LEGAL STUDIES RESEARCH PAPER SERIES

Working Paper No. 06-11
February 19, 2007

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University of Colorado Law Review, v. 77, p. 101 (2006)

INTIMATE HOMICIDE: GENDER AND CRIME CONTROL, 1880–1920

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The received wisdom, among feminists and others, is that historically the criminal justice system tolerated male violence against women. This article dramatically revises feminist understanding of the legal history of public responses to intimate homicide by showing that, in both the eastern and the western United States, men accused of killing their intimates often received stern punishment, including the death penalty, whereas women charged with similar crimes were treated leniently. Although no formal "battered woman's defense" existed in the late 1800s and early 1900s, courts and juries implicitly recognized one—and even extended it to abandoned women who killed their unfaithful partners. In contrast, when men were accused of intimate murder, the provocation doctrine and other defenses were applied narrowly, and men were held to higher standards of self-control. Paternalistic efforts to curb male abuse of women did not go uncontested; indeed, competing norms contributed to a deplorable failure to prevent the occurrence and escalation of intimate violence. Nevertheless, the research presented here undercuts the common view that, in the late nineteenth and early twentieth centuries, a hegemonic gender ideology tolerant of extreme violence against women controlled public responses to intimate homicide.

INTRODUCTION

In New York City in 1892, a jury convicted John Osmond of first-degree murder for the death of his unfaithful wife.[1] He was executed in

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1. *See* People v. Osmond, 33 N.E. 739, 740 (N.Y. 1893) (describing alleged infidelity

the electric chair the following year.[2] By the time Osmond fired the fatal bullets at his wife and her lover, he had known of their affair for several months. His wife previously alleged in divorce papers that he had "beaten and bruised" her and "savagely bitten . . . her right breast."[3] The year before Osmond's trial, Pasqualina Robertiello shot her lover, Nicolo Pierro, to death in a New York City street because he got her pregnant and then refused to marry her.[4] In contrast to the *Osmond* case, the press criticized New York prosecutors for bringing Robertiello to trial,[5] and the jury acquitted her in the face of damning prosecution evidence.[6]

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and fatal shooting); Indictment Coversheet, People v. Osmond, Folder 4180, Box 454, N.Y. COUNTY DISTRICT ATT'Y INDICTMENT PAPERS, N.Y. Mun. Archives [hereinafter DA PAPERS] (1891) (recording that Osmond was convicted of first-degree murder on April 14, 1892). The New York Municipal Archives maintains an extensive collection of New York County District Attorney indictment papers, which often contain Police Court records, the Coroner's Inquisition, and the indictment, as well as miscellaneous affidavits and sometimes even a trial transcript. The coversheet of the indictment typically contains handwritten notes on the final disposition of the case. Copies of all cited material from the DA Papers collection are on file with the author.

2. *See Osmond Dead*, N.Y. DAILY NEWS, June 12, 1893, *microformed on* DISTRICT ATT'Y NEWSPAPER CLIPPING SCRAPBOOK (N.Y. Mun. Archives) [hereinafter DA SCRAPBOOK] at Roll 15 (reporting electrocution of Osmond at Sing-Sing Prison on June 12, 1893). The New York Municipal Archives houses a collection of newspaper scrapbooks compiled by the Office of the New York County District Attorney. The scrapbooks have been preserved on forty-nine rolls of microfilm. Because the scrapbooks do not always provide accurate citations for the clippings, the footnotes in this article can give only approximate dates and probable newspaper sources for some reports. For this reason, researchers using these footnotes are encouraged to rely on the microfilm roll numbers and the article titles. Copies of all cited news reports and editorials from the DA Scrapbooks are on file with the author.

3. Divorce Petition of Mary Osmond, People v. Osmond, Folder 4180, Box 454, DA PAPERS, *supra* note 1 (1891). Prior to the homicide, John and Mary Osmond lived in the home of a bachelor named John Burchell. Burchell took Mary on excursions, for which he paid, and John Osmond caught them in bed together. *See Osmond*, 33 N.E. at 740 (stating that heat-of-passion defense would have been inappropriate because evidence showed "long-acquired knowledge of his wife's improper relations with Burchell"). Osmond killed both his wife and her lover, but he was only indicted for his wife's murder. *See Osmond Guilty of Murder*, N.Y. DAILY TRIB., April 15, 1892, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 12. This result was entirely consistent with social norms and even statutory law in a few jurisdictions that exculpated men for killing their wives' paramours. *See infra* notes 224, 254 and accompanying text (discussing honor-killing doctrine).

4. *See* Indictment and Coroner's Inquisition, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891). The District Attorney's office erroneously indicted Pasqualina as "Pasqualina Lubertiello." *See* Indictment Coversheet, People v. Robertiello, *supra*. However, all other sources indicate that her surname was Robertiello. I will refer to her as "Robertiello" throughout this article. For information about the relationship between the killer and the deceased, see *Charged with Murder*, N.Y. TIMES, May 19, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 11.

5. *See, e.g.*, *A Good Square Look at New York's District Attorney*, PRESS, May 30, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 11.

6. *See* Indictment Coversheet, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891).

A similar disparity in the treatment of men and women who killed their spouses, lovers, or relatives occurred in Denver, Colorado in the late 1800s and early 1900s.[7] Male defendants were often convicted on serious charges. But juries, which by law were composed solely of men until the mid-twentieth century,[8] acquitted women from all social classes or found them guilty of lesser-included offenses, crediting their stories of physical abuse or dishonor. Based on close analysis of New York and Colorado intimate homicide cases, this article suggests that in such cases, lenient treatment of female defendants and harsher treatment of their male counterparts constituted a typical pattern in both the eastern and the western United States between 1880 and 1920. Both men and women faced murder charges. However, while prosecutorial zeal to convict male defendants accorded with public opinion, juries showed their aversion to the severe punishment of women, many of whom had been seduced, physically abused, or trapped in dire economic straits. Although acquittals and convictions for lesser-included offenses sometimes exemplified jury nullification, appellate courts also crafted rulings that reinforced ideals of protectiveness toward women.

This article thus calls into question prevalent views of the criminal justice system's response to intimate homicide. Nineteenth-century feminists assumed that juries routinely exonerated men of passion killings but proved reluctant to do so when women stood trial.[9] Similarly, in recent decades, feminist scholars have complained that the criminal law, and especially the heat-of-passion and self-defense doctrines, justify or excuse men's aggression.[10] A number of histories of wife-beating ex-

7. *Compare infra* text accompanying notes 97–100, 154–57, 171–79, tbl.2, and app. E (presenting data related to female defendants in Colorado) *with infra* text accompanying notes 221–23, 228, 256, 281–83, tbl.3, and app. F (presenting data related to male defendants in Colorado).

8. New York amended its laws to allow jury service by women in the late 1930s. *See* 1938 N.Y. LAWS 684; 1937 N.Y. LAWS 1171; *see also* Gerry v. Volger, 298 N.Y.S. 433, 436 (N.Y. App. Div. 1937) ("[P]rior to September 1, 1937, women were uniformly ineligible as jurors throughout the state."). In 1944, Colorado amended its constitution to provide that "the right of any person to serve on any jury shall not be denied or abridged on account of sex." COLO. CONST. art. 2, § 23 (amended 1944); 1945 Colo. Sess. Laws 424–25. Even when adopted, however, such provisions often proved illusory.

9. *See, e.g.*, Robert M. Ireland, *Frenzied and Fallen Females: Women and Sexual Dishonor in the Nineteenth-Century United States*, 3 J. WOMEN'S HIST. 95, 102 (1992) (describing nineteenth-century feminist view that unwritten law embodied a double standard that treated female avengers of sexual dishonor more harshly than male defendants accused of comparable crimes).

10. *See* CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 157, 163 (2000); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE 31–49 (1989); JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 192–94 (1992); CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 7 (2003); Marina Angel, *Criminal Law and Women: Giving the*

ist,[11] but there are few academic studies of the legal history of intimate homicide and, except for this article, no multi-state analyses of the topic that rigorously explore public responses to both men's and women's cases.[12] The relative lack of historical research on intimate homicide, as

Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles, 33 AM. CRIM. L. REV. 229, 325 (1996); Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/ Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 128–29 (1992). *See also* Laura E. Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN'S L.J. 53, 56 (1991) ("The substantive criminal law mirrors male homicide patterns and consequently discriminates against female criminal defendants. Unless a female criminal defendant commits a crime like a man, she may be stripped of substantive doctrine to mitigate or excuse her crime, unlike a male defendant who fits the paradigm on which the law was based."); Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1681 (1986) (examining sex-bias inherent in heat-of-passion defense "developed by male common-law judges, codified by male legislators, enforced by male police officers, and interpreted by male judges and juries").

11. Indeed, historians helped lay the groundwork for the view that American police and prosecutors have done little to prevent intimate violence and that the state has shown reluctance to reach behind the veil of family privacy to punish male perpetrators. *See* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880–1960 at 7, 20 (1988); ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 6 (1987); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117–18 (1996). *See generally* DAVID PETERSON DEL MAR, WHAT TROUBLE I HAVE SEEN: A HISTORY OF VIOLENCE AGAINST WIVES (1996) (analyzing history of wife beating in Oregon in late nineteenth and early twentieth centuries); OVER THE THRESHOLD: INTIMATE VIOLENCE IN EARLY AMERICA (Christine Daniels & Michael V. Kennedy eds., 1999) [hereinafter OVER THE THRESHOLD] (offering collection of fourteen essays that present case studies of intimate violence prior to 1865).

12. The most complete historical treatment of intimate homicide that I have encountered deals exclusively with England. *See generally* MARTIN J. WIENER, MEN OF BLOOD: VIOLENCE, MANLINESS AND CRIMINAL JUSTICE IN VICTORIAN ENGLAND (2004). Several scholars have written about individual cases in the United States. *See generally, e.g.*, Cara W. Robertson, *Representing "Miss Lizzie": Cultural Convictions in the Trial of Lizzie Borden*, 8 YALE J.L. & HUMAN. 351 (1996) (analyzing nineteenth-century trial of Lizzie Borden, who was charged with killing her father and stepmother). Other researchers have limited their inquiries to a single city or region. *See generally, e.g.*, Jeffrey S. Adler, *"My Mother-in-Law is to Blame, But I'll Walk on Her Neck Yet": Homicide in Late Nineteenth-Century Chicago*, 31 J. SOC. HIST. 253 (1997) (discussing nature and incidence of murders committed by men in Chicago). Finally, the presumption that throughout history, women received harsh punishment for challenging patriarchy has been undercut by a few earlier studies of female murderers, which show that juries often acquitted them. *See generally* ANN JONES, WOMEN WHO KILL (1980) (presenting case studies of women suspected of murder, including intimate murder); *see also* Jeffrey S. Adler, *"I Loved Joe, But I Had to Shoot Him": Homicide by Women in Turn-of-the-Century Chicago*, 92 J. CRIM. L. & CRIMINOLOGY 867, 883–884 (2002) (stating that Chicago juries applied "new unwritten law" to acquit women who killed abusive husbands); *cf.* Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 874–78 (1990) (documenting societal aversion to executing female criminals and explaining such aversion in terms of chivalry or gender bias). Still, to my knowledge, there are no comprehensive treatments of the legal history of public responses to intimate homicide in the United States—a deficiency that this article seeks to remedy.

opposed to non-lethal wife-beating, has generated incomplete and even erroneous views of the way gender norms affected public responses to violence among lovers, spouses, and other family members. The hasty assumption that, in the past, female defendants received severe punishments for avenging infidelity or defending themselves against abuse, whereas men were given a virtual license to kill, remains common.[13]

Challenging this orthodoxy without rejecting feminist aims, this article will suggest that although no formal "battered woman's defense"[14] existed in the late nineteenth and early twentieth centuries, courts and juries implicitly recognized one and even extended it to abandoned women who killed their unfaithful partners. Female defendants charged with murdering their children could also expect mercy, especially if the evidence showed that an abusive male drove them to violence. In contrast, men who killed intimates, particularly those who killed to avenge separation or suspected infidelity, had a more difficult time obtaining mitigation due to rigorous scrutiny of their provocation or insanity claims. This article goes beyond a simple explanation of the salient disparities in terms of chivalry or paternalism toward female offenders.[15] Instead, it contends that verdicts in intimate murder cases in the late 1800s and early 1900s not only policed ideals of civilized masculinity, but often tacitly recognized a factor similar to one emphasized by domestic-violence researchers today—past abuse that might lead a woman to kill

13. *See* FORELL & MATTHEWS, *supra* note 10, at 157–58, 197–98; LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 221 (1993); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 113–114 (2000); LENORE E. WALKER, TERRIFYING LOVE 236–37 (1989); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 121–23, 139–40 (1985); Ireland, *supra* note 9, at 95. *See also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 165–66 (1987) (implying that Blackstone's commentary trivializing wife-killing but equating husband-killing to treason continued to be influential in nineteenth-century America). *Cf.* Laura L. Crites, *Wife Abuse: The Judicial Record*, *in* WOMEN, THE COURTS AND EQUALITY 39, 45 (Laura L. Crites & Winifred L. Hepperle eds., 1987) ("While judges seem unwilling to view wife abuse as a serious crime, they appear to exercise little leniency toward women who kill their husbands in self-defense or after years of abuse."). Even Cynthia Lee's otherwise excellent book on the modern heat-of-passion defense seems to assume that, in the past, female defendants were usually convicted of murdering their partners. *See* LEE, *supra* note 10, at 22–23 ("The law expected a dutiful wife to accept her philandering husband's misbehavior. If a wife killed her unfaithful husband or his lover she was a murderer.").

14. The battered woman's defense allows consideration of violent incidents and expert testimony on the battered woman's syndrome in cases involving women who killed their abusers. For a discussion of this defense under modern criminal law, see *infra* text accompanying notes 200–03.

15. *Cf.* Frances Bernat, *Gender and Law*, *in* WOMEN, CRIME, AND CRIMINAL JUSTICE: ORIGINAL FEMINIST READINGS 212, 216–18 (Claire Renzetti & Lynne Goodstein eds., 2001) (mentioning criminological theories that suggest that judges treat women chivalrously at sentencing); Meda Chesney-Lind, *Women and Crime: The Female Offender*, 12 SIGNS 78, 88 (1986) (same).

her loved ones.[16] Hence, the historical analysis presented here indirectly allows for reflection on two modern developments in the criminal law: the battered woman's syndrome defense and the extreme emotional disturbance ("EED") doctrine.[17]

Part I of this article demonstrates that, from 1880 to 1920, juries and occasionally courts considered an expanded time frame surrounding lethal violence in women's cases, but not in men's, acknowledging that past abuse by a male victim might justify or excuse homicide committed by a woman. Gradually escalating anger or terror operated to spare female defendants without offering a reliable defense for men. These disparate results were underpinned by aspects of civility condemning seduction, abandonment, and extreme violence toward women that endured as Victorianism shifted to a more strenuous masculinity at the turn of the century.

Rather than revealing a monolithic gender ideology, intimate murder cases in New York and Colorado between 1880 and 1920 show that such killings implicated a struggle to define American manhood. In this struggle, the jury, the press, and even the judiciary urged male self-restraint and expressed sympathy for women's suffering at the hands of physically or emotionally abusive men. The cultural values that helped spare women charged with homicide underestimated female rationality, resourcefulness, and autonomy. Hence, defense strategies based on such values offered female defendants a double-edged sword. In addition to condemning the behavior of the men who abused or abandoned them, female defendants often perpetuated stereotypes about their own weakness and irrationality to secure acquittal.

Part II addresses the question of why the criminal justice system responded harshly to intimate killings perpetrated by men but failed to prevent these brutal murders from occurring. This article concurs with prevalent feminist views that police and prosecutors failed to control intimate violence and that the lack of deterrent policies or socioeconomic

16. *See infra* text accompanying notes 106–09.

17. The EED doctrine frees provocation arguments from traditional common-law categories and eliminates cooling-time limitations in a minority of modern jurisdictions, including New York. The Model Penal Code and several states refer to "extreme mental or emotional disturbance." MODEL PENAL CODE § 210.3(1)(b) (1962). However, for the sake of brevity, I use the shorter label throughout this article. For further discussion of the EED doctrine, see *infra* notes 231, 234, 262 and accompanying text. EED in the domestic context also plays a role in capital sentencing today, allowing men who commit separation murders to escape the death penalty. *See* Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the post*-Furman *Era*, 49 SMU L. REV. 1507, 1521, 1528 (1996).

support for abuse victims placed such victims in an untenable position.[18] However, the persistence of homicide in the home and in sexual relationships, despite laws against wife-beating and the killing of intimates, shows dissonance, rather than uniformity, in cultural attitudes shaping male behavior. As Part II suggests, the ineptitude of the state in curbing intimate violence was attributable to this dissonance, as well as to the deficiency and corruption of early public law enforcement. It was not the product of a hegemonic gender ideology that endorsed or even accepted male brutality toward women.

I. THE OUTCOME OF INTIMATE HOMICIDE CASES IN NEW YORK AND COLORADO

A. Definitions and Sources

In this article, the term "intimate violence" refers to violence against a family member, a spouse, or a person who is (or has been involved) in a romantic or sexual relationship with the defendant. Family members include both in-laws and blood relations, such as children and siblings. A romantic or sexual relationship is a non-commercial relationship that at least initially involved the consent of both parties. This definition excludes sex between prostitutes and johns and some stalking cases, but it is broader than the term "domestic violence," which often refers to brutality between spouses only.[19] The term "intimate homicide" describes the killing of a person connected with the defendant by any of the relationships mentioned above. Violence between lovers or spouses often embodies different power dynamics than that between other family members; I nevertheless cast a wide net in researching this article to see what patterns might emerge and to provide contrast to the marital or romantic partner cases. However, even though I defined intimate homicide broadly, the overwhelming majority of the cases that I found involved opposite-sex spouses or lovers, and the murder of such persons predominated among the intimate homicide cases that led to death sentences or life imprisonment for men.[20]

18. *See supra* note 11. *See also* SCHNEIDER, *supra* note 13, at 18 (discussing untenable choice faced by abused women due to refusal of state to intervene in violent households, aside from sporadically punishing perpetrators).

19. Christine Daniels, *Intimate Violence, Now and Then*, *in* OVER THE THRESHOLD, *supra* note 11, at 4–5. Unlike Daniels, I have not included assaults on servants.

20. *See infra* text accompanying notes 93–94, 97 and apps. A–F (noting high numbers of homicides involving spouses and lovers among total intimate homicides in New York and Colorado). In addition to finding that cases involving spouses or lovers predominated over other types of intimate homicides that police and prosecutors pursued, I did not locate any

The blood of ordinary people killed in the intimate context stains the pages of appellate opinions, trial court records, indictments, coroner's inquisitions, and newspapers in New York and Colorado in the late nineteenth and early twentieth centuries. This article attempts not only to tell some of these victims' stories, but also to analyze data revealing how intimate violence was viewed and how the fledgling public criminal justice system[21] responded to the problem. This article relies in part on case files preserved by New York County prosecutors, whose jurisdiction was coextensive with New York City for most of the nineteenth century, and emphasizes a very complete and searchable sub-set of these records for the years 1879 to 1893.[22] Where feasible, I have supplemented the prosecutors' files with information from published appellate opinions and newspaper reports covering the entire forty-year period from 1880 to 1920. For the sake of convenience, the terms "New York County" and "New York City" are used interchangeably throughout the article, even though this nomenclature sacrifices some historical accuracy. The Denver data comes from the scrapbooks of police detective Sam Howe, who kept a record of Denver homicides prior to 1921 in a special book.[23] Most of Howe's cases can also be found in the records of the Denver and Arapahoe County District Courts,[24] but some were dismissed before in-

cases that clearly involved gay or lesbian relationships. Legal scholars belatedly have devoted attention to the problem of intimate violence in homosexual communities. *See, e.g.*, SCHNEIDER, *supra* note 13, at 66 (stating that definition of domestic violence must be expanded to include battering in gay and lesbian relationships); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 49–53 (describing how battered women's movement has excluded lesbians and failed to address problems of lesbian battering); *see generally* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986) (providing accounts of lesbian battering incidents). However, due to a lack of data, this article only considers non-marital heterosexual relationships and family bonds based on marriage or blood.

21. For details on the late advent of public law enforcement in both the eastern and western United States, see *infra* note 312 and text accompanying notes 312–19, 349–63.

22. These records are housed in the New York Municipal Archives. *See supra* note 1 (describing the DA PAPERS collection). New York County included only Manhattan Island prior to 1898; after that date, it encompassed the other boroughs as well. *See* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1313 (2002) [hereinafter Ramsey, *Discretionary Power*].

23. Sam Howe served as a detective in Denver from 1874 to 1921. The newspaper clipping scrapbooks that he maintained, describing many crimes committed in Denver between 1883 and 1920, are located at the Stephen H. Hart Library, which is run by the Colorado Historical Society. The Sam Howe Murder Book—a separate volume that preserves the detective's notations, along with a few press articles, about Denver homicides prior to 1921—is available on microfilm at the Stephen H. Hart Library. *See* SAM HOWE MURDER BOOK (Stephen H. Hart Library, Colo. Hist. Soc'y) [hereinafter SHMB]. Copies of all cited materials from the SHMB are on file with the author.

24. The Colorado State Archives in Denver houses the criminal case records of the Arapahoe County and Denver County District Courts for the period encompassed by this arti-

dictment. Impeccable data on American executions compiled by M. Watt Espy[25] and Michael Radelet[26] facilitates a discussion of capital punishment in intimate murder cases. Combined with published appellate decisions from 1880 to 1920, this death-penalty material completes the picture by yielding statewide impressions for both New York and Colorado.

This rich collection of sources reveals that, although police and prosecutors in the east and the west responded erratically to non-lethal intimate assaults, they approached homicide cases with vigor by pursuing severe charges against intimate killers of both sexes. Such a response primarily had punitive, rather than preventive effects. Moreover, anti-violence norms were not equally applied at trial. This article will demonstrate that intimate homicide cases in New York City and Denver shared common features of stern charging and gender-based jury leniency toward female defendants. Furthermore, while the cases often illuminated tensions between bench and jury box, some decisions by Colorado and New York appellate courts also underscored values that condemned men (whether defendants or decedents) for brutalizing and dishonoring women.

In short, a comparison between the two states and their urban centers will reveal their remarkably similar treatment of intimate homicide. Despite vast differences in population and culture, New York and Colorado both resolved these cases in a gender-biased way that benefited female defendants. Nevertheless, the two locales did show regional variation in one phase of the legal process—sentencing. Whereas surprisingly large numbers of men convicted of murdering their intimates died on the gallows or the electric chair in New York, such convicts in Colorado

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cle. Intimate homicide cases were found, using the Sam Howe Murder Book as the primary source of defendants' names. These names could then be traced to criminal cases located among the Arapahoe County and Denver County District Court records. Quantitative portions of this article only count Sam Howe cases for which a disposition could be ascertained from the court records, newspapers, or some other source. In addition to excluding cases with unclear outcomes, this article also omits the murder-suicides that Sam Howe recorded.

Prior to 1902, crimes committed in Denver were prosecuted in the Arapahoe County District Court. In 1902, the City of Denver became part of Denver County. *See* http://www.colorado.gov/dpa/doit/archives/arcgov (last visited Sept. 21, 2004). Throughout this article, I usually refer to Colorado's urban center as "Denver," rather than using the unwieldy and changing county designations.

25. *See generally* M. WATT ESPY & JOHN ORTIZ SMYLKA, EXECUTIONS IN THE UNITED STATES, 1608–1991: THE ESPY FILE (Inter-University Consortium for Pol. & Soc. Res. ed., 1994) [hereinafter ESPY & SMYLKA] (database on capital punishment containing such variables as defendant's name, occupation, race, and execution date).

26. *See generally* Michael L. Radelet, *Capital Punishment in Colorado: 1859–1972*, 74 U. COLO. L. REV. 885 (2003) (describing and analyzing history of death penalty in Colorado and providing appendix of capital cases resulting in execution between 1859 and 1972).

were almost always sentenced to a prison term.[27] Part I(E) will suggest why this was so.

B. Prosecutorial Charging Decisions: A Preference for Severity

Prosecutors charged both John Osmond and Pasqualina Robertiello, the Italian seamstress who shot her faithless lover,[28] with first-degree murder.[29] Indeed, the District Attorney was so convinced of his chances for success in the *Osmond* case and of the inevitability of public outrage if he did not seek the death penalty that he refused to allow Osmond to plead guilty to the lesser offense of first-degree manslaughter.[30] Such charging decisions represented the rule, not the exception in intimate homicide cases.

Relatively few individuals were charged with manslaughter or second-degree murder. For example, cases from the 1879-1893 sub-sample reveal that New York County District Attorneys during this time period indicted only 208 defendants for manslaughter and thirty-one for second-degree murder, compared to 405 first-degree murder indictments. Of the 208 manslaughter indictments, the vast majority involved construction and railroad mishaps,[31] saloon fights in which the aggressor's violence

27. *See infra* tbls.4–5 and text accompanying notes 298–99.

28. *See* Affidavit of Pasqualina Robertiello, Coroner's Inquisition, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891) (noting defendant's occupation).

29. *See* Indictment, People v. Osmond, Folder 4180, Box 454, DA PAPERS, *supra* note 1 (1891); Indictment, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891).

30. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1365–66. Evidence from the New York County District Attorney's files strongly suggests that prosecutors more often accepted pleas to lesser offenses from men charged with murdering other men than they did from male defendants who allegedly killed their intimates. The District Attorney's office was especially likely to plea bargain with men whose ethnicity, gang membership, or political connections gave them a modicum of influence. *See id.* at 1383–90.

31. *See, e.g.*, Indictment, People v. Rood, Folder 929, Box 84, DA PAPERS, *supra* note 1 (1882) (recording that train conductor George Rood was indicted but acquitted of manslaughter in case involving fatal train crash); Indictment, People v. Indelli, Folder 4912, Box 539, DA PAPERS, *supra* note 1 (1893) (indicting two defendants for manslaughter because they "willfully and recklessly, with gross and culpable negligence" blasted rock through wall of Mary Posey's room, killing her).

was partially justified,[32] illegal abortions in which the pregnant woman died,[33] and accidents between horse-drawn vehicles and pedestrians.[34]

Intimate homicides constitute but a small fraction—about ten percent—of the manslaughter indictments, and their numbers only rise from nineteen to twenty-one cases if infanticides are counted.[35] In most of the intimate manslaughter cases, a male defendant allegedly killed his female spouse or lover.[36] Only one manslaughter indictment involved a woman who lethally assaulted an intimate over the age of one year.[37] Prosecutors charged intimate killers with second-degree murder even less frequently than manslaughter. In the 1879-1893 sub-sample, only two of thirty-one second-degree murder indictments targeted a defendant who allegedly killed an intimate. In both of these cases, the defendant was a

32. For example, in 1886, bartender Thomas Thompson was acquitted of manslaughter for killing a disorderly patron, Morris Slattery, with a sword. *See* Indictment Coversheet, People v. Thompson, Folder 2171, Box 221, DA PAPERS, *supra* note 1 (1886) (noting defendant's acquittal); Affidavit of Thomas Thompson, Coroner's Inquisition, People v. Thompson, *supra* (stating that defendant was barkeeper by trade); Affidavits of Francis Doody, Mathew O'Connor, and William Richardson, People v. Thompson, *supra* (describing details of lethal incident).

33. *See, e.g.*, Indictment, People v. Chase, Folder 4687, Box 514, DA PAPERS, *supra* note 1 (1893) (recording that Sarah Chase was indicted and convicted of first-degree manslaughter for causing death of Margaret Manzoni during illegal attempt to procure miscarriage of fetus).

34. *See, e.g.*, Indictment, People v. Josephs, Folder 886, Box 80, DA PAPERS, *supra* note 1 (1882) (recording that Samuel Josephs was indicted but acquitted of manslaughter for running over Joseph O'Brien with horse-drawn wagon). Careening carriages and wagons continued to trigger angry newspaper editorials despite the arrest and criminal charging of many "rough-shod drivers." *Our Streets Full of Peril*, N.Y. DAILY TRIB., March 25, 1888, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 5.

35. I have not included infanticides in my quantitative data for this article because, in an era before reliable birth-control or legal, affordable abortions, the killing of children under the age of one year often served as a brutal means for desperately poor women to limit family size. However, the murders of children over the age of one year *have* been counted. My decision accords with the research practices of other scholars studying homicide in the nineteenth century. *See* ROGER LANE, VIOLENT DEATH IN THE CITY: SUICIDE, ACCIDENT, AND MURDER IN NINETEENTH-CENTURY PHILADELPHIA 100–01 (Ohio State Univ. Press 1999) [hereinafter LANE, VIOLENT DEATH IN THE CITY]; ERIC MONKKONEN, MURDER IN NEW YORK CITY 69 (2001).

36. Fourteen of the nineteen manslaughter indictments returned against intimate killers between 1879 and 1893 involved the death of a spouse or lover. The victim in thirteen of these cases was female. *See infra* app. A.

37. *See* Indictment, People v. Quinquinet, Folder 1047, Box 97, DA PAPERS, *supra* note 1 (1883) (charging defendant with first-degree manslaughter of Desire Houvet and containing notes indicating that defendant was acquitted); Affidavit of Detective Max F. Schmittburger, Coroner's Inquisition, People v. Quinquinet, *supra* (stating that defendant wanted to end intimate relations with her lover, Houvet, because her husband learned of illicit affair, but that Houvet grabbed and insulted her); *Done in Self-Defence*, JOURNAL, May 1, 1883, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 1 (reporting that Quinquinet was acquitted because she killed illicit lover in self-defense).

drunken, working-class man who fatally stabbed a male relative.[38] Thus, the District Attorney's office rarely chose either second-degree murder or manslaughter as a milder, non-capital charge for a female defendant. By contrast, we will encounter a relatively large number of first-degree murder cases involving women who killed; the vast majority of these killings were of male spouses or lovers.[39]

Under New York's criminal sentencing regime from 1880 to 1920, the prosecutorial preference for murder indictments preserved the possibility of very severe penalties for individuals who committed intimate homicide. New York statutes provided for two degrees of murder.[40] First-degree murder carried a mandatory death sentence throughout the period discussed in this article.[41] In the 1880s and 1890s, life imprisonment was the required sentence for second-degree murder, which covered intentional but not premeditated or deliberate killings.[42] By 1908, the penalty for this crime had been changed to a prison sentence of no fewer than twenty years and no more than the offender's natural life.[43] In contrast, penalties for lesser types of homicide ranged from a one-thousand-dollar fine to as many as twenty years in prison.[44]

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38. In 1884, fish-seller Julius Hart got into a drunken quarrel with his brother and stabbed him to death with a fish knife. *See* Indictment, People v. Hart, Folder 1533, Box 149, DA PAPERS, *supra* note 1 (1884) (recording that defendant was indicted and tried on second-degree murder charges but convicted of first-degree manslaughter); *Stabbed by his Brother*, N.Y. TIMES, Aug. 23, 1884, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 1A (reporting details of homicide). In the second case, Thomas Dunphy killed his brother-in-law, Thomas Murphy, by breaking a glass pitcher over his head and cutting him with one of the shards. *See* Indictment, People v. Dunphy, Folder 1859, Box 184, DA PAPERS, *supra* note 1 (1885) (recording second-degree murder indictment and describing manner of killing); *A Murderer at Twenty*, N.Y. HERALD, July 22, 1885, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 2 (noting relationship between defendant and victim).

39. *See infra* text accompanying notes 93–96 and app. B. For Colorado murder cases involving female defendants, see *infra* text accompanying notes 97–100 and app. E.

40. In New York, first-degree murder encompassed killings "from a deliberate and premeditated design"; homicides evincing a "depraved mind, regardless of human life"; and killings perpetrated during the commission of a felony. *See* N.Y. PENAL LAW ch. 41, art. 94, §§ 1044, 1046 (Cahill 1923); N.Y. PENAL CODE §§ 183–184 (Parker 1908) (1881 N.Y. LAWS ch. 676, *as amended by* 1882–1908 N.Y. LAWS); N.Y. REV. STAT. pt. 4., ch. 1, tit. 1, § 5 (Throop 1882).

41. *See* N.Y. PENAL LAW ch. 41, art. 94, § 1045 (Cahill 1923); N.Y. PENAL CODE § 186 (Parker 1908) (1881 N.Y. LAWS ch. 676, *as amended by* 1882–1908 N.Y. LAWS); N.Y. REV. STAT. pt. 4., ch. 1, tit. 1, § 1, ¶ 2 (Throop 1882).

42. *See* N.Y. REV. STAT. part 4, ch. 1, tit. 1, § 5 (Throop 1882); *see also* N.Y. CODE CRIM. PROC., § 187 (Parker 1905) (1881 N.Y. LAWS, ch. 676, *as amended by* 1882–1905 N.Y. Laws).

43. *See* N.Y. PENAL CODE § 187 (Parker 1908) (1881 N.Y. LAWS ch. 676, *as amended by* 1907 N.Y. LAWS, ch. 738).

44. *See* N.Y. PENAL LAW ch. 41, art. 94, §§ 1051, 1053 (Cahill 1923) (providing penalties for manslaughter); N.Y. PENAL CODE, §§192, 202 (Parker 1908) (1881 N.Y. LAWS, *as amended by* 1892 N.Y. LAWS ch. 662) (same); N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, §§

Colorado's sentencing laws were not quite as draconian. Nonetheless, with the exception of a four-year period during which the death penalty was abolished, murder charges still had the potential to result in capital punishment in Colorado.[45] Whereas a murder defendant might face legal execution or a long prison term, the two forms of manslaughter (voluntary and involuntary) carried much lighter penalties.[46] The District Attorney's office usually pursued tough charges in Denver between 1880 and 1920, where at least sixty-nine out of seventy-five intimate homicide cases gleaned from detective Sam Howe's scrapbook and other sources resulted in the filing of an information or indictment for "murder," "murder in the first degree," or "murder in the second degree."[47]

20–21 (Throop 1882) (same). In the early 1880s, the four degrees of manslaughter included both inadvertent killings and killings committed in the heat of passion. *See* N.Y. REV. STAT., pt. 4, ch. 1, tit. 2, art. 1, §§ 6–19 (Throop 1882). In 1887, the definitions of first- and second-degree manslaughter were altered so that the first-degree crime now encompassed heat-of-passion killings done in a cruel or unusual manner or by a dangerous weapon; second-degree manslaughter included killings done "[i]n the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual;" and the other two degrees of manslaughter were eliminated. *See* N.Y. PENAL CODE, §§ 189, 193 (Parker 1908) (1881 N.Y. LAWS ch. 676, *as amended by* 1887 N.Y. LAWS ch. 23). Prosecutors sometimes charged defendants under the umbrella term "manslaughter," rather than specifying the degree. *See, e.g.*, People v. Caporella, Folder 648, Box 57, DA PAPERS, *supra* note 1 (1882).

45. Penalties for first-degree murder in Colorado fluctuated during the four decades discussed in this article from a mandatory death penalty in 1883, to a four-year period in which the state abolished capital punishment, and, finally, to a choice on the part of the jury between death and life imprisonment. For the mandatory death penalty provision, *see* COLO. GEN. STAT., ch. 25, div. 4, § 709 (1883). For the repeal of the death penalty in 1897, *see* 1897 Colo. Sess. Laws 135. The death penalty was restored in Colorado in 1901. *See* 1901 Colo. Sess. Laws 154. Colorado statutes divided murder into two degrees, specifying similar elements to those that appeared in the New York murder statute. The statutory provisions for first-degree murder remained unchanged, with the exception of the penalty, from 1883 to 1921. *See* COLO. GEN. STAT., ch. 25, div. 4, §§ 707–709 (1883); COLO. REV. STAT. §§ 35–3–1622 to 1624 (1908); COLO. COMP. LAWS, ch. 153, div. 4, §§ 6663–6665 (1921).

46. Colorado statutes provided for voluntary manslaughter, which was a heat-of-passion killing arising from provocation, and involuntary manslaughter, which encompassed unintentional homicides. *See* COLO. GEN. STAT., ch. 25, div. 4, §§ 710–713 (1883); COLO. REV. STAT. §§ 35–3–1625 to 1628 (1908); COLO. COMP. LAWS, ch. 153, div. 4, §§ 6666–6669 (1921). Punishments for manslaughter ranged from between one and eight years in the penitentiary for voluntary manslaughter to a term not exceeding one year in county jail for involuntary manslaughter. These penalty provisions remained static over time. *See* COLO. GEN. STAT., ch. 25, div. 4, § 714 (1883); COLO. REV. STAT. § 35–3–1629 (1908); COLO. COMP. LAWS, ch. 153, div. 4, § 6670 (1921).

47. *See infra* app. E, F. Both men's and women's cases illustrate the tendency of Denver prosecutors to use language in the information that made a first-degree murder conviction possible, but simply to designate the crime as "murder" on the coversheet. *See, e.g.*, Information (filed Sept. 19, 1902), People v. Edwards, No. 15649 (Arapahoe County Dist. Ct. 1902) (charging male defendant with murder); Information (filed Sept. 10, 1913), People v. Pumphrey, No. 21565 (Denver County Dist. Ct. 1913) (charging female defendant with murder). This practice seems to have been followed in the nineteenth century, as well as the early twentieth. *See, e.g.*, Information (filed July 30, 1892), People v. Butler, No. 8277 (Arapahoe

Prosecutors seem to have reserved the manslaughter category for cases in which they anticipated legal problems in proving intent to kill. For example, twelve out of nineteen manslaughter indictments in New York County from 1879 to 1893 targeted defendants who had beaten or kicked their victims to death, whereas none involved the use of a gun.[48] The prevalence of weaponless homicides among intimate manslaughter indictments likely stems from the fact that a jury could infer intent to kill from the use of a firearm,[49] whereas when the defendant pummeled an intimate with his fists or feet, he might make a convincing argument that corporal punishment inadvertently turned into homicide. Problems of proof in fatal beating cases were exacerbated when the only witness to the assault was a small, distraught child, such as little Norah Whitelaw, who testified that her father beat her mother with a pair of shoes,[50] but could not remember the precise date.[51]

Moreover, as Roger Lane notes, juries might regard victims who died from beatings or kickings as losers in a Darwinian lottery—weak or degenerate individuals who succumbed when a stronger person would have survived.[52] In several cases, medical experts found that the victim suffered a pre-existing condition that was the most direct cause of her death. One decedent, Julia Weldon, had a brain tumor.[53] Similarly, in *People v. Whitelaw*, the prosecutor concluded that "the cerebral haemmorrhage [sic] which was the cause of death was not produced or induced by violence but was the result of a diseased condition of the brain."[54] Some evidence of past beatings existed in these cases;[55] how-

County Dist. Ct. 1892). It was also prevalent in other cities, including Philadelphia. *See* LANE, VIOLENT DEATH IN THE CITY, *supra* note 35, at 66.

48. *See infra* app. A.

49. *See* People v. Rogers, 13 Abb. Pr. 370, 371 (n.s.) (N.Y. Sup. Ct. 1872) ("The inference of intent to kill is to be drawn by the jury from the facts of the case, and may arise from the use of a deadly weapon, directed at a vital part of the body."). About half of all intimate killers executed in New York County between 1880 and 1920 shot their victims with a gun. Another ten cases involved killings committed with a knife, hatchet, or razor. Only one intimate killer executed in New York City during this time period fatally beat the decedent. *See infra* app. C. Data on New York state executions reveals a similar pattern. *See infra* app. D.

50. *See* Testimony of Norah Whitelaw, Coroner's Inquisition at 23–27, People v. Whitelaw, Folder 4049, Box 439, DA PAPERS, *supra* note 1 (1891).

51. *See* Indictment Coversheet, People v. Whitelaw, Folder 4049, Box 439, DA PAPERS, *supra* note 1 (1891) (containing Assistant District Attorney's notation that "[t]he only witness to the alleged assault is the daughter of defendant and deceased, a little girl scarcely old enough or competent to testify and she is unable to the fix the date").

52. *See* LANE, VIOLENT DEATH IN THE CITY, *supra* note 35, at 66.

53. *See* Coroner's Inquisition, People v. Weldon, Folder 217, Box 17, DA PAPERS, *supra* note 1 (1880).

54. Indictment Coversheet, People v. Whitelaw, Folder 4049, Box 439, DA PAPERS, *supra* note 1 (1891).

ever, the District Attorney's office ultimately decided to discharge both defendants on the ground that causation could not be proved.[56]

Many intimate homicides occurred in hard-drinking families in which the victim habitually consumed liquor. In such cases, alcohol-related problems of the liver and kidneys often loomed large in the coroner's analysis.[57] Autopsies blaming the victim's death on her intemperance reflected the Victorian tendency to link health with morality and to appoint doctors as "moral monitors" of their patients' behavior.[58] Such determinations did not go uncontested. For example, in one Colorado case, a newspaper criticized Denver doctors for attributing a young woman's "foul murder" to alcohol-related Bright's disease despite evidence that her lover had kicked her to death.[59] Yet, faced with an au-

55. For instance, Julia Weldon's son stated, "The prisoner was always abusing my mother, knocking her about and kicking her." Unsigned Statement of George Heubich, Notes on Facts, People v. Weldon, Folder 217, Box 17, DA PAPERS, *supra* note 1 (1880). *See also* Affidavit of Alice Murphy, Coroner's Inquisition, People v. Weldon, *supra* (reporting that family friend had seen Julia Weldon with black eyes and lump on her head, which she (Julia Weldon) attributed to beatings from Thomas Weldon). In the *Whitelaw* case, the victim's sister, Norah McCarthy, indicated that, on various occasions, she had witnessed Thomas Whitelaw attack his wife with a razor, a broomstick, and his feet. *See* Notes on Interview with Norah McCarthy, People v. Whitelaw, Folder 4049, Box 439, DA PAPERS, *supra* note 1 (1891).

56. *See* Indictment Coversheet, People v. Weldon, Folder 217, Box 17, DA PAPERS, *supra* note 1 (1880) ("The cause of death of the [deceased] can't be traced to the agency of the prisoner. I think he may be discharged on his own recognizance."); Indictment Coversheet, People v. Whitelaw, Folder 4049, Box 439, DA PAPERS, *supra* note 1 (1891) ("[S]uch violence as is alleged to have been inflicted upon the deceased on March 13th cannot be considered as having accelerated her death. I therefore recommend the dismissal of the indictment herein.").

57. *See, e.g.*, Coroner's Inquisition, People v. Cornetta, Folder 153, Box 12, DA PAPERS, *supra* note 1 (1880) (stating that victim's "death was accelerated by her habits of intemperance"); People v. Stewart, Folder 761, Box 68, DA PAPERS, *supra* note 1 (1882) (stating that victim's death was "accelerated by the use of intoxicating liquors"). For a more detailed analysis of two additional cases involving alcoholic victims, see People v. Whittel, Folder 3989, Box 432, DA PAPERS, *supra* note 1 (1891), and People v. McLaughlin, Folder 3333, Box 353, DA PAPERS, *supra* note 1 (1889) and text accompanying notes 65, 337–38, 348.

58. PETER N. STEARNS, BATTLEGROUND OF DESIRE: THE STRUGGLE FOR SELF-CONTROL IN MODERN AMERICA 60–61 (1999).

59. SHMB, *supra* note 23, at No. 760 (preserving newspaper article, *Shame on Denver's Chivalry to Women*, GRAND JUNCTION SENTINEL, June 2, 1911). The newspaper opined:

> It was a foul murder, a devilish deed, kicking to death this unprotected girl who fell to the wiles of the bartender [Mike] Whalen and who repaid her love and devotion by kicking her to death. It matters not who the physicians are who rendered such a shameful verdict, let them be held up to the contempt of the people in their effort to shield Whalen, for, if ever a man committed foul and brutal murder upon an innocent young woman, this man Whalen did on the night of April 27 [1911], practically kicking her to death, as she remained unconscious from the results of the booting he gave her for thirty-two hours.

topsy that did not clearly link the victim's death to the defendant's actions, prosecutors often refused to bring murder charges[60] and sometimes even recommended dismissing the manslaughter indictments that they obtained.

In *People v. McLaughlin*, for instance, the victim's alcohol-related maladies, combined with her failure to perform her duties as wife and mother, led to the dismissal of manslaughter charges against her husband.[61] Witnesses testified that Bernard McLaughlin pushed his wife Mary out of the apartment and dragged her across the yard.[62] But Assistant District Attorney Vernon Davis noted on the indictment coversheet: "It cannot be made to appear that defendant inflicted the injuries from which she died."[63] He further implied that Bernard's good character and his wife's drunken neglect of their four children posed insuperable hurdles to prosecution.[64] A woman like Mary McLaughlin made an unsympathetic victim because she monstrously inverted the nineteenth-century image of the wife as "guardian angel"—a pure, nurturing pillar of moral strength upon whom a husband and his offspring could depend.[65]

Id. Interestingly, Roger Lane notes that Bright's Disease can be caused by either physical trauma or alcohol abuse. *See* LANE, VIOLENT DEATH IN THE CITY, *supra* note 35, at 57.

60. In *People v. Whittel*, the District Attorney's office charged George Whittel with manslaughter, rather than with the first-degree murder of his wife, Catherine, whom he beat so badly that he dislodged her eye from its socket. *See* Indictment, People v. Whittel, Folder 3989, Box 432, DA PAPERS, *supra* note 1 (1891) (charging Whittel with manslaughter in fatal beating of his wife Catherine); Testimony of Julia Driscoll, Trial Transcript at 11, People v. Whittel, *supra* (stating "[h]er face was black and her eye hanging on her cheek"). The autopsy attributing Catherine's death to numerous ailments including "Bright's disease of the kidney [and] fatty degeneration [and] enlargement of the liver, hastened by some external violence" arguably precluded a first-degree murder charge. Autopsy, Coroner's Inquisition, People v. Whittel, *supra*.

61. *See* Indictment Coversheet, People v. McLaughlin, Folder 3333, Box 353, DA PAPERS, *supra* note 1 (1889) (recording dismissal of case on May 9, 1889, and containing prosecutor's notes explaining decision to dismiss); Coroner's Inquisition, People v. McLaughlin, *supra* (attributing Mary's death to "Fatty Degeneration of the Liver and Chronic Bright's Disease, accelerated by injuries received at the hands of her husband."); Affidavit by Defendant, People v. McLaughlin, *supra* (alleging that "frequently upon deponent's return home at night from his work he would find [Mary] helplessly drunk and his house and children abandoned and neglected").

62. *See* Testimony of Mary E. Anthony, Mary O'Donnell, Rosanna Cunningham, and Peter Cunningham, Coroner's Inquisition at 1–4, People v. McLaughlin, Folder 3333, Box 253, DA PAPERS, *supra* note 1 (1889). The defendant admitted to dragging his wife, but claimed that he was "exasperated at her misconduct." Affidavit By Defendant, People v. Mclaughlin, *supra*.

63. Indictment Coversheet, People v. McLaughlin, Folder 3333, Box 353, DA PAPERS, *supra* note 1 (1889).

64. *See id.*

65. *See, e.g.*, E. ANTHONY ROTUNDO, AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA 107 (1990) (describing men's images of women in nineteenth century).

However, while extra-legal gender norms played some role in charging decisions, prosecutors usually brought murder charges against people who killed their intimates, even if the victims drank, were sexually unfaithful, or neglected gender-specific duties like breadwinning or child care.[66] Moreover, appellate courts supported such prosecutorial decisions, especially in cases where juries convicted men. For instance, the New York Court of Appeals reminded Richard Leach, who was sentenced to death for the fatal stabbing of his inebriated lover: "That the defendant may have been influenced to the commission of his atrocious crime by resentment at the woman's habits of drunkenness and immorality, does not tend to relieve the case of its brutal features."[67]

Of course, defendants could claim provocation, self-defense, or insanity, but prosecutors usually left such strategies to opposing counsel.[68] As we shall see, despite public criticism of prosecutors for being soft on crime,[69] leniency toward female defendants in intimate homicide cases more often came from juries than from the District Attorney's office.

This article does not suggest that prosecutorial charging decisions were sound. Indeed, a one-size-fits-all approach that designated the majority of intimate homicides as "murder" may have resulted in over-punishment in some cases, and under-punishment in others, where muddy issues of causation or intent prompted prosecutors to avoid risking embarrassment at trial. Nor does this article contend that the District Attorney's office followed an idealistic agenda. As I have argued elsewhere, prosecutors brought severe charges against intimate killers because they perceived trying such cases to be more feasible and less politically dangerous than fighting against public corruption or attempting to quell street violence perpetrated by powerful gangs.[70] By prosecuting

66. *See infra* text accompanying notes 67, 74–78, 132–34, 255–56, 271–78.

67. People v. Leach, 40 N.E. 865, 867 (1895) (affirming capital conviction of Richard Leach).

68. The New York County records do contain a few cases in which prosecutors incorporated a provocation or self-defense analysis into their charging decisions. For example, when seeking a first-degree manslaughter indictment against Richard Scanlan for throwing a lighted oil lamp at his wife, the District Attorney's office may have considered that Scanlan found his wife in his brother's bed. *See* Indictment, People v. Scanlan, Folder 4369, Box 477, DA PAPERS, *supra* note 1 (1892) (charging Scanlan with first-degree manslaughter for burning death of his wife); Affidavit of Officer Samuel H. Waitzfelder, Coroner's Inquisition, People v. Scanlan, *supra* (stating that Scanlan said "he found his wife in his brother's bed with his brother"); Unsigned Statement of Richard Scanlan, Police Court Records, People v. Scanlan, *supra* ("I found her in bed with my brother."). Nevertheless, prosecutors typically left such defenses for the defendant's lawyer to make.

69. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1336–38.

70. *See id.* at 1369–73, 1388–91, 1392. *Cf.* Allen Steinberg, *The "Lawman" in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York*, 34 U. TOL. L. REV. 753, 754–55 (2003) (arguing that New York District

criminals who lacked ties to the political machine, District Attorneys in New York City and Denver sought to adopt legal strategies that appeased public demands for tough law enforcement.[71]

The choice of intimate killers seemed like a safe one. Prosecutors undoubtedly believed that bringing severe charges against such defendants would be palatable to the public because these charges harmonized with social values urging both sexes to display self-restraint and civility in the domestic sphere.[72] However, sometimes the District Attorney's office miscalculated, as the discussion of women accused of first-degree murder will show.

C. Jury Verdicts, Paternalism, and Leniency Toward Female Defendants

1. Expanding Time Frames to Acquit Abused Women

When twenty-year-old Pasqualina Robertiello shot Nicolo Pierro on March 2, 1891,[73] she carried Pierro's future child in her womb.[74] Testimony at the coroner's inquisition focused on her excited and nervous

Attorneys prior to 1900 were "machine loyalists" who furthered "the private ends of Tammany [Hall] and its members"). In Denver, as in New York City, corruption, vote-buying, and even armed conflict characterized the political process in the late nineteenth and early twentieth centuries. *See* STEPHEN J. LEONARD & THOMAS J. NOEL, DENVER: MINING CAMP TO METROPOLIS 70–71, 106–07, 132–36 (1990). Political accountability remained an elusive ideal in Denver in part because governors and legislators directly controlled various municipal bureaus and made alliances with the providers of electric, gas, and tram services. *See* CARL UBBELOHDE, MAXINE BENSON, & DUANE A. SMITH, A COLORADO HISTORY 274 (1973).

71. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1355, 1380, 1391–92.

72. *See infra* text accompanying notes 106–09, 123–27, 241–52. Although civility was often associated with public interactions, or with etiquette observed when visiting close friends and acquaintances, conduct manuals also emphasized the importance of good manners and self-control among family members. One author reminded her readers, for example:

> Good manners, it has been said, are too often a cloak that is flung aside like a burden, as soon as the threshold of the home is crossed. Yet, surely there is no spot on earth, where kindness and consideration for others—the foundation of etiquette—are better displayed, or more appreciated . . . .

MARY SIMMERSON LOGAN, THE HOME MANUAL: EVERYBODY'S GUIDE IN SOCIAL, DOMESTIC, AND BUSINESS LIFE 21 (1889).

73. *See* Indictment, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891); *see also* Affidavit of Pasqualina Robertiello, Coroner's Inquisition, People v. Robertiello, *supra* (containing defendant's statement as to her age); *Shot Her Lover Twice*, MAIL AND EXPRESS, March 2, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 10 (reporting that Robertiello shot "faithless lover" with pistol).

74. *See Loath to be Jurymen*, WORLD, May 19, 1891, *microformed* on DA SCRAPBOOK, *supra* note 2, at Roll 11.

state, as well as her fixed, staring eyes at the time of the shooting.[75] The coroner's jury found that Robertiello killed Pierro, a blacksmith who was seven years her senior,[76] "while laboring under temporary aberration of the mind."[77] Nevertheless, the District Attorney's office charged her with first-degree murder, and a grand jury returned an indictment on March 11, 1891.[78]

Newspapers hanging on every detail of the sensational case reported that "[t]he selection of the jury was slow work."[79] Defense attorneys weeded out talesmen who held prejudices against Italians, while prosecutors attempted to eliminate those who "would hesitate to bring in a verdict against a woman under such circumstances as surrounded the case."[80] After interviewing forty potential jurors on May 18, the lawyers only managed to find three "who felt sure that they could view the evidence dispassionately."[81] Indeed, the *World* speculated that "it would probably take three days to fill the jury box, the talesmen evinced so manifest a reluctance to sit in judgment upon the pitiful ruined little woman at bar."[82]

At trial, the defense lawyer outlined a web of falsehood emanating from the seducer's family and argued that Robertiello suffered from temporary insanity precipitated by her agonizing circumstances.[83] There was no question that she fired the fatal shots at Pierro: two eyewitnesses saw her do so, and Pierro identified her as the killer in his dying declaration.[84] Nevertheless, a "big crowd of people in the courtroom rose to

75. *See* Testimony of Pasqualo Padulo, Coroner's Inquisition at 10, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891).

76. *See* Indictment, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891) (indicting defendant for pistol shooting of Pierro); Coroner's Inquisition, People v. Robertiello, *supra* (noting that Pierro was twenty-seven years old); *Loath to be Jurymen*, *supra* note 74 (reporting that Pierro was prosperous blacksmith who emigrated to America and that Robertiello followed him to New York, based on his promises to marry her).

77. Coroner's Inquisition, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891). *See Charged with Murder*, *supra* note 4.

78. *See* Indictment, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891).

79. *Charged with Murder*, *supra* note 4.

80. *Id.*

81. *Loath to be Jurymen*, *supra* note 74.

82. *Id.*

83. *See Insanity Will Be the Plea*, PRESS, May 23, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 11 (describing defense strategy); *see also Pasqualina Acquitted*, N.Y. DAILY TRIB., May 28, 1891, *microformed* on DA SCRAPBOOK, *supra* note 2, at Roll 11 (same).

84. *See Insanity Will Be the Plea*, *supra* note 83; *see also* Antemortem Statement of Nicolo Pierro, Antemortem Inquisition, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891) ("Pasqualina Robertiello came behind me and shot me in the back."); Testimony of Officer Patrick Corcoran, Coroner's Inquisition at 2, People v. Rober-

their feet and cheered" when the jury announced on May 27 that Robertiello was not guilty.[85]

While the defendant formally relied on an insanity defense, newspaper editorials and other cultural evidence surrounding the case suggest that her acquittal stemmed from norms that condemned Pierro for deceiving and dishonoring her, rather than from careful analysis of whether her mental state corresponded to the legal definition of insanity. Accounts of Robertiello's betrothal conjured a pastoral romance set in old Italy; sparks from Pierro's anvil corresponded to "the sparks of love which burned within his breast."[86] This romance turned into a tragedy of epic proportions when Pierro—"intoxicated by his success" in the New World—ravished and then "grew weary of the girl."[87] Journalistic narratives of Robertiello's seduction, pregnancy, and descent into murder consistently depicted her as a naïve girl—"half child, half woman."[88] At the same time, they vilified the "dirty dog," Pierro, who would not have died young if he had honored his engagement to his sweetheart.[89] One writer even justified the murder under natural law, contending that:

> Certainly she killed the man, and she *should* have killed the man. According to the strict letter of the law the little girl was guilty of murder in the first degree, but according to the broad tenets of that high law by which communities are guided and nations governed, she was as guiltless as the purest angel floating above in the ambient air. Suppose that jury had brought in a verdict of murder in the first degree, or any other degree. How the community would have risen as one man to protest against such barbarism, such cruelty—aye, such infamy.[90]

This commentator criticized the District Attorney for bringing Robertiello to trial, arguing that prosecutorial insensitivity toward "common sense and public opinion and human nature" resulted in harm

tiello, *supra* ("I saw her then when I got there fire a shot . . . I kept running hard and . . . when I was within five or six feet she fired another shot at him . . . ."); Testimony of Pasqualo Padulo, Coroner's Inquisition at 7, People v. Robertiello, *supra* ("I seen the shooting; this lady was shooting the man.").

85. *Pasqualina Acquitted*, *supra* note 83.

86. *Loath to be Jurymen*, *supra* note 74.

87. *Id.*

88. *Id.* (also referring to defendant as "[t]he childish prisoner").

89. *A Good Square Look at New York's District Attorney*, *supra* note 5. *See Loath to be Jurymen*, *supra* note 74 ("If Pierro had married Pasquinelina [sic] at once he would doubtless be alive to-day, and his little sweetheart would be as free as when they played together under the skies of Sicily.").

90. *A Good Square Look at New York's District Attorney*, *supra* note 5 (emphasis added).

to defendants even if juries refused to convict.[91] Indeed, he concluded, the District Attorney's outrageous presumption that Robertiello was guilty until proven innocent demonstrated that "[t]he whole system needs revision."[92]

Table 1: ***Women Accused of Intimate Homicide in New York County, 1879-1893***

Outcomes	Number
Acquittals	8
Manslaughter Convictions/Guilty Pleas	4
1st Degree Murder Convictions	1
2nd Degree Murder Convictions	1
Died Before Trial	1
Total Cases	**15**
Murder Charges	(14)
Manslaughter Charges	(1)

The outcome of the *Robertiello* case was not unusual. From 1879 to 1893, prosecutors obtained thirty-one first-degree murder indictments against female defendants in New York County. Fourteen of these were intimate killings, not counting infanticides. The vast majority of the murdered intimates—eleven out of fourteen—were the male spouse or lover of the defendant.[93] Only three cases involved a woman's killing of her children.[94] Trial juries ultimately acquitted seven of the fourteen fe-

91. *Id.*
92. *Id.*
93. *See infra* app. B.
94. For the child killings, see Indictment, People v. McCluskey, Folder 1755, Box 173, DA PAPERS, *supra* note 1 (1885); Indictment, People v. Lebkuchner, Folder 2924, Box 304, DA PAPERS, *supra* note 1 (1888); Indictment, People v. Korn, Folder 4780, Box 525, DA PAPERS, *supra* note 1 (1893). *See also infra* app. B.

male defendants who allegedly murdered intimates.[95] Four of these acquittals rested on insanity grounds.[96]

Table 2: *Women Accused of Intimate Homicide in Denver/Arapahoe County, 1880-1920*

Outcomes	Number
Acquittals	14
Manslaughter Convictions	6
Nolle Prosequi	2
1st Degree Murder Convictions	1
2nd Degree Murder Convictions	1
Court Ordered Dismissal	1
Ignoramus by Grand Jury	1
Never Charged	1
Total Cases	**27**
Murder Charges	(23)
Charge Unclear	(3)
Never Charged	(1)

Acquittal rates for female defendants accused of murder in Denver were similarly high. Research for this article unearthed twenty-seven cases involving Denver women who allegedly killed intimates between 1880 and 1920; all of the victims, except one, were husbands or male lovers.[97] In more than half of these cases, juries acquitted the defen-

95. *See* Indictment Coversheet, People v. McCluskey, Folder 1755, Box 173, DA PAPERS, *supra* note 1 (1885) (recording that defendant was acquitted of murder); Indictment Coversheet, People v. Lessmann, Folder 1811, Box 179, DA PAPERS, *supra* note 1 (1885) (same); Indictment Coversheet, People v. Lebkuchner, Folder 2924, Box 304, DA PAPERS, *supra* note 1 (1888) (same); Indictment Coversheet, People v. Cordes, Folder 3252, Box 345, DA PAPERS, *supra* note 1 (1889) (same); Indictment Coversheet, People v. Nelson, Folder 3949, Box 428, DA PAPERS, *supra* note 1 (1891) (same); Indictment Coversheet, People v. Robertiello, Folder 3975, Box 431, DA PAPERS, *supra* note 1 (1891) (same); Indictment Coversheet, People v. Korn, Folder 4780, Box 525, DA PAPERS, *supra* note 1 (1893) (same). *See also infra* app. B.

96. The insanity acquittals occurred in the *McCluskey*, *Robertiello*, *Lebkuchner*, and *Korn* cases. *See* Indictment Coversheet, People v. McCluskey, Folder 1755, Box 173, DA PAPERS, *supra* note 1 (1885) (noting that defendant was "[t]ried and [a]cquitted on the ground of [i]nsanity" at time of commission of offense); Indictment Coversheet, People v. Lebkuchner, Folder 2929, Box 304, DA PAPERS, *supra* note 1 (1889) (same); Indictment Coversheet, People v. Korn, Folder 4780, Box 525, DA PAPERS, *supra* note 1 (1893) (same); *Pasqualina Acquitted*, *supra* note 83 (indicating that Robertiello was acquitted on grounds of temporary insanity). *See also infra* app. B.

97. *See infra* app. E. Ida Mercer was convicted of first-degree murder for killing her son-in-law. *See infra* text accompanying notes 146, 154–55 (discussing *Mercer* case).

dant.[98] Five others resulted in no charge at all, a *nolle prosequi*, a court-ordered dismissal, or a refusal by the grand jury to indict.[99] The trial jury returned a guilty verdict in only eight cases, six of which resulted in convictions for less serious offenses than murder.[100]

Although jurors may have demonstrated special solicitude toward Pasqualina Robertiello due to her youth and beauty,[101] difficulty empanelling a neutral jury afflicted other murder cases featuring female defendants. For example, when Johanna Lessmann was tried in New York City for poisoning her third husband, the *Morning Journal* reported: "Some time was consumed in getting a jury, many of those summoned having the usual scruples about the death penalty, especially in the case of a woman."[102]

Once empanelled, juries in both Denver and New York City often proved inclined to distinguish between their own values and the legal rules imposed upon them by the court. They rendered verdicts that justified the killing of "bad" men by "wronged" women, even when the facts of the case did not comport with self-defense, provocation, or insanity doctrines.[103] Moreover, such verdicts were based on consideration of an expanded context or time frame around the killing that anticipated some aspects of the battered woman's syndrome defense. Several scholars discuss insanity acquittals in women's cases, but juries' tendency to take

98. *See infra* app. E.

99. *See id.*

100. *See infra* text accompanying notes 146, 154–56 (discussing the only two Denver cases resulting in murder convictions).

101. *See Loath to be Jurymen*, *supra* note 74.

102. *Borgia in Widow's Weeds*, MORNING J., Oct. 16, 1885, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 2. Lessmann claimed that her hard-drinking mate committed suicide during an episode of depression over business setbacks, and she ultimately prevailed. *See* Indictment Coversheet, People v. Lessmann, Folder 1811, Box 179, DA PAPERS, *supra* note 1 (1885) (recording Lessmann's acquittal on October 16, 1885); *On Trial for Murder*, N.Y. TIMES, Oct. 16, 1885, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 2 (describing defense theory). However, in Lessmann's case (unlike Robertiello's), the prosecutor conceded the inappropriateness of a conviction after the defendant testified, and the judge instructed the jury that, "although a chain of suspicious circumstances had been woven around the prisoner . . . there was no evidence that she had administered the poison." *No Poison in His Potion*, MORNING J., Oct. 17, 1885, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 2. Doing as they were told, the jury returned a verdict of "not guilty." *Id.* Few cases replicated the harmony among judge, prosecutor, and jury (not to mention the procedure used) in acquitting Johanna Lessmann.

103. Although judges typically served as the mouthpieces of legal doctrine, newspaper accounts occasionally offered glimpses of judges' less formalistic side. The *New York Daily Tribune* described the reaction from the bench to the acquittal of Pasqualina Robertiello: "Judge Van Brunt, who usually insists upon preserving perfect decorum in the court over which he presides did not even rap for order [to quiet the cheering crowd]. He even smiled as if he were pleased at both the verdict and the demonstration." *Pasqualina Acquitted*, *supra* note 83.

the history of the relationship into account, rather than focusing narrowly on the incident during which the homicide occurred, and to blame male victims for failing to meet standards of manliness has gone largely unnoticed.[104]

This sympathy for female defendants in the late 1800s and early 1900s is all the more notable, considering that at English common law, mitigating doctrines often embodied biases against women. For example, under the early law of manslaughter, one of the chief provocation categories—adultery—was defined to protect a husband's exclusive sexual access to his wife without reproaching a man's infidelity toward his spouse or lover.[105] Despite the sexist pedigree of criminal doctrines borrowed from England, however, American cases from the late nineteenth and early twentieth centuries reveal a shift towards the condemnation of men who abused or abandoned female intimates and corresponding leniency toward women who killed abusive men. This article contends that such legal outcomes owed much to prescriptive notions of manliness.

In the mid-nineteenth century, influential social values, especially among the middle-class, associated manliness with sobriety, industry, and control over the passions. These ideals of male self-restraint came under attack toward the end of the nineteenth century, when American men increasingly were urged to embrace their animal instincts in sports, sex, and battle.[106] Nevertheless, at least up to 1920, the model white man remained protective of women and displayed reverence for their

104. For instance, Evan Stark states that "[t]he insanity defense was premised on the stereotypical belief that aggression and violence were unnatural in women." Evan Stark, *Representing Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 994 (1995). However, he also contends: "In homicide cases, fearing that prosecutors would use evidence of abuse to establish motive, female defendants often hid extensive histories of injury and suffering." *Id.* at 986. By focusing solely on the insanity defense, he misses instances in which courts and juries recognized women's self-defense arguments based on past abuse. For examples of such cases, see *infra* text accompanying notes 132–44.

105. Under early modern English law, "adultery" was defined as sex with a married woman. A married man did not commit adultery if he had sex with a single female. This definition influenced not only the provocation doctrine, but also seventeenth-century English and colonial laws that made a married woman's sexual transgressions punishable by death. *See* Carolyn B. Ramsey, *Sex and Social Order: The Selective Enforcement of Colonial American Adultery Laws in the English Context*, 10 YALE J.L. & HUMAN. 191, 207 (1998). *Cf.* LEE, *supra* note 10, at 22 (noting sex bias in early provocation doctrine but too hastily generalizing her comments to legal outcomes in American cases during nineteenth and twentieth centuries).

106. *See* GAIL BEDERMAN, MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917 at 217–39 (1995); *see also* JOHN DEMOS, PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY 60 (1986) (commenting on increased exaltation of men's "animal energy" in late Victorian America); ROTUNDO, *supra* note 65, at 222–46 (making similar observations).

presumptively greater moral purity.[107] He used his aggressive impulses to conquer beasts, other races, and even white male rivals, but he did not use violence against females.[108] A man who beat a woman, or ruined her to satisfy his lust, indulged in primal behavior unchecked by the tempering hand of civilization. He failed in his duty to be the protector of women and children and was thus a wholly "uncivilized" man, rather than a hero to be celebrated.[109] Such beliefs were, of course, prescriptive ideals that did not reflect the realities of many intimate relationships. Yet, I will argue that when these societal standards conflicted with the formal law, juries often took a different course than that suggested to them by the court, exonerating women to whom no formal defense doctrine seemed to apply.

For example, in *People v. Gordon*, a Denver judge instructed that "alleged insulting language and alleged vile and . . . brutal conduct" by the victim toward the defendant did not legally justify or excuse murder.[110] Nevertheless, jurors seem to have sympathized with Beatrice Gordon, a domestic servant who became the lover of her abusive employer, William Shirey.[111] Despite evidence that Gordon shot Shirey to death and then fled by train,[112] the jury acquitted her.[113] Willingness to consider past history between Gordon and Shirey in the context of a self-defense theory, despite the court's instructions, paralleled the appeal of an extended time period in excusing Pasqualina Robertiello's killing of her lover. In jurors' eyes, murder cases involving seduction, which was a crime in the late nineteenth century,[114] called for the same results as those centering on physical abuse. Paternalistic attitudes militated against punishing lethal violence by a woman that arose from either a man's physical or his emotional maltreatment of her.

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107. *See* DEMOS, *supra* note 106, at 32, 49; STEVEN MINTZ, A PRISON OF EXPECTATIONS: THE FAMILY IN VICTORIAN CULTURE 33, 143 (1983).

108. *Cf.* BEDERMAN, *supra* note 106, at 227–30 (locating new image of masculinity in Edgar Rice Burrough's character Tarzan, who rescues Jane from the ape that abducts her and then suppresses his own apelike desire to rape her); Ramsey, *Discretionary Power*, *supra* note 22, at 1371–73, 1379–81, 1386–87 (arguing that public admiration for bravado of men who killed male rivals made prosecuting such cases more difficult than seeking conviction of reviled intimate murderers). For a discussion of how Theodore Roosevelt embodied these norms, see *infra* text accompanying notes 239–43, 323.

109. *See* BEDERMAN, *supra* note 106, at 25.

110. Jury Instructions (filed Feb. 17, 1908), People v. Gordon, No. 18325 (Denver County Dist. Ct. 1908).

111. *See* SHMB, *supra* note 23, at No. 236.

112. *See id.* (stating that "Miss Gordon left on train for Lafayette" after shooting Shirey). *See also* Jury Instructions, People v. Gordon, No. 18325 (instructing jury that defendant's flight was factor to consider).

113. *See* Verdict (filed Feb. 17, 1908), People v. Gordon, No. 18325.

114. *See* Ireland, *supra* note 9, at 109.

Extra-legal norms might also excuse killings that could not be justified. The flip side of the ideal woman's moral strength was her weakness, which inhered not only in her lack of physical power, but also in a "dependence [that] appeals to all that is generous and chivalrous and tender in [a man's] nature."[115] A woman needed someone to provide for her, both socio-economically and reproductively. Without proper provision, her "natural" tendency towards emotion and bouts of hysteria[116] might topple over the brink into insanity. The image of an unfortunate woman driven mad by hardship and maltreatment at the hands of a man thus exerted a powerful influence upon jury verdicts. However, while many observers deemed the killing of an abusive husband or lover to be justified, the exculpation of female defendants who murdered their children typically required an insanity theory.

Insanity arguments often saved female defendants from punishment in child-killing cases, especially if the defense was paired with a wrenching story of hardship and abuse by a male relative. For example, Wilhelmine Lebkuchner—a widow who killed two of her small children by putting rat poison in their tea—claimed that her wealthy in-laws had disowned her, forcing her to take in laundry and cook meals at a brothel to support her sons.[117] In particular, she vilified her brother-in-law. She alleged that he turned her husband against her and that, after she became a widow, he tried to get the children removed from her care.[118] Her purported motive for murder was her fear that the Society for Prevention of Cruelty to Children would take the boys because she could not provide for them properly.[119] Even though Lebkuchner apparently appreciated the wrongfulness of her act and asked to "get the highest sentence possi-

115. ROTUNDO, *supra* note 65, at 106 (quoting *Cosmopolitan* article from 1901).

116. *See, e.g.*, Carroll Smith-Rosenberg, *The Hysterical Woman: Sex Roles and Role Conflict in Nineteenth Century*, *in* DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 215 (1985) (discussing parallels between symptoms of hysteria and features of middle-class woman's role in nineteenth century).

117. *See* Affidavit of Wilhelmine Lebkuchner, Coroner's Inquisition at 4–5, People v. Lebkuchner, Folder 2924, Box 304, DA PAPERS, *supra* note 1 (1888); *see also Poison Her Only Hope*, N.Y. STAR, March 26, 1889, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 5 (repeating Lebkuchner's story with details about her in-laws' allegedly cruel behavior); *Thinks She Did her Duty*, N.Y. HERALD, March 26, 1889, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 5 (same).

118. *See Poison Her Only Hope*, *supra* note 117. In contrast, at least one newspaper took the in-laws' side, reporting that Lebkuchner was a woman of dubious moral character, who married a wealthy brewer for his money and then drove him away with her "unbearable disposition." *Poisoned by the Mother*, N.Y. DAILY TRIB., March 25, 1888, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 5.

119. *See* Affidavit of Wilhelmine Lebkuchner, Coroner's Inquisition, People v. Lebkuchner, Folder 2924, Box 304, DA PAPERS, *supra* note 1 (1888).

ble,"[120] the defense produced experts opining that she was insane.[121] Jurors seemed eager to believe the insanity theory, rather than to view the defendant as a cold, calculating monster that poisoned her sons to get rid of hungry mouths. The jury verdict showed compassion for Lebkuchner and spared her life; nevertheless, her sympathizers partially discredited her story (as opposed to her male lawyer's argument) about the poisoning incident by denying her rationality.[122]

This tendency to excuse, rather than justify, child-killing may have been related to changing social roles for mothers and children. Starting in the nineteenth century, Americans of all social classes began to value children as precious, innocent individuals, instead of miniature adults[123] or economic assets.[124] Alternate modes of correction, including shaming and psychological coercion, were increasingly viewed as preferable to whipping.[125] Private societies turned their attention to the abuse and neglect of children by impoverished or violent parents.[126] At the same time, the increasing separation of the home from commerce and politics heightened women's responsibility to nurture the next generation.[127] Various authorities, including ministers and medical doctors, stressed that motherhood was a woman's destiny and accorded the mother the primary role in the upbringing of her offspring.[128] Given these prescriptive norms, a woman who killed her children could not hope to claim moral legitimacy for her actions. The insanity defense offered the only

120. *Id.*

121. *See* Judge's Charge at 9–11, People v. Lebkuchner, Folder 2924, Box 304, DA PAPERS, *supra* note 1 (1888) (summarizing defense evidence of Lebkuchner's insanity).

122. *See Thinks She Did her Duty*, *supra* note 117.

123. *See* CARL N. DEGLER, AT ODDS: WOMEN AND FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 66–85 (1980).

124. *Cf.* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2407 & n.17 (1995) (citing JOHN J. DEMPSEY, THE FAMILY AND PUBLIC POLICY 3 (1981)); Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1037–47 (1992).

125. *See* DEGLER, *supra* note 123, at 90–100; DEMOS, *supra* note 106, at 14; GORDON, *supra* note 11, at 33; MINTZ, *supra* note 10, at 33–38.

126. *See* GORDON, *supra* note 11, at 46–52 (describing activities of Massachusetts Society for Prevention of Cruelty to Children in 1870s and 1880s). *Cf.* PLECK, *supra* note 11, at 85 (stating that such anti-cruelty societies often fell short of their goals of rescuing physically abused children).

127. *See* DEGLER, *supra* note 123, at 73 ("The domestic role of women, which we have been calling the separation of the spheres, went hand-in-hand with the new conception of children as precious, and different from adults."); DEMOS, *supra* note 106, at 49 (making similar observations).

128. *See* DEGLER, *supra* note 123, at 55, 77.

avenue to exculpation, unless she successfully depicted the homicide as an accident.[129]

Two versions of the "wronged" woman trope thus tended to lead to acquittal: the wronged woman who avenged herself against a deceitful, abusive male and the wronged woman who inflicted insane violence on an innocent victim. Defense attorneys often blended these two images. They characterized their female clients as weak and hysterical to generate sympathy for them, even when the women's homicidal acts seemed to have some moral legitimacy. For instance, the celebrated trial lawyer, William F. Howe, referred to one defendant as "this little bundle of nerves sitting here, a poor, frail, fragile little thing, not a tithe of the woman she was" before the deceased allegedly drugged, raped, and ruined her.[130]

When accused women took the witness stand, as they did in many of the cases analyzed in this article,[131] they also made use of stock narratives about their victimization by degenerate and brutal men. *People v. Nelson*[132] provides an example. The New York press and the jury—so often unanimous in their sympathy for female defendants—disagreed over the fate of Ella Nelson, who was accused of the first-degree murder of her lover, Samuel Post. Post and the defendant had been living together for several years when Post, who was married to another woman, decided to leave the defendant and "lead a decent life."[133] Prosecutors

129. For a discussion of a New York law excusing the accidental homicide of disobedient children during lawful correction, see *infra* text accompanying note 217.

130. Statement of William F. Howe, Coroner's Inquisition at 6, People v. Southworth, Folder 3505, Box 375, DA PAPERS, *supra* note 1 (1889). For more on the *Southworth* case, see *infra* text accompanying notes 181–82.

131. *See, e.g.*, People v. Barbieri, 43 N.E. 635, 636 (N.Y. 1896) ("The defendant was sworn as a witness in her own behalf, and it is from her statement alone that we are enabled to obtain any clear or connected view of the circumstances and events which preceded and produced the tragedy."); People v. Cignarale, 17 N.E. 135, 137 (N.Y. 1888) (recounting testimony of defendant Chiara Cignarale); *No Poison in his Potion*, *supra* note 10 (reporting that Johanna Lessmann testified to her husband's suicidal tendencies); *Ella Nelson is Not Guilty*, N.Y. RECORDER, June 20, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 11 (stating that Ella Nelson gave her evidence "in a low voice, but quite clearly"); *Annie Walden Convicted*, N.Y. TIMES, April 23, 1892, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 12 (indicating that Annie Walden took the witness stand); *Mrs. Dunne's Story Told*, N.Y. HERALD, March 16, 1894, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 16 (reporting that Mary Dunne told her own story at trial).

132. Folder 3949, Box 428, DA PAPERS, *supra* note 1 (1891).

133. Antemortem Statement of Samuel Post, Antemortem Inquisition, People v. Nelson, Folder 3949, Box 428, DA PAPERS, *supra* note 1 (1891). *See* Unsigned Statement of Nathan Michaels, Coroner's Inquisition, People v. Nelson, *supra* ("He said he had a good position down town and as he wanted to lead a straight life he had made up his mind to leave Ella."); *Ella's Shot was Fatal*, PRESS, Feb. 21, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 10 (reporting that Nelson "and the deceased had been living together for several years").

contended that Nelson planned for months to avenge the separation and that her remorse at Post's death did not negate evidence that she premeditated the killing.[134] In contrast, Nelson depicted herself as an honest widow to whom Post lied about his marital status and whom he abandoned for the company of other females besides his wife. The defense centered on the theory that Post was killed with a bullet from his own gun, which accidentally discharged during a struggle that he started.[135]

Several newspapers expressed surprise at Nelson's unanimous acquittal, [136] and the *Times* snidely commented that the jury was only "an average one as to intelligence."[137] However, despite receiving some bad press, Nelson successfully employed the wronged woman narrative to cast her victim as a deceitful adulterer and an aggressive male who "often threatened her with . . . [the] pistol."[138] Her case and others like it thus demonstrated the potential of stereotypical images to benefit an individual female defendant, even if they subordinated and proved deleterious to women in the long run.

Although the bench and the jury sometimes disagreed about women's cases, appellate opinions reveal that compassion for abused females had also begun to influence judicial thinking. Indeed, in several cases, judges gave the wronged woman narrative legal legitimacy by emphasizing the appropriateness of admitting past-abuse evidence at trial. In *People v. Taylor*, for example, the New York Court of Appeals reversed the first-degree murder conviction of Kate Taylor, who allegedly shot her husband and decapitated him with an axe.[139] The opinion stated that evidence of prior domestic violence should have been admitted to corroborate the defendant's testimony that "she had reason to apprehend great bodily harm" as she struggled with her husband for possession of a pistol.[140] Explaining the ruling, the court suggested that, if jurors had known about the previous violent conduct of the deceased, they might have exonerated Taylor completely on self-defense grounds:

> [F]or the trial judge to have excluded evidence proving or tending to prove previous violent conduct of the deceased towards the defen-

134. *See Ella Nelson is Not Guilty*, *supra* note 131.

135. *See id.*

136. *See, e.g.*, *More Than She Hoped For*, N.Y. TIMES, June 20, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 11 ("A verdict of manslaughter was as much as Mrs. Nelson dared hope fore [sic]."); *Acquitted of Murder, Mrs. Nelson Swoons*, N.Y. HERALD, June 20, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 11 ("The verdict was received with amazement by every one who heard it.").

137. *More Than She Hoped For*, *supra* note 136.

138. *Ella Nelson is Not Guilty*, *supra* note 131.

139. 69 N.E. 534, 535, 538 (1904).

140. *Id.* at 537.

> dant, and his threats against her, or his attempts to take her life upon other occasions, was an error gravely prejudicial to her defense because it deprived her of the right to have competent testimony in her favor considered by the jury.[141]

Comparable reasoning extended to sexually or emotionally abusive behavior by a male decedent. For example, in one New York County case, the appellate court explicitly stated that a longer time frame was necessary to ascertain Maria Barbieri's state of mind when she cut her lover's throat in a saloon.[142] Reversing her first-degree murder conviction because the trial judge erroneously excluded corroborating evidence of her seduction and alleged rape by the deceased, the New York Court of Appeals stated:

> The condition of the defendant's mind was not to be ascertained solely from what took place in the saloon at the time of the homicide. The relations of the parties which preceded it were competent for the consideration of the jury, since they were connected with the tragedy and were of such a nature and character as to produce a powerful influence upon the mind when recalled at the moment that the defendant heard the final refusal of the deceased [to marry her], expressed as it was in the most insulting and provoking language.[143]

In an atmosphere charged with feminist allegations that the criminal justice system discriminated against women, Barbieri stood trial for a second time and was acquitted.[144] Thus, nineteenth-century activists' claims of a double standard making it more difficult for female murder defendants to be found "not guilty" appear overstated when they are viewed in the light of Barbieri's exoneration and the acquittal of other women accused of intimate murder during roughly the same time period.

141. *Id.* The *Taylor* court further noted: "The case of *People v. Druse* . . . is authority for the proposition, simply, that a defendant, after giving evidence that the homicide was committed in self-defense, may follow it by proof of the general reputation of the deceased for quarrelsomeness and violence." *Id.* at 538. Although Roxalana Druse received capital punishment, *see infra* text accompanying note 153, language from her case was invoked to spare Kate Taylor. *Id.* (reversing Taylor's conviction and ordering new trial).

142. People v. Barbieri, 43 N.E. 635, 638 (N.Y. 1896).

143. *Id.* at 638. Marie Barbieri alleged that "the deceased had intercourse with . . . [her] by means of either force or fraud" and that he used some violent means to intimidate her into co-habiting with him. *Id.* at 637.

144. *See* Ireland, *supra* note 9, at 102.

2. Lesser-Included Offense Convictions

Not all female defendants of dubious respectability fared as well at trial as Ella Nelson, the New York widow acquitted of murdering her married lover.[145] In Denver between 1880 and 1920, at least eight women were convicted of some kind of criminal homicide in an intimate context[146] and in my sub-sample of New York City cases from 1879 to 1893, six women were found guilty of such crimes.[147] Even the jury that ultimately acquitted Pasqualina Robertiello deliberated for five hours and "sent a message to Judge Van Brunt wanting to know if they could find a verdict for manslaughter in the second degree."[148]

In both cities, however, first-degree murder convictions of female defendants proved very rare, and when juries did treat women with the utmost severity, gubernatorial clemency usually intervened. For instance, only one female defendant—Chiara Cignarale—was convicted of capital murder in New York City between 1879 and 1893.[149] Supporters of Cignarale, a woman who allegedly committed adultery as well as premeditated killing, organized a successful petition to the governor to reduce her death sentence to life imprisonment; the governor agreed in part because her deceased husband had abused her.[150] Between 1880 and 1920, only two females were executed in the entire state of New York: Roxalana Druse, a farmwife who dismembered her husband's body after shooting him, and Martha Place, a middle-class woman who threw acid at her stepdaughter and then asphyxiated her.[151] The anoma-

145. *See supra* text accompanying notes 132–138 (discussing Nelson's case).

146. Ida Mercer and Mattie Lemmons were convicted of first-degree and second-degree murder, respectively. *See supra* text accompanying note 97 and *infra* text accompanying notes 154–56 (describing their cases). Juries found the remaining six women guilty of manslaughter. *See infra* app. E.

147. Two of these convictions were for some kind of murder. A jury convicted Chiara Cignarale of first-degree murder. *See infra* notes 149–50 and accompanying text (discussing *Cignarale* case). A second defendant, Annie Walden, was found guilty of second-degree murder. *See infra* notes 184–99 and accompanying text (describing and analyzing *Walden* case). The remaining four convictions or guilty pleas were for manslaughter. *See infra* app. B. For a full analysis of Mary Dunne's manslaughter conviction, see *infra* text accompanying notes 159–70.

148. *Pasqualina Acquitted*, *supra* note 83.

149. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1366.

150. *See id.* at 1359 nn.288, 1366 (discussing Chiara Cignarale's case); People v. Cignarale, 17 N.E. 135, 137 (N.Y. 1888) (stating that prosecution "sought on the trial to establish that improper relations existed between the defendant and [Antonio] D'Andrea," who was jointly charged with murder and with whom defendant lived after leaving her husband).

151. *See generally* People v. Druse, 8 N.E. 733 (N.Y. 1886) (describing facts of Druse's case and affirming her first-degree murder conviction); People v. Place, 52 N.E. 576 (N.Y. 1899) (describing facts of Place's case and affirming her first-degree murder conviction). For

lous death sentences for these female prisoners excited great public sympathy. Indeed, Governor Hill "was petitioned and beseeched from all parts of the State to commute [Mrs. Druse's] sentence to imprisonment."[152] Although Druse was hanged, the outcry against capital punishment grew so strong in her case that the press expected the few women later convicted of capital crimes to escape death.[153]

Societal aversion to the severe punishment of female defendants was as strong half-way across the country. My research uncovered only two instances in Denver between 1880 and 1920 in which a woman was found guilty of intimate murder, and only one of these women was convicted on first-degree charges. A jury found Ida Mercer guilty of first-degree murder for shooting her son-in-law, whom she allegedly despised.[154] Although she claimed to have fired the first few shots at the victim in self-defense, she continued to fire after he fell to the ground. Mercer unsuccessfully raised an insanity defense as to the final bullets, and upon conviction, she was sentenced to life imprisonment.[155] In the second case, a thirty-two-year old mulatto housekeeper received a ten-year sentence, but was discharged from the penitentiary in May 1887, after being imprisoned for only three years.[156] The state of Colorado did not execute any women between 1880 and 1920; indeed, all of the 102 legal executions in Colorado between 1859 and 1972 were of male prisoners.[157]

When juries found female murder defendants guilty of any crime, they typically convicted them of lesser-included offenses. Three features of such cases are salient. First, the women often transgressed gender norms by engaging in excessive alcohol consumption or illicit sex, in addition to lethal violence. Second, such cases involved abusive men who

confirmation that these prisoners received capital punishment, see ESPY & SMYLKA, *supra* note 25.

152. *Maria Barbieri to Die*, N.Y. RECORDER, July 16, 1895, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 19 (comparing Barbieri's case to that of Druse).

153. *See, e.g.*, *id.* ("Few believe . . . that [Maria Barbieri] will ever sit in the death chair."). The *New York Recorder* correctly predicted that the appellate court would spare Barbieri, an Italian woman who shot her lover. *See supra* notes 142–44 and accompanying text.

154. *See* Verdict (filed Oct. 13, 1914), People v. Mercer, No. 22063 (Denver County Dist. Ct., 1914) (recording first-degree murder conviction); Order Denying Motion for New Trial, People v. Mercer, No. 22063 (describing facts of case); *But One Woman is Guilty in First Degree*, SHMB, *supra* note 23 (noting that victim was defendant's son-in-law).

155. *See* Order Denying Motion for New Trial, People v. Mercer, No. 22063 (describing defense theories). *See also* Jury Instructions, People v. Mercer, No. 22063 (instructing on insanity and self-defense). For information on Mercer's punishment, see Mittimus to Penitentiary (filed Feb. 8, 1915), People v. Mercer, No. 22063 (recording Mercer's life sentence); *But One Woman is Guilty in First Degree*, *supra* note 154 (recording Mercer's life sentence).

156. *See* Colorado State Penitentiary Records, No. 1138 (Colorado State Archives).

157. *See* Radelet, *supra* note 26, at 891.

deviated from prescribed sex roles. Where both the male victim and female defendant violated social norms, those standing in judgment usually extended some mitigation to the woman, even if they did not exonerate her. Third, as we shall see, convicted females included not only working women, but also women of elite and middle-class status. The line between convictions and acquittals was not always a class line.[158]

The killing of George Dunne in New York City in 1893 illustrates the first two aspects of the pattern. Prosecutors charged Mary Dunne with first-degree murder for beating George to death with a hammer.[159] Describing the gruesome killing, witnesses and journalists offered wildly divergent assessments of the defendant's character. There were many reports that Mary Dunne habitually consumed liquor and that she was intoxicated—or, to quote the *World*, "rum-crazed"[160] and "frenzied by drink and the sight of blood"[161]—when she killed her husband.[162] Accounts taking a critical view of Mary tended to emphasize George's sober nature and his industriousness as an engineer for the Marlborough Hotel.[163] Any violence on his part was attributed to extreme frustration with his wife's dissolute lifestyle.[164] In contrast, the defendant and the

158. *See infra* text accompanying notes 181–99 (discussing *People v. Southworth* and *People v. Walden*).

159. *See* Indictment, People v. Dunne, Folder 4907, Box 539, DA PAPERS, *supra* note 1 (1893).

160. *She Is a Husband-Murderer*, WORLD, Oct. 16, 1893, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 16.

161. *A Hammer Her Weapon*, WORLD, Oct. 15, 1893, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 16.

162. *See* Testimony of Charles McGovern, Trial Transcript at 6–7, People v. Dunne, Folder 4907, Box 539, DA PAPERS, *supra* note 1 (1894) (recording testimony of defendant's ten-year-old son that defendant drank several pints of beer on day of killing); Testimony of Celia Chatillion, Trial Transcript at 10–13, People v. Dunne, *supra* (recording testimony of neighbor that defendant got drunk, beat her husband, and threatened to kill him). *See also His Wife Killed Him*, MORNING ADVERTISER, Oct. 16, 1893, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 16 (describing defendant's allegedly frequent bouts of drunkenness and stating that, on day of homicide, "Mrs. Dunn [sic] was intoxicated and her husband reproached her.").

163. *See, e.g.*, Testimony of Peter J. Brady, Trial Transcript at 14, People v. Dunne, Folder 4907, Box 539, DA PAPERS, *supra* note 1 (1893) (stating that deceased was "a sober man always attending to his work."); *A Hammer Her Weapon*, *supra* note 161 ("He bore a good reputation with his associates at the hotel.").

164. *See Slew Her Husband*, N.Y. RECORDER, Oct. 16, 1893, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 16 (reporting that deceased began to physically abuse his wife after he learned that she spent his money on liquor); *His Wife Killed Him*, *supra* note 162 ("Dunn [sic] objected, with only too much reason, it appears, to his wife's habits and conduct. Whenever he remonstrated with her she flew into a violent passion, and as Dunn [sic] was not especially meek himself the altercations were usually fierce."); *She is a Husband-Murderer*, *supra* note 160 (describing violent, drunken argument leading to George Dunne's death and stating that "there have been many such quarrels" between defendant and her husband).

witnesses on her behalf claimed that George Dunne drank, beat her mercilessly, and called her vile names.[165] Mary Dunne alleged that, on the day of the homicide, her husband learned that she planned to leave him and then began to choke and kick her brutally. She depicted the hammer killing as an act of self-defense.[166] Disagreement also centered on the pivotal question of whether the deceased, who was found lying across the bed, had been awake or asleep when his wife attacked him with the hammer.[167]

On March 16, 1894, a jury rejected the state's premeditated murder theory, instead convicting Mary Dunne of second-degree manslaughter, which encompassed heat-of-passion killings.[168] The fact that George Dunne's "face was battered almost beyond recognition" may have shocked jurors, but they nevertheless seem to have believed that he engaged in a classic form of provocation—extreme assault and battery.[169] Their choice of a lesser-included offense, as well as the strong recommendation of mercy that they appended to the verdict, expressed condemnation for the deceased man's violence toward the defendant. Their decision to stick with the law of provocation or imperfect self-defense,[170] rather than acquitting, probably arose from their judgment

165. *See* Testimony of Mary Dunne, Trial Transcript at 18–22, People v. Dunne, Folder 4907, Box 539, DA PAPERS, *supra* note 1 (1893) (presenting her version of facts); Testimony of David Latimer, Trial Trancript at 23–24, People v. Dunne, *supra* ("I have seen George Dunne commit acts of violence against his wife, in 1889, 1890 and 1891. I have seen him blacken her eyes and kick her downstairs and into the street."); Testimony of Dr. George Tucker Harrison, Trial Transcript at 22, People v. Dunne, *supra* (stating that he treated George Dunne "for symptoms of chronic alcoholism"). *See also Mrs. Dunne's Story Told*, *supra* note 131 (recounting defendant's trial testimony); *Mrs. Dunn* [sic] *Guilty of Manslaughter*, N.Y. TIMES, March 17, 1894, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 16 (reporting that deceased was also "given to drink," that he "frequently abused his wife," and that he kicked her before she struck the fatal blow to his head).

166. *See* Testimony of Mary Dunne, Trial Transcript at 18–22, People v. Dunne, Folder 4907, Box 539, DA PAPERS, *supra* note 1 (1893); *Mrs. Dunne's Story Told*, *supra* note 131.

167. *See Mrs. Dunn* [sic] *Guilty*, MORNING ADVERTISER, March 17, 1894, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 16.

168. *See* Indictment Coversheet, People v. Dunne, Folder 4907, Box 539, DA PAPERS, *supra* note 1 (1893) (recording verdict); *Mrs. Dunn* [sic] *Guilty of Manslaughter*, *supra* note 165 (reporting jury's recommendation of mercy).

169. *See His Wife Killed Him*, *supra* note 162; *Mrs. Dunn* [sic] *Guilty*, *supra* note 167 (speculating that verdict endorsed narrative in which deceased was awake and violent, rather than "sleeping victim" story). For a complete discussion of traditional categories of provocation at common law, see, among others, *Girouard v. State*, 583 A.2d 718, 720 (Md. 1991). New York courts, during the time period discussed in this article, recognized the deceased's attack on the defendant as a form of provocation. *See generally* People v. Fiorentino, 91 N.E. 195 (N.Y. 1910) (reversing first-degree murder conviction in case in which deceased threatened to kill defendant and assaulted him with knife).

170. As Joshua Dressler notes, provocation and imperfect self-defense technically constitute distinct mitigating doctrines. *See* Joshua Dessler, *Rethinking Heat of Passion: A Defense*

that, due to her drinking, Dunne deserved punishment when measured against extra-legal standards of femininity.

In Denver, as in New York City, juries that refused to acquit women who claimed to have been threatened or assaulted almost always reduced their crimes to lesser-included offenses. The district court records contain several cases in which female murder defendants were convicted of manslaughter after the judge issued a reminder that threats or violence by a victim gave the defendant no absolute right to use a deadly weapon.[171] Instructions urging a distinction between the jittery wife and the reasonable person sometimes convinced the jury not to acquit; however, in such cases, lesser-included-offense convictions were much more common than murder convictions. For example, evidence of Norma Pumphrey's frightening past experience with her former husband, Charles, elicited sympathy from the jury, even though the court expressly instructed that such evidence had "no bearing upon the question of self-defense."[172] Perhaps influenced by the judge to see Pumphrey as "an excessively nervous and timid person," rather than a "reasonable" individual who could not have believed her life was in "imminent" danger, the jury declined to acquit her.[173] Nevertheless, she was convicted of involuntary manslaughter, not murder.[174]

Similarly, in *People v. Fiorini*,[175] a Denver trial judge refused to instruct that Carmella Maria Fiorini "was not required to leave her home and flee for safety but had a perfect right to kill [her husband] if necessary to avoid [his threatened attack on her life]."[176] Still, the jury did not convict her of murder, preferring the milder verdict of voluntary man-

in Search of a Rationale, 783 J. CRIM. L. & CRIMINOLOGY 421, 458 (1982). However, historically, courts and juries often conflated justification and excuse in their decisions. *Cf. id.* at 443.

171. *See, e.g.*, Jury Instructions (filed Nov. 28, 1892), People v. Butler, No. 8277 (Arapahoe County Dist. Ct. 1892). The Arapahoe County District Court instructed the jury:

> [A]lthough they should find . . . that the said Albert Butler and the defendant got into a quarrel and that the said Albert Butler followed the defendant in a threatening manner, still the defendant would have no right to assault the said Albert Butler with a deadly weapon in a manner calculated to take life or do great bodily injury unless the circumstances were such as to lead a reasonable person to believe that such an assault was necessary . . . to prevent receiving a great bodily injury herself.

Id. The jury found Emma Butler not guilty of murder, but guilty of involuntary manslaughter. *See* Verdict (filed Nov. 28, 1892), People v. Butler, No. 8277.

172. Jury Instructions (filed Oct. 18, 1913), People v. Pumphrey, No. 21565 (Denver County Dist. Ct. 1913).

173. *See id.*

174. Verdict, People v. Butler, No. 8277.

175. *See* Information (filed Aug. 11, 1906), People v. Fiorini, No. 17722 (Denver County Dist. Ct. 1906).

176. Defendant's Instructions Refused (filed Oct. 13, 1906), People v. Fiorini, No. 17722.

slaughter with a recommendation of extreme clemency.[177] *Pumphrey* and *Fiorini* thus show that the aggressive behavior of deceased men lessened sanctions against female defendants in a frontier city, just as in an eastern metropolis. Indeed, the verdicts in these cases demonstrate the practical efficacy of imperfect self-defense arguments for abused women in the early twentieth century.

Although self-defense theories often proved more persuasive to jurors than to the bench, some judges also acknowledged the mitigating potential of past-abuse evidence. For example, in *People v. Ray*, the Colorado Supreme Court stated that a manslaughter instruction would have been appropriate in the murder trial of a woman whose husband beat and threatened her over a long period of time before she killed him.[178] The court only affirmed Ray's second-degree murder conviction because the defendant had failed to request the manslaughter instruction at trial.[179]

Although compassion for abused women often led to mitigation, if not complete acquittal, neither the formal law nor extra-legal values spared all women from being punished for the most heinous type of homicide—murder. When a female defendant's bad character was combined with a high-status victim and clear-cut evidence of intent to kill, the jury might return a conviction for a crime more severe than manslaughter. Some scholars believe that legal outcomes were instrumental in distinguishing the reputed purity of white, middle-class women from the immoral violence of their working-class counterparts.[180] However, my research suggests otherwise. In fact, class-based stereotypes sometimes had the opposite effect on murder cases. An impoverished Italian seamstress might appeal successfully to jurors' paternalistic impulses and be spared from any criminal punishment. Conversely, a white middle-class woman who led a fast life and shot an influential man could expect a hostile press and perhaps even a guilty verdict (albeit for a lesser-included offense). Thus, when the widow of an upstate attorney killed railroad magnate Stephen Pettus in New York City, alleging that he had raped and ruined her,[181] the newspapers discounted her tale of woe and

177. *See* Verdict (filed Oct. 13, 1906), People v. Fiorini, No. 17722.

178. 167 P. 954, 957 (Colo. 1917). *See also supra* text accompanying notes 142–144 (discussing *Barbieri* case in New York).

179. *See Ray*, 167 P. 954, at 957.

180. *See, e.g.*, Robertson, *supra* note 12, at 416 (analyzing acquittal of Lizzie Borden); *cf.* Stark, *supra* note 104, at 989 (remarking on class bias in legal treatment of violent intimate relationships in England).

181. *See* Indictment, People v. Southworth, Folder 3505, Box 375, DA PAPERS, *supra* note 1 (1889) (charging Hannah Southworth with first-degree murder for fatally shooting Stephen Pettus); Testimony of Officer William Goodwin, Coroner's Inquisition at 10–12, People v. Southworth, *supra* (testifying that Southworth confessed to crime and stated that Pettus "ruined her"); Testimony of Capt. William W. McLaughlin, Coroner's Inquisition at 31, People v.

characterized her as a "vindictive creature" guilty of a "crime which had not the slightest justification."[182] Pettus's killer, Hannah Southworth, died in prison before her trial.[183] But another case, *People v. Walden*,[184] indicates that if Southworth had faced a jury, she would not have been completely exonerated. Her "fallen" lifestyle and lethal attack on a pillar of the business community made it imperative that she suffer an exemplary punishment.

Annie Walden, the only female defendant found guilty of second-degree murder for killing an intimate in New York County between 1879 and 1893, reportedly led a "dissolute life."[185] She left a respectable husband in the dry-goods business for a bookmaker named Len Marshall.[186] While accompanying Marshall to the racetracks of the northeast, she caught the eye of James Walden, a young racehorse trainer with whom she engaged in a three-day spree of "wild dissipation."[187] James still depended upon his father—"a well-known man on the American turf"—for financial support.[188] He supposedly entered a secret marriage to Annie while he was intoxicated and later discovered, to his horror, that his bride

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Southworth, *supra* (stating that Southworth claimed Pettus took her to "house of assignation," where he drugged her and had sex with her); Statement of Attorney William H. Howe, Coroner's Inquisition at 41, People v. Southworth, *supra* (indicating that Southworth had illegal abortion because Pettus impregnated her); *Pettus's Murderess Dead, Too*, SUN, Jan. 8, 1890, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 9 (describing Southworth as "an attractive woman of a good Kentucky family, the widow of a lawyer of Geneva in this State," who was introduced to Pettus by mutual friends); *Shot Down by a Woman*, N.Y. TIMES, Nov. 23, 1889, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 8 (recounting Southworth's version of events and noting that Pettus was, among other business ventures, "Secretary and Treasurer of the Union Elevated Railway of Brooklyn").

182. *Don't Waste Any Sympathy*, N.Y. STAR, Jan. 8, 1890, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 9. Similarly, *The World* opined:

> There were no mitigating circumstances connected with her crime. Pettus had been devoted to her and had deserted her. From that moment she pursued him, demanding support and protection. He refused to accede to her request and she shot him. It was simply an act of vengeance. . . . Whether or not she was entitled to sympathy or what happened in the early days of her acquaintance with Pettus is a question entirely apart from her crime.

Untitled, WORLD, Jan. 8, 1890, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 9.

183. *See Pettus's Murderess Dead, Too*, *supra* note 181 (reporting that Southworth died in her cell of "heart failure, anæmia, general debility, acute bronchitis, and hypostatic pneumonia").

184. *See* Indictment, People v. Walden, Folder 4219, Box 459, DA PAPERS, *supra* note 1 (1891) (charging Annie Walden with first-degree murder of James Walden).

185. *Walden's Wife Kills Him*, N.Y. DAILY TRIB., Oct. 31, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 12.

186. *Id.*

187. *Id.*

188. *Id.*

was a "drunkard, also that she had an insatiate passion for opium."[189] A brief, unhappy marriage followed: "Constant quarrels, fights, threats, mutual accusations of infidelity had been part of their married life. He had beaten her; she had threatened to kill him."[190] On October 30, 1891, Annie Walden shot her husband in a New York City street and immediately confessed to a police officer.[191]

At trial, the defendant alleged that the decedent physically assaulted her immediately prior to the shooting, but the jury did not believe her.[192] Although Annie Walden was only twenty-two years old at the time of her crime,[193] the prosecutor succeeded in depicting her as an immoral, older woman who seduced and then murdered a foolish boy from an influential family. Nevertheless, confronted with the defense attorney's warning that the "poor, frail, fallen creature" would haunt them if they sent her to the electric chair, the jurors declined to convict her of a capital crime.[194] Instead, they "declared by their verdict that her act, while intentional, was not deliberate"— finding her guilty of second-degree murder, which carried a life term.[195]

The jury's typical reluctance to find a woman guilty of first-degree murder, paired with allegations that the victim was physically abusive and unfaithful,[196] softened the result in the *Walden* case. According to one newspaper, jurors unanimously agreed that Annie Walden committed a premeditated killing; indeed, they wanted to convict her of first-

189. *Id. See also She Killed Her Boy Husband*, N.Y. RECORDER, Oct. 31, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 12 (reporting that James Walden's friends said that he was drunk when he married Annie).

190. *Id.*

191. *See* Testimony of Officer Griffin H. Merritt, Coroner's Inquisition at 1–2, People v. Walden, Folder 4219, Box 459, DA PAPERS, *supra* note 1 (1891); *see also* Indictment, People v. Walden, *supra*.

192. *See Annie Walden to Go to Prison for Life*, N.Y. HERALD, Apr. 23, 1892, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 12 (stating that "none of the jurymen believed the woman's story that Walden was beating her when she fired the fatal shots").

193. *See* Affidavit of Annie Walden, Police Court Records, People v. Walden, Folder 4219, Box 459, DA PAPERS, *supra* note 1 (1891).

194. *Her Sex Alone Saved Her*, WORLD, Apr. 23, 1892, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 12.

195. Untitled, N.Y. DAILY TRIB., Apr. 23, 1892, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 12.

196. *See* Report of Detective Sergeant McCarthy, People v. Walden, Folder 4219, Box 459, DA PAPERS, *supra* note 1 (1891) (reporting his findings regarding various witnesses who said that James Walden beat his wife); *Annie Walden Convicted*, *supra* note 131 (reporting that prosecutor justified victim's beating of defendant on grounds that she provoked him by associating, against his wishes, with a black woman "who kept a questionable house next door"); *see also She Killed Her Boy Husband*, *supra* note 189 ("Her friends say that Walden beat her cruelly and deserted her for other women."); *Walden's Wife Kills Him*, *supra* note 185 ("Scarcely a night followed [their marriage] without a fierce quarrel, in which Walden would brutally beat the woman.").

degree murder with a strong recommendation of mercy.[197] However, they ultimately "decided that this course would not be safe" because they "did not want to risk the woman's life."[198] Their verdict stemmed not only from paternalistic solicitude for female defendants in general, but also from their belief that Annie Walden "had great provocation by reason of [her husband's] beating her" on previous occasions.[199]

3. Conclusions About Female Defendants' Cases

In sum, the sympathetic treatment of women accused of intimate murder in New York and Colorado calls into question the prevalent scholarly view that "[t]he unwritten law was . . . a law for men only" and that "[w]omen were not supposed to avenge themselves on husbands . . . ."[200] The tendency to justify a female defendant, either completely or in part, for defending her life or her virtue with bloodshed was common in both regions in the late nineteenth and early twentieth centuries. Indeed, while defense strategies often emphasized female weakness and thus contained elements of an "excuse" doctrine, the degree of moral denunciation directed at men who allegedly drove women to commit homicide constitutes the more remarkable aspect of these cases. Female defendants who defied gender-based social values fared worse than those who played more decorous and traditional roles. However, on the whole, women were treated with a paternalistic kind of compassion, whereas men were judged harshly for disgracing or tormenting them. Perhaps most importantly, the assessment of a female defendant's guilt or innocence during the time period covered by this article included an expanded time frame that helped reveal the causes of her homicidal fear or rage.

The task of persuading courts to admit histories of abuse, while jettisoning invidious stereotypes about women's irrationality and weakness, poses a challenge for modern reformers of intimate violence law. At the urging of feminist litigators and psychologists, American courts in the late twentieth century began to make evidentiary rulings that recognized the battered woman's syndrome—in particular, the "learned helplessness" supposedly produced when a woman becomes trapped in a cycle of violence and contrition on the part of her abuser.[201] Some feminist legal

197. *See Annie Walden to Go to Prison for Life*, *supra* note 192.

198. *Id.*

199. *Id.*

200. FRIEDMAN, *supra* note 13, at 221.

201. The majority trend leans toward admitting battered woman's syndrome evidence because it is relevant to show the reasonableness of the woman's lethal response. *See, e.g.*, Peo-

scholars, such as Martha Mahoney, argue against an analysis that focuses on particular battering incidents, instead depicting the problem as an ongoing "struggle for power and control."[202] Mahoney notes that a woman may face the greatest danger from her violent partner when she resists, exerts autonomy, and tries to leave the relationship.[203] However, common to both approaches is the argument that, when judging a battered woman who kills, the jury should be allowed to take her history of abuse into account. A third strand of the debate raises valid concerns about the battered woman's syndrome defense without offering an adequate substitute for it. For example, Anne Coughlin expresses the view that the defense is "the offspring of patriarchal assumptions" that cast women as feeble, dysfunctional victims.[204]

The fate of female defendants between 1880 and 1920 simultaneously demonstrates the utility of an expanded time frame as a defense strategy and the danger of relying on a narrative imbued with stereotypical images. This article offers a historical analysis, rather than advocating a normative agenda for twenty-first century law. Yet, I do believe that, when arguing for the admissibility of past-abuse evidence, feminist scholars and attorneys ought to emphasize a female defendant's long struggle against the wrong of intimate violence, not her psychological and emotional disintegration in the face of it. Moreover, I am convinced that, contrary to the historical pattern revealed here, the criminal law must distinguish between serious physical abuse, which should at least partially justify a lethal response, and emotional harms like seduction and abandonment, which should not.

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ple v. Humphrey, 13 Cal. 4th 1073, 1086–1087 (1996) (declining to adopt "reasonable 'battered woman' standard" but admitting syndrome evidence to show "defendant's situation and knowledge"). *See also* Mahoney, *supra* note 20, at 36–39 (explaining and critiquing battered woman's syndrome defense). Courts have admitted evidence related to financial dependence, low self-esteem, care for dependent children, and other factors to explain why a woman failed to leave an abusive relationship. *See id.* at 38. A key aspect of this actual or perceived inability to sever bonds to the batterer is supposed to be a condition known as "learned helplessness," which Lenore Walker associates with submission and passivity. LENORE WALKER, THE BATTERED WOMAN 47–48 (1979).

202. Mahoney, *supra* note 20, at 28.

203. *See id.* at 64–76 (naming and describing "separation assault").

204. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 7 (1994). A few scholars have proposed alternate strategies for defending abused women who kill, in lieu of battered woman's syndrome evidence. For example, Joshua Dressler suggests a duress claim. *See* Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormentors: Reflections of Maintaining Respect for Human Life While Killing Moral Monsters*, *in* CRIMINAL LAW THEORY: DOCTRINE OF THE GENERAL PART 259 (Stephen Shute & A.P. Simester eds., 2002).

D. Convicting Men: Passion, Insanity, and Self-Control

In a previous article, I noted the apparent willingness of late nineteenth century New York prosecutors, juries, and courts to impose capital punishment on men who killed female intimates, as opposed to defendants who committed other types of homicides.[205] First-degree murder defendants of both sexes who went to trial during the fourteen-year period that I studied were more likely to be found guilty of lesser-included offenses than of capital crimes.[206] Indeed, confronted with life or death decisions in the jury box, New Yorkers often faltered in their commitment to tough crime control and returned verdicts that angered at least one organ of public opinion—the press.[207] Nevertheless, juries convicted thirty-four men (compared to just one woman) of first-degree murder between 1879 and 1893; more than half of these men had killed female intimates.[208] The state executed fifteen of the eighteen intimate murderers.[209] As a group, the intimate killers tended to be marginal men that "drank heavily and relied on the meager earnings of women."[210] In contrast to the rough bravery of male gang members, the ne'er-do-wells convicted of slaying their lovers, wives, or relatives inspired no awe, and those standing in judgment thus had fewer qualms about inflicting capital punishment upon them.[211]

This article expands upon my earlier research by widening the chronological scope, placing New York County cases in the context of statewide data, and comparing this data to the conviction and punishment of men in Colorado. Evidence from New York state, Denver, and Colorado as a whole supports my hypothesis: Whereas women charged with murder were treated leniently, men risked not only receiving a guilty verdict, but also being sentenced to substantial prison terms or even exe-

205. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1366–83. A study of another city, Chicago, notes that "wife murder was punished quite severely" there during a slightly later time period, but documents fewer death sentences in such cases than were imposed in New York. *See* Cynthia Grant Bowman & Ben Altman, *Wife Murder in Chicago: 1910–1930*, 92 J. CRIM. L. & CRIMINOLOGY 739, 789 (2002).

206. Ramsey, *Discretionary Power*, *supra* note 22, at 1364 fig.4.

207. *See id.* at 1363–65 (discussing jury leniency).

208. *See id.* at 1366.

209. *Id.* at 1366, 1368 fig.6, 1371. Seventeen out of the thirty-four male convicts intentionally killed female intimates and another, Daniel Driscoll, fatally shot his girlfriend while attempting to slay a male rival. *See id.* In my previous article, I did not count the *Driscoll* case as an intimate homicide because it involved transferred intent, but I have decided to do so here to assemble as complete a record as possible of criminal cases arising from the death of lovers, spouses, or relatives.

210. *Id.* at 1375.

211. *See id.* at 1372 (contrasting cowardice of one such defendant with legendary toughness of Whyo gang leader Michael McGloin).

cuted. The common-law provocation doctrine mitigated the punishment of male defendants whose deadly behavior fell within its narrow parameters, but as both a doctrinal and a cultural matter, it offered a smaller safety net than is often assumed.

Throughout history and across cultures, men have committed homicide more often than women have; this generalization holds true both inside and outside the home.[212] Yet, contrary to prevalent assumptions about the nature of sex bias in the criminal law,[213] men's killing of their spouses and lovers has been illegal for centuries, unless such killings were deemed to be accidental. Indeed, even the common-law right of chastisement, which nineteenth-century legal authorities rejected, limited men to "moderate correction" of their wives, forbidding them from causing permanent injury.[214] By the 1870s, American judges and treatise writers agreed in their formal renunciation of a man's right to inflict physical punishment on his spouse.[215]

In contrast, notwithstanding a vocal campaign against child cruelty, advice-book authors and legal authorities continued to tolerate the beating and even inadvertent killing of unruly children throughout the 1800s and early 1900s.[216] New York's criminal code excused killings committed "[b]y accident and misfortune, in lawfully correcting a child or servant" as late as the 1920s, for example.[217] Yet, stern punishment of men who perpetrated fatal violence in *other* intimate contexts, especially marital or romantic relationships, was the typical legal outcome in the late nineteenth and early twentieth centuries. Indeed, despite lingering callousness toward the "accidental" death of insubordinate children, the killing of a child usually resulted in a first-degree or second-degree murder conviction if it occurred during an episode of intimate violence against the child's mother.[218]

212. *See* WIENER, *supra* note 12, at 1; *see also* Adler, *supra* note 12, at 259 (stating that most spouse-killers in nineteenth-century Chicago were men); *cf.* MONKKONEN, *supra* note 35, at 4, 55, 58 fig.3.1, 181 (showing that male murderers vastly outnumbered women who killed in nineteenth-century New York, but that men's victims were most often other men).

213. *Cf. supra* notes 10, 13.

214. *See* Siegel, *supra* note 11, at 2118, 2123.

215. *See id.* at 2129–30.

216. Even the child protection societies that reached a pinnacle of activity in the 1870s and 1880s endorsed spanking, while seeking to shield children from physical pain that was "wrongfully, needlessly, or excessively inflicted." PLECK, *supra* note 11, at 83; *see also* DEGLER, *supra* note 123, at 87–90 (noting that corporal punishment was not abandoned completely despite advice books' preference for emotional or psychological inducements).

217. CONSOLIDATED LAWS OF N.Y., ch. 41, art. 94, § 1054 (Cahill 1923). It is worth noting that this provision did not apply to the death of a man's wife.

218. *See generally* People v. Schuyler, 12 N.E. 783 (N.Y. 1887) (affirming first-degree murder conviction of appellant for smashing his toddler's head during violent altercation with his wife). For more information about this case, see *infra* text accompanying notes 342–44.

The condemnation of men's homicidal attacks on their families or lovers described in this article has no parallel in the current American death-penalty regime. Indeed, whereas the miniscule number of women executed between 1880 and 1920 fits into a broader historical pattern of leniency toward female criminals,[219] the willingness of courts and juries in the late 1800s and early 1900s to convict men of first-degree murder for slaying intimates contrasts starkly with the small fraction of death-sentenced men who committed intimate homicides in the late twentieth century.[220]

Table 3: ***Men Accused of Intimate Homicides in Arapahoe/Denver County, 1880-1920***

Outcomes	Number
1st Degree Murder Convictions	16
2nd Degree Murder Convictions/Guilty Pleas	12
Lesser-Included Offense Convictions/Guilty Pleas	9
Voluntary Manslaughter	(4)
Involuntary Manslaughter	(5)
Acquittals	5
Other Convictions as Charged (Assault with Deadly Weapon)	1
Found Insane Without Trial	1
Case Dismissed	1
Nolle Prosequi	1
Nolle Prosequi/Discharged after Conviction Reversed	2
Total Cases	**48**
Murder Charges	(46)
Other Charges	(1)
Charge Unclear	(1)

Moreover, the pattern of holding men accountable for intimate murder crossed geographical and cultural boundaries. It is evident in both

See also People v. Green, 94 N.E. 658 (N.Y. 1911) (affirming murder conviction of abusive husband who fatally shot his daughter when his wife and family tried to leave him); SHMB, *supra* note 23, at No. 531 (recording that Clarence Perkins was sentenced to life imprisonment in a Colorado penitentiary after he killed his fourteen-month-old baby during assault on his wife).

219. *See* Victor Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 446 (2002) (stating that women comprised only 4.3% of all executions in the United States before 1900 and less than 1% of executions thereafter).

220. *See* Rapaport, *supra* note 17, at 1517 tbl.2 (showing that only 12% of men sentenced to capital punishment in six states in the post-*Furman* era killed intimates).

the eastern and the western United States from 1880 to 1920. Like their New York City counterparts, Denver prosecutors typically pressed severe charges against men who killed intimates during this time period. Out of my sample of forty-eight cases involving male defendants, the Denver District Attorney's office charged forty-six men with some kind of murder.[221] Many of these men were convicted. Indeed, juries in Denver may have been more likely than those in New York City to find male defendants guilty of first-degree murder because Colorado law did not mandate the death penalty for this crime. Table 3 shows that Denver trial juries returned first-degree murder convictions in sixteen cases and second-degree murder verdicts in twelve cases. Five men were acquitted; one man was found insane without trial; one case was dismissed; another resulted in a *nolle prosequi*; and the District Attorney chose not to re-prosecute two male defendants whose convictions were reversed.[222] Nine men pled guilty to, or were convicted of, lesser-included offenses, four of which were voluntary manslaughter.[223] Thus, about sixty percent of the male murder defendants in my Denver sample were convicted and punished for committing murder in either the first-degree or the second-degree. Voluntary manslaughter verdicts constituted a comparatively rare outcome for men in the Denver cases, whereas first-degree murder convictions were the most common type of case disposition.

1. The Narrow Bounds of the Provocation Defense

Although voluntary manslaughter verdicts were uncommon in my Denver data set, the heat-of-passion doctrine theoretically constituted the main avenue of mitigation for a man who killed his unfaithful wife. If successful, a heat-of-passion claim would lead to conviction for manslaughter, instead of murder; yet, as we shall see, this defense strategy often failed. A related doctrine, the so-called honor-killing defense, offered total exculpation for men under formal law in only four states;

221. At least eight of these were first-degree charges; most of the others fell under the generic "murder" category. *See infra* app. F.

222. Appellate courts reversed the convictions of two male defendants, John H. Herren and Theodore Ehrhardt, who had been found guilty of voluntary manslaughter and second-degree murder, respectively, at their first trials. Prosecutors declined to re-try them. *See id.* I have not counted their cases as convictions.

223. Juries convicted two defendants, Edward McBride and Joseph E. Bailey, of involuntary manslaughter at new trials after their second-degree murder convictions were reversed. *See id.* I have counted these cases as convictions for involuntary manslaughter, rather than second-degree murder. However, like the cases discussed in note 222, *supra*, *McBride* and *Bailey* further corroborate the willingness of juries to return guilty verdicts against men charged with intimate murder.

moreover, this defense was often limited to a husband's killing of his wife's paramour and did not extend to the death of the wife.[224]

Whereas other feminist scholars have criticized the heat-of-passion doctrine for treating intimate killings less severely than a fatal assault by a stranger,[225] my research on the west and the northeast offers little reason to think that juries in those regions tilted the facts in favor of male defendants charged with killing women, or that courts construed provocation categories broadly to overturn men's convictions. In contrast to some southern states that "expanded the notion of provocation to cover a broad range of sexual effrontery,"[226] Colorado and New York policed male violence by refusing to depart from common-law categories.

The common law confined the heat-of-passion defense to five types of provocation: extreme assault or battery on the defendant; mutual combat; illegal arrest of the defendant; injury or serious abuse of a close relative; and sudden discovery of a spouse's adultery.[227] If sufficient time elapsed between the provoking incident and the killing for the defendant's emotions to cool, he was not supposed to receive heat-of-passion

224. From the nineteenth century to the 1970s, four American states—Texas, New Mexico, Utah and Georgia—deemed the killing by a husband of his wife's lover to be justifiable homicide. *See* Taylor, *supra* note 10, at 1694–96 & n.87. In Texas, the statutory honor-killing defense applied only to male defendants in cases where the defendant was charged with the murder of his wife's lover. *See* Reed v. State, 59 S.W.2d 122, 124 (Tex. Crim. App. 1933); Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, The Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC'Y REV. 393, 410–11 (1999); *see also The 'Equal Shooting Rights' Saga*, TEX. OBSERVER, Mar. 19, 1965, at 10 (copy on file with author) (noting that defense in Texas applied only to killings of men by other men). New Mexico's law was similar. *See* N.M. STAT. ANN. § 1468 (1915) (providing defense for "[a]ny person who kills another who is in the act of having carnal knowledge of such person's legal wife"). In Utah, either a male or a female defendant charged with killing a person who raped or defiled the defendant's female relative could claim the defense. *See* UTAH CODE ANN. § 76-30-10 (1953); UTAH COMP. LAWS § 8032(4) (1917); *id.* at § 4168(4) (1907); *id.* at § 4168(4) (1898). Finally, Georgia's version of the honor-killing defense extended to both male and female defendants who killed in defense of their family's honor. *See* Biggs v. Georgia, 29 Ga. 723, 727 (1860) (stating that man who attempts to kill another man for raping his wife or daughter does so in defense of his family); Scroggs v. State, 93 S.E.2d 583, 585 (Ga. Ct. App. 1956) ("If a wife kills another woman to prevent sexual relations between such other woman and her husband, the killing is justified . . . ."). Martha Umphrey has shown that, in New York, extra-legal attitudes toward honor-killing shaped perceptions of men who murdered male sexual rivals. *See generally* Umphrey, *supra* (analyzing murder case of Harry Thaw). However, neither the honor-killing statutes nor unwritten versions of them are inconsistent with my thesis. As I have argued here and elsewhere, late nineteenth-century cultural values tended to tolerate or even glorify violence among men, while condemning men's killing of women and children. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1371–73.

225. *See, e.g.*, *supra* note 10 (collecting books and articles critical of provocation defense).

226. Umphrey, *supra* note 224, at 410.

227. Girouard v. State, 583 A.2d 718, 720 (Md. 1991); *see* LEE, *supra* note 10, at 19; Taylor, *supra* note 10, at 1693 & n.79 (identifying *Regina v. Mawgridge*, 84 Eng. Rep. 1107 (1707), as the "case that first enumerated the categories of adequate provocation").

mitigation.[228] Trial judges in Colorado and New York often refused to instruct on provocation because the evidence showed cooling time or other factors precluding the defense as a matter of law.[229] Appellate courts usually affirmed murder convictions in such cases, commenting on the poor fit between the facts and the elements of voluntary manslaughter.[230]

Whereas reformist jurisdictions in the late twentieth century jettisoned provocation categories and cooling-time limitations,[231] courts and juries in the 1800s and early 1900s were willing to execute male defendants who claimed that simmering jealousy, anger, or fear led them to commit homicide. This severity was not gender-neutral. Rather, verdicts exonerating women due to their victims' past violence or romantic inconstancy[232] contrasted with the *lack* of empathy for similar stories when a man was on trial. Moreover, in distinction to capital sentencing in the post-*Furman* era, the pain arising from romantic or family strife was generally not considered a mitigating factor that precluded the death penalty in men's cases.[233]

228. *See, e.g.*, People v. Ferraro, 55 N.E. 931, 934 (N.Y. 1900) ("If there had been provocation, there was time to cool off."). *See also infra* text accompanying notes 257–60 (discussing application of cooling-time limitation).

229. In many of the capital murders discussed in my previous article, the defendant stalked the victim after separation, providing evidence of cooling time to preclude a heat-of-passion argument. Ramsey, *Discretionary Power*, *supra* note 22, at 1378. *See infra* text accompanying notes 234–39, 264–65, 267.

230. *See infra* text accompanying notes 235–37, 256–62, 268–70.

231. EED doctrine, in both its statutory and judge-made forms, abolishes the traditional common-law provocation categories, as well as the cooling-time limitation. Furthermore, with the creation of the Model Penal Code in the 1960s, this reformist position became the law in a "substantial minority of jurisdictions" by the early 1980s. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1340 (1997). For an example of the effect of reformed doctrine on an actual case, see generally *People v. Berry*, 556 P.2d 777 (Cal. 1976) (reversing first-degree murder conviction of defendant who lay in wait for twenty hours before killing his wife).

232. *See supra* text accompanying notes 73–92 (analyzing Pasqualina Robertiello's acquittal on ground that decedent's seduction and subsequent rejection of her rendered her temporarily insane). As noted, some appellate courts acknowledged the relevance of the deceased's past violence to a female defendant's self-defense theory; others even allowed evidence of past emotional abuse. *See supra* text accompanying notes 139–144 (discussing New York and Colorado appellate cases). But compassion for a woman subjected to provoking or frightening behavior over a long period of time often came from jury attitudes, not from the formal law. *See supra* text accompanying notes 110–13 (discussing Denver District Court cases).

233. For a discussion of the mitigating role, in post-*Furman* capital sentencing, of emotional disturbance arising from domestic separation, see Rapaport, *supra* note 17, at 1528.

a. Separation Assaults

Unlike modern jurisdictions, including New York, that use the EED doctrine, judges in the late nineteenth and early twentieth centuries refused to recognize an attempt by a wife or girlfriend to leave a man as legally adequate provocation.[234] For example, in *People v. Youngs*, the murder victim separated from her husband and threatened to seek a divorce when she learned that he had given her "a private disease."[235] He then went to a neighboring house where she and the children were staying and fatally shot her.[236] Affirming the capital conviction, the New York Court of Appeals noted in dicta that the facts showed "the absence of all . . . provocation . . . for the commission of the crime."[237] As the Colorado Supreme Court stated in a Denver case, a man did not have the right to use force to induce his estranged spouse to return to his household; jury instructions to the contrary erroneously proclaimed "a doctrine concerning the relation of husband and wife" that was "nothing less than monstrous at this period of our civilization."[238] In many such cases, neither juries nor appellate courts showed qualms about a capital verdict. Almost half of all intimate murderers executed in both New York County

234. Of the modern EED doctrine's tendency to bind "women to the emotional claims of husbands and boyfriends long ago divorced or rejected," Nourse argues: "Reform in other areas of the law has encouraged battered women to leave their victimizers. Reform of the passion defense, however, discourages such departures, allowing defendants to argue that a battered wife who leaves has, by that very departure, supplied a reason to treat the killing with some compassion." Nourse, *supra* note 231, at 1334. *But cf.* Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 979–84 (2002) (criticizing Nourse's argument but agreeing that "it is perfectly appropriate to limit the partial defense to [a defendant] whose lack of self control is the result of adequate provocation and not just any provocation"). For late twentieth-century New York separation murders in which the court instructed the jury on EED, see Nourse, *supra* note 231, at 1419–21, 1427–29 & app. B (collecting cases).

235. 45 N.E. 460 (N.Y. 1896).

236. *Id.* at 461.

237. *Id.* at 460–61. This statement constituted dicta because Youngs' defense relied on an insanity claim, rather than the provocation doctrine. *See id.* at 460. For a general discussion of defense claims that jealous men made in lieu of a provocation theory, see *infra* text accompanying notes 255, 268–92.

238. Bailey v. People, 130 P. 832, 834 (Colo. 1913). In this case, the deceased severely beat the defendant's sister. When the woman took refuge in her mother's house, the deceased angrily stormed into the yard to claim her. The defendant, who also lived in the house, warned the deceased not to come any closer and, when he disobeyed, shot him. *Id.* at 833–34. The judge erroneously instructed that, in deciding whether the deceased posed a threat to the inhabitants of the house, the jury should focus on the deceased's state of mind alone. *See id.* at 834. Moreover, the trial judge misstated the law when he said that the deceased "had a right to exercise such reasonable control over . . . [his wife] as was necessary to conduce to the proper establishment and maintenance of his household as the head of a family." *Id.*

and New York state between 1880 and 1920 committed lethal attacks when their victims tried to sever romantic or family ties.[239]

Whereas judges adhered to fairly rigid doctrinal bounds, juries' readiness to convict men of murdering their estranged partners can also be attributed to sources outside the formal law. Recall that William Youngs's wife left him in the mid-1890s because he gave her a venereal disease. In *Youngs* and numerous other cases, separation occurred when the female victim sought to leave a relationship rendered unbearable by her male partner's violence, infidelity, alcoholism, or chronic unemployment.[240] In addition to killing, the defendants in these cases transgressed other rules of conduct for men. They failed to embody the Victorian ideal of the Christian Achiever, who succeeded at a business calling while eschewing prostitutes, liquor, and unrestrained passion.[241] Nor did they adopt the image of rough-riding Theodore Roosevelt that began to supplant Victorian manliness around the turn of the century.[242] Exalting the white rancher who fought Indians and wild animals to establish the American nation,[243] Roosevelt associated rape and baby-murder with Native Americans and clung to Victorian attitudes about the nearly asexual purity of females.[244] Moreover, when he addressed Congress in 1904, he expressly advocated corporal punishment for wife-beaters.[245] Although his criticism of the Indians' alleged brutality toward women and children masked the hypocritical tendency of some white men to engage in the same behavior, Roosevelt's public comments condemning

239. At least thirteen of thirty-three intimate murders punished by death in New York County during this time period were classic separation assaults in which the victim separated from the defendant. Approximately thirty-three of seventy-six defendants executed for intimate killings in New York state between 1880 and 1920 committed their crimes under similar circumstances (Data on file with author). Two New York County cases not counted as separation assaults above arguably qualify. One case involved a male murder convict who faced the choice of going to jail or leaving his family and country after the discovery of incest. *See* People v. Loose, 92 N.E. 100, 101 (N.Y. 1910). In yet another case, the male defendant shot his sister-in-law, who sheltered his estranged wife. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1376 n.364 (describing facts of *People v. Hovey*).

240. *See id.* at 1375–77.

241. *See* SARAH E. NEWTON, LEARNING TO BEHAVE: A GUIDE TO AMERICAN CONDUCT BOOKS BEFORE 1900 52–61 (1994).

242. *See* BEDERMAN, *supra* note 106, at 170–215 (describing how Roosevelt transformed his image from effeminacy to "quintessential symbol of turn-of-the-century masculinity").

243. *Id.* at 176.

244. *See id.* at 181, 205. Edmund Morris argues that Roosevelt's "anti-Indian prejudice" was "strangely at odds with his enlightened attitude to blacks." EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT 454 (1979).

245. *See* PLECK, *supra* note 11, at 119.

rape and wife-beating arguably reinforced societal aversion to intimate violence.[246]

Concern about drink and idleness also remained strong. Some middle-class men in New York began to imitate the saloon culture of the working class as a release from the constraints of Victorianism,[247] but anti-liquor ideologies continued to exert a powerful influence from the late nineteenth century through the Prohibition Era.[248] Finally, while a series of economic depressions between 1873 and 1896 helped spawn a new ideal of masculinity that glorified physical prowess, rather than business achievement,[249] a man who relied on a woman's financial support still would not have inspired admiration at the turn of the century.[250] Thus, although Roosevelt's virile imperialism tapped into an emerging recognition of "powerful 'masculine' passions," the new ideology retained vestiges of Victorian self-control.[251] Neither code of conduct provided clear endorsement for drunken binges, economic failure, or violence towards the so-called "weaker sex," and Victorian mores explicitly forbade all three.[252] Hence, women who left men that broke these rules did not provoke homicide in a way that inspired empathy for the killer.

Marital separation assaults were only one type of intimate killing that resulted in murder convictions when men stood trial. Severe treatment, including capital punishment, of male defendants allegedly abused by those they killed also extended to a few cases involving mothers and

246. *But cf.* DEL MAR, *supra* note 11, at 110 (indicating that cultural changes identified by Bederman heightened men's violence toward women in Oregon). After 1910, some prominent men *did* begin to celebrate primal sexual instincts and brutality toward non-conformist females, including woman suffragists. For further discussion, see *infra* notes 387–88 and accompanying text.

247. *See* BEDERMAN, *supra* note 106, at 17.

248. For a discussion of the strength of anti-liquor forces in Denver and the role of woman suffrage in achieving Prohibition, see THOMAS J. NOEL, THE CITY AND THE SALOON: DENVER, 1858–1916 at 109–117 (2d ed. 1996); UBBELOHDE, BENSON, & SMITH, *supra* note 70, at 265–66; *see also* BARBARA LEE EPSTEIN, THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM, AND TEMPERANCE IN NINETEENTH-CENTURY AMERICA 102 (1981) (noting that temperance crusaders associated alcohol abuse with wife-beating and disruption of domestic harmony).

249. *See* BEDERMAN, *supra* note 106, at 12–13.

250. *Cf.* ROTUNDO, *supra* note 65, at 5–6 (arguing that ideal of passionate manhood that arose in late nineteenth century glorified male ambition).

251. *See* BEDERMAN, *supra* note 106, at 217–18.

252. *See* NEWTON, *supra* note 241, at 52–61 (discussing prohibitions contained in Victorian conduct manuals); ROTUNDO, *supra* note 65, at 168 ("If a man was without 'business,' he was less of a man."); STEARNS, *supra* note 58, at 296 (discussing late nineteenth-century attention to drunkenness as a "moral disease" that threatened families); Siegel, *supra* note 11, at 2129 ("By the 1870s, there was no judge or treatise writer in the United States who recognized a husband's prerogative to chastise his wife."). Later in this article, I offer some criticisms of Siegel's larger premise that, despite repudiating the doctrine of chastisement, legal authorities helped to preserve the wife-beating prerogative. *See infra* text accompanying notes 374–83.

even male family members;[253] it was not exclusively limited to the murder of female spouses and lovers. As a practical matter, gradually escalating rage or fear operated as a defense only for women.[254]

b. Suspected Infidelity

Legal doctrine and gender norms negated "simmering emotions" defenses raised by men in a variety of factual scenarios, including infidelity. Mere suspicion of adultery—especially suspicion that grew over a long period of time—was rarely recognized as an adequate basis for a heat-of-passion argument when a man killed his spouse. Thus, in both New York and Colorado, male defendants enraged by suspected infidelity often raised insanity, alibi, or accidental death defenses.[255] Those who did request provocation instructions were frequently thwarted by adverse rulings from the bench.

For example, the Colorado Supreme Court affirmed a refusal to instruct on provocation where the defendant had "suspicion, or even knowledge of prior acts of adultery" but had not witnessed his estranged wife having sex with another man.[256] New York courts proved almost as rigorous. The case law suggests that a homicide following immediately

253. For a case of matricide, see generally *People v. Carlin*, 87 N.E. 805 (N.Y. 1909). Here, the jury returned a guilty verdict, despite testimony by Bernard Carlin purporting to show "an utter failure of maternal affection and solicitude for his welfare, physical and moral, on the part . . . [of the victim]." *Id.* at 808. Affirming his first-degree murder conviction, the appellate court reminded Carlin: "Maternal neglect has never yet been recognized as an excuse for matricide." *Id.* After losing his appeal, Carlin (a career criminal who spent much of his youth in reformatories, *id.* at 806) received capital punishment for killing his mother. *See* ESPY & SMYLKA, *supra* note 25. In *People v. Brown*, the New York Court of Appeals affirmed the capital conviction of Bert Brown for fatally shooting his half-brother, despite evidence that "he had been bullied and beaten by the deceased." 96 N.E. 367, 368 (N.Y. 1911). Brown was electrocuted by the state in 1911. *See* ESPY & SMYLKA, *supra* note 25. Based on the facts recounted in the appellate opinions, Carlin's testimony seems to have been less credible than Brown's.

254. Even in the few states that deemed a man's killing of his wife's lover justifiable homicide, a long lapse of time typically precluded invocation of the honor-killing defense. *See* Territory v. Halliday, 17 P. 118, 122 (Utah 1888) (stating that husband who "slew defiler of his wife . . . after deliberating upon the defilement for 24 hours" could not claim defense). *But cf.* Price v. State, 18 Tex. App. 474, 484 (1885) (stating that, although statute required killing to have occurred "before the parties to the act of adultery have separated," such language did not mean that "the parties must be physically united . . . in the act of copulation").

255. *See, e.g.*, People v. Fornaro, 91 N.E. 542 (N.Y. 1909) (noting that defendant claimed alibi defense to death of female lover, whom he suspected of consorting with other men in "house of ill-repute"); People v. Sutherland, 48 N.E. 518 (N.Y. 1897) (stating that defendant claimed he accidentally shot his allegedly unfaithful wife, even though he fired four times at point-blank range). For cases where jealous men claimed to be insane when they killed their wives or lovers, see *infra* text accompanying notes 265–90.

256. Garcia v. People, 171 P. 754, 755 (Colo. 1918).

upon an oral report of infidelity might receive mitigation in New York, but that any lapse of time prevented the defendant from raising a heat-of-passion defense. In *People v. Garfalo*, a case that resulted in capital punishment, the trial judge excluded the defendant's past statements about the suspected infidelity of his wife.[257] Expressing approval of this evidentiary ruling, the New York Court of Appeals noted: "Adultery gives no licence [sic] to kill either of the offending parties; and if a man deliberately, after a lapse of time sufficient for his passion to subside, kills either [his wife or her lover], it is murder in the first degree . . . ."[258] Similarly, in *People v. Wood*,[259] the appellate court stated:

> In this state it has been held that the fact that information of the wife's adultery had been imparted to the husband can only be proved when it is shown that such information was given so near the time of the commission of the crime that the court can see there was not a sufficient period for the passion it would naturally excite to subside.[260]

In short, despite its bad reputation among modern legal scholars, the traditional heat-of-passion doctrine held men to relatively high standards of self-control. Rage that fell outside the five provocation categories or reached the boiling point over a long period of time did not result in mitigation for men. Rather, courts recognized the basic compatibility of passion and premeditation in wife-murder convictions[261] and rejected arguments that, like the modern EED defense, conflated an instantaneous, provoked flare of rage with prolonged emotional or psychiatric impairment. [262]

257. 100 N.E. 698 (N.Y. 1912); ESPY & SMYLKA, *supra* note 25 (confirming that Garfalo was executed).

258. *Garfalo*, 100 N.E. at 700.

259. 27 N.E. 362 (N.Y. 1891).

260. *Id.* at 365.

261. Affirming the first-degree murder conviction of a male defendant for the fatal shooting of his wife, the New York Court of Appeals commented that "[a] man may deliberate, may premeditate, and intend to kill after premeditation and deliberation, although prompted, and to a large extent controlled, by passion at the time." People v. Jones, 2 N.E. 49, 52 (N.Y. 1885). In *People v. Foy*, the same court noted:

> The defendant was seemingly carried away by his brutal passion of rage, intermingled with jealousy, and indulged such passion to the extent of murdering the woman who was the cause of his jealousy. There was *nothing* to bring the case down to murder in the second degree, or to any of the degrees of manslaughter.

34 N.E. 396, 397 (1893) (emphasis added).

262. Criticizing the Model Penal Code's formulation of the EED defense in the late twentieth century, Dan Kahan and Martha Nussbaum write: "[Modern] case law applying the Code is bristling with examples of defendants whose homicidal outbursts cannot be understood at all, much less understood as expressing appropriate judgments of value. . . . If the theme of

Nor could sexual jealousy between unmarried lovers often be shoehorned into the adultery category in late Victorian murder cases in which men did the killing.[263] For example, in *People v. Foy*, trial testimony established that Martin Foy lay in wait for his former paramour after he learned "that she was throwing him out; that she had another mash . . . ."[264] Despite having been jilted by his lover, however, Foy was convicted. Such jury verdicts harmonized both with the formal law and with social mores that condemned vengeful conduct by rejected suitors as "cowardly and unmanly."[265] Hence, while newspapers speculated about Pasqualina Robertiello's marital prospects after her acquittal,[266] the state of New York executed Foy in 1893.[267]

2. Male Defendants' Unsuccessful Insanity Claims

Men who stalked their victims often sought to claim temporary insanity to make an end-run around the cooling-time doctrine.[268] Yet, unlike Pasqualina Robertiello, male defendants could not successfully equate rage with temporary insanity. As the New York trial court stated in *Foy*: "[T]he heat of passion, and feeling produced by motives of anger,

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common law manslaughter cases is 'virtuous rage,' the theme of the Model Penal Code is 'pathology.'" Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 322–23 (1996).

263. There were a few exceptions to this general rule. For example, in the Denver case, *People v. Spurrier*, the defendant was allowed to plead guilty to voluntary manslaughter for killing his female lover, Jennie Hastings (otherwise known as Lizzie Wright). *See* People v. Spurrier, No. 5989 (Arapahoe County Dist. Ct. 1890) (providing information on defendant's relation to deceased, who resided with another man, and recording his sentence of three years' imprisonment at hard labor for voluntary manslaughter); SHMB, *supra* note 23, at No. 590 (noting that Spurrier pled guilty to voluntary manslaughter).

264. *Foy*, 34 N.E. at 397.

265. DECORUM: A PRACTICAL TREATISE ON ETIQUETTE AND DRESS OF THE BEST AMERICAN SOCIETY 185 (S.L. Lewis ed., 1881).

266. *See Pasqualina's Prospects*, N.Y. HERALD, May 29, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 11 ("So Pasqualina has not found a husband yet. He will turn up though, no-doubt, ere long.").

267. *See* ESPY & SMYLKA, *supra* note 25 (confirming that Foy was executed).

268. *See, e.g.*, *Foy*, 34 N.E. at 397 ("The case thus made against . . . [Foy] was met by him with an effort to prove a kind of temporary insanity). In one Colorado case, the defendant requested, but was denied jury instructions on both heat-of-passion and insanity. *See* Defendant's Requested Instructions, People v. Marshall, No. 20196 (Denver County Dist. Ct. 1911). He was convicted of first-degree murder and sentenced to life imprisonment. *See* Verdict (filed Sept. 29, 1911), People v. Marshall, *supra* (recording first-degree murder conviction of Gus W. Marshall); Mittimus to the Penitentiary (filed Nov. 10, 1911), People v. Marshall, *supra* (recording that Marshall received life sentence). According to Detective Sam Howe, Marshall shot his wife, Lucille, after she eloped with a lover and opened a restaurant in Denver. *See* SHMB, *supra* note 23, at No. 434.

hatred, or revenge is not insanity."[269] Denver courts proved similarly stringent in distinguishing fury from the legally exculpating inability to tell right from wrong. According to a standard set of Colorado jury instructions: "One who does not control his passion is to blame, but an insane man is not to blame."[270]

In several cases, a man was found guilty of capital murder, even though the trial judge admitted evidence that would have persuaded a jury that the victim's past behavior literally drove the defendant crazy if the sexes were reversed. When a male inflicted either emotional or physical abuse on a female, her frenzied killing of him was at least deemed excusable—and often justifiable. By contrast, when jurors heard testimony about a deceased woman's illicit sexual activity, they did not always feel enough sympathy for her husband to spare his life. For example, New Yorker Frank Conroy began to suspect that his spouse was unfaithful to him while he worked as a longshoreman in Montreal.[271] When he returned home, a friend of the family "informed him that his wife went out riding during the afternoon with a man . . . and that she had not returned."[272] Indeed, she stayed away from home all night and the entire next day, appearing "upon the scene about half-past nine in the evening."[273] Conroy raised an insanity defense at his trial for killing his wife, presenting evidence that "he was easily excited to anger."[274] But, instead of crediting his theory, the jury convicted him on capital charges.[275] He was executed in 1897.[276] Whether the jury compared Conroy's mental state with the legal requirements of the *M'Naghten* insanity test as instructed,[277] or simply faulted him under extra-legal norms for failing to master his emotions,[278] remains open to debate. But it is

269. *Foy*, 34 N.E. at 397 (quoting jury instructions).

270. Jury Instructions (filed Dec. 9, 1903), People v. Bass, No. 16168 (Denver County Dist. Ct. 1903); Jury Instructions (filed Oct. 5, 1900), People v. Barager, No. 14520 (Arapahoe County Dist. Ct. 1900).

271. *See* People v. Conroy, 47 N.E. 258 (N.Y. 1897).

272. *Id.* at 258.

273. *Id.*

274. *Id.* at 260.

275. *Id.* at 258, 262.

276. *See* ESPY & SMYLKA, *supra* note 25 (confirming that Conroy was executed).

277. The test for legal insanity established in *M'Naghten's Case* requires proof that the defendant, at the time of the commission of his crime, did not know the nature and quality of his act, or if he did know it, that he did not know that the act was wrongful. *See generally* M'Naghten's Case, 8 Eng. Rep. 718 (1843). New York courts applied this test around the time of the *Conroy* case. *See, e.g.*, People v. Nino, 43 N.E. 853, 856 (N.Y. 1896). Hence, I assume that when the "question of the defendant's mental condition was submitted to the jury" in *Conroy*, People v. Conroy, 47 N.E. 258, 260 (N.Y. 1897), the *M'Naghten* instruction was given.

278. *See* JOHN F. KASSON, RUDENESS AND CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA 147–61 (contending that nineteenth-century Americans, especially

clear that neither formal doctrine nor societal attitudes operated to save him.

On the whole, men experienced difficulty in sustaining claims of insanity in intimate murder cases. Of seventy-four male prisoners executed for such crimes in New York state between 1880 and 1920, almost one-third raised unsuccessful insanity defenses.[279] At least eight of thirty-three men who received capital punishment for killing intimates in New York County during the same time period used this strategy, to no avail, at trial.[280] Of forty-eight Denver cases involving male defendants, I only found two in which a man was exonerated on insanity grounds.[281] By contrast, of the sixteen male defendants convicted of first-degree murder in Denver, at least five had raised an insanity defense.[282] In addition, at least one Denver man unsuccessfully argued that he was uncon-

men, were judged by "exacting standards of emotional control"); NEWTON, *supra* note 241 (stating that, throughout the nineteenth-century, writers of conduct manuals continued to emphasize self-discipline, including "controlling and subjugating the passions"); STEARNS, *supra* note 58, at 67–69 (describing Victorian emphasis on emotional control).

279. About twenty-three intimate murderers, all males, who received capital punishment in New York state during this time period, argued that they were not guilty by reason of insanity. These sources are on file with the author.

280. *See* People v. Wood, 94 N.E. 638, 639 (N.Y. 1911); People v. Coleman, 91 N.E. 368, 370 (N.Y. 1910); People v. Furlong, 79 N.E. 978, 981 (N.Y. 1907); People v. Braun, 53 N.E. 529, 531 (N.Y. 1899); People v. Osmond, 33 N.E. 739, 740 (N.Y. 1893); People v. Smiler, 26 N.E. 312, 312 (N.Y. 1891); People v. Packenham, 21 N.E. 1035, 1035 (N.Y. 1889); People v. Nolan, 21 N.E. 1060, 1061 (N.Y. 1889). For confirmation that all of these prisoners received capital punishment, see ESPY & SMYLKA, *supra* note 25.

281. In the first case, O.J. Haller was acquitted of slaying his unfaithful wife and her lover, Sam Morris. *See* SHMB, *supra* note 23, at No. 258 (recording information about this 1884 case). *But cf.* STEPHEN J. LEONARD, LYNCHING IN COLORADO, 1859–1919 at 61 (2002) (discussing Haller's acquittal by reason of emotional insanity). In the second case, the Denver District Attorney's office filed an information for murder against Ben Wade, Jr., for fatally shooting his father. *See* Information (filed April 26, 1905), People v. Wade, No. 16980 (Denver County Dist. Ct. 1905). But a county court judge found Wade to be insane in May, 1905. *See* SHMB, *supra* note 23, at No. 371 (noting that Wade was committed to county hospital).

282. *See* Jury Instructions (filed Mar. 17, 1911), People v. Murphy, No. 20002 (Denver County Dist. Ct. 1911) (stating that defendant advanced insanity as excuse); Verdict (filed Mar. 16, 1911), People v. Murphy, *supra* (convicting Murphy of first-degree murder); Jury Instructions (filed Sept. 28, 1911), People v. Marshall, No. 20196 (Denver County Dist. Ct. 1911) (instructing jury on legal test for insanity); Verdict (filed Sept. 29, 1911), People v. Marshall, *supra* (convicting Marshall of first-degree murder); Jury Instructions (filed Dec. 9, 1903), People v. Bass, No. 16168 (Denver County Dist. Ct. 1903) (showing that defendant claimed to be insane); Verdict (filed Dec. 10, 1903), People v. Bass, *supra* (convicting Bass of first-degree murder); Jury Instructions (filed Oct. 5, 1900), People v. Barager, No. 14520 (Arapahoe County Dist. Ct. 1900) (indicating that defendant claimed insanity defense); Verdict (filed Oct. 5, 1900), People v. Barager, *supra* (convicting Barager of first-degree murder); Defendant's Requested Instructions, People v. Medley, No. 4800 (Arapahoe County Dist. Ct. 1889) (indicating that court gave general instructions on insanity but refused language that defendant specifically requested); Verdict (filed Sept. 28, 1889), People v. Medley, *supra* (convicting Medley of first-degree murder).

scious due to epilepsy or somnambulism when he killed his victim, and another failed to prove incompetence to stand trial.[283] Thus, a substantial number of men in both east and west ended up on the gallows or in the penitentiary despite their insanity claims. This fact is significant, considering that female murderers benefited from the readiness of juries to excuse their lethal behavior as infirmity of the mind. When a woman was found to have suffered temporary insanity, she typically received neither punishment nor institutionalization in an insane asylum.[284]

Courts and juries were especially unmoved by men's attempt to link drunkenness with insanity. Defense lawyers put on expert witnesses to describe a condition known as delirium tremens, in which the sufferer manifests physical trembling and delusions due to prolonged alcohol abuse,[285] but such strategies often failed. For example, the New York Court of Appeals in *People v. Mills* upheld the refusal to give a delirium tremens instruction.[286] The trial judge had stated that "[i]ntoxicated men *do* premeditate and deliberate," and then read portions of the penal code providing that intoxication did not excuse criminal behavior.[287] Approving these jury instructions, the appellate court noted that the generic instruction given on "any species of insanity which prevented . . . [the defendant's] distinguishing between right and wrong . . . would include delirium tremens" and thus that no special discussion of the condition was needed.[288] The State of New York executed Mills in 1885.[289] A

283. For the case involving unconsciousness, see Jury Instructions (filed Nov. 13, 1897), People v. Sanchez, No. 12570 (Arapahoe County Dist. Ct. 1897) (indicating that unconsciousness was an issue in the case); Verdict (filed Nov. 13, 1897), People v. Sanchez, *supra* (convicting Sanchez of first-degree murder). For the case involving alleged incompetence to stand trial, see Affidavit of Defense Attorney (filed May 24, 1904), People v. Waycaster, No. 16390 (Denver County Dist. Ct. 1904) (claiming that "defendant is not in mental condition to be tried"); Affidavit of Physician (filed May 26, 1904), People v. Waycaster, *supra* (stating that defendant was sane); Verdict (filed June 8, 1904), People v. Waycaster, *supra* (convicting Waycaster of first-degree murder).

284. For instance, a jury deemed Wilhelmine Lebkuchner insane at the time she poisoned her children with rat poison, but she subsequently was released to resume work as a laundress on the grounds that she had recovered her wits. *See A Queer Case Throughout*, SUN, Jan. 10, 1890, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 9. The same result occurred in *People v. McCluskey*, in which a mother faced first-degree murder charges for throwing her young daughter out of a window. *See Insane When She Killed Her Child*, WORLD, June 11, 1885, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 12 ("A commission yesterday reported that . . . [Annie McCluskey] was insane at the time and she was discharged from custody.").

285. *Cf.* WIENER, *supra* note 12, at 272–77 (discussing use of this defense strategy in English courts).

286. *See* People v. Mills, 98 N.Y. 176, 1885 WL 10544, at *3 (N.Y. 1885).

287. *Id.* (emphasis added).

288. *Id.*

289. *See* ESPY & SMYLKA, *supra* note 25 (confirming that Mills was executed).

similar result obtained in the case of Patrick Packenham, a New York City wife-killer hanged with three other intimate murderers in 1889.[290] Packenham's lawyers analogized a person who killed during an alcoholic trance to a sleepwalker,[291] but Recorder Smyth charged the jury that, unless they found that Packenham was insane under the *M'Naghten* test, they must convict him of first-degree murder.[292]

Judicial unwillingness to let intoxication arguments further encroach into the concept of legal insanity thus harmonized with jurors' aversion to drunkenness. Alcohol abuse was a vice that tended to further inculpate, rather than exculpate the accused, especially when a man faced murder charges. In women's cases, by contrast, distaste for female drunkenness competed with squeamishness about convicting women of severe charges, and in the end, some female defendants prevailed by invoking delirium tremens.[293] Perhaps their struggle with the demons of liquor proved less frightening to society than a frank acknowledgement that they might kill in cold blood.

E. Why the Wild West Hanged Fewer Intimate Murderers

The discussion above supports the conclusion that intimate homicide cases in New York and Colorado produced strikingly similar results. In both states, men who killed intimates risked a murder conviction, while female defendants tended to be acquitted or found guilty of lesser crimes by juries sympathetic to their stories of physical or emotional abuse. Yet, as we shall see, New York and Colorado differed dramatically in social and cultural terms in the late nineteenth century, and those differences produced divergent sentencing patterns. Whereas New York sentenced a relatively large number of intimate killers to death as a percentage of its total executions, Colorado did not. Instead, men who killed their paramours, spouses, or relatives in this western state most often received life sentences.

This article suggests that the disparity in execution rates for intimate murder in the two states owed much to the slow westward spread of

290. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1365, 1369 & n.331.

291. *See Was Packenham Insane?*, N.Y. DAILY TRIB., Nov. 11, 1888, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 7 (discussing duel of experts over mental effects of defendant's drunkenness).

292. *See New York's Last Hanging*, N.Y. STAR, Nov. 10, 1888, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 7.

293. *See, e.g.*, Letter from Dr. William L. Hardy to Judge of Court of General Sessions (July 6, 1885), *in* People v. McCluskey, Folder 1755, Box 17, DA PAPERS, *supra* note 1 (1885) (stating that Annie McCluskey, who was acquitted on grounds of insanity, "killed her child during an attack of delirium tremens").

norms of civilized masculinity and distaste for capital punishment. At the end of the nineteenth century and the beginning of the twentieth, Colorado's eagerness to shed its frontier image helped fuel revulsion toward male defendants who killed their lovers, wives, or other family members. Hence, Colorado juries did not hesitate to convict men of intimate murder. But ideals of male civility were newer and less deeply rooted in this western state than in the northeast. Moreover, by the time Colorado experienced a surge of opposition to the death penalty, New Yorkers once again embraced it with fervor.[294] Thus, in contrast to their east-coast counterparts, Coloradoans proved reluctant to use state-sponsored execution—a form of punishment they increasingly questioned—to exact retribution or deterrence in intimate homicide cases.

Plagued by adult crime, juvenile gangs, and inadequate law enforcement, Denver was a rough and dirty city in the late nineteenth century. Heatless tent slums rife with disease sprawled on the banks of the Platte River, into which raw sewage drained until the mid-1880s. Citizens raised chickens and dairy cows on their urban property, and municipal officials characterized stray dogs as the second worst nuisance, aside from public drunkenness.[295] Compared to New York County's population of more than one million residents in 1880, the county in which Denver was located contained only 38,644 people.[296] Denver's distinctly un-cosmopolitan environment embodied much of the lawless violence often associated with the American West. For example, in 1880, a pool-hall dispute between a white man and a Chinese immigrant erupted into widespread rioting and the looting of many Chinese-owned businesses.[297]

One might expect that, in this setting, the state would have ordered men convicted of killing their wives, girlfriends, or relatives to swing from the gallows. Yet, as Tables 4 and 5 show, Colorado and its largest city executed fewer intimate murderers as a percentage of total execu-

294. *See infra* text accompanying notes 320–24.

295. *See* LYLE DORSETT, THE QUEEN CITY: A HISTORY OF DENVER 92–93, 100 (1977).

296. University of Virginia Library Historical Census Browser (reporting census data from 1800), http://fisher.lib.virginia.edu/collections/stats/histcensus (last visited Oct. 2, 2005). In 1880, the census for New York state showed a population of 5,082,871, whereas only 194,327 people lived in Colorado. *Id.* Colorado experienced dramatic population growth over the forty-year period covered in this article; however, in 1920, it still appeared tiny compared to New York. By 1920, New York state claimed a population of 10,385,227, and New York County boasted 2,284,103 people. *Id.* (reporting census data from 1920). In contrast, the census still showed less than a million people in Colorado and less than 300,000 in Denver County. *Id.*

297. DORSETT, *supra* note 295, at 102 (recounting events leading to the Hop Alley Fracas of 1880); *see also* LEONARD, *supra* note 281, at 132–35 (providing information on these anti-Chinese riots); NOEL, *supra* note 248, at 28–29 (same).

tions than did New York. During this time period, not a single Denver prisoner was legally hanged for an intimate homicide, although the state executed eleven people convicted of crimes in the city.[298] Indeed, in the entire state of Colorado, only about eleven percent of all legal executions (four of thirty-seven) involved defendants found guilty of intimate killings.[299] All men, save one, who were convicted of first-degree murder in Denver for killing their lovers, wives, or relatives received life sentences, many of which were commuted to shorter prison terms.[300]

Table 4: ***Legally Executed Male Prisoners Identified as Intimate Murderers, 1880–1920***

Years	New York State	New York County	Colorado	Denver/ Arapahoe County
1880–1889	17	10	1	0
1890–1899	23	12	1	0
1900–1909	19	7	2	0
1910–1920	15	4	0	0
Total (1880–1920)	74	33	4	0
% of all Executions (1880–1920)	24% (74 of 307)	36% (33 of 91)	11% (4 of 37)	0% (0 of 11)

298. Data about executions in Colorado was gleaned from Radelet, *supra* note 26, at app. 1; *see also* ESPY & SMYLKA, *supra* note 25. I have only counted legal executions, not lynchings.

299. Only two intimate killers were executed in Colorado before the turn of the century. *See* Radelet, *supra* note 26, at app. 1 (discussing case of Marshall Clements, executed for murdering his brother and sister-in-law, who he claimed had abused his father, and William H. Davis, who was convicted of killing his foster mother and her paramour). Two more intimate murderers received capital punishment during the eight years following the reinstatement of the death penalty in 1901, but none was executed between 1910 and 1920. *See id.* (providing details of events leading to capital punishment of Azel Galbraith for fatally shooting his wife and eight-year-old son, and James Lynn, who was hanged for the murder of girl with whom he was infatuated). The latter case, *People v. Lynn*, should not count if Lynn's romantic attentions were never welcomed by his victim. *See supra* Part I.A (defining "intimate homicide"). However, so far, I have encountered no facts indicating that the *Lynn* case must be excluded on these grounds.

300. *See infra* app. F. Only one of the male defendants convicted of murder received his sentence during the period when first-degree murder carried a mandatory death penalty. This defendant, James Medley, was released on habeas corpus. *See* Order (filed Apr. 16, 1890), People v. Medley, No. 4800 (Arapahoe County Dist. Ct. 1890) (ordering discharge of James H. Medley). For more information on the mandatory death penalty provision, see *supra* note 45 and accompanying text.

By contrast, New York state executed at least seventy-six intimate murderers between 1880 and 1920—about twenty-five percent of its total executions.[301] And capital punishment in New York County during the same period claimed the lives of ninety-one prisoners, more than one-third of whom had killed their paramours, spouses, or other family members.[302] Animosity toward wife-killers and support for hanging or electrocuting them ran deep in northeastern society. Indeed, the state-sponsored capital punishment of men who murdered their wives or lovers accorded with the blood lust of mobs that sometimes gathered, threatening to stage a lynching.[303]

Table 5: ***Legally Executed Female Prisoners Identified as Intimate Murderers, 1880-1920***

Years	New York State	New York County	Colorado	Denver/ Arapahoe County
1880–1889	1	0	0	0
1890–1899	1	0	0	0
1900–1909	0	0	0	0
1910–1920	0	0	0	0
Total (1880–1920)	2	0	0	0
% of all Executions (1880–1920)	.01% (2 of 307)	0% (0 of 91)	0% (0 of 37)	0% (0 of 11)

What accounts for the disparity between New York and Colorado execution rates in intimate murder cases? The most legalistic answer

301. *See infra* app. D.

302. Thirty-three intimate murderers were executed in New York County between 1880 and 1920. Wives and girlfriends comprised the vast majority of victims in intimate murder cases resulting in executions in both New York County and New York state. *See infra* apps. C, D.

303. *See, e.g.*, *Shoots Girl Who Has a Warrant for Him*, WORLD, June 7, 1910, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 35 (reporting that mob kicked, pummeled, and tore most of clothing from rejected suitor after he shot woman who sought warrant against him for threatening her); *Threats of Lynching*, WORLD, July 7, 1895, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 19 (noting that wife-killer James McAvoy was "mobbed by excited neighbors" and that police had to protect him from "fists, sticks, and stones at the peril of their own skins"); *Wife Fatally Shot*, MORNING J., July 7, 1895, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 19 ("Only the clubs of six policemen kept James McAvoy from being lynched by his frantic neighbors last night.").

simply looks to the statutes: First-degree murder carried a mandatory death sentence in New York, whereas in Colorado, for most of the period encompassed by this article, it did not.[304] However, going beyond the statutory explanation, it is possible to identify significant cultural differences between the two states.

As a general matter, the west lagged behind the east in the reception of social and cultural change. The separate spheres ideology—which accorded women the duty of keeping house and inculcating the next generation with religious values, while their husbands sallied forth into the business sphere[305]—remained impracticable on the frontier through the mid-nineteenth century. Pioneer women had to perform a wide range of tasks, including physical labor, in order for the family to survive.[306] Although participation in breadwinning may have given frontier wives greater strength, the lack of distinct sex roles was paired with the survival of patriarchal norms that tacitly encouraged men's use of violence to obtain female submission.[307] Ironically, the ideal of companionate marriage arrived late in both Wyoming, the first state to grant woman suffrage,[308] and Colorado, the second state to give the vote to females.[309] Indeed, middle-class values emphasizing self-discipline, morality, and segregated sex roles did not spread across the country until the late nineteenth century,[310] when northeasterners had already begun to rebel against them.[311]

The lack of established legal structures in the west also gave patriarchy lingering power and legitimacy that it lacked in the northeast. While public law enforcement developed later in New York than is often assumed,[312] western legal institutions were even more ad hoc. When

304. *See supra* notes 40–41, 45 and accompanying text; *see also infra* note 323.

305. Historical scholarship abounds with descriptions of these sex-segregated roles. *See, e.g.*, BEDERMAN, *supra* note 106, at 125. For a discussion of the separate spheres with reference to nineteenth-century conduct literature, see NEWTON, *supra* note 241, at 91–92.

306. *See* DEL MAR, *supra* note 11, at 10–11, 16–17, 20 (describing relatively late establishment of separate spheres in Oregon, compared to the northeast); Jenifer Banks, *"A New Home" for Whom? Caroline Kirkland Exposes Domestic Abuse on the Michigan Frontier*, *in* OVER THE THRESHOLD, *supra* note 11, at 143 (describing impossibility of maintaining separate spheres in frontier Michigan in the late 1830s).

307. *See* DEL MAR, *supra* note 11, at 10–11, 16, 19.

308. *See* Paula Petrik, *Send the Bird and Cage: The Development of Divorce Law in Wyoming, 1868–1900*, 6 W. LEGAL HIST. 153, 154 (1993).

309. Colorado gave women the vote in 1893. *See* NOEL, *supra* note 248, at 111–12.

310. *See, e.g.*, DEL MAR, *supra* note 11, at 47.

311. *See* BEDERMAN, *supra* note 106, at 12–13; ROTUNDO, *supra* note 65, at 222–46.

312. New York City's first municipal police force was established in 1845. *See* WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870 x–xi (1973). The New York County District Attorney became an elected official with full-time responsibilities for managing criminal cases the following year. *See* Ramsey, *Discretion-*

New Yorker Horace Greeley visited early Denver, he reported that it was full of ruffians "soured in temper, always armed, bristling at a word, ready with the rifle, revolver or bowie knife."[313] Efforts to deal with criminality were slow, sporadic, and often extra-legal. In the 1860s, Denver civic leaders unsuccessfully attempted to stamp out gang activity with vigilance committees, which took part in lynching.[314] In fact, lynching constituted a popular, extra-legal mode of punishing criminals until the mid-1880s, when respectable Coloradoans began to oppose it.[315]

Law enforcement in Denver remained inadequate throughout the nineteenth century. There was no penitentiary in the Colorado territory until 1871,[316] and as late as 1878, Denver had only one police officer for every 4,166 citizens, compared to New York City's ratio of one patrolman for every 400 citizens.[317] The western city still was making do with far fewer police per capita than New York or Philadelphia in 1887.[318] In the absence of a sufficiently large and well-trained police force, the authority of the male household head over his family retained political as well as social importance.[319]

Anti-capital punishment agitation also followed a different chronology in Colorado than it did in New York. Antebellum New Yorkers articulated strong, evangelical opposition to the death penalty during the 1830s and 1840s, and in 1841, they nearly accomplished their objective of abolishing capital punishment.[320] Yet, by the late nineteenth century, the attitude that murderers ought to be executed quickly to deter similar crimes predominated and was expressed vociferously in New York City newspapers.[321] Despite the greater squeamishness of juries, compared with the press, men who killed intimates in New York faced a very real possibility of being convicted and sentenced to death for first-degree

ary Power, *supra* note 22, at 1327. For criticism of the misleading hypothesis that public prosecution existed in New York during the colonial period, see *id.* at 1325–26.

313. DORSETT, *supra* note 295, at 30.

314. *See id.* at 8, 30; *see also* LEONARD, *supra* note 281, at 23–24 (estimating that Denver vigilance committees were responsible for more than three hangings in 1859–1860).

315. *See* LEONARD, *supra* note 281, at 156, 158; *see also infra* text accompanying note 324.

316. *See* ELINOR M. MCGINN, FEMALE FELONS: COLORADO'S NINETEENTH CENTURY INMATES 3 (2001).

317. DORSETT, *supra* note 295, at 94.

318. LEONARD, *supra* note 281, at 104 (noting that Denver had only forty-three police officers in 1887).

319. *See* Banks, *supra* note 306, at 138 (making similar observations about frontier Michigan).

320. *See* David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787–1861*, 63 AM. HIST. REV. 23, 46 (1957).

321. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1353 n.263, 1354 n.264.

murder. In contrast, nearly two-thousand miles to the west, Colorado death-penalty opponents increased in strength and numbers in the 1890s, after New Yorkers had largely abandoned their agitation.

Colorado's movement to abolish capital punishment gained steam from religious leadership. In 1893, the State Senate passed a bill embodying the abolitionist position.[322] Although neither this bill nor a second effort in 1895 secured the necessary votes in the State House of Representatives, Colorado Governor Alva Adams finally signed legislation eliminating the death penalty for first-degree murder on March 29, 1897.[323] The new law substituting life imprisonment for execution enjoyed popular support in its early days, and even when the death penalty was reinstated in 1901, the culture of capital punishment seemed different. Proponents now offered the deterrence of lynching—a practice that supposedly dissuaded respectable settlers and investors from coming to Colorado—as a sanitized rationale for state-sponsored executions.[324]

Coloradoans' opposition to the death penalty in the late 1800s, combined with the relative youth of social values condemning extreme violence toward frontier women, may account for the fact that the public response to men who killed their intimates was not quite as harsh in Colorado as it was on the east coast. In the late nineteenth century, several eastern states experimented with the use of the whipping post to deter wife-beating.[325] The campaign for the corporal punishment of wife-beaters embodied many aspects of the image conveyed by Theodore Roosevelt and others at the turn of the century. It represented a new muscular form of masculinity, in which men who failed to protect their women were beaten, not merely jailed or censured. Indeed, President Roosevelt advocated whipping post laws in his annual address to Congress in 1904.[326]

322. *See* Radelet, *supra* note 26, at 907–08.

323. *See id.* at 908.

324. *See id.* at 910–12. *See also* LEONARD, *supra* note 281, at 32, 35 (describing respectable Denver's opposition to vigilante justice). The strategy apparently worked, for "[a]fter 1902, Colorado counted only three lynchings . . . ." *Id.* at 8.

325. In 1882, Maryland passed a bill providing for the whipping of men convicted of domestic assault. PLECK, *supra* note 11, at 111. Massachusetts, Pennsylvania, and New Hampshire considered, but ultimately rejected such legislation in mid-1880s, and in 1901, Delaware followed Maryland by enacting a whipping post law. *See id.* (describing whipping post legislation in these states).

326. *See id.* at 118–19. The corporal punishment of wife-beaters may have been intended to establish social control over blacks, Indians, and immigrants and to distinguish them from the respectable, white male establishment. *See* DEL MAR, *supra* note 11, at 87, 95; *see also* PLECK, *supra* note 11, at 109. Yet, some historians resist drawing a parallel between Roosevelt's policies and racist efforts at social control. For example, while admitting that Roosevelt considered blacks to be temporarily inferior to whites, Edmund Morris indicates that he took a relatively progressive stance toward improving race relations and that he courted black voters.

Although the whipping post campaign had a few adherents in the western United States,[327] the state of Colorado did not participate as a matter of official law and policy.[328] Indeed, unlike New York, it was not among the twelve states that even considered such legislation.[329] Colorado's reluctance to use either the whip or the gallows to control intimate violence may have stemmed from its insecure position as a patriarchal, frontier society that sought to earn a more polished reputation. Until 1870, the state struggled with a gender imbalance that left women outnumbered six to one in Denver.[330] In the 1860s, the saloon served as the primary social institution in the city; it was a multi-purpose space where men lived, did business, took their meals, and even worshipped their God.[331] When more women started to arrive, Denver faced the delicate task of convincing them that they were coming to a religious, female-friendly community where it would be safe and comfortable to reside. With regard to intimate murders, which occurred despite the civilizing ethos urged by the church and the municipal government, legal authorities weighed two options: they could bow to anti-death penalty forces (thus risking the appearance of being soft on intimate murder), or they could hang the culprits (potentially turning the spotlight on the city's gendered tensions and dangers). They chose the former, and in doing so, revealed that Colorado had not synthesized solicitude for women with martial aggression.

The separate spheres ideology, with its accent on controlling the passions, had reached Denver by the late nineteenth century. However, the newer image of the impulsive, physically active man who still protected his woman from violence—an image that increasingly enchanted New Yorkers and animated their political rhetoric—was not yet ascendant in Colorado. Indeed, there is little reason to think that urban Coloradoans shared in the idealization of the violent Western ranchman. Rather, in the late 1800s, residents of Denver increasingly aped values

See EDMUND MORRIS, THEODORE REX 52–53, 172, 198–200, 425, 455 (2001); MORRIS, THE RISE OF THEODORE ROOSEVELT, *supra* note 244, at 255, 351, 482–83.

327. Whipping post legislation was considered but ultimately defeated in California in the mid-1870s. *See* PLECK, *supra* note 11, at 110. Although Oregon adopted a whipping-post law in 1905, the state only used it two times before it was repealed in 1911. *See* DEL MAR, *supra* note 11, at 77–78.

328. Acting extra-legally, mobs occasionally whipped wife-beaters and lynched wife murderers in late nineteenth-century Colorado. *See* LEONARD, *supra* note 281, at 91, 115, 120.

329. *See* PLECK, *supra* note 11, at 109 n.4 (listing California, Missouri, Maryland, Massachusetts, Pennsylvania, New Hampshire, New York, New Jersey, Virginia, Illinois, Delaware, and Oregon as states that considered whipping post legislation). The District of Columbia also debated adopting such a law. *See id.*

330. *See* DORSETT, *supra* note 295, at 50, 90.

331. *See* NOEL, *supra* note 248, at 113–14.

and institutions that, in their eyes, embodied the sophistication of east-coast cities. To cultivate a more progressive image, they designed sky-scrapers, expressed their disapproval of lynching, and hid state-sponsored capital punishment behind the walls of the penitentiary.[332] Theatres, museums, libraries, and churches began to supplant the social functions of saloons, as Denver grew to be a metropolis.[333] Indeed, the neighborhood tavern became not only an anachronism, but also a "civic embarrassment."[334] Thus, whereas Roosevelt borrowed buckskin and a hunting rifle to appear more masculine to New York City voters when he ran for mayor in 1886,[335] Coloradoans wanted their capital city to radiate manicured urbanity.[336] The strong tendency to impose prison terms, rather than the death penalty, on men who killed their intimates may have mirrored Colorado's self-conscious effort to shed the Wild West image that New Yorkers increasingly saw as an antidote to Victorianism.

To summarize: In the unsettled culture of a western state trying to change its ways, intimate homicide perpetrated by a man was considered bad enough to warrant a murder conviction, but insufficiently heinous to risk the controversy that Coloradoans had begun to associate with capital punishment. New York and Colorado thus took differing approaches to sentencing male prisoners convicted of intimate murder. Nevertheless, the fact that fewer intimate killers were executed as a percentage of total executions in Colorado than in New York should not distract from the more important conclusion that the two states pursued a similar course with regard to condemning lethal intimate violence by men.

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332. *See* DORSETT, *supra* note 295, at 142–43 (stating that proposal to erect fourteen-story building in Denver in 1907 provoked controversy, but that newspapers supported it because it would transform Denver into vertical city like New York); LEONARD & NOEL, *supra* note 70, at 80 (noting that Denverites preferred Eastern and European architecture to southwestern or Hispanic building styles); LEONARD, *supra* note 281, at 158–60 (arguing that lynching began to fall out of fashion in Colorado in the mid-1880s because it "was increasingly seen as a foe of civilization"); Radelet, *supra* note 26, at 899–901 (discussing motives behind legislation moving all executions within walls of Cañon City penitentiary in 1889); *see also* CARL ABBOTT, THE METROPOLITAN FRONTIER: CITIES IN THE AMERICAN WEST xviii (1993) (stating that "[i]n the nineteenth and early twentieth centuries, Western cities . . . helped to 'civilize' the West" by imitating northeastern values and institutions and that they did not quit "playing catch up" until the 1940s).

333. *See* NOEL, *supra* note 248, at 113.

334. *Id.* at 115.

335. *See* BEDERMAN, *supra* note 106, at 176 (describing Roosevelt's successful mayoral campaign), 177 fig.12 (reproducing picture showing Roosevelt as "virile Western ranchman").

336. *See, e.g.*, ABBOTT, *supra* note 332, at xviii (noting growth of charitable, religious, and literary organizations in Denver by 1900); DORSETT, *supra* note 295, at 161–62 (stating that Mary Elitch Long strove to bring classical music and light opera to Denver in early twentieth century); UBBELOHDE, BENSON, & SMITH, *supra* note 70, at 263 (contending that Mayor Robert Speer transformed Denver by expanding parks and adding new boulevards).

II. THE FAILURE OF PREVENTION

Showing that there was no hegemonic gender ideology protecting male perpetrators of intimate violence, as Part I does, leaves unanswered the question of why the public criminal justice system in the late nineteenth and early twentieth centuries punished intimate murders, but failed to prevent them from occurring. The problem of intimate violence was allowed to fester until it produced autopsies, coroner's inquisitions, and murder trials, in addition to bruises and broken bones. Part II will suggest three reasons for the deplorable lack of a preventive public response. First, the decline of neighborly and family intervention against intimate violence thrust the problem upon a police force that was too corrupt and brutal to handle it effectively. Second, caught in a cycle of violence and dependence, some victims impeded solutions by refusing to seek or accept help from the police. Third, whereas Victorian social values and the ideal of passionate manhood that replaced them generally condemned a man's brutality against his girlfriend, wife, or family, the same countercurrents that produced intimate assaults frustrated efforts to curb them.

A. Policing Civilized Masculinity

1. The Decline of Neighborly Intervention

By the late nineteenth century, the network of relatives, neighbors, and friends who helped shield victims of intimate violence from their abusers had largely disintegrated. Both Denver and New York had become anonymous cities, in which urban dwellers increasingly maintained a polite distance from their relatives and treated the family next door as strangers. Court records and prosecutors' papers abound with evidence that both neighbors and relatives frequently ignored screams from family fights and that, if they *did* attempt to play a peacemaking role, they often learned a violent lesson about the costs of intervention.

In the world of working-class families who moved from one rented room to another, there was little hope that neighbors would intercede to stop a beating. Mary Slattery lived on the same floor as George Whittel, who beat his wife to death in New York City in 1891.[337] The following excerpt from her trial testimony illuminates the decline of neighborly intervention against intimate violence:

337. *See* Testimony of Mary Slattery, Trial Transcript at 1, People v. Whittel, Folder 3989, Box 432, DA PAPERS, *supra* note 1 (1891) (stating where she lived in relation to Whittel family).

Q: What did you do when you saw [the defendant hitting and kicking the deceased]?
A: I went and shut my own door, I would not be looking at him any longer.
Q: You shut the door and left the sick woman to be kicked around by this husband, did you?
A: I did not know them much.
Q: You never had been introduced to her and therefore you could not go in and defend her?
A: I did not take much notice of them, I thought it would not be so bad as this.
Q: You say you saw her afterward?
A: Yes sir, I saw her after when they sent a little boy in for me.
Q: Why did not you go down when you saw this man kicking this woman, go down on the street a report him to a policeman?
A: I did not like to.
Q: Why didn't you?
A: I did not do it.
Q: You made no demonstration to stop him?
A: I did not make any remark, I shut my own door, I had no more to say.[338]

The inquisition into the death of Catharine Derringer in the same year as the *Whittel* case reveals a similar lack of neighborly concern. A female neighbor and her friend dressed and left their building, without investigating the loud quarrel and the anguished cry, "Oh, Billy, Oh, Billy, I am dying" which emanated from the Derringers' room.[339]

Such isolation from neighbors was common in less urban areas, as well. For example, when Frank Conroy and his wife got into a bloody battle over her alleged infidelity in Ogdensburg, New York, several neighbors "were attracted to the front door by the screams of the deceased."[340] Conroy answered their knock "covered with blood" and

338. Testimony of Mary Slattery, Trial Transcript at 7–8, People v. Whittel, Folder 3989, Box 432, DA PAPERS, *supra* note 1 (1891).

339. *See* Testimony of Mary Murray, Coroner's Inquisition at 7–9, People v. Derringer, Folder 3996, Box 433, DA PAPERS, *supra* note 1 (1891). For other New York City examples, see *People v. Koenig*, 72 N.E. 993, 993 (N.Y. 1904) (stating that male lodger started to investigate when he heard quarreling and "gurgling" noise, but that "his wife told him to mind his own business"), and *People v. Coleman*, 91 N.E. 368, 369 (N.Y. 1910) (noting failure of other inhabitants of dwelling to shield woman from husband's violence).

340. People v. Conroy, 47 N.E. 258, 260 (N.Y. 1897).

holding "a carving knife in his hand." Yet, "the outsiders did not interfere at this point"; rather, the "defendant was allowed to close the street door" and slaughter his wife.[341]

Several factors, besides population growth and urbanization, contributed to the decline of neighborly assistance. First, household heads increasingly claimed that their troubles with intimates were a private matter. Second, attempts to stop a spousal beating or quarrel often resulted in escalated violence, including attacks on children, other relatives, or the would-be peacemaker. *People v. Schuyler*[342] provides a shocking illustration of both factors. A neighbor reproved Schuyler for striking his wife, whereupon the defendant angrily retorted: "This is a family affair, and neighbors need not interfere."[343] Schuyler then grabbed his three-year-old daughter and fatally bashed her head against a wooden block**,** claiming later that he would not have killed the child "but for the neighbors."[344]

The few neighbors or bystanders who tried to help risked becoming victims themselves. For instance, in Denver, Birdie Brown alleged that William F. Nichols hit her in the stomach and the nose when she told him to "let [his wife] Ida alone."[345] Sometimes, an individual who attempted to assist the abuse victim paid with his life. In 1898, a nineteen-year-old New York City resident died after being shot when he attempted to stop a man from beating his ex-wife.[346]

Although some family members shielded battered individuals or made accusations against the abuser,[347] others were too submissive or apathetic even to call a doctor for the dying victim. For example, in the *Whittel* case discussed above, the sister of the beaten woman acquiesced

341. *Id.* The appellate court described a fierce and prolonged struggle in which the defendant pursued the victim throughout their house and inflicted multiple knife wounds on her hands, arm, breast, face, and scalp, before finally slicing her jugular vein. *See id.*

342. 12 N.E. 783 (N.Y. 1887).

343. *Id.* at 784.

344. *Id.* at 785.

345. Affidavit of Birdie Brown, Coroner's Inquisition into Death of William F. Nichols (Aug. 25, 1903), Box 27931, Coroner's Records, City and County of Denver. New Yorkers who tried to stop intimate violence also risked being attacked. For example, Adrian Braun was imprisoned for assaulting several men who "rushed in" to break up a quarrel between him and his wife. *See* People v. Braun, 53 N.E. 529, 530 (N.Y. 1899). While serving his sentence for the assault, he killed his wife in the prison visiting area and was convicted of capital murder. *See id.* at 533 (affirming first-degree murder conviction).

346. *See Wife's Defender Shot*, N.Y. DAILY TRIB., Apr. 22, 1898, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 23.

347. For example, Thomas Murphy spoke out against the abuse of his wife by his brother-in-law Thomas Dunphy. As a result of this quarrel, Dunphy killed him. *See, e.g.*, Affidavit of James Murray, Police Court Records, People v. Dunphy, Folder 1859, Box 184, DA PAPERS, *supra* note 1 (1885).

when the woman's husband said that she did not need a doctor.[348] If neighbors and family members failed to shield the victim, police intervention or stoic endurance constituted the only remaining options.

2. The Corruption and Brutality of Early Public Law Enforcement

Although the coroner had the greatest responsibility for investigating homicide,[349] the police broke up fights in private homes, as well as in the streets and saloons.[350] As the public criminal justice system developed and neighborly intervention declined, the police increasingly responded to violent altercations among family members.[351] The papers of the New York County District Attorney contain very few non-lethal intimate assault cases, indicating that such matters were processed at a lower level, either by the discretionary decisions of police magistrates or by the patrolmen themselves.[352] Extra-legal station-house releases seem to have been a common way of dealing with a variety of crimes.[353] However, newspaper articles provide anecdotal evidence that officers at least sporadically hauled men into police court for beating or otherwise attacking their intimates.[354] The criminal records of men convicted of

348. *See* Testimony of Elizabeth Daley, Trial Transcript at 20, People v. Whittel, Folder 3989, Box 432, DA PAPERS, *supra* note 1 (1891).

349. *See* MONKKONEN, *supra* note 35, at 18 (stating that this was true in New York City until about 1910); *see also* ROGER LANE, MURDER IN AMERICA: A HISTORY 112 (1997) (noting that, during early days of public policing, police did not perform detective functions in homicide cases and that instead coroners, who were "low-caliber elected officials," cursorily examined dead bodies).

350. *Cf. id.* at 126 (stating that in antebellum Boston, the "biggest single job" of Boston Watch and Police was breaking up fights, most of which occurred in private homes).

351. For a discussion of such intervention in New York, see *infra* text accompanying notes 374–75. A comparable situation seems to have existed in the western states. *See* DEL MAR, *supra* note 11, at 65 (describing expanded role of police in attempting to protect abused women in Oregon). During the 1870s, feminist Lucy Stone catalogued 500 arrests per year for wife-beating in Boston. *See* Stark, *supra* note 104, at 988.

352. Pamela Haag makes similar observations about the disposition of intimate assault cases during a slightly earlier time period. *See* Pamela Haag, *The"Ill-Use of a Wife:" Pattern of Working Class Violence in Domestic and Public New York City, 1860–1880*, J. SOC. HIST. 447, 449 (1992).

353. *See* MILLER, *supra* note 312, at 73.

354. *See, e.g.*, *A Wife Beater Held*, N.Y. STAR, July 8, 1887, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 4 (reporting that John Irwin was arraigned in police court for beating and kicking his wife Mary, that she charged him with assault, and that he denied charges but was held on $500 bail); *Tried to Shoot His Wife*, N.Y. STAR, Feb. 23, 1889, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 7 (reporting that dissolute stonecutter was arrested for shooting at his wife and that he attempted to regain her trust by begging her pardon at station house); *Assaulted by Her Mother and Brother*, N.Y. STAR, May 13, 1890, *microformed on* DA SCRAPBOOK, at Roll 9 (reporting that New York City woman was "beaten,

murder also reveal arrests and peace bonds from past incidents of domestic violence.[355] Still, such strategies did not solve the problem.

Failure to establish an effective system of intimate-violence prevention owed at least in part to the primitive nature of policing. Law enforcement in the age of machine politics was infamously corrupt and inefficient. Professionalism barely had begun to reach the police forces of New York City and Denver in the period covered by this article.[356] Denver police commissioners shielded gamblers and prostitutes, and although the New York force was much larger than its western counterpart, respectable New Yorkers still viewed officers in their city as partisan amateurs exercising legal power in the interests of Tammany Hall.[357]

Besides gambling, receiving kickbacks for protecting criminals, and generally doing the bidding of the political bosses,[358] the police earned a well-deserved reputation for brutality. For example, in the early 1890s, the New York press expressed concern about the shooting of a bartender by a police officer who apparently believed his political connections would spare him from prosecution.[359] Apropos of the homicide, the District Attorney made a great show of saying, "It is time these police outrages should be stopped. The police are the servants of the community, but sometimes act as if they were its brutal masters."[360] Nevertheless,

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kicked, and dragged by her hair until she became unconscious" when she attempted to break up a fight between her mother and brother and that police arrested both of her assailants).

355. *See, e.g.*, People v. Conklin, 67 N.E. 624, 628 (N.Y. 1903) (noting that New York County District Attorney produced evidence of criminal proceedings against defendant by his wife, whom he subsequently shot to death). The court listed the contents of these records:

> These records contain the sworn complaints of the wife, charging defendant with disorderly conduct, threats, and assaults, and also abandonment and refusal to support or provide for her or her child. Then follow the warrant for his arrest, the return of the officer, the bail bonds, and other proceedings in detail.

Id. The State of New York executed Conklin in 1903. *See* ESPY & SMYLKA, *supra* note 25.

356. *See* LEONARD, *supra* note 281, at 104. *Cf.* LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910 at 77–79 (1981) (describing lack of professionalism and criminal origins of many Oakland, CA police officers).

357. *See* LEONARD & NOEL, *supra* note 70, at 106 (noting connections between Denver police commissioners and criminal underworld). Of similar problems in New York City, historian Wilbur Miller comments, "One venerable and persistent aspect of New York's police tradition is corruption." MILLER, *supra* note 312, at 169. For Miller's discussion of partisan control of the New York police force prior to 1870, see *id.* at 16–17, 23, 140–41, 151.

358. *See* Steinberg, *supra* note 70, at 764, 771 (discussing District Attorney's exposure of police corruption in Progressive Era New York City). *See also* Ramsey, *Discretionary Power*, *supra* note 22, at 1389 (noting that New York police officers were suspected of shielding criminals from arrest or prosecution, based on ethnic and political loyalties).

359. *See, e.g.*, *Trumps with Clubs*, MORNING J., Feb. 18, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 10 (discussing whether Officer Lally would be indicted for killing bartender).

360. *Id.*

the *Morning Journal* wondered how long the policeman's "pull" would last, opining that "[m]any citizens who know these supposed guardians of the peace only as sources of terror to the community are very much interested in the question."[361] Around the same time, the *New York Tribune* admitted that the police had made progress in driving gangs of robbers from the streets, but still complained: "Their commonest, most injurious, and inexcusable fault is their readiness to brandish their clubs and their eagerness to apply them when there is no necessity for menace, much less violence."[362] Indeed, from the late nineteenth through the early twentieth centuries, urban law enforcers allegedly clubbed citizens without provocation, instilling in the public the view that the police perpetrated violence, rather than prevented it.[363]

Although police officers increasingly offered the only hope of outside protection from intimate violence, some were wife-beaters and even wife-murderers themselves. In 1891, for example, on-duty patrolman William Smith inflicted a fatal head injury on his wife with his truncheon after she interrupted him at the saloon where he drank and caroused with another woman.[364] Police officers' notorious readiness to lie, cheat, and assault may have not only reduced their credibility in the eyes of juries,[365] but also deterred victims from seeking their assistance.

3. Non-Reporting and Victim Recantation

Terrified victims often refrained from reporting battering incidents. They invented fictions to hide abuse from family, friends, and neighbors;

361. *Id.*

362. *Clubs in the Police Force*, N.Y. DAILY TRIB., Feb. 23, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 10.

363. *See, e.g.*, *Trumps with Clubs*, *supra* note 359 (reporting, in 1891, that sixty-year old man was "clubbed without provocation" by policeman in front of his teenage daughter); *More Policemen in Trouble*, SUN, Mar. 24, 1910, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 35 (reporting, in 1910, on manslaughter prosecution of police officer for clubbing death of young Italian man in Bronx saloon).

364. *See* Testimony of Officer William Gillespie, Coroner's Inquisition at 4–17, People v. Smith, Folder 3155, Box 429, DA PAPERS, *supra* note 1 (1891) (testifying to details of events at saloon); Testimony of John Smith, Coroner's Inquisition at 58–59, People v. Smith, *supra* (testifying that his father struck his mother with police truncheon outside saloon). It is significant that, unlike most individuals suspected of an intimate homicide, Officer Smith was charged with manslaughter, not murder. *See* Indictment, People v. Smith, *supra.* This fact tends to corroborate journalists' complaints about police officers evading the punishments they deserved.

365. Defense attorneys sometimes referred to police misconduct to shake the jury's confidence in an officer's testimony. *See, e.g.*, *Murder in the Second Degree*, N.Y. STAR, June 18, 1890, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 9 (discussing use of such tactics in trial of George Spence for murdering his wife).

they also hesitated to involve the police. Prior to being killed by her husband, for instance, a New York City woman named Minnie Schultz told her sister that she had "bumped" herself, rather than admitting to having suffered a beating.[366] If a victim of intimate abuse did call for a patrolman, she might ask him to leave without making an arrest. Patrick Conklin's wife made frequent complaints to the authorities about threats and violence by her husband, who later shot her to death. However, in describing this New York City couple's past marital strife, the court noted that, in at least two incidents, criminal "proceedings were withdrawn at the request of the wife."[367]

A violent murder in Westchester County, near Manhattan, offers another sad example. Oscar Borgstrom "was unjustly jealous of his wife, frequently quarreled with her, and threatened on several occasions to kill her."[368] His violent attacks finally escalated to such a frightening level that she "swore out a warrant for his arrest, and placed it in the hands of an officer to serve."[369] However, when the policeman arrived, Mrs. Borgstrom "relented, for the reason . . . that she said she didn't like to do it on account of its being Easter Eve . . . and she wanted to go to communion."[370] The following Monday, Oscar slit her throat.[371]

Two factors seem to have led to non-reporting and victim recantation. First, as the *Borgstrom* case demonstrates, a visit from the police might cause an abuser to become even more violent. A typical New York City woman was afraid to have her husband arrested for beating her "as he would murder her if he got out [of prison]."[372] Second, many victims of intimate abuse worried that their family's livelihood would be destroyed by a criminal case. Battered wives, in particular, might have faced terrible economic hardship if the men upon whom they depended financially were imprisoned, fired from their jobs, or shunned by business associates for being wife-beaters. The spouse of New York City police officer William Smith, who clubbed her with his truncheon, attempted to keep the cause of her ultimately fatal injuries a secret. As her brother testified, "she was shielding [her husband], she was afraid he

366. Testimony of Minnie Schultz, Coroner's Inquisition at 44, People v. Schultz, Folder 3472, Box 370, DA PAPERS, *supra* note 1 (1889).

367. People v. Conklin, 67 N.E. 624, 628 (N.Y. 1903).

368. People v. Borgstrom, 70 N.E. 780, 780 (N.Y. 1904).

369. *Id.*

370. *Id.*

371. *See id.*

372. Testimony of Alice Murphy, Coroner's Inquisition at 3, People v. Weldon, Folder 217, Box 17, DA PAPERS, *supra* note 1 (1880).

would be broken off the police" if she reported his attack on her.[373] His arrest would mean the end of the income that put food on the family's table. Even if the abuser failed in his role as breadwinner, as many intimate murderers apparently did, reporting his violent behavior to the police threatened to leave the children fatherless. Thus, as mediated solutions brokered by neighbors and family members evaporated, victims of intimate violence faced a stark choice: stay silent or involve the police. To many, the latter option seemed as perilous as the former.

B. Countercurrents: Resilient Beliefs in the Wife-Beating Prerogative

Police officers who attempted to settle violent domestic incidents met other forms of resistance, besides victim recantation. Some were shot or faced life-threatening assaults from wife-beaters and their cronies.[374] In New York City, for example, Officer Herrlich got more than he bargained for when he responded to the entreaties of a woman whose drunken husband, John Crowley, grabbed her throat and head-butted her:

> He found Crowley in the yard of the building in the company of a gang of thieves, who at once attacked him with stones and huge pieces of ice. Herrlich, finding his club of no service, drew his revolver, and, having grabbed Crowley, he levelled the weapon at the ruffians.[375]

Such incidents confirm the resilience of beliefs in the wife-beating prerogative. However, I am less convinced than other feminist scholars that the white male establishment simply transformed its rhetoric to hide

373. Testimony of Edward Hagen, Coroner's Inquisition at 47, People v. Smith, Folder 3155, Box 429, DA PAPERS, *supra* note 1 (1891). Even if the abuser were arrested, indicted, and brought to trial, his victim still might be reluctant to testify against him, as is shown by the New York state case, *People v. Green*, 94 N.E. 658 (N.Y. 1911). Fearing her violent husband, Emma Green took her children and fled to her uncle's home. *Id.* at 659. Her husband followed with a rifle and opened fire, shooting her non-fatally in the head and killing their teenaged daughter. *See id.* at 659–60. However, instead of assisting with the murder prosecution of Charles Green, the abused woman testified on his behalf at trial. When asked about the nature of their marital differences, she replied, "I don't want to tell anything that would hurt my husband." *Id.* at 659. Although her refusal to testify against Green may have stemmed from her emotional bonds to him, it is equally likely that she feared losing the family farm if he were incarcerated or executed. *See id.* at 659 (stating that defendant lived on small farm in Albany County, New York).

374. *See Wife's Defenders Shot*, *supra* note 346 (reporting that police officer was shot in April 1898 when responding to domestic fracas involving wife-beater who also killed young man that intervened).

375. *Missiles for the Policeman*, EVENING POST, Jan. 2, 1891, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 10.

a firm commitment to the brutal subjugation of women.[376] Rather, in my view, the ice-throwing incident described above[377] and the murder cases analyzed in this article reveal a deep cultural rift over the issue of intimate violence.

Reva Siegel and others have argued that efforts to control wife-beating in the post-bellum United States primarily targeted working-class men and ethnic minorities.[378] According to Siegel, elite white men paid lip service to the repudiation of marital chastisement, but in fact, continued to beat women behind newly erected walls of family privacy. She provides some evidence of a tacit conspiracy among upper-class males to shield elite wife-beaters, while blaming the problem of family violence on immigrants, poor people, and blacks.[379] My own findings, to some extent, harmonize with Siegel's argument. Among male defendants executed for intimate murder in New York state and Colorado, for example, working-class men, low-earning white-collar workers, and artisans predominated, and many defendants were unemployed.[380] Moreover, although my racial data is limited, it appears that about twenty percent of all men who received severe punishment for killing intimates in the two cities belonged to racial minorities, even though such minorities constituted a tiny percentage of the total population.[381]

376. For an example of such an argument, see Siegel, *supra* note 11, at 2120.

377. *See infra* text accompanying note 379.

378. *See* Siegel, *supra* note 11, at 2134–41. *See also* DEL MAR, *supra* note 11, at 80–81, 87 (arguing that whipping post laws were used to stigmatize marginal men); PLECK, *supra* note 11, at 109–110, 116 (discussing racial implications of whipping post campaign and involvement of Ku Klux Klan in punishment of wife-beaters and child-abusers).

379. *See* Siegel, *supra* note 11, at 2134–41, 2154–61.

380. *See infra* app. G.

381. In Denver at least three of the sixteen men convicted of first-degree intimate murders between 1880 and 1920 were Hispanic, and two were black. *See* Motion for Continuance (filed Dec. 16, 1918), People v. Rocco, No. 24538 (Denver County Dist. Ct. 1918) (stating that Jose Rocco was "a Mexican by birth"); SHMB, *supra* note 23, at No. 604 (describing Fred Sanchez, whose life term for killing his wife was commuted to forty-four years, as "a Mexican"), No. 58 (describing Frank Bass, who was convicted of murder in 1903, as "Negro"), No. 648 (stating that William Bruno, who received life sentence in 1917, was "Mexican"), No. 299 (noting that Dennis Humphreys, a "Negro," was convicted of first-degree murder for shooting Gussie Watson in jealous rage). At least two blacks and one Hispanic numbered among the fifteen male defendants who pled guilty to, or were convicted of, second-degree murder charges for killing intimates. *See* SHMB, *supra* note 23, at No. 187 (describing Charles Ford, who pled guilty to second-degree murder for killing his mistress with a flat iron, as "colored" or "brown skin mulatto"), No. 394 (stating that Phillip [sic] Lopez, who killed Eralia [sic] Arguello in 1910, was "Mexican"), No. 781 (noting that H.D. Davis, a "Negro," pled guilty to killing his wife and was sentenced to thirty years to life in state penitentiary). In addition, one of two women convicted of murder for killing a male intimate in Denver between 1880 and 1920 was mulatto. *See supra* note 156 and accompanying text (discussing *Lemmons* case). In both 1880 and 1920, "colored persons" accounted for less than three percent of Denver or Arapahoe County's total population. *See* HISTORICAL CENSUS BROWSER (Univ. of Virginia

Anecdotal evidence suggests that the problem of intimate violence was not confined to the lower classes or to non-whites. For instance, in 1890, the son of a wealthy and prominent Rochester family faced charges in New York County for beating his common-law spouse—a woman "from a good family in Louisiana."[382] When family strife turned to homicide, a few professional men even ended up in the electric chair: two prisoners executed in New York County for killing their wives were either doctors or medical students.[383] Such cases indicate a couple of things. First, intimate murder was not exclusively restricted to the working class. Second, elite intimate violence occasionally resulted in criminal charges and even severe punishment. Because my research traces public responses to the killing of lovers, spouses, and other family members, rather than the actual incidence of such crimes, I cannot contend that the sparse number of elite cases I encountered demonstrates that high-status men generally refrained from murdering or even beating their intimates. Perhaps the handful of elite abusers who appear in legal records and newspapers represented the tip of a large, submerged iceberg. Punishing murderers simply may have reinforced the status regime by ensuring that the white male establishment did not undermine its claims to legitimacy by shedding too much intimate blood.

Nevertheless, resilient beliefs in the wife-beating prerogative were not synonymous with a conspiracy against women. In my view, it is more plausible that, instead of being controlled by a hegemonic gender ideology, late nineteenth-century and early twentieth-century America was divided over whether violence had a legitimate place in family gov-

Geospatial & Statistical Data Center), *available at* http://fisher.lib.virginia.edu/census (reporting census data from 1880 and 1920) (last visited Feb. 11, 2005).

In New York County, seven out of thirty-three men executed for intimate murder between 1880 and 1920 were black, although "male negroes" also comprised less than three percent of New York County's total population in both 1880 and 1920. *See id.* The black prisoners' names were Augustus Leighton, Miguel Chacon, John Lewis, Howard Scott, Lewis, Pullerson, William Nelson, and Gilbert Coleman. *See* ESPY & SMYLKA, *supra* note 25 (confirming race and execution of these defendants). At least four of the seven black intimate murderers executed in New York County killed black victims. For information on the race of the victim in these New York cases, see Ramsey, *Discretionary Power*, *supra* note 22, at 1382 n.396 (stating that victims in the *Chacon* and *Lewis* cases were black); People v. Scott, 46 N.E. 1028, 1028 (N.Y. 1897) (stating that murdered wife of defendant was "a colored woman"); People v. Nelson, 81 N.E. 768, 769 (N.Y. 1907) (describing defendant, deceased, and all of their neighbors in building where they lived as "ignorant colored people").

382. *A Fast Young Man*, PRESS, May 12, 1890, *microformed on* DA SCRAPBOOK, *supra* note 2, at Roll 9.

383. It is worth noting, however, that the two elite men executed in New York County both poisoned their victims (a stereotypically white-collar method of killing), rather than shooting, stabbing, or battering them to death. *See* Ramsey, *Discretionary Power*, *supra* note 22, at 1374–75, 1379–80 (discussing capital cases of Carlyle Harris and Robert Buchanan).

ernment. The press and the jury box demonstrated little empathy for males who killed their intimates, and policemen like Officer Herrlich even attempted to quell battering before it escalated to homicide. In spite of such efforts, some American men continued to believe that "a few thumps once in a while can do no harm."[384]

The survival of their viewpoint, in the face of cultural exhortations to self-restraint, guaranteed a steady supply of blackened eyes, broken bones, and even corpses. It also ensured a certain amount of tension in the criminal justice system. Trial juries sometimes acquitted abused or abandoned women of homicides that coroner's juries deemed unjustifiable;[385] judges gave instructions that men in the jury box chose to ignore; and appellate courts failed to articulate a coherent doctrinal justification for the disparate treatment of male and female murder defendants.

Furthermore, the same values that promoted protectiveness toward women contained loose threads that often unraveled in actual intimate relationships. Frustrated by their inability to achieve success in the public sphere, husbands, fathers, and brothers may have struck angrily at those who loved and lived with them. Told to be sober, restrained, and industrious, some men rebelled and were none of these things.[386] As ideals of masculine physicality and passion began to supplant Victorianism around the turn of the century, certain aspects of the new ideal seemed to resonate with the violent conquest of women. Even though public figures like Roosevelt denounced child-murder and wife-beating and placed the American mother on a pedestal, other voices—including those of eminent scientists—celebrated men's primitive sexual instincts as a counterweight to the "unnatural" behavior of the woman suffragists.[387] This competing strand of early twentieth-century culture suggested that, if females failed to be modest, refined, and maternal, "all bets were off . . . [w]oman must then bear the brunt of unfettered mascu-

384. *See* Testimony of Alice Murphy, Coroner's Inquisition at 3, People v. Weldon, Folder 217, Box 17, DA PAPERS, *supra* note 1 (1880) (testifying to statement made by Thomas Weldon, who was indicted but never tried for the death of his wife).

385. *Compare* Coroner's Inquisition into Death of Peter Duncan (Aug. 23, 1904), Box 27931, Coroner's Records, City and County of Denver (stating that Rosa Anderson "unjustifiably" inflicted lethal gunshot wound on Peter Duncan) *with* Verdict (filed Sept. 29, 1904), People v. Anderson, No. 16628 (Denver County Dist. Ct. 1904) (acquitting Anderson of the murder of Peter Duncan).

386. *Cf.* Adler, *supra* note 12, at 266–68 (making complementary argument about domestic homicide in late nineteenth-century Chicago).

387. *See supra* text accompanying notes 243–46, 326 (discussing Roosevelt's views); BEDERMAN, *supra* note 106, at 158–62 (discussing scientists' writings on the "primal savage rapist").

line violence."[388] In increasingly anonymous urban environments that were not policed effectively, such tensions and countercurrents killed.

CONCLUSION

Legal scholars in recent decades have expressed a great deal of concern about symmetry, or lack thereof, in the criminal law's treatment of intimate homicide. The most hostile critics of battered woman's syndrome evidence label the defense the "abuse excuse" and suggest that it creates a special rule excusing women's crimes.[389] In contrast, many feminists see the provocation doctrine as a safety net that encourages characteristically male forms of aggression and perpetuates a standard of "reasonableness" determined from men's perspective.[390] Victoria Nourse asks, for example: "If the battered woman must control herself, why should the cuckolded man be permitted to let his emotions run free?"[391] Despite their disparate points of departure, however, many of these critiques of the criminal law share the view that the litigation playing field ought to be leveled so that one sex does not enjoy a monopoly on exculpating and mitigating doctrines.

In the late nineteenth and early twentieth centuries, neither the American male public nor juries drawn from its ranks seemed concerned about symmetry. However, the asymmetrical attitudes evident in the cases discussed in this article do not tell the anticipated story of men who favored other men when called to judge them for committing homicides. Scholars often assume that male jurors routinely empathized with accused men's rage at the infidelities and lapses of duty that sometimes accompany intimate relationships, but that they did not extend comparable

388. *Id.* at 159 (discussing views of bacteriologist Sir Almroth Wright and biologist William T. Sedwick); *see also id.* at 205 (contrasting Roosevelt with Sedgwick and Wright).

389. *See, e.g.*, JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? 48–58 (1997) (presenting scathing critique of battered woman's syndrome defense); Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615, 627 n.55 (1982) (referring to "disquieting indications of vigilantism in the battered wife setting").

390. *See* Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435, 1435, 1447, 1453 (1998) (book review); *see also supra* note 10.

391. Nourse, *The New Normativity*, *supra* note 390, at 1447. Legal scholars have suggested various solutions to this perceived inequality. For example, Cynthia Lee makes the creative proposal that the jury be asked to imagine that the defendant and the victim are a different sex than they actually are when provocation is an issue in the case. *See* LEE, *supra* note 10, at 11–12. *Cf.* Kahan & Nussbaum, *supra* note 262, at 332–33 (contending that courts ought to relax imminence requirement in cases of battered women who kill because criminal law in some jurisdictions allows men to use deadly force to defend their honor or property).

understanding to female defendants.[392] It is true that the traditional provocation doctrine partially justified or excused one gendered category of intimate killings: those occurring immediately after the discovery of adultery. It bolstered patriarchy by making a normative judgment about the wrongfulness of behavior that infringed the husband's exclusive sexual access to his wife. Yet, by focusing on the potential for the provocation doctrine to lessen the punishment of violent men, scholars have overlooked the late Victorian era's greater concern with self-control and protectiveness toward women.

Although the heat-of-passion defense operated to spare some men from murder convictions, a substantial number of intimate killers were executed or sentenced to long prison terms in both the eastern and the western United States. Most of the intimate killers who received harsh sentences between 1880 and 1920 were men. The disproportionately large number of male defendants sent to the gallows, electric chair, or prison can be attributed in part to the fact that murder is usually a man's crime.[393] However, such an explanation fails to suffice. Rather, men received severe punishment for killing intimates because an influential set of cultural values in nineteenth-century America emphasized that manliness inhered in self-restraint and that a man's loss of control was often intolerable. Thus, while instantaneous passion provoked by a narrow set of circumstances was eligible for mitigation, male defendants who lay in wait for their victims or whose rage and frustration grew slowly over time faced the punishments associated with first-degree murder. Held to a higher standard of self-control than their female counterparts, men in New York and Colorado were judged rigorously for avenging separation, and courts refused to accept their efforts to conflate jealous rage with temporary insanity.

Even as values of Victorian manliness declined and were supplanted by a more impulsive, violent standard of masculinity around the turn of the century, the ideal of solicitude for women's supposed weakness and dependence retained its currency. Indeed, cultural forces that may have reduced sympathy for women caused no major transformation in public perceptions of intimate violence until after 1900 or even after 1920.[394]

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392. *See, e.g.*, Taylor, *supra* note 10, at 1697–98 ("Understanding and sympathy comes from those who can see themselves in the defendant's situation. Only recently given full participation in jury service and still underrepresented on the bench, women may have difficulty finding sympathy as defendants.").

393. *See id.* at 1680. *See also supra* note 212 and accompanying text (discussing men's cross-cultural and trans-historical penchant for committing murder).

394. The decline of paternalistic sympathy for women is beyond the scope of this article. Cultural forces reflecting or contributing to such a change may have included women's suffrage, the entry of women into certain sectors of the workforce, the rise of psychoanalytic

The exemplary punishment of men who failed to keep their passions in check contrasted with the relatively lenient treatment of female murder defendants, almost all of whom were either exonerated or convicted of lesser-included offenses. Paternalistic sympathy for women often came in the form of insanity acquittals. But the willingness of courts and juries to consider evidence of past abuse also meant that a woman's trial might focus on the history of an intimate relationship scarred by terrifying violence and a protracted struggle for power, rather than simply on the lethal moment when she killed the deceased. Hence, some female defendants prevailed or received mitigation on grounds of perfect or imperfect self-defense; their options were not limited to insanity claims. Indeed, retaining a modicum of control over their trials, many women took the witness stand in their own defense and thus helped construct the narratives designed to spare them.

The recognition of long time frames leading to homicide had the positive potential to justify a woman's choice of violence as a last resort in a relationship that put her life at risk. Nonetheless, the strategy still embodied a subordinating attitude toward women. Exculpating traumas included not only physical blows and death threats, which legitimately might lead to a defensive killing, but also broken engagements and other emotional harms that, in my view, responsible adults must learn to bear. The urge to protect female honor from the dalliances of rakish men may have harmonized with the claims of a husband who killed his adulterous wife; both recognized nineteenth-century concerns with reputation, property, and sexual exclusivity. Yet, the acquittal of women whose anger at romantic rejection reached the boiling point or whose past suffering or even alcoholism allegedly resulted in insanity often went beyond the bounds of traditional exculpating or mitigating doctrines, as they were applied to men.

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theories emphasizing female masochism, the popularity of rape narratives in books and film, and the increased tendency of social-work organizations to blame abuse victims. *Cf.* BEDERMAN, *supra* note 106, at 232–33; GORDON, *supra* note 11, at 21–22, 61, 73; PLECK, *supra* note 11, at 159.

The largest spate of legal executions of intimate murderers in New York clustered in the 1880s and 1890s and then, perhaps affected by changing gender norms, slowly began to dwindle in the first two decades of the twentieth century. *See supra* tbl.4. In keeping with Colorado's tendency to lag behind New York in cultural trends, Colorado began to execute more intimate killers after 1920. There were sixteen legal executions of this type in the state between 1920 and 1972; eleven persons who killed intimates in Denver received capital punishment during this later period. *See* Radelet, *supra* note 26, at app. 1.

Appendix A
Men and Women Charged with Manslaughter for Killing Intimates
New York County, NY (1879-1893)

(MS = manslaughter)

Defendant	Charge	Verdict / Date	Sentence	D's Sex	V's Sex	V's Relationship	Method
Angelo Cornetta	MS	MS 4 (guilty plea) (1880)	2 years in prison	M	F	Female lover/ Domestic partner	Beating
James Powers	MS	MS 4 (guilty plea) (1880)	2 years in prison	M	F	Wife	Beating
Thomas Weldon	MS	Dismissed (1880)	None	M	F	Wife	Fatal beating alleged, but doctor attributed V's death to brain tumor
Antonio Caporella	MS	Acquitted (1882)	None	M	M	Brother	Blow to head
John Stewart	MS	Acquitted (1882)	None	M	F	Wife	Kicking, accelerated by use of intoxicating liquor
Theodore Gebert	MS	MS 4 (guilty plea) (1882)	2 years in prison	M	M	Stepson	Blow to head
Elizabeth Quinquinet	MS 1	Acquitted (1883)	None	F	M	Male lover	Stabbing
Henry Brand	MS 1	MS 2 (guilty plea) (1887)	8 years in prison	M	F	Wife	Kicking
John Garvey	MS 1	MS 2 (guilty plea) (1888)	2 years & 6 months in prison	M	M	Brother	Throat cut
William Fogarty	MS	MS 2 (guilty plea) (1888)	2 years & 6 months in prison	M	M	Brother	Stabbing
Bernard McLaughlin	MS 2	Dismissed (1890)	None	M	F	Wife	Bright's disease, accelerated by beating
Charles Schultz	MS 1	MS 2 (1890)	11 years in prison	M	F	Wife	Beating
William Smith	MS 1	MS 1 (1891)	11 years & 6 months in prison	M	F	Wife	Blow to head with club; V got tetanus in head wound and died of lockjaw
John Harris, Sr.	MS 1	MS 2 (guilty plea) (1891)	7 years & 6 months in prison	M	M	Son	Blow to head
George Whittel	MS 2	MS 2 (1891)	3 years in prison	M	F	Wife	Bright's disease, accelerated by beating and kicking

Appendix A (Cont'd)

(MS = manslaughter)

Defendant	Charge	Verdict / Date	Sentence	D's Sex	V's Sex	V's Relationship	Method
Philip Derringer (indicted as "William Derringer")	MS 2	MS 2 (1891)	12 years & 6 months in prison	M	F	Wife	Beating
Thomas Whitelaw	MS 1	Dismissed (1891)	None	M	F	Wife	Meningitis and cerebral hemorrhage, accelerated by beating
Richard Scanlan	MS 1	MS 1 (guilty plea) (1892)	7 years & 6 months in prison	M	F	Wife	Burning
Michael O'Connell	MS	MS 2 (1892)	5 years & 6 months in prison	M	F	Female lover/ Domestic partner	Kicking and exhaustion due to effects of criminal abortion

Sources: DA PAPERS, *supra* note 1; DA SCRAPBOOK, *supra* note 2; ESPY & SMYLKA, *supra* note 25; published appellate opinions.

Appendix B
Women Charged with Murder for Killing Intimates
New York County, NY (1879-1893)

Defendant	Charge	Verdict / Date	Sentence	V's Sex	V's Relationship
Bridget McCabe	Murder 1	Manslaughter 3 (1881)	2 years in prison	M	Husband
Elizabeth Coleman	Murder 1	Manslaughter 3 (1881)	4 years in prison	M	Male lover
Annie McCluskey	Murder 1	Acquitted by reason of insanity (1885)	None	F	Daughter
Johanna Lessmann	Murder	Acquitted (1885)	None	M	Husband
Chiara Cignarale	Murder 1	Murder 1 (1887)	Death sentence commuted to life in prison	M	Husband
Susan Hendricks	Murder 1	Manslaughter 2 (guilty plea) (1889)	15 years in prison	M	Male lover
Wilhelmine Lebkuchner	Murder 1	Acquitted by reason of insanity (1889)	None	M (2)	Sons
Hannah Southworth	Murder 1	Died before trial (Indicted 1889)	None	M	Male lover/Seduced & then rejected D
Emma Cordes	Murder 1	Acquitted (1890)	None	M	Husband
Pasqualina Robertiello (Indicted as "Lubertiello")	Murder 1	Acquitted by reason of insanity (1891)	None	M	Male lover/Seduced & then rejected D
Ella Nelson	Murder 1	Acquitted (1891)	None	M	Male lover/Seduced & then rejected D
Annie Walden	Murder 1	Murder 2 (1892)	Life in prison	M	Husband
Fannie Korn	Murder 1	Acquitted by reason of insanity (1893)	Committed to asylum	F	Daughter
Mary Dunne	Murder 1	Manslaughter 2 (1894)	6 years & 5 months in prison	M	Husband

Sources: DA PAPERS, *supra* note 1; DA SCRAPBOOK, *supra* note 2; ESPY & SMYLKA, *supra* note 25; published appellate opinions.

Note: For one additional female defendant, Elizabeth Quinquinet, see Appendix A (manslaughter cases), *supra*.

Appendix C
Executions of Persons Convicted of First-degree Murder
New York County, NY (1880-1920)

Defendant	Appeal Date	D's Sex	V's Sex	V's Relationship	Method
Pietro Balbo	1880	M	F	Wife	Stabbing
Augustus Leighton	1882	M	F	Female lover (?)	Unclear
Pasquale Majone	1882	M	F (2)	Wife and Mother-in-law	Shooting
Edward Hovey	1883	M	F	Sister-in-law	Shooting
Miguel Chacon	1886	M	F	Female lover	Shooting
Daniel Driscoll	1887	M	F	Female lover	Shooting
Patrick Packenham	1889	M	F	Wife	Throat cut
John Lewis	1889	M	F	Female lover	Shooting
James Nolan	1889	M	F	Female lover/ Domestic partner	Shooting
Ferdinand Carolin	1889	M	F	Female lover/ Domestic partner	Hatchet
James Slocum	1891	M	F	Wife	Hatchet
Harris Smiler	1891	M	F	Wife	Shooting
Martin Loppy	1891	M	F	Wife	Stabbing
Carlyle Harris	1893	M	F	Wife	Poisoning
John Osmond	1893	M	F (1) M (1)	Wife and Wife's lover	Shooting
Robert Buchanan	1895	M	F	Wife	Poisoning
Richard Leach	1895	M	F	Female lover/ Domestic partner	Stabbing
Louis Herrmann	1896	M	F	Wife	Shooting
Charles Pustolka	1896	M	F	Wife	Stabbing/Throat cut
Howard Scott	1897	M	F	Wife	Shooting
Adrian Braun	1899	M	F	Wife	Stabbing/Throat cut
Lewis Pullerson	1899	M	F	Female lover/ Domestic partner	Strangled
Joseph Mullen	1900	M	F	Wife	Shooting
Aaron Hall	1901	M	F	Fiancée/ Rejected D's attentions	Shooting
Antonio Triola	1903	M	F	Rejected D's attentions	Shooting
Patrick Conklin	1903	M	F	Wife	Shooting
Adolph Koenig	1904	M	F	Female lover/ Domestic partner	Strangled
Frank Furlong	1907	M	F	Aunt	Blow to head
William Nelson	1907	M	F	Female lover/ Domestic partner	Throat cut
Gilbert Coleman	1910	M	F	Wife	Stabbing/Beating
Carl Loose	1910	M	F	Daughter	Shooting
Robert Wood	1911	M	F	Niece	Shooting
Gregorio Giordano	1915	M	F	Wife	Beating

Sources: DA PAPERS, *supra* note 1; DA SCRAPBOOK, *supra* note 2; ESPY & SMYLKA, *supra* note 25; published appellate opinions.

Appendix D
Executions of Persons Convicted of First-degree Murder
New York State (1880-1920)

Defendant	Appeal Date	D's Sex	V's Sex	V's Relationship	Method
Pietro Balbo	1880	M	F	Wife	Stabbing
Nathan Greenfield	1881	M	F	Wife	Throat cut
Augustus Leighton	1882	M	F	Female lover (?)	Unclear
James Walsh	1882	M	F	Rejected D's attentions	Stabbing
Pasquale Majone	1882	M	F (2)	Wife and Mother-in-law	Shooting
Edward Hovey	1883	M	F	Sister-in-law	Shooting
George Mills	1885	M	F	Wife	Stabbing
Franz Petmecky	1885	M	F	Female lover	Axe
James Jones	1885	M	F	Wife	Shooting
Peter Otto	1886	M	F	Wife	Shooting
Miguel Chacon	1886	M	F	Female lover	Shooting
Roxalana Druse	1886	F	M	Husband	Shooting/Axe
Daniel Driscoll	1887	M	F	Female lover	Shooting
Asbury Hawkins	1888	M	F	Mother	Shooting
Patrick Packenham	1889	M	F	Wife	Throat cut
Ferdinand Carolin	1889	M	F	Female lover/ Domestic partner	Hatchet
John Lewis	1889	M	F	Female lover	Shooting
James Nolan	1889	M	F	Female lover/ Domestic partner	Shooting
William Kemmler	1890	M	F	Female lover Domestic partner	Axe
James Slocum	1891	M	F	Wife	Hatchet
Harris Smiler	1891	M	F	Wife	Shooting
Martin Loppy	1891	M	F	Wife	Stabbing
Joseph Tice	1892	M	F	Wife (estranged)	Stabbing
Carlyle Harris	1893	M	F	Wife	Poisoning
James Hamilton	1893	M	F	Wife	Throat cut
John Osmond	1893	M	F (1) M (1)	Wife and Wife's Lover	Shooting
Martin Foy, Jr.	1893	M	F	Female lover/Rejected D's attentions	Shooting
John Delfino	1893	M	F	Rejected D's attentions	Shooting
Robert Buchanan	1895	M	F	Wife	Poisoning
Richard Leach	1895	M	F	Female lover/ Domestic partner	Stabbing
Charles Pustolka	1896	M	F	Wife	Stabbing/Throat cut
Louis Herrmann	1896	M	F	Wife	Shooting
John Hoch	1896	M	F (1) M (1)	Rejected D's attentions and Third-party (accidentally struck by bullet)	Shooting
Howard Scott	1897	M	F	Wife	Shooting
John Barker	1897	M	F	Wife	Shooting
Frank Conroy	1897	M	F	Wife	Stabbing
Hadley Sutherland	1897	M	F	Female lover/ Domestic partner	Shooting

Appendix D (Cont'd)

Defendant	Appeal Date	D's Sex	V's Sex	V's Relationship	Method
Bailer Decker	1898	M	F	Wife	Shooting
Martha Place	1899	F	F	Stepdaughter	Asphyxiation
Adrian Braun	1899	M	F	Wife	Throat cut/ Stabbing
Oscar Rice	1899	M	F	Wife (estranged)	Stabbing
Lewis Pullerson	1899	M	F	Female lover/ Domestic Partner	Strangled
Joseph Mullen	1900	M	F	Wife	Shooting
Fred Krist	1901	M	F	Female lover	Shooting
Joseph Zachello	1901	M	F	Mother-in-law	Stabbing
Aaron Hall	1901	M	F	Fiancée/ Rejected D's attentions	Shooting
Antonio Triola	1903	M	F	Rejected D's attentions	Shooting
Patrick Conklin	1903	M	F	Wife	Shooting
William Ennis	1903	M	F	Wife	Shooting
Allen Mooney	1904	M	F	Female lover	Shooting
Oscar Borgstrom	1904	M	F	Wife	Throat cut
Adolph Koenig	1904	M	F	Female lover/ Domestic partner	Strangled
Martin Ebelt	1905	M	F	Wife	Strangled
John Johnson	1906	M	F	Wife (estranged)	Shooting
Frank Furlong	1907	M	F	Aunt	Blow to head
William Nelson	1907	M	F	Female lover/ Domestic partner	Throat cut
Chester Gillette	1908	M	F	Female lover	Drowning
William Brasch	1908	M	F	Wife	Drowning
Bernard Carlin	1909	M	F	Mother	Shooting
William Scott	1909	M	F	Stepmother	Shooting
Frank Jackson	1909	M	F	Female lover/ Domestic partner	Throat cut
Gilbert Coleman	1910	M	F	Wife	Stabbing/Beating
Antonio Fornaro	1910	M	F	Female lover/ Domestic partner	Throat cut
William Gilbert	1910	M	F	Fiancée	Shooting
Guiseppe Gambaro	1910	M	M	Brother	Shooting
Carl Loose	1910	M	F	Daughter	Shooting
Samuel Austin	1910	M	F	Wife	Shooting
Sam Ford	1910	M	F	Female lover/ Domestic partner	Stabbing/Cutting with razor
Robert Wood	1911	M	F	Niece	Shooting
Charles Green	1911	M	F	Daughter	Shooting
Bert Brown	1911	M	M	Half-brother	Shooting
Joseph Garfalo	1912	M	F	Wife	Axe
George Harris	1913	M	F	Wife	Shooting
Robert Kane	1915	M	F	Female lover	Shooting
Gregorio Iordano	1915	M	F	Wife	Beating
Walter Watson	1916	M	F	Wife	Stabbing

Sources: DA PAPERS, *supra* note 1; DA SCRAPBOOK, *supra* note 2; ESPY & SMYLKA, *supra* note 25; published appellate opinions.

Appendix E
Women Accused of Killing Intimates
Denver and Arapahoe Counties, CO (1880-1920)

Defendant	Charge	Verdict / Date	Sentence	V's Sex	V's Relationship
Mattie Lemmons	Murder	Murder 2 (1884)	10 years in prison (Discharged in 1887)	M	Male lover (?)
Emily Witter	Murder	Acquitted (1888)	None	M	Husband
Lucy Swarthout	Murder	Hung jury – Then nolle prosequi (1892)	None	M	Male lover
Emma Butler	Murder	Involuntary Manslaughter (1892)	1 year in county jail	M	Husband
Mrs. Whitehead	None	Released without charge (1896)	None	M (1) F (1)	Husband and Husband's lover (?)
Bell Dixon (a.k.a. Lizzie Dixon)	Murder	Acquitted (1897)	None	M	Husband
Cornelia Knight	Unclear	Manslaughter (1898)	1 year in county jail	M	Husband
Nellie Gabrin	Murder	Grand Jury did not indict (Ignoramous 1901)	None	M	Husband
Ida Nichols	Murder	Case dismissed by court order (1903)	None	M	Husband
Jennie Davis	Murder	Acquitted (1903)	None	M	Husband
Rosa Anderson	Murder	Acquitted (1904)	None	M	Male lover
Helen Schmidlap	Murder	Acquitted (1906)	None	M	Husband
Carmella Maria Nigri Fiorini	Murder	Voluntary Manslaughter (1906)	2 to 3 years in prison	M	Husband
Beatrice Gordon	Murder 1	Acquitted (1908)	None	M	Male lover/ Employer
Lottie Webb Pereault	Murder	Voluntary Manslaughter (1909)	6 to 8 years in prison	M	Husband
Millie Smith	Murder	Involuntary Manslaughter (1909)	1 year in county jail	M	Husband
Emma Jett	Murder 1	Acquitted (1910)	None	M	Husband
Rosa Rubenstein	Murder 1	Nolle Prosequi (Indicted 1910)	None	M	Husband
Gertrude Patterson	Murder	Acquitted (1911)	None	M	Husband
Assunta Mollicone	Murder	Acquitted (1911)	None	M	Husband

Appendix E (Cont'd)

Defendant	Charge	Verdict / Date	Sentence	V's Sex	V's Relationship
Eleanor Valentine	Murder	Acquitted (1911)	None	M	Husband
Rose O'Grady	Unclear	Acquitted (1913)	None	M	Male lover
Norma Pumphrey	Murder 1	Involuntary Manslaughter (1913)	9 months in county jail	M	Husband
Ida Mercer	Murder	Murder 1 (1914)	Life in prison	M	Son-in-law
Berta Wright	Unclear	Acquitted (1915)	None	M	Husband
Stella Moore Smith	Murder	Acquitted (1917)	None	M	Husband
Mary Collins	Murder	Acquitted (1920)	None	M	Husband

Sources: Denver and Arapahoe County District Court Records, *supra* note 24; SHMB, *supra* note 23; Colorado State Penitentiary Records, *supra* note 156.

Appendix F
Men Accused of Killing Intimates
Denver and Arapahoe Counties, CO (1880-1920)

Defendant	Charge	Verdict / Date	Sentence	V's Sex	V's Relationship
O.J. Haller	Murder	Acquitted by reason of insanity (1883)	None	F (1) M (1)	Wife and Wife's lover
Mr. Murphy	Murder	Voluntary Manslaughter (Appeal 1887)	Unclear	F	Female lover
James Medley	Murder	Murder 1 (1889)	Released on habeas corpus	F	Wife
Charles Spurrier	Murder	Voluntary Manslaughter (guilty plea) (Indicted 1890)	3 years in prison	F	Female lover
John McGraw	Murder	Involuntary Manslaughter (1890)	9 months in county jail	M	Son
Edward McBride	Murder	Involuntary Manslaughter (First convicted of Murder 2 and sentenced to life imprisonment, but that conviction was reversed; Subsequently convicted of Involuntary Manslaughter) (Appeal 1894)	1 day in county jail	F	Wife
Charles Ford	Murder	Murder 2 (1894)	Life in prison (Commuted to 53 years to life. Paroled in 1914)	F	Female lover
William Rose	Murder	Murder 2 (1894)	21 years in prison	F	Female lover (?)
Pat Phillips	Murder	Involuntary Manslaughter (guilty plea) (1896)	1 day in county jail	F	Wife
Frederico Sanchez	Murder	Murder 1 (1897)	Life in prison (Commuted to 44 years. Paroled in 1918)	F	Wife
William Baldwin	Murder	Murder 2 (1898)	15 years in prison	F	Female lover (?)
Edward Brooks	Murder	Murder 2 (Appeal 1899)	Unclear	M	Father-in-law
John Herren	Murder	Discharged after Voluntary Manslaughter conviction reversed (1899) (Appeal 1900)	Originally sentenced to 8 years in prison.	F	Wife
George Bond	Murder	Murder 2 (1899)	10 to 20 years in prison (Paroled in 1905)	F	Rejected D's attentions

Appendix F (Cont'd)

Defendant	Charge	Verdict / Date	Sentence	V's Sex	V's Relationship
William Barager	Murder	Murder 1 (1900)	Life in prison (Commuted to 35 years to life)	F	Female lover
Thomas Taylor	Assault with a Deadly Weapon with Intent to Commit Murder	Assault with a Deadly Weapon with Intent to Commit Murder (1901)	10 to 11 years in prison	F	Ex-wife
Thomas Edwards	Murder	Murder 2 (1902)	15 to 16 years in prison	M	Son-in-law
John Watkins	Murder	Voluntary Manslaughter (1903)	Unclear	F	Female lover/ Rejected D's attentions
Frank Bass	Murder	Murder 1 (1903)	Life in prison	F	Rejected D's attentions
Octavius Doram	Unclear	Dismissed (1904)	None	M	Brother
Seymour Waycaster	Murder	Murder 1 (1904)	Life in prison	F	Wife
Joseph Burns	Murder	Voluntary Manslaughter (1904)	6 to 8 years in prison	M	Wife
Joseph Kotsch	Murder	Acquitted (1904)	None	M	Brother
Henry Wianand	Murder	Murder 2 (1905)	10 to 15 years in prison	F	Wife
Ben Wade, Jr.	Murder	Found insane (1905)	None	M	Father
Charles Pennington	Murder	Involuntary Manslaughter (1906)	1 day in county jail	F	Female lover
Benjamin Wright	Murder 1	Acquitted (1907)	None	F (2)	Wife and Daughter
Eugene Marugg	Murder	Murder 2 (1907)	10 to 12 years in prison (Paroled in 1912)	F	Wife
Ernest Rupp	Murder 1	Acquitted (1910)	None	F	Wife
Theodore Ehrhardt	Murder 1	Nolle prosequi after Murder 2 conviction reversed (1910) (Appeal 1911)	Unclear	F	Wife
Clarence Perkins	Murder 2 (child) Assault with Intent to Kill (wife)	Murder 2 (child) (1910)	Life in prison for death of child (Commuted to 17 years to life. Paroled in 1914)	F (2)	Wife and Child
Felipe Lopez	Murder 1	Murder 2 (1910)	20 to 30 years in prison	F	Female lover (?)

Appendix F (Cont'd)

Defendant	Charge	Verdict / Date	Sentence	V's Sex	V's Relationship
George Smith	Murder	Nolle prosequi (1910)	None	F	Wife
Michael Henry Murphy	Murder 1	Murder 1 (1911)	Life in prison	F	Rejected D's attentions
Benjamin Beckenstein	Murder 1	Acquitted (1911)	None	F	Wife
Gus Marshall	Murder	Murder 1 (1911)	Life in prison	F	Wife
Henry Robitaille	Murder	Murder 1 (1912)	Life in prison (Commuted to 25 years to life. Paroled in 1924)	F	Wife
Oscar George	Murder	Murder 2 (1912)	10 to 12 years in prison	M	Brother
Joseph Bailey	Murder 1	Involuntary Manslaughter (First convicted of Murder 2 in 1910; Retried and convicted of Murder 1 in 1911; Tried for a third time and convicted of involuntary manslaughter in 1913) (Appeal 1913)	3 months in county jail	M	Brother-in-law
John Freeze	Murder	Murder 1 (1914)	Life in prison	F	Wife
Carl Erickson (Carl Brown)	Murder	Murder 1 (1915)	Life in prison	F	Wife
William Bruno	Murder	Murder 1 (1917)	Life in prison	F	Wife
Jose Rocco	Murder 1	Murder 1 (1919)	Life in prison (Commuted to deportation in 1926)	F	Wife
Pearl Centers	Murder	Murder 1 (1919)	Life in prison	F	Wife
Louis Novak	Murder	Murder 2 (1919)	10 to 15 years in prison (Commuted to 5 years 11 months to life. Paroled in 1922)	F	Wife
Lloyd White	Murder	Murder 1 (1920)	Life in prison	F	Female lover
H.D. Davis	Murder	Murder 1 (1920)	30 years to life in prison	F	Wife
Dennis Humphreys	Murder	Murder 1 (1920)	Life in prison	F	Female lover/Rejected D's attentions

Sources: Denver and Arapahoe County District Court Records, *supra* note 24; SHMB, *supra* note 23; Colorado Penitentiary Records, *supra* note 156.

Appendix G
Known Occupations of Executed Intimate Murderers, New York and Colorado (1880-1920)

Defendant's Job	Defendant's Name	State
Baker	Carl Loose	New York
Bird-seller (former bootblack, barber, and rag picker)	John Delfino	New York
Candy-maker	Peter Otto	New York
Cigar-maker	Miguel Chacon	New York
Coachman	Joseph Mullen	New York
Cook in railroad dining car	Gilbert Coleman	New York
Day laborer	James Lynn	Colorado
Driver	Louis Herrmann	New York
Factory executive	Chester Gillette	New York
Farmer	Nathan Greenfield	New York
Farmer & hunter (described by witnesses as "a man of the woods")	Charles Green	New York
Furniture manufacturer	Fred Krist	New York
Leader of Whyo Gang & horse dealer	Daniel Driscoll	New York
Gardener	Oscar Borgstrom	New York
Harness-maker	George Mills	New York
Housewife	Roxalana Druse	New York
Housewife	Martha Place	New York
Huckster of market produce	William Kemmler	New York
Jockey	Samuel Austin	New York
Laborer	Gregorio Giordano	New York
Laborer	William Nelson	New York
Laborer	William Ennis	New York
Laborer	Pietro Balbo	New York
Laborer (worked for contractors building dams and reservoirs for aqueduct)	Sam Ford	New York
Laborer in paint shop	James Walsh	New York
Longshoreman and day laborer	Frank Conroy	New York
Mechanic	Franz Petmecky	New York
Medical student	Carlyle Harris	New York
Messenger boy (only sporadically employed)	Frank Furlong	New York
Miner & aqueduct laborer	John Lewis	New York
Occasional worker	Oscar Rice	New York
Physician	Robert Buchanan	New York
Railroad gateman & preacher	James Hamilton	New York
Railroad laborer & street musician	Pasquale Majone	New York
Salvation Army lieutenant, newspaper folder, & printer	Harris Smiler	New York
Seaman & farmer (irregularly employed)	Robert Wood	New York
Store clerk	Asbury Hawkins	New York
Teamster	Martin Ebelt	New York
Unemployed bartender	Aaron Hall	New York
Unemployed baseball player	James Slocum	New York
Unemployed brass polisher	John Osmond	New York
Unemployed butcher	Charles Pustolka	New York
Unemployed carpenter	Ferdinand Carolin	New York
Unemployed expressman	James Nolan	New York
Unemployed glass designer	Guiseppe Gambaro	New York

Appendix G (Cont'd)

Defendant's Job	Defendant's Name	State
Unemployed house painter	Howard Scott	New York
Unemployed mine manager	Axel Galbraith	Colorado
Unemployed painter	Edward Hovey	New York
Unemployed painter	Patrick Packenham	New York
Unemployed porter	Lewis Pullerson	New York
Unemployed state prisoner (formerly cigar-maker)	Adrian Braun	New York
Unemployed tugboat fireman	Martin Loppy	New York
Unemployed (had worked as 1st-class fireman in U.S. Navy & as engineer's assistant)	Robert Kane	New York
Waiter	Augustus Leighton	New York
Wood-molding manufacturer	Joseph Tice	New York
Worker in cutlery manufacting	George Harris	New York

Sources: DA PAPERS, *supra* note 1; DA SCRAPBOOKS, *supra* note 2; ESPY & SMYLKA, *supra* note 25; Radelet, *supra* note 26, at Appendix I; published appellate opinions.