional homicides were exhaustively divided into two complementary

154. *Maulden v. State*, 617 So. 2d 298, 302-03 (Fla. 1993).

155. LAFAYE, *supra* note 125, § 7.1(a).

156. *Id.*; MODEL PENAL CODE § 210.6 commentary at 121.

157. Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 707 (1937). The four types of common law murder are as follows: (1) intent-to-kill murder; (2) intent-to-do-serious-bodily-injury murder; (3) depraved-heart murder; and (4) felony murder. See LAFAYE, *supra* note 125, § 7.1.

classes, those committed in cold blood and those committed in the heat of adequately provoked passion. The inability of common law to reflect gradations of moral culpability among criminal homicides other than that between murder and manslaughter was a powerful impetus to reform.

Following the lead of Pennsylvania's 1794 statute, all but a handful of American jurisdictions introduced degrees of murder in order to reserve the death penalty for crimes deemed sufficiently reprehensible to merit the death penalty.¹⁵⁸ The classifications of murder adopted in reform states differed significantly, but the great majority elevated only deliberate and premeditated killing and killing in the course of a violent felony to first degree murder.¹⁵⁹ A few states, notably New York, included depraved heart murder, that is, murder done with reckless disregard for the imminent danger to human life.¹⁶⁰ The most recent grading innovation has again been motivated by the desire to further restrict the application of capital punishment. In 1976, the Supreme Court began elaborating a set of rules which limited capital punishment to cases where the crime or the criminal or both are more blameworthy than the majority of first degree murders, and no evidence in mitigation of the sentence has persuaded the jury to show mercy. Analysis of contemporary capital punishment statutes reveals that murders committed for a predatory purpose such as robbery or rape, murder of an agent of the state, and a history of violent crime or an especially brutal murder are the categories of crime which can elevate a first degree murder to capital murder.¹⁶¹

The majority of states sought to define all first degree murder save felony murder with the "deliberate and premeditated" formula. The defects of the formula have been well-aided; its widespread continued use as the "chief criterion"¹⁶² of first degree murder attests to the importance and durability of the connection between the first rank of offense seriousness and killing which proceeds from a cool mind, rather than hot blood. Indeed, Judge Cardozo famously observed that "while the distinction between premeditated and unpremeditated murder fails as an intellectual edifice, it has served a critical if ill articulated purpose: It allows juries to bring in a second degree verdict when murder appears to them to be the product of passion rather than a cool mind."¹⁶³

Two kinds of difficulties have frustrated efforts to use the premeditation and deliberation formula to explicate the basis for assigning murders to the highest grade of offense seriousness. The first kind result from the lack of a clear and serviceable definition of the legal term of art. The legal definition of "premeditation and deliberation" has diverged from the ordinary definitions of these words, paralleling the similar denaturing

158. Michael & Wechsler, *supra* note 157, at 703.

159. *Id.* at 704.

160. *Id.* at 705 n.18.

161. *See supra* part II.

162. MODEL PENAL CODE § 210.3 commentary at 67.

163. Benjamin N. Cardozo, *What Medicine Can Do for Law*, in *LAW AND LITERATURE AND OTHER ESSAYS* 155 (1931).

of its common law antecedent "malice aforethought."¹⁶⁴ "Premeditation" has been confusingly defined by courts as requiring little or no duration of thought; mere seconds suffice. This is of course contrary to the common significance of the term, namely, "planned." Durationless "premeditation" is difficult to distinguish from the mental state necessary for the lesser offense of second degree murder, which requires only the intent to kill. Consequently, juries are confounded between the common meaning of "premeditated," that is, "planned,"¹⁶⁵ and the legal significance of the term. The distinction between second degree murder—merely intentional murder—and premeditated murder evaporates in definitional confusion.¹⁶⁶ "Deliberation" appears to be little more than a synonym for "done by a cool mind" or "in a cool state of blood." More importantly for the present inquiry, some of the worst murders apparently lack the quality of premeditation.

Two types of murder not requiring premeditation are ranked among first degree murders: felony murder and depraved heart murder. These types of murder are cold-blooded crimes in the sense that the victims are wholly innocent. The victims share no part of the moral responsibility for their deaths. "Cold-blooded" has another meaning, synonymous with the common meaning of "deliberate and premeditated," something like, "planned and carried forward with a firm and fixed purpose." The worst murders known to our law, with the exception of the category of revenge murders, are cold-blooded in the first sense, but not necessarily in the second. The absence of reflection and firm purpose does not improve the moral quality of crimes which take the lives of innocent victims.

The common-law felony murder rule has been severely criticized because it imposes strict liability for an unintended death occurring during the commission of a felony.¹⁶⁷ Yet, felony murder survives in most American jurisdictions as first degree murder, although with its scope curtailed to a lesser or greater extent.¹⁶⁸ The survival of the felony murder rule can be explained by the failure of the concept of premeditation to capture all the qualities our culture associates with murders of the worst kind. The taking of life innocent of any affront to the killer or complicity in its own destruction is assigned the highest grade of offense seriousness. The application of the felony murder rule is morally defensible in so far as the defendant may be fairly charged with knowledge that a substantial risk of lethal harm attached to his or her felonious activities; reform of the felony murder rule has been in the direction of applying it

164. Michael & Wechsler, *supra* note 157, at 707-08.

165. Some jurisdictions do require something like the ordinary language meaning of "premeditation." See *People v. Anderson*, 447 P.2d 942, 948 (Cal. 1968).

166. Cardozo, indeed, remarked that he himself was not confident that he grasped the distinction between first and second degree murder, hinging as it did on the definition of premeditation: "I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in books." Cardozo, *supra* note 163, at 100-01.

167. See MODEL PENAL CODE § 210.2 commentary at 29-42.

168. See LAFAVE, *supra* note 125, § 7.5.

only to cases where the defendant evinced reckless indifference to a great risk to human life.¹⁶⁹ In this sense, felony murder is cold-blooded; the depth of our revulsion from such crime is revealed by our placing strict liability upon those whose predatory ventures result in the foreseeable loss of innocent life.

A similar analysis accounts for the appearance of depraved heart murder, unintentional killing which manifests an extreme indifference to the value of human life, as first degree murder in the statutes of a minority of states.¹⁷⁰ Examples of such extremely reckless murder include shooting into a room in which several persons are known to be¹⁷¹ and shooting into a moving automobile.¹⁷² As with felony murder, a life innocent of any morally cognizable offense against the killer is taken.

There are also unplanned, impulsive murders which rank on a par morally with planned murders. The legal definition of premeditation in some jurisdictions may allow impulsive murders to be graded as first degree murder due to premeditation; this would be true wherever the definition of "premeditation" collapses planned and merely intentional murder. But the moral basis of the inclusion of some impulsive murders in the highest grade of offense seriousness is obscured by the semantics of the legal definition of "premeditation."

Sir James Fitzjames Stephen argued that impulsive murders can be as morally reprehensible and bespeak characters as dangerous to society as premeditated murders. Consider two of Stephen's examples: "A man passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him in and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat."¹⁷³ Such easy cruelty in response to the sheer vulnerability of a child or the legitimate assertiveness of a woman displays a frightening lack of moral inhibition. In addition to the taking of innocent life, these impulsive murders display cold-bloodedness in the lack of the moral emotions that normally create visceral barriers to acting on anti-social impulses.

Revenge murders deviate from other murders classified among the worst murder offenses in that their victims may indeed have wronged their killers and hence lack the innocence that outrages our moral sensibility in other kinds of cases. Assuming that the victim has committed some atrocious wrong—killed or terribly injured a relative of his murderer, for example—the state may have difficulty persuading a jury to

169. The Model Penal Code commentators argue that it would be preferable to eliminate felony murder as a separate category of murder offense altogether and subsume it under reckless murder committed with extreme indifference to human life. See MODEL PENAL CODE § 210.2 commentary at 29-30.

170. See LAFAYE, *supra* note 125, § 7.4.

171. *People v. Jernatowski*, 144 N.E. 497 (N.Y. 1924).

172. *Wiley v. State*, 170 P. 869 (Ariz. 1918).

173. 1 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 94 (London, MacMillan 1883). Stephen's argument is quoted and endorsed by the Model Penal Code. MODEL PENAL CODE § 210.6 commentary at 128.

make the killer suffer the full weight of legal retribution. The state would be seeking to punish for the violation of the legal norms of our civilization, including the norms that retribution belongs to the state and requires due process of law: These norms may not have the immediacy of those that condemn the killing of the morally innocent. If the magnitude and quality of the wrong done by the killer is morally sufficient—a war crime, a murder unreachable by the law—or is popularly regarded as having been insufficiently punished by official justice, the lack of moral innocence on the part of the victim may hamper prosecution to the fullest extent permitted by law.

D. FEMINIST CRITIQUE OF THE DOMESTIC DISCOUNT

I now reach the question, should a domestic discount operate to exclude domestic murder from the highest grade of offense seriousness—from capital liability under the present dispensation? Should blood heated by the negative and painful emotions of intimate and familial life shield a defendant from the highest degree of criminal liability? I will argue that the worst cases of domestic murder, post-separation executions and murder arising out of habitual wife beating, should be counted among the worst murders, absent legitimate mitigating circumstances. There should be no blanket or automatic extension of imperfect provocation, or diminished capacity, or the two in combination, to domestic killers merely in virtue of the domestic relationship.

Heat of passion doctrine is the conceptual fount of all provocation doctrine. The heat of passion doctrine grants mitigation to a killer reacting to assault on his person or that of a close relative. Adultery is sufficient provocation by virtue of being assimilated to assault: The blow administered to the husband is moral, not physical.¹⁷⁴ Adultery derogates from his manhood, which both entitles him and requires him to control his wife, sexually and otherwise. Within the patriarchal conception of marriage, any challenge to masculine control—adulterous behavior or inclinations, contesting household authority, leaving—is an assault on both legitimate prerogatives and the very masculinity of the husband. Traditionally, violence to reassert possession or punish defiance has been considered legitimate masculine behavior. It is the rootedness of adultery provocation in patriarchal norms which explains why the extension of this mitigation to women who kill adulterous husbands did not occur until the law began to undergo the transition towards gender egalitarianism. It was not pain and anger at betrayal, which either the husband or wife may feel, that mitigated culpability at classical common law; rather, it was the defense of masculinity and its prerogatives and the legitimacy of violence as a vehicle of male control of the family.¹⁷⁵

174. See Coker, *supra* note 108.

175. *Holmsted v. Director of Public Prosecutions*, App. Cas. 588 (1946).

In contemporary society, patriarchal values have no more legitimate place in criminal law than they do in family law. Particularized inquiry, not patriarchal values, should determine whether there are grounds for mitigation of blame for a killing rage. A wife-victim may have asserted her own autonomous judgment, or she may have provoked her husband to a degree which mitigates his culpability. The blood of a Godfrey may be hot, but his wife may yet be as morally innocent of complicity in her own death as are the victims of cold-blooded killers. Society has in effect asked men to relinquish patriarchal conceptions of masculinity, at least in domestic life: Consistency and efficacy in the reform effort requires that our law not legitimate retaliation against spouses whose provocation can be seen only through a patriarchal lens.

Nor should diminished capacity mitigation be so liberally interpreted as to permit virtually any nonpredatory domestic murderer to avoid the full measure of culpability on the grounds that rejection triggered powerful emotions he could not control. The Florida Supreme Court, for example, refuses to assign premeditated nonpredatory domestic murder the highest grade of offense seriousness because such crimes are "mad acts prompted by wild emotions."¹⁷⁶ The Illinois Supreme Court held that because Carlson had suffered the constriction of his life due to two disabling heart attacks, Carlson was, therefore, impaired in his ability to endure peaceably the defection of his wife.¹⁷⁷ These courts should not be emulated. Patriarchal conceptions of masculine identity are constituent of a moral outlook which makes wifely defection hard or impossible to bear peaceably. The too ready ascription of "impairment" to domestic killers may result in a disguised reintroduction of the ancient permission to take revenge upon a wife who defies patriarchal norms.

The law should impose new standards of peaceful deportment rather than accept adherence to the old norms as mitigating. In analogous fashion, reformed rape laws impose new standards of sexual conduct on men who may find them alien to their traditional moral outlook. The laws of rape no longer allow, for example, a woman's consent to be inferred from her reputation for unchastity.¹⁷⁸ Being mired in sexual oldthink is not a defense to a charge of rape. Similarly, the wild and violent—and murderous—responses to rejection which are mitigating in the eyes of the Florida Supreme Court are readable as such only within a patriarchal moral framework. It is the work of the criminal law in this period of social transition to delegitimize and transcend this patriarchal moral framework.

176. *Santos*, 591 So. 2d at 163. See *supra* notes 87-101 and accompanying text, for discussion of the Florida exemption from capital punishment for domestic murder.

177. *Carlson*, 404 N.E.2d at 244.

178. So-called rape shield laws forbid reputation evidence about alleged victims' past sexual behavior (other than with the defendant), thereby blocking the ancient unchastity defense predicated on the syllogism: "The victim slept with Tom, she slept with Harry, and, therefore, she slept with the defendant." See *FED. R. EVID.* 412.

The moral culture that supported the justification of the domestic discount, of marital mitigation, is fading. Contemporary society officially recognizes sexual equality in marriage and in divorce and is liberal in allowing divorce. What was traditionally a universally accepted morality—property rights in wives—has become a profound affront to the newly recognized rights of women. Further, the remaining justificatory leg on which the extent of mitigation granted to domestic homicide now stands, the pain and anger suffered by the defied or abandoned spouse, cannot provide sufficient justification standing alone. What gave male anger justificatory force was its rootedness in rights; without these patriarchal rights it becomes harder to make out a case for sufficient provocation for mitigation of domestic homicide of any rank of offense severity.¹⁷⁹ It is especially hard if a court or jury does not slip into a narrowly male perspective, if attention is paid to the quality of the victim's actions and experiences. The doctrine of mitigation has traditionally required that the killer's reactions reflect those of the morality of the typical member of his society. In a world which repudiates traditional patriarchal rights in marriage, the homicidal rage of the defied or abandoned spouse loses its moral force.

What remains for both sexes when confronted with the loss of a spouse is, of course, primal suffering. But excessive psychologizing and individualized consideration of the suffering of denied domestic killers tends to allow men to retain by force and threat of force that which the equality of the sexes and the reform of marriage was designed to remove: Their right to control the women in their lives. It also continues to give a degree of sanction to male styles, deployment of force and threat of force, which the reforms undertaken presumably commit our society to combatting, at least in the domestic sphere. Finally, too great a rein for subjective analysis again creates a lack of parity between predatory and spousal homicides. Predators also have emotional lives, but the criminal law has been more resistant to folding the emotional life of predators into calculations of culpability and offense severity than it has with domestic crime.

179. The translation of moral argument into policy is too complex and difficult a matter to be done woodenly, especially since moral analysis does not automatically answer a large range of questions about efficacy in achieving the goals of criminal law. Getting the jurisprudence right is a necessary first step.