A Provocative Defense

Aya Gruber
It is common wisdom that the provocation defense is, quite simply, sexist. For decades, there has been a trenchant feminist critique that the doctrine reflects and reinforces masculine norms of violence and shelters brutal domestic killers. The critique is so prominent that it appears alongside the doctrine itself in leading criminal law casebooks. The feminist critique of provocation embodies several claims about provocation's problematically gendered nature, including that the defense is steeped in chauvinist history, treats culpable sexist killers too leniently, discriminates against women, and expresses bad messages. This article offers a (likely provocative) defense of the provocation doctrine. While fully acknowledging widespread gender inequity in society, the article argues that the feminist critique may overestimate the provocation doctrine's contribution to such inequality and underestimate its value to marginalized defendants. Provocation, like many legal doctrines, has a complex history. Further, the limited available empirical evidence appears to undermine rather than confirm assertions that the defense disproportionately burdens women and proves strategically vital to murderous men. Moreover, efforts to utilize criminal punishment to express an anti-masculinity, anti-violence message may, in the end, reinforce destructive masculine norms, exacerbate racial hierarchies, justify extant unequal power distributions, and ironically increase violence and suffering. In the end, the article cautions that the feminist critique of provocation and similar progressive critiques of doctrinal leniency may unintentionally instantiate and entrench the punitive impulses that create and sustain mass incarceration.
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A PROVOCATIVE DEFENSE

INTRODUCTION

On July 3, 2013, the Supreme Court of California handed down a decision that will likely appear in criminal law books and law review articles as the exemplar of all that is wrong with the provocation, or heat-of-passion, defense.\(^1\) To students of provocation law, the facts of People v. Beltran are disturbingly familiar, and critics will no doubt recount them in lurid detail as positive confirmation that the defense must be abandoned. The male defendant, Tare Beltran, was a miscreant—a controlling, jealous, and vicious abuser.\(^2\) In his less-than-two-year relationship with the decedent, Joyce Tempongko, Tare had beaten Joyce several times, barricaded her in the apartment, and violated a protection order.\(^3\) After Tare moved out of the apartment and shortly before her death, Joyce began dating another man, despite Tare’s threat that "their relationship would end over his dead body or hers."\(^4\) Following several harassing phone calls, Tare went over to Joyce's apartment and opened the door with the key he had kept. The two argued. Tare then grabbed a large knife from the kitchen and stabbed Joyce to death in front of her two small children.\(^5\) Tare fled to Mexico, where he was arrested 6 years later.\(^6\)

At trial, Tare asserted Joyce provoked him into a state of passion, such that the killing constituted voluntary manslaughter, not murder. According to Tare, after Joyce hurled insults and expletives at him, he attempted to leave the apartment. Joyce then yelled, "F— you. I was right. I knew you were going to walk away someday. That's why I killed your bastard. I got an abortion."\(^7\) Having believed that their past efforts to get pregnant were naturally unsuccessful, Tare went into a shocked state and eventually found himself standing in the living room holding a bloody knife.\(^8\) The question before the Supreme Court of California was whether the trial judge committed reversible error by initially instructing the jury that provocation is only sufficient if a reasonable person would have killed under the circumstances (sometimes called "act reasonableness").\(^9\) The defense asserted that the judge was incorrect to imply that the defendant's act of killing had to be reasonable and that adequate provocation exists simply when a reasonable person would have been provoked to act rashly (sometimes called "emotion

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\(^{1}\) People v. Beltran, 301 P.3d 1120 (Cal. 2013).

\(^{2}\) See id. at 1123-24 (observing that Tare repeatedly physically abused the decedent, had threatened her, and ultimately stabbed her to death).

\(^{3}\) Id.

\(^{4}\) Id.

\(^{5}\) Id. at 1124.

\(^{6}\) Id.

\(^{7}\) Id.

\(^{8}\) Id.

\(^{9}\) Id. at 1127 (quoting the trial judge as stating "In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts"). See CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 262 (2003) (describing "act reasonableness" as "a reasonable person in the defendant’s shoes would have responded or acted as violently as the defendant did").
reasonableness").

Siding with the defense, the California Supreme Court reaffirmed "the standard for determining heat of passion that [it] adopted nearly a century ago," namely, that the provocation defense does not require defendant's act of killing to be reasonable.11

One can hear the collective jeer from provocation critics everywhere.12 This case will undoubtedly add further fuel to what experts describe as a formidable "feminist attack" on the provocation defense.13 The doctrine's partial exoneration of certain enraged killers has been the subject of varied theoretical and practical objections.14 However, it is the law's apparent tendency to privilege men and disadvantage women that has emerged as the most salient critique.15 Various analyses of provocation's gender problems (which this paper refers to collectively as "the feminist critique" of provocation)16 figure prominently in the voluntary manslaughter sections of leading criminal law casebooks, and scholarly commentary condemning the defense (or broad formulations of it) is profuse.17 The amicus brief filed in Beltran by the San Francisco Domestic Violence Consortium et al. reads like a feminist manifesto.18 Headings include: Since Its Inception Hundreds Of Years Ago And Continuing Up Until Today, The Provocation Defense Has Perpetuated Gender Biases And Sheltered Men Who Kill Their Intimate Partners; The Ultimate Form Of Domestic Abuse Is Murder; and the perhaps no-so-strategically-savvy, California courts—led by this one—have historically embraced abusers' "blame-the-victim" rationalization.19 In coming to its defense-friendly conclusion, the California Supreme Court simply avoided commenting on gender all together. After all, what could it have said? Who could sympathize with a man like Tare Beltran?

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10 Beltran, 301 P.3d at 1127 (stating that the correct question is not "whether an average person would react physically and kill" but how he would "react[] mentally, experiencing obscured reason"). See Lee, supra note 9, at 263 (defining "emotion reasonableness" as "the defendant's emotional outrage or passion was reasonable").

11 Id. at 1136

12 See Lyanne Melendez, Justices to decide fate of murder suspect Tare Beltran, ABCLOCAL.COM (Mar. 5, 2013), http://abclocal.go.com/kgo/story?section=news/local/san_francisco&id=9017055 (quoting Beverly Upton, spokesperson for the San Francisco Domestic Violence Consortium, as stating that the defense position is "concerning" because it "sends a message that domestic violence in itself is not as serious").


14 See infra Part I.

15 See Dressler, Reflections supra note 13, at 961 (calling the feminist critique the "modern criticism of provocation law"); see, e.g., Jeremy Horder, Provocation and Responsibility (1991) (finding general support for the defense but advocating abolition after considering its gender implications).

16 The "feminist critique" referred to in this paper broadly includes all gender-based objections to the provocation defense and not just those lodged by self-described feminists or those otherwise connected up to a specific feminist theory. In fact, many of those who participate in the "feminist" critique might not consider themselves feminist legal theorists at all or subscribe to any particular school of feminism.


19 Id. at *i–*iii.
Indeed, the feminist critique of the provocation defense is so devastating that few question the now common assertion that broad formulations of the defense, and particularly the Model Penal Code's expansive defense of extreme emotional disturbance ("EED"), are "anti-woman." Critics make a number of explicit and implicit claims about the specially gendered nature of the defense. Some of these observations involve the chauvinist history of the doctrine. Other claims are aggregate and empirical in nature and concern the numbers and types of offenders that the provocation defense serves.

Many of the arguments regard the messages expressed by the defense. These arguments combine to create a formidable opponent to provocation, especially EED.

This article picks up the gauntlet thrown down decades ago by gender-conscious scholars and defends provocation against the specific arguments connecting the doctrine to sex inequality. However, let me be clear about what this article does and does not defend. It does not defend violence against women (or defendants like Tare Beltran), nor does it condone the gendered social and cultural conditions precedent to gender violence. It fully acknowledges widespread gender inequality and a "tolerated residuum" of gender violence. It also does not simply assume that criminal defendants' liberty interests generally trump women's interests in gender equality. While consciously aware of the pervasive problem of male domination in law and society, this article questions whether feminists are correct about the extent to which the provocation defense is complicit in this state of affairs and the extent to which its elimination will alleviate it. In other words, the feminist account may underdescribe the provocation doctrine. Moreover, provocation's

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20 Model Penal Code § 210.3(1)(b) (1980) ("Criminal homicide constitutes manslaughter when . . . [it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.").


22 See infra Part III.A.

23 See infra Part III. B & C.

24 See infra Part III.D.

25 See Victoria Nourse, Passion’s Progress: Modern Law Reform and the Provocation Defense, 106 YALE L.J. 1331, 1342. 1389 (1997) [hereinafter Nourse, Passion] ("Feminists’ arguments about this defense have fallen on deaf ears in large part because defenders of the EED formulation, or provocation in general, do not have an intellectual method that will permit them to engage a claim of gender bias.").

26 See Duncan Kennedy, Sexual Abuse, Sexy Dressing, and the Eroticization of Domination, in SEXY DRESSING, ETC. 126, 137 (1993) (discussing the "tolerated residuum" of sexual abuse in contemporary American society).
problematically gendered nature, even if assumed, may undetermine proposals for its elimination or limitation.

Responding to the variegated arguments that form the feminist critique of the provocation defense necessarily requires some scholarly excavation and exegesis. Because different authors developed the critique over time, a significant part of this project is devoted to distilling the arguments and normative commitments underlying the critique. The remainder of the paper consists of responses to the critique. The article proceeds in four parts. Part I introduces the provocation defense and briefly discusses general scholarly conflicts over the doctrine. Part II provides a short genealogy of the gender-based critique. Part III catalogues and describes the various claims constituting the feminist critique of provocation. Finally, Part IV defends provocation in the face of these powerful arguments.

I. PROVOCATION FROM A GENDER NEUTRAL PERSPECTIVE

The provocation defense has a long history in Anglo-American law and is the subject of many types of criticisms. Those who adhere to a tough-on-crime philosophy decry the defense’s leniency toward killers. Legal psychologists question the doctrine’s assumptions about human emotion and loss of control. Penal theorists argue over the defense’s relationship to appropriate punishment. Nevertheless, it is the gender critique that provocation reflects and reinforces violent male domination of women that has proven nearly universally persuasive. This Part will introduce provocation law and describe general scholarly conflicts over the doctrine.

The legal scholarship landscape is littered with writings explaining, categorizing, and dissecting the various formulations of the provocation defense. In brief, the provocation defense, when successful, mitigates murder to voluntary manslaughter. Such mitigation is extremely significant to the defendant because it can mean the difference between life and death. Legal psychologists question the doctrine’s assumptions about human emotion and loss of control. Penal theorists argue over the defense’s relationship to appropriate punishment. Nevertheless, it is the gender critique that provocation reflects and reinforces violent male domination of women that has proven nearly universally persuasive. This Part will introduce provocation law and describe general scholarly conflicts over the doctrine.

27 See Dressler, Reflections supra note 13, at 961 (stating that “Of course, one might expect law-and-order advocates to criticize a doctrine that can permit an intentional killer to avoid conviction for murder.”).
29 See infra notes 55-58 and accompanying text.
31 See infra notes 55-58 and accompanying text.
32 See infra notes 55-58 and accompanying text.
34 See, e.g., GA. CODE ANN. § 16-5-2(a) (provocation is “the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person”).

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and death or between a short sentence and perpetual incarceration. The idea is that a provoked defendant acts without the "malice" required for murder culpability. Consequently, the defense is not satisfied just because the defendant subjectively feels passion. While the fact of passion can reduce a first degree premeditated murder to a second degree murder, in order to reduce murder to manslaughter, something more is normatively required. The passion must be triggered by "adequate provocation." 

There are a wide variety of approaches to defining adequate provocation, ranging from narrow (good for prosecutors) to broad (good for defendants). Traditional provocation law confines the defense to categories of victim behavior considered highly offensive in Tudor-era England, namely mutual combat, a sudden injury, a false arrest, and adultery. The "nineteenth-century four" has been criticized on many grounds, including being hopelessly outdated and overinclusive. In the mid-to-late 20th Century, however, the largely progressive criminal law professoriate characterized the list as underinclusive, disadvantaging defendants who may have been provoked by other circumstances. As a result, in the United States, states have all but abandoned the

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32 See Berman & Farrell, supra note 30, at 1107 (Appendix listing states’ respective sentences for voluntary manslaughter and murder).

33 See Beltran, 301 P.3d at 1125 (noting that provocation "precludes the formation of malice and reduces an unlawful killing from murder to manslaughter"); Com. v. Rodriguez, 958 N.E.2d 518, 524 (Mass. 2011) (defining provocation as "a sudden transport of passion or heat of blood without malice").

34 See State v. Smith, 822 N.W.2d 401, 408 (Neb. 2012) (calling the question of whether there is reasonable provocation "an objective one"); People v. Steele, 47 P.3d 225 (Cal. 2002) (noting that "the circumstances giving rise to the heat of passion are viewed . . . objectively."); Com. v. Hutchinson, 25 A.3d 277 (Pa. 2011) (adopting an "objective test").

35 However, certain states adopt diminished capacity defenses that are purely subjective. See, e.g., CONN. GEN. STAT. ANN. § 53a-13 (West through 2012); Missouri, MO. REV. STAT. §§ 552.015.2(8), 552.030(3) (2012); N.J. STAT. ANN. § 2C:4-2 (LexisNexis through 2012); ALASKA STAT. § 12.47.020 (2012); HAW. REV. STAT. ANN. § 704-401 (LexisNexis 2012); ME. REV. STAT. ANN. tit. 17-A, § 38 (2012); MONT. CODE ANN. § 46-14-102 (2012); UTAH CODE ANN. § 76-2-305(1) (West through 2013).

36 See ARIZ. REV. STAT. § 13-1103 (defining defense as "heat of passion resulting from adequate provocation by the victim"); MAINE REV. STAT. § 203 ("extreme anger or extreme fear brought about by adequate provocation"); NEW MEXICO STAT. § 20-12-50 ("heat of sudden passion caused by adequate provocation"); TENN. CODE § 39-13-211 ("state of passion produced by adequate provocation").

37 See Nourse, Passion, supra note 25, at 1342 (observing that provocation’s "two poles are the broad MPC formulation and the narrow categorical approach). 

38 See infra Parts III.A. & IV.A. (discussing provocation’s history in English law); see generally HORDER, supra note 15, at 1-43; Ashworth, supra note 30.

39 Nourse, Passion, supra note 25, at 1341 (calling the categories the "19th century four"); see Mark Kelman, Interpretive Construction in the Substantive Criminal Law, 33 STAN. L. REV. 591, 593-94, 636 (1981) (stating that jibes, assaults, or adultery would never provoke an ordinary man to kill); HORDER, supra note 15, at 178 (asserting that equating "action in moments of unexpected anguish" with reasonable action is a "sham").

categorical approach in favor of a standard that permits a certain amount of flexibility in determining what constitutes adequate provocation.\footnote{41}{It appears that only two states, Alabama and Illinois, retain the categorical approach. See, e.g., Riggs v. State, 2013 WL 1859018, at *8 (Ala. Crim. App. 2013) (not yet released for production) (adopting categories of witnessed adultery, imminent assault, and witnessed assault on a close relative) People v. Hernandez, 562 N.E.2d 219, 226 (Ill. App. 2 Dist. 1990) (enumerating the categories of substantial physical injury, mutual combat, illegal arrest, and adultery). See Berman & Farrell, supra note 30, at 1038 (observing that "the categorical approach was replaced by a standard of reasonableness").}

The majority of jurisdictions require that the alleged provoking act be sufficient to arouse the passions of an "ordinary," "typical," or "reasonable" person.\footnote{42}{See, e.g., GA. CODE ANN. § 16-5-2 (West 2012) ("reasonable person"); LA. REV. STAT. ANN. § 14:31(1) (2011) ("average person"); MO. REV. STAT. § 565.001(1) (2010) ("person of ordinary temperament"); NEV. REV. STAT. ANN. § 200.050 (LexisNexis 2009) ("reasonable person"); WIS. STAT. ANN. § 939.44(1) (West 2010) ("ordinarily constituted person"). See LEE, supra note 9, at 235 (characterizing the purpose of reasonableness as creating "uniformity and fairness").} Still, some states place certain categorical limits on provocation. They require, for example, that the provoking act consist of physical conduct, as opposed to "words alone."\footnote{43}{See, e.g., Cassels v. State, 92 P.3d 951, 960 (Colo. 2004) ("[W]ords that revile, disparage, or insult . . . can never rise to the level of legal provocation."); State v. Shane, 590 N.E.2d 272, 277 (Ohio 1992); Girouard v. State, 583 A.2d 718, 721 (Md. 1991) (same).} A handful of states adopt the Model Penal Code's expansive defense of extreme emotional disturbance (EED).\footnote{44}{See infra notes 48-58 and accompanying text. While utilitarian concerns occasionally appear in the literature, see, e.g., Berman & Farrell, supra note 30, at 1076 (asserting that requiring passion deters retaliatory killings); Adam Candeu, An Economic Theory of Criminal Excuse, 50 B.C. L. REV. 87 (2009) (conceptualizing provocation in economic terms), most of the debate is distinctly retributive. See Dressler, Reflections supra note 13, at 963 ("[M]ost modern scholars would agree that the basis for the defense of provocation is found in retributive concepts of desert.").} This broad version of provocation mitigates murder to manslaughter when a defendant commits the killing "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."\footnote{45}{See, e.g., Reflections supra note 13, at 963.} Accordingly, anything may qualify as provocation so long as it compels the requisite emotional state in the defendant and there is a fair reason for that emotional state.

Debates rage in criminal law scholarship over the morally required, socially desirable, and utile formulation of the provocation defense.\footnote{46}{See Dressler, supra note 13.} Instead of delving into each of these conversations, which could (and has) filled up entire volumes of law reviews and is not fully germane to the paper's main thesis, it should suffice simply to describe briefly the principal areas of contention. One issue generating quite a bit of discussion involves categorizing the provocation defense as an excuse, meaning the defendant committed a wrongful but legally excusable act, or as a justification, meaning the defendant committed a nonwrongful act.\footnote{47}{See, e.g., Symposium, The Nature, Structure, and Function of Heat of Passion/Provocation as a Criminal Defense, 43 U. Mich. J.L. Reform 1, et seq. (2009).} This issue is further divided into several other questions. The question asks whether the defense should be called a justification or excuse because doing so reflects actual legal practice or is analytically compelled.\footnote{48}{See Gabriel J. Chin, Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction, 43 U. Mich. J.L. Reform 79, 79 (2009) (observing that scholars "vigorously debate" the subject).} Other debates

\footnote{49}{Reid G. Fontaine, Adequate (Non)Provocation and Heat of Passion as Excuse Not}
are more normative in nature and include how provocation claims should be categorized given the legal implications of calling a defense a justification or excuse and whether it is appropriate to call certain categories of killings justifications rather than excuses and vice versa.50

A related scholarly dispute concerns whether the provocation defense should operate to totally exculpate the defendant, exculpate him of murder only, or not exculpate at all. Some argue that if a provoked killing is a justified killing (because the victim in fact acted in a wrongful manner), it should fully exonerate the defendant.51 Others assert that provocation as an excuse (where the defendant was "reasonably" impassioned by "innocent" victim behavior) should not even serve to mitigate.52 Finally, some theorists argue that the justification-versus-excite issue is beside the point either because provocation's categorization makes no actual difference53 or because provocation's problems do not stem from how it is categorized.54

Another series of debates, grounded in legal psychology, question passion as an exculatory factor. Scholars problematize provocation's distinction between emotion and intention,55 and some contend that seemingly passion-crazed defendants act quite deliberately.56 Alternatively, experts opine that homicidal reactions often stem from emotional states quite different from anger, for which the law ought to account.57 Finally, there are multiple conversations about the reasonableness requirement, including


See SMEISTER & SULLIVAN, supra note 48, at 348 (asserting reasonably provoked defendants should be acquitted); Reflections, supra note 13, at 980, 998 (prescribing exculpation for reasonable defendants).

See infra note 130 (abolition proposals); Gruber, Victim Wrongs, supra note 30 (proposing to eliminate provocation and replace it with a defense based on wrongful victim conduct); Nelson, supra note 30 (favorably describing Canadian provocation law's requirement of wrongful victim conduct).

See, e.g., Chin, supra note, at 83 (denying that the justification/excuse "distinction is important"); but see Rethinking Passion, supra note 28 (emphasizing the importance of distinguishing justification and excuse). Cf. Huigens, supra note 63, at 5 (observing that the taxonomic debate could "clarify the law's moral message for the public").


See, e.g., Elise Percy et al., "Sticky Metaphors" and the Persistence of the Traditional Voluntary Manslaughter Doctrine, 44 U. Mich. J. L. Reform, 383, 394 (2011) (stating that "anger is not the only [passionate] emotion"); People v. Wu, 286 Cal. Rptr. 868, 884 (Cal. App. 4th Dist. 1991) (noting that "'passion' need not mean 'rage' or 'anger' but may be any 'violent, intense, high-wrought or enthusiastic emotion'") (quoting People v. Borchers, 325 P.2d 97 (Cal. 1958)).
whether reasonableness should be required, how subjective the requirement should be, and the implications of the standard to certain classes of defendants and victims.\(^{58}\)

The above debates are rooted in many important values such as morality, legal coherency, and social utility. However, most are not principally concerned with provocation law's relationship to gender-based hierarchy. Prior to the advent of the feminist critique, criminal law scholars typically viewed expansive, defense-friendly formulations, like extreme emotional disturbance, as liberal versions of provocation law.\(^{59}\) Now, however, many left-leaning criminal theorists either abandon civil libertarian concern for homicide defendant's interests in favor of anti-subordination concerns for female victims or find the entire matter steeped in insoluble dilemma.\(^{60}\)

II. PROVOCATION FROM A GENDERED PERSPECTIVE

The majority of jurisdictions define adequate provocation in terms of the emotions of a "reasonable person," as noted above. Thus, the fundamental question for judges, jurors, and criminal law students throughout the United States is, "Who is the reasonably provoked person?" Several years ago, I came upon an excellent cultural depiction of the modern reasonable man provoked to kill, by way of the 2002 movie "Unfaithful."\(^{61}\) Attractive, refined, gray-haired businessman Richard Gere is married with a child to the lovely Diane Lane and living an idyllic suburban life, free from marital or financial strife. Gere, a phlegmatic but uptight type, ends up killing the man with whom Lane serendipitously fell into a passionate, adulterous affair. Although Gere does not catch Lane in the very act of adultery,\(^{62}\) he nonetheless has proof positive that infidelity occurred.\(^{63}\) Gere's passion is triggered when, at the paramour's apartment, he notices a snow globe he had given Lane previously as a special gift. Gere becomes physically ill and in a moment of blind fury hits the paramour over the head with the snow globe just twice, but with enough force to hasten death. It is noteworthy that Gere does not commit any act of violence against the diminutive Lane, who is herself highly morally conflicted over the affair.\(^{64}\) Rather, he kills the paramour, an over-sexed, strikingly seductive, French Lothario.\(^{65}\) To be sure, violence in general is outside of Gere's nature, which is visually confirmed by the fact that he sports spectacles and a sweater vest during the killing.

Richard Gere is what one might imagine, and Hollywood has imagined, as the reasonable cuckold provoked to kill. This literal reasonable man script involves a white,

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\(^{58}\) See supra notes 9-11 and accompanying text and infra notes 130-33 and accompanying text.

\(^{59}\) See Nourse, Passion, supra note 25, at 1384–85.

\(^{60}\) See supra note 21 (listing articles).


\(^{62}\) Cf. Mays v. State, 88 Ga. 403 (1891) (requiring provocation defendant to find "the deceased in the very act of adultery with his wife").

\(^{63}\) Cf. id. (clarifying that it is sufficient if the defendant "found them together in such position as to indicate with reasonable certainty to a rational mind that they had just then committed the adulterous act").

\(^{64}\) See Holden, supra note (calling Lane's character sympathetic).

\(^{65}\) See id. (observing that the film reduces the paramour to "a generic Continental rake").
upper-middle class, caring husband slaying an unsympathetic male victim in an uncharacteristic act made involuntary by passion. In popular culture, two characters comprise the adequately provoked killer. One is the man, who after being wronged in some horrific manner (usually the wanton slaying of a loved one), plots understandable, if not justified, revenge. The other is the person who suddenly "snaps" in the face of an emotionally charged event. Previously, men exclusively occupied the media space of the reasonably provoked killer, but today, women characters are increasingly taking on that role. In fact, an argument could be made that the concept of a killer who "snapped" conjures up the image of murderess. In the case of adultery killings, like the one in Unfaithful, the provoked killer has both characteristics. He is somewhat justified in the killing, and he snapped.

Decades ago, feminist scholars began to demonstrate that the popular script of adequately provoked intimate killers may be true in Hollywood movies, but not in the real world. Some critics take the hardline position that any adultery killing, even one as sanitized as Gere's, reflects masculinist norms of violence and gender subordination and should not be mitigated. Others seek to expose the "real faces" of male intimate homicide defendants. Far from being nonviolent cuckolded husbands who snapped, male intimate killers invoking the provocation defense include batterers, jealous men speculating about adultery, controlling spouses angered by their wives' attempts to leave, or a combination of all three. Today, the contention that the provocation defense, especially EED, "shelters" abusive and murderous men, is repeated with banal frequency.

The first rumblings of this now-familiar critique appeared in the mid-1980s. In 1986, Laurie Taylor, a UCLA law student, authored a note exposing and critiquing gender disparities in the criminal law's treatment of intimate homicides. The article begins with the bold empirical observations, "Homicide is overwhelmingly a male act," and "Women

66 See Coker, supra note 28, at 89 (observing "the popular image" of a wife killer as someone who "suddenly cracked").
67 See Braveheart (Paramount Pictures 1995) (Mel Gibson); Collateral Damage (Warner Bros. 2002) (Arnold Schwarzenegger); Princess Bride (Act 111 Communications 1987) (Inigo Montoya); Death Wish (Death Wish Productions, 1974) (Charles Bronson).
68 See Falling Down (Le Studio Canal+ 1993) (Michael Douglas); Shutter Island (Columbia & Paramount Pictures 2010) (Leonardo DiCaprio).
69 See, e.g., The Brave One (Warner Bros. 2007) (Jodi Foster).
70 There is a true crime series on the Oxygen network devoted to women killers, entitled Snapped. See http://www.oxygen.com/tvshows/snapped/.
71 See, e.g., Rozelle, supra note 56; Milgate, supra note 21 at (calling for "the abolishment of the heat of passion defense in spousal infidelity cases").
72 See, e.g., Coker, supra note 28.
73 See infra note 94 and accompanying text.
74 See supra note 212. See also, e.g., Antonia Elise Miller, Note, Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion, 17 WM. & MARY J. WOMEN & L. 249, 250 (2010) (asserting that provocation protects "male defendants who kill"); Emily Miller, supra note 21, at 666 (calling the MPC's "expansion" of provocation doctrine "particularly disastrous for women").
rarely kill," leading the reader to believe it will ultimately reject lenient defenses that disproportionately benefit male killers. Surprisingly, however, Taylor's primary gripe is that the provocation doctrine is too narrow and does not appropriately accommodate women who kill. There is thus some irony in the fact that one of the first articles looking a provocation law from a gendered perspective is about the overpunishment of women rather than the underpunishment of men.

In constructing her argument, Taylor relies heavily on Catharine MacKinnon's observations about the inevitability of jurists infusing objective reasonableness with male attributes. The problem, Taylor maintains, is that "reasonable provocation" might not accommodate the emotions that drive women to kill—fear, depression, and sadness rather than anger. In addition, the ways in which women develop these emotions may differ from the "snapped" scenario. Taylor thus asserts that provocation law should accept a variety of emotions as constituting "passion," and permit women to argue that provocation can develop over time. Her argument is accordingly similar to the feminist critiques of self-defense that assert the "imminent harm" requirement disfavors battered women who kill abusers. The only concrete suggestion the Note makes for narrowing the defense consists of a proposal to prevent men from asserting they killed in response to women's provocative "course of conduct." In the end, the Note opines that the MPC's broad EED defense holds the most promise for gender equality, stating that "a sensitive and informed adoption of the Model Penal Code might help equalize the balance" because "the Code's more subjective standard may better accommodate female defendants.

In 1991 and 1992, a book and law review article geared the gender discussion away from provocation's inadequate protection of sympathetic female defendants and toward provocation's inadequate punishment of unsympathetic male defendants. In the 1991 book, Provocation and Responsibility, legal historian Jeremy Horder discusses the historical and philosophical underpinnings of the provocation defense in general and offers a

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76 Id. at 1680. Taylor's actual statistics, however, do not demonstrate such a wide gap between male and female intimate killers. According to the article, in 1986, 755 men killed their wives or girlfriends compared to 477 women who killed their boyfriends or husbands. Id.
77 See id. at 1682–83 (asserting that provocation law's standard is not accommodating toward women defendants and opining that the law must "incorporate an informed understanding of the full spectrum of human behavior to ensure criminal justice for women as well as for men").
78 See id. at 1690 (quoting MacKinnon's statement, "When the state is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied.") (quoting Catharine MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 173, 196 (1983)).
79 Taylor, supra note 25, at 1714-15 ("Women who kill in a passion of fear for their physical safety would then have the same protection as men who kill in a passion of rage to 'defend' their honor.").
80 Id. at 1717.
81 Id. at 1719 ("Cumulative terror should serve as an emotion adequate for heat-of-passion manslaughter . . . .").
83 Id. at 1718–19.
84 Id. at 1733.
persuasive gender-based case for abolishing it. The book critically retells the story of 17th Century English provocation law, which historians had previously described as grounded in mercy, acknowledging the frailty of man. Horder alternatively describes the doctrine as largely a product of bygone views regarding male honor. Normatively, the book sets forth a searing indictment of the British provocation defense on the ground of its tendency to disadvantage women. Horder contends that the discrimination lies, not just in deserving women (abuse survivors) being denied the defense, but also in undeserving men (sexist men with histories of violence) successfully utilizing the defense. Thus, the analysis departs from Taylor’s in the sense that broadening provocation to accommodate battered women will not solve the primary problem of exonerating culpable men. Horder further makes an expressivist argument that provocation law communicates that "there is something natural, inevitable, and hence in some (legal) sense-to-be-recognized forgivable about men's violence against women, and their violence in general." Ultimately, Horder argues that the only way to remedy provocation’s discrimination and expressivist problems is to abolish it.

Professor Donna Coker’s 1992 article, Heat of Passion and Wife Killing: Men who Batter/Men who Kill, is a complex and forceful indictment of provocation law’s complicity in constructing false images of men who kill their female partners. The article lends itself to a narrow and a broad reading. Under a narrow interpretation, the article primarily serves an educative function by demonstrating that many defendants one might initially believe to be reasonably provoked by adultery are, in fact, pattern abusers who acted in character. In this reading, the only problem with the provocation defense is that the existence of the adultery category may reinforce the public’s misconceptions about wife-killers and make it more likely that a fully culpable wife-killer can falsely claim he acted in passion. However, once public opinion is corrected, judges and juries will be in a tolerable position to apply the defense in cases that actually merit it.

The article also makes some stronger claims. For example, Coker intimates that male-on-female intimate homicides, even ones involving witnessing adultery, are

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85 HORDER, supra note 15, at 178.
86 See Ashworth, supra note 30, infra Part IV.A.
87 Id. at 26–29; see infra note 147.
88 HORDER, supra note 15, at ch. 9.
89 Id. at 186–87.
90 See infra Parts III.D & IV.D. (discussing expressivism).
91 HORDER, supra note 15, at 194.
92 Id. at 197.
93 Coker, supra note 28.
94 See id. at 83 (asserting that the doctrine "hides the degree to which 'adultery killings' are really like other wife-killings").
95 See Coker, supra note 28, at 76 (contending that adultery’s status as the paradigmatic provocation perpetuates the "misconceptions" that wife killers act from sudden provocation rather than "personal inclination to be violent with female intimate partners").
96 Id. at 130 (dispelling the "myth" that "men who kill their wives or girlfriends do so in the heat of "uncontrolled passion").
virtually never spontaneously provoked.\textsuperscript{97} They, like battering in general, are the products of conscious and deliberate patterns of control and abuse.\textsuperscript{98} Moreover, Coker appears to criticize provocation writ largely for its normative approval of a masculinist culture of anger and violence.\textsuperscript{99} Given these broad objections, one might expect Coker to advocate wholesale abandonment of the defense, or at least prohibiting the defense's application to male-on-female intimate homicides.\textsuperscript{100} In the end, she does not recommend any specific law reform. Her observations about provocation's gender problems, nevertheless, linger like a bad taste and move the reader inexorably toward an abolitionist stance.

The paper that played the most prominent role in elevating the gender inequality argument to the primary critique of provocation was Professor Victoria Nourse's 1996 Yale Law Journal article, \textit{Passion's Progress}.\textsuperscript{101} The article is cited in hundreds of publications and appears in many of the leading Criminal Law casebooks.\textsuperscript{102} It begins with the observation that broad provocation standards, particularly EED, permit male killers to argue that they were provoked by their wives' and girlfriends' departures.\textsuperscript{103} From this observation, the article lodges two principle objections to the defense. First, the article makes a gendered argument that the law encourages abused or unhappy women to stay with their male partners (presumably because the doctrine makes men more likely to exact a private death penalty as the price of separation).\textsuperscript{104} Second, it sets forth a more general argument that it is idiosyncratic, and thus doctrinally unsound, for the provocation doctrine to protect those who react violently to "lawful" victim conduct.\textsuperscript{105} Because I am primarily concerned with the gender critique of provocation, this paper will concentrate on the first claim. Indeed, Nourse's article's legacy is more the gender critique than the theory about consistency in criminal defenses.

\textit{Passion's Progress} recognizes up front that the extreme emotional disturbance defense is neutral on its face.\textsuperscript{106} The problem, it contends, is that the neutral language of EED hides normative judgments about the circumstances under which people are entitled

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\textsuperscript{97} Id. at 84 (recognizing that reasonably provoked killers may exist but that this description does not apply to "men who kill their female partners") & 94 (asserting that if the impassioned wife-killer "does exist, he is apparently part of a very small group").

\textsuperscript{98} Id. at 129 (contending that wife-kilings are generally "planned killings").

\textsuperscript{99} Id. at 102-03 (problematizing the assumptions that men become enraged and "that rage leads inevitably to violence"); \textit{infra} Part III.D.2 (arguments about provocation's pro-violence message).

\textsuperscript{100} Coker does strongly intimate that the law needs to be reformed. \textit{See} Coker, supra note 28, at 130 ("We must . . . plac[e] the legal and cultural analysis of wife-murder squarely within that of wife-battering.").

\textsuperscript{101} Nourse, \textit{Passion}, supra note 25.

\textsuperscript{102} \textit{See}, e.g., casebooks cited, \textit{supra} note 17. A Westlaw keycite citing reference search on the article reveals 149 citing references.

\textsuperscript{103} Nourse, \textit{Passion}, supra note 25, at 1332 (noting the significant number of cases involving "the desire of the killer's victim to leave a miserable relationship.").

\textsuperscript{104} Id. at 1334 (observing that under EED "a battered wife who leaves has, by that very departure, supplied a reason to treat the killing with some compassion").

\textsuperscript{105} Id. at 1334 (observing that "[r]arely, if ever, does the criminal law embrace defendants who kill in response to a lawful act or trivial slights") & 1396-97 ("The law only suffers contradiction when it refuses to embrace a sense of outrage which is necessary to the law's rationalization of its own use of violence.").

\textsuperscript{106} Id. at 1333-34.
to become emotionally disturbed.\textsuperscript{107} This argument is not dissimilar to Taylor's assertion, channeling MacKinnon, that apparently neutral legal rules will inevitably benefit men in male supremacist societies.\textsuperscript{108} Unlike Taylor, however, Nourse's primary issue is not that male intimate killers are more successful in arguing provocation than female intimate killers. Rather, she objects to the ability of sexist male intimate killers to assert that they were reasonably provoked at all.\textsuperscript{109} The principal pathology the article identifies is that courts allow specious claims of provocation (namely, those based on separation) far more frequently under broad constructions of the defense (specifically EED) than under narrow ones.\textsuperscript{110} It offers original empirical evidence in support.\textsuperscript{111} Thus, the paper's unique concern is underenforcement. Having described the problem as one of courts approving too many sexist provocation claims, the article proposes law reform to minimize it.\textsuperscript{112} It endorses a redesigned provocation doctrine that would apply only in cases where the defendant had "warranted" grounds for outrage.\textsuperscript{113} The killer's emotional reaction must mirror a communal sense of morality, as enumerated by criminal laws.\textsuperscript{114} In other words, "the defendant's emotional judgments [must be] the law's own sense of appropriate retribution."\textsuperscript{115}

If one interpreted the proposal in \textit{Passion's Progress} to require that defendants' judgments strictly mirror codified criminal law, it would be a narrow defense indeed. The criminal law prescribes death for only one type of crime: aggravated murder. Thus, it would seem that only those defendants provoked by witnessing aggravated murder of loved ones could prevail under the reformulated defense. Nourse, however, points to the (curiously gendered)\textsuperscript{116} example of the man who kills his wife's rapist as a paradigmatically warranted killing.\textsuperscript{117} Thus, the article envisions that a defendant's judgments could match formal criminal law's in a much looser sense. The limitation really boils down to the requirement that provoking victim behavior constitute some crime, not

\textsuperscript{107} Id. (stating that the MPC's seeming neutral concern with self-control "masks a different, more pernicious" set of "judgments about the equities of relationships") & 1398 ("[D]ecisions applying this defense express judgments about when defendants 'should' exercise self-control.").

\textsuperscript{108} Id. at 1387 ("If the defendants involved in these cases are largely male, it follows that the description of the defendant (who the "man" is) becomes the arbiter of the implicit normative question (how we should "relate" to each other.).")

\textsuperscript{109} See id. at 1370 (asserting that because the provocation defense, even EED, has an evaluative component, allowing sexist defendants to assert provocation is a functional normative approval of their judgments).

\textsuperscript{110} See id. at 1343 (contending that in EED jurisdictions separation "is as likely, if not more likely" a ground for the defense than sexual infidelity).

\textsuperscript{111} Id. at 1342-68.

\textsuperscript{112} Id. at 1338 (noting that her proposal would "bar[] manslaughter verdicts in most intimate homicide cases").

\textsuperscript{113} See id. at Part IV.B.

\textsuperscript{114} Id. at 1392 (asserting that provocation is appropriate only when the defendant "is expressing outrage in ways that communicate an emotional judgment . . . that is uncontroversially shared, indeed, that the law itself recognizes")

\textsuperscript{115} Id.

\textsuperscript{116} Killing men who sexually violate women seems to be a favored example of a paradigmatically provoked killing. \textit{See}, e.g., Dan Kahan & Martha C. Nussbaum, \textit{Two Conceptions of Emotion in Criminal Law}, 96 COLUM. L. REV. 269, 313 (1996) (calling reasonable the "woman who kills a man in anger after discovering that he has sexually abused the woman's young daughter").

\textsuperscript{117} Nourse, \textit{Passion}, supra note 25, at 1337-38 & 1392.
necessarily a crime punishable by death or even long-term imprisonment.\textsuperscript{118} This might exclude defendants provoked by adultery and separation alone, but not necessarily similar defendants whose wives fought back in some way.\textsuperscript{119} In this sense, the proposal may be underinclusive when compared with the identified problem. But the proposal is also overinclusive in the sense that makes the defense unavailable to other sympathetic classes of defendants, for example, serially bullied kids, postpartum infant killers, and minorities provoked by racial epithets. But wait, Nourse holds that racial epithets can count as provocation "because they can be analogized to hate-crime offenses,"\textsuperscript{120} However, if analogic reasoning is fair game, Nourse’s seemingly bright-line warranted-excuse/legality rule looks a lot more the MPC’s standard of a "reasonable explanation or excuse."\textsuperscript{121} Consequently, depending on its application, Nourse’s apparently neutral criterion may also hide normative judgments that reinforce social hierarchies, including gendered ones.\textsuperscript{122}

Passion’s Progress sparked an explosion of gender-based critiques of provocation that continue to proliferate today.\textsuperscript{123} The vast majority of the articles have several features in common. First, they nearly universally discuss the chauvinistic origins of the defense in old Britain.\textsuperscript{124} Many quote the early 18\textsuperscript{th} Century provocation case, Regina v. Mawgridge, which called adultery the "highest invasion of property," to support the proposition that the defense is inextricably linked to women’s historical subordination, including chastisement.\textsuperscript{125} Second, the vast majority of articles describe in excruciating detail the facts of individual brutal intimate killings.\textsuperscript{126} For example, provocation critic Susan Rozelle recounts the 1980 Arkansas case of Randall Dixon:

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  \item \textsuperscript{118} See id. at 1396 n.381 (noting that the lawfulness test is "not a doctrinal standard" and adding the caveats that outrage from a traffic violation, though illegal is not adequate provocation, but outrage "based on conduct that appears lawful . . . may reflect warranted emotion under a different normative reconstruction of the provoking behavior.")
  \item \textsuperscript{119} It seems, however, that Nourse believes this (more minor) unlawful victim behavior would not count, as she envisions her proposal to bar intimate homicide claims. See id. at 1397 n.385 ("Outrage inspired by nominally unlawful acts, such as adultery, should not reach a jury.").
  \item \textsuperscript{120} Victoria F. Nourse, Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person, 2 OHIO ST. J. CRIM. L. 361, 364 n.11 (2004).
  \item \textsuperscript{121} MODEL PENAL CODE § 210.3(1)(b).
  \item \textsuperscript{122} As Nourse recognizes, "the ‘veil of relationship’ is extraordinarily resistant to change and will reassert itself.” Nourse, Passion, supra note 25, at 1403.
  \item \textsuperscript{123} See supra notes 17 & 21. According to Westlaw, the article has 148 citing references. All the scholarly articles cited in supra note 21 that postdate Passion’s Progress cite to its analysis.
  \item \textsuperscript{124} See infra Part III.A.
  \item \textsuperscript{125} R. v. Mawgridge (1706), Kel. J. 119, 84 E.R. 1107 at 1115 (Eng. K.B.). See infra note 143 (discussing chastisement); see generally infra part III.A.
  \item \textsuperscript{126} See, e.g., Emily Miller, supra note 21, at 665 (beginning article with story of Calvin Ott, who killed his estranged wife); Tom Stacy, Changing Paradigms in the Law of Homicide, 62 OHIO ST. L.J. 1007 (2001) (introducing mitigation analysis with the story of defendant Schnopp, who killed his wife after she said she was divorcing him and that ”I have got something bigger and better [for sex]”); Caroline Forell, Homicide and the Unreasonable Man, 72 GEO. WASH. L. REV. 597, 598 (2004) [hereinafter Forell, Homicide] (beginning article with the admittedly ‘extreme’ case of Javier Romero, an abuser who stabbed his wife and son to death and received a sentence of 10 years for murder, and stating, "I am haunted by the Romero case"); REASONABLE MAN, supra note 12, at 38. See also id. at 36–37 (describing the Hippolito Martinez case, in which married Martinez saw his female paramour dancing with a man (her brother). Nourse quotes extensively from the fact sections of murder cases, supra note, at 1342–43, 1351–52, 1358–59, 1362–63, including the case of "Smith" who, after finding out his wife Becky filed for divorce, 'shot through the door [of Becky’s family’s home],
Randall Dixon and his fiancée went out with friends to celebrate their engagement, but because his bride-to-be danced with another man at the party, Dixon beat her to death. He first attacked her at the celebration, then followed her to her sister's house, where he beat her until she stopped breathing. He revived her with mouth-to-mouth resuscitation, then took her home and continued the assault. When the beating stopped at 5:00 a.m., his fiancée again lay unconscious. This time she never woke up. She remained on a respirator until she died, twelve days after the party. The Arkansas jury was instructed that it could find Dixon guilty of only manslaughter, rather than murder, if it believed he acted "under the influence of extreme emotional disturbance for which there is reasonable excuse." The jury voted manslaughter.\textsuperscript{127}

Such heart-wrenching anecdotes prime readers to feel that male intimate homicide defendants should receive the most exacting punishment available under law and to regard the provocation doctrine as incontestably defective because it fails to produce appropriate retribution.\textsuperscript{128} Consequently, it should come as little surprise that the final common attribute is that the scholarship generally proposes ratchet-up reforms, meaning reforms that make punishment harsher or more likely.\textsuperscript{129}

As noted above, many provocation critics, such as Jeremy Horder, assert that eliminating the defense is the sole means of achieving gender justice.\textsuperscript{130} Some, like Victoria Nourse, propose to limit the defense by narrowing the definition of adequate provocation.\textsuperscript{131} While Nourse creates a warranted excuse/legality test, others call for "normative" reasonable standards or the requirement of "act" reasonableness, as was urged by the prosecution in \textit{Beltran}.\textsuperscript{132} One of the more female-centric suggestions has

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127 Rozelle, \textit{supra} note, at 201. The 1976 case, \textit{People v. Berry}, in which the defendant, an abuser, strangled his wife to death and was permitted to argue provocation based on his wife’s "provocative course of conduct." Scholarship discussing the case includes \textit{Coker, supra} note 28. \textit{See also} \textsc{Katherine T. Bartlett & Deborah L. Rhode, Gender and Law: Theory, Doctrine, Commentary} 344–63 (5th ed. 2010) (excerpting and analyzing \textit{Berry}); \textit{Lee, supra} note 9, at 43–45; \textit{Forell, Homicide, supra} note 126, at 605.

128 \textit{See Joseph A. Amato, Victims and Values: A History and a Theory of Suffering} 175 (1990) ("There is an elemental moral requirement to respond to innocent suffering;"); Susan Bandes, \textit{Empathy, Narrative and Victim Impact Statements}, 63 U. Chi. L. Rev. 361, 412 (1996) ("We ought not to pretend that storytelling and empathy are value neutral, when in fact they are potent weapons . . . .").

129 \textit{See}, e.g., \textit{Kahan & Nussbaum, supra} note 113, at 352 (endorseing an "evaluative" formulation in which defendants’ emotional reactions must stem from correct moral appraisals); \textit{Gruber, Victim Wrongs, supra} note 30, at 712 (endorseing a lack of predisposition requirement); \textit{Antonia Miller, supra} note 74, at (calling for the elimination of the provocation defense in cases involving abuse); \textit{Clavel, supra} note 21, at 350 (same).

130 \textit{See supra} notes and accompanying text; \textit{see also} \textit{Emily Miller, supra} note 21, at 692–93 (advocating abolition); Rozelle, \textit{supra} note, at 233 (advocating abolition except for cases of excessive force in self-defense).

131 \textit{See supra} notes 113-15 and accompanying text.

132 \textit{See supra} notes 9-11 and accompanying text (discussing "act reasonableness in the \textit{Beltran} case); \textit{see, e.g., Lee, supra} note 9, at 246 & 260–69 (proposing that provocation should have a "normative" definition of reasonableness and include act reasonableness); \textit{Pillsbury, supra} note 54, at 142 (restricting the defense to those who respond to "serious wrongs"); \textit{Gruber, Victim Wrongs, supra} note 30 (asserting that the defense should only apply to "wrongful" behavior).
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been a "reasonable woman" standard, requiring the defendant, male or female, to act like a reasonable woman. The next Part catalogues and describes the various theoretical arguments underlying critics' calls to reign in provocation.

III. A TYPOLOGY OF THE FEMINIST CRITIQUE OF PROVOCATION

This Part seeks to distill the principal analytic constructs underlying the feminist critique of provocation. It is worthwhile to note that the arguments laid out below represent the most forceful objections to the provocation doctrine in general. They are less concerned with modest tweaks that incrementally narrow provocation. It is true that some critics advocate less radical changes to provocation law, for example, eliminating just the adultery category or adopting a caveat that men with a documented history of abuse cannot argue provocation.

These limited reforms leave provocation doctrine largely intact, but they only modestly address the overarching gender problem. For example, a provision preventing repeat abusers from claiming provocation will not stop sexist wife killers who fall outside the "repeat abuser" category from invoking the defense. Accordingly, many feminist critics propose far-reaching changes like abolition or generalized limitations of the defense's applicability (i.e. calling for a warranted excuse). Below is a comprehensive list of arguments behind such proposals.

A. Provocation Law is Steeped in Chauvinist History

The majority of writings maligning provocation emphasize the doctrine's apparently sexist origins. According to critical commentators, old English jurists created the voluntary manslaughter doctrine specifically to protect men who responded to affronts to their honor, particularly the affront of marital infidelity. The doctrine is...

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133 Caroline Forell & Donna Matthews, A Law of Her Own: The Reasonable Woman As a Measure of Man 172 (2000).
134 Today, proposals to eliminate the adultery category while keeping intact the remainder of the doctrine are largely unnecessary, given that so few jurisdictions retain an explicit adultery category. See supra note 41 (observing that only two states retain a categorical approach).
135 Domestic homicide statutes narrowly address the issue of pattern abusers claiming provocation. For example Minnesota’s statute makes it first degree murder when "causes the death of a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse upon the victim or upon another family or household member." Minn. Stat. § 609.185(5). Interestingly, the statute applies the same logic to child abuse, making it first degree murder when a defendant "causes the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon a child." Id. at § 609.185(5). Such a provision may negatively affect many female defendants. See infra note 314 (discussing intimate homicides committed by women).
136 See, e.g., Taylor, supra note 25, at 1718-19 (proposing that provocation law disallow defendants to argue their anger was provoked by a "course of conduct"); Antonia Miller, supra note 74 at (proposing that the defense should not apply to cases involving abuse).
137 For example, those who concern Nourse, supra note 25.
138 See id.
139 See, e.g., Emily Miller, supra note 21, at 669 (observing the "masculine assumptions of the common law of voluntary manslaughter").
140 The notion that modern provocation law is grounded in 17th Century notions of honor can be traced to Jeremy Horder, who endeavored to demonstrate that traditional categorical provocation law, developed in the 17th Century, was less a product of medieval juries' inclination toward temperance and more
thus inextricably entwined with the antiquated principle that women are men's property, to be defended from "invasion" by death (primarily through slaying the "invader").\textsuperscript{141} By giving license to men to kill for thefts of affection, the provocation law substantively limited women's ability to leave abusive, controlling, and unsatisfying relationships, or engage in consensual extramarital sexual relations.\textsuperscript{142} Scholars also link the defense to the antiquated principle of chastisement, which prescribed low level violence as an acceptable method of controlling wives.\textsuperscript{143} Consequently, the common sentiment regarding provocation's past is that the "doctrine has its historical roots in a value system that embraced the oppression of women."\textsuperscript{144}

B. Provocation Law Underpunishes Culpable Male Murderers

Provocation critics contend the doctrine (especially in its broad form) prevents the state from appropriately enforcing criminal law against sexist killers who deserve punishment for murder.\textsuperscript{145} According to the critique, the doctrine does more than just allow some guilty to slip through the cracks, it creates the conditions under which many culpable defendants avoid appropriate punishment.\textsuperscript{146} Some critics simply assume that because the defense has the potential to partially exonerate this class of killers, it actually does so in large numbers.\textsuperscript{147} Others, most notably Victoria Nourse, endeavor to provide

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\textsuperscript{141} See, e.g., Antonia Miller, supra note 74, at 256 (asserting that the provocation encouraged men "to retaliate against any trespass on his most precious property: his wife"); Milgate, supra note 21, at 226 (maintaining that the defense "was developed at a time in which the woman’s identity was dictated by her husband"); Alafair S. Burke, Equality, Objectivity, and Neutrality, 103 MICH. L. REV. 1043, 1062 (2005) ("[P]rovocation law reflected . . . prevalent norms about women as male property.").

\textsuperscript{142} See Emily Miller, supra note 21, at 672 (opining that provocation law reflected the antiquated view that an unfaithful wife "lost the moral authority needed to fulfill her domestic roles").


\textsuperscript{144} James J. Sing, Note, Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law, 108 YALE L.J. 1845, 1865 (1999).

\textsuperscript{145} See, e.g., Mayo Moran, The Reasonable Person: A Conceptual Biography in Comparative Perspective, 14 LEWIS & CLARK L. REV. 1233, 1258 (2010) (asserting that discriminatory application of provocation "results in a standard that under-convicts" culpable men); Forell, Homicide, supra note 126, at 609 ("The MPC’s EED test for provocation provides an ‘abuse excuse’ for certain violent men who hold perverse views of what it means to be a man.").

\textsuperscript{146} See, e.g., Milgate, supra note 21, at 196 (contending that when provocation is applied to "romantic" cases, "the results are nearly always unjust").

\textsuperscript{147} See, e.g., Steven F. Shatz & Naomi R. Shatz, Chivalry Is Not Dead: Murder, Gender, and the Death Penalty, 27 BERKELEY J. GENDER L. & JUST. 64, 90 (2012) (asserting that because of provocation law, "[m]any domestic violence killings do not result in a murder conviction"); Coker, supra note, at 78 (arguing that provocation's structure suggests "likely [underenforcement] outcomes at trial").
\end{flushleft}
empirical evidence that slippage occurs in nonnegligible quantities. Nourse, for example, examined all provocation cases from MPC jurisdictions and found that men who killed their partners in response to threatened or attempted separation were extremely successful at getting their provocation claims to the jury.

There is an anti-majoritarian strain and a majoritarian strain of the underenforcement argument. In the anti-majoritarian story, widespread gender bias currently exists among judges, jurors, and in our culture. Society largely tolerates male-on-female intimate killing because of misconceptions, stereotypical thinking, or plain animus. Broad provocation laws thus permit state actors and jurors to exercise chauvinistic empathy toward male murder defendants. Consequently, a narrowed provocation law controls legal decision-makers' natural inclination to be biased. In anti-majoritarian story, law reform is necessary to check the influence of powerful social and cultural norms in the courtroom. The majoritarian strain of the argument proceeds in an inverse manner. The claim here is that provocation law itself "perpetuates, ideas about men, women, and their relationships that society long ago abandoned." Accordingly, judges and juries really do not wish to confer leniency on sexist killers. However, the provocation law basically compels these legal actors to be lenient toward a class of offenders they would otherwise condemn. In this view, reform that narrows the defense frees judges and jurors to exercise judgments that truly reflect contemporary social and cultural norms.

C. Provocation Law Formally Discriminates Against Women

The last section laid out the argument that, as an absolute number, the provocation doctrine treats too many culpable male defendants leniently. There is also a relativist argument that the provocation doctrine confers disproportionate leniency on undeserving male defendants. Much anti-provocation theorizing adopts a civil-rights framework that law and policy should not discriminate based on gender, race, or other

148 See Nourse, Passion, supra note 25, at 1332 n.2 (including every intimate homicide involving a provocation claim in MPC jurisdictions over a fifteen year period and "samples" from non-MPC jurisdictions). Nourse intends the data to be illustrative, stating that her argument "could as easily be made with ten cases as with 200." Id. at 1348 n.97. Cf. Coker, supra note 28, at 78 (stating that "while significant anecdotal evidence suggests that a voluntary manslaughter defense is successful for many wife-killers, there is scarce empirical data or relevant information on which to rely to discern the realities of trial practice").

149 In MPC jurisdictions pure separation claims constituted 26% of all provocation claims, and 79% of them reached juries. See id. at 1349 & 1356 (charts with percentages).

150 See, e.g., Antonia Miller, supra note 74, at 250 (tracing provocation's problems to the "effects of [society's] gender bias on the concept of reasonableness").

151 See, e.g., Emily Miller, supra note 21, at 669 (asserting that broad provocation formulas allow jurors "to give voice to their own prejudices").

152 Nourse, Passion, supra note 25, at 1332.

153 See Forell, Homicide, supra note 126, at 608-09 ("Under the MPC, juries are instructed in a way that may appear to ask them to set [evolved] norms aside and excuse men who kill because of their idiosyncratic antiwoman and antigay views."); Nourse, Upending Status, supra note 120, at 369 (contending that under the MPC, "judges felt compelled to send almost any kind of a case to a jury").

154 See Sing, supra note 143, at 1865 (noting the feminist argument that provocation "registers an adversely disproportionate impact on women.").
characteristics. Accordingly, many feminist scholars disseminate the message that the heat-of-passion doctrine, as implemented, disparately benefits men and burdens women. This seemingly straightforward claim of disparity is actually a collection of comparisons. I discuss the two main comparisons below.

1. The provocation defense favors male intimate killers over female intimate killers

One of the earliest and most popular discrimination-based critiques of heat-of-passion is that the defense, as constituted or applied, treats male defendants disproportionately leniently. In other words, the defense mitigates the charges of male intimate at a greater rate than those of female intimate killers. At times, the literature compares male defendants' chances of successfully pleading provocation to female defendants' chances of successfully pleading self-defense. In this view, an injustice occurs when the percentage of male killers who mitigate their charges to manslaughter exceeds the percentage of female killers who obtain total acquittal. The solution to the problem of disproportionate leniency can be a ratchet-up solution (make it harder for men to claim provocation), a ratchet-down solution (make it easier for women to claim provocation/self-defense), or a combination of both. While a few articles prescribe a ratchet-down solution, notably the Taylor comment, most articles either call for ratcheting up punishment for men or a combination of ratcheting up punishment for men and ratcheting down punishment for women.

2. The provocation defense generally benefits men and burdens women

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155 See D. Barret Broussard, Comment, Principles for Passion Killing: An Evolutionary Solution to Manslaughter Mitigation, 62 EMORY L.J. 179, 183 (2012) ("Feminists have criticized manslaughter doctrine for its disparate impact on women . . .").
156 See supra notes 153-54.
157 See, e.g., Milgate, supra note 21, at 201 (observing that the doctrine’s "gendered perspective" "may favor the male over the female defendant").
158 See supra notes 77-82 and accompanying text; Antonia Miller, supra note 74, at 267 (decrying provocation "law’s willingness to grant leniency to men who retaliate against their unfaithful wives, but not to women who kill their adulterous husbands").
159 See supra notes 77-82 and accompanying text; Antonia Miller, supra note 74, at 267 (decrying provocation "law’s willingness to grant leniency to men who retaliate against their unfaithful wives, but not to women who kill their adulterous husbands").
160 Such would operatively abandon women defendants. See infra Part IV.C.1.
161 Such would not address the perceived underpunishment of sexist men. See supra Part III.B.
162 Cynthia Lee proposes a "switching" jury instruction whereby the jury hypothetically switches the race/gender/sexual orientation of various parties to the murder case. LEE, supra note 9, at 217-25 & 253-59. This would have the effect sometimes ratcheting-up (for example, when the jury has to imaging what a "reasonable wife" would have done in a case where the man killed his wife for leaving) and sometimes ratcheting down (for example, when the jury has to imagine what a "reasonable husband" would do when the wife killed the husband who committed adultery). Id. at 217.
163 See supra notes 83-85 and accompanying text.
164 See, e.g., FORELL & MATTHEWS, supra note 133, at 172 (proposing that the woman’s point of view be applied in all cases).
Many of the writings critical of provocation make the point that homicide is largely a male phenomenon. Based on this, some simply denounce provocation law for advantaging murder defendants who are disproportionately men. Critics also compare the aggregate interests of male homicide defendants and victims to the aggregate interests of female homicide defendants and victims. The argument here is that because women are more likely to be victims of male violence than perpetrators of violence against men, broad defenses to violent crimes, like provocation, are generally bad for women. Broadening the scope of comparison from male and female defendants to male and female parties to a homicide or males and females in general changes the calculus. When merely comparing male and female defendants' chances of success, one could support treating female defendants more leniently without changing provocation's applicability to male defendants. This is, however, unsatisfying to many provocation critics on the ground that "[g]iving women the chance to argue for manslaughter, based on infidelity, does not free them from the violent enforcement of sexual fidelity." If it is true that men commit more intimate homicides against women than the reverse, aggregating female defendants' and victims' interests supports generally narrowing the provocation defense (ratcheting up). Even though a few female defendants will suffer, more male defendants will suffer (thus benefitting female victims). The result is thus a net benefit to women.

D. Provocation Law Expresses Destructive Messages

The last category of feminist argument does not rely on evidence of exoneration rates or enforcement disparities. Its logic is a priori and excruciatingly simple: Provocation is bad, regardless of its actual effects, because it sends the wrong messages about gender, morality, and human nature. This argument sounds in "expressivist" penal theory because it prioritizes the symbolic and communicative attributes of criminal law. Penal

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165 See, e.g., Taylor, supra note 25, at 1680; Antonia Miller, supra note 74, at 254 ("[T]he vast majority of homicide defendants are male.");
166 See, e.g., Emily Miller, supra note 21, at 669 (critiquing provocation doctrine on ground that women are "socialized" to respond to events like adultery "in a nonviolent manner").
167 See, e.g., Emily Miller, supra note 21, at 667 (recognizing that men can also be victims, but critiquing EED on the grounds that "a greater percentage of victims of intimate homicide are female" and "more homicides are considered manslaughter under the MPC"); Moran, supra note 144, at 1258 (observing that in provocation cases, women "tend to be the victims, not the accused."); Caroline Forell, The Meaning of Equality: Sexual Harassment, Stalking, and Provocation in Canada, Australia, and the United States, 28 T. JEFFERSON L. REV. 151, 153 (2005) (calling efforts to broaden provocation to accommodate women defendants unjust because "women rarely kill 'in the heat of passion' but represent the vast majority of victims of such killings")
168 See id. (asserting that "voluntary manslaughter continues to serve a primarily male interest").
170 See Berman & Farrell (noting the argument that "the provocation doctrine reinforces beliefs that members of some groups are less worthy than the mainstream"); see, e.g., Rozelle, supra note, at 215 (contending that provocation law has sent the wrong message and "influence[ed] behavior in an anti-social direction");
171 See Joel Feinberg, The Expressive Functions of Punishment, in JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 118 (1970) ("[I]t is social disapproval and its appropriate expression
theory, or the question of why it is ethical for the state to subject an offender to punishment (typically through loss of liberty or life), has concerned Western philosophers for millennia.173 In the United States today, criminal law scholars continue to debate, refine, and reformulate various justifications for punishment, and penal theoretical scholarship is a vibrant cottage industry.

Theorizing on the unique expressive function of the penal law can be largely traced to legal philosopher Joel Feinberg.174 Observing that criminal punishment "has a symbolic significance largely missing from other kinds of penalties,"175 According to Feinberg, philosophical accounts of punishment "that leave[] out the condemnatory function" are disappoint[ing]" and "offensively irrelevant."176 It is clear that many if not most feminist provocation critiques, at some level, set forth expressivist accounts of provocation.177 To maintain that provocation law sends a bad message, one need not demonstrate that the defense actually leads to excessive acquittals of sexist abusers, that men disproportionately benefit from the defense, or that the defense increases intimate homicides. Instead, the expressivist argument can be based on a single instance of undeserved leniency or speculation about how the defense might be used. The argument simply says because the provocation defense opens up a discursive space at trial for abusive men to argue their wives provoked them, the doctrine signals legal approbation of masculinist violence. Consequently, the provocation defenses expresses two particularly pernicious messages, one about gender and one about violence, discussed below in turn.

1. The provocation defense reinforces gender stereotypes

Feminist critics assert that provocation law reflects and reinforces a vision of the world "in which men are perceived and perceive themselves as natural aggressors, and in particular women's natural aggressors."178 In this view, broad formulations of the doctrine

that should fit the crime"). It is not entirely clear whether Feinberg's expressivism is simply making a descriptive claim about punishment's tendency to express messages, asserting that the expressive function justifies punishment, or contending that expressing the correct messages is a necessary component of just punishment. See Aya Gruber, Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense, 52 BUFF. L. REV. 433, 470 (2004) [hereinafter Righting Wrongs] (calling "unclear" "whether expressivism is itself a ground for criminal punishment or if expression is merely an ancillary aspect of the government's execution of penal laws based on other philosophical grounds"; Bernard E. Harcourt, Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment, 5 BUFF. CRIM. L. REV. 145, 165-66 (2001).

173 See R.A DUFF, TRIALS & PUNISHMENTS 4 (1986) ("It is agreed that a system of criminal punishment stands in need of some strenuous and persuasive justification. . . .").

174 See Carol Steiker, Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 GEO. L.J. 775, 803 (1997) ("Joel Feinberg can be credited with inaugurating the 'expressionist' turn in punishment theory").

175 Feinberg, supra note, at 98.

176 Id. at 105. Kahan and Nussbaum put it in stronger normative terms, stating, "The expressive theory . . . reveals how much is at stake politically and morally in the correspondence between the message that a wrongdoer's act conveys and the law’s punitive retort." Supra note 113, at 352.

177 See, e.g., sources cites supra note 21 and infra notes 183-87; Kahan & Nussbaum, supra note 113, at 351-53 (arguing in favor of a narrow "evaluative" provocation defense on expressive grounds).

178 HORDER, supra note 15, at 192. See also Pillsbury, supra note 54, at 147 (noting the critique that modern provocation rules "permit the expression of sexist assumptions about gender roles").
and even the doctrine itself send a message that men, and only men, are entitled to be homicidally angry when their partners express interest in another or attempt to leave them.179 In turn, the law encourages women to remain in unsatisfactory and even abusive relationships.180 At the very least, the doctrine expresses tolerance for or ambivalence toward male-on-female intimate homicides.181 For many theorists, solving provocation's expressive problem necessarily involves abolishing or narrowing the law to signal that men should not be aggressive and that women victims "count."182 Narrowing provocation also may express low tolerance for unnecessarily violent behavior. Indeed, critics hope that reforming provocation will communicate more than a gender message. It will express a general sentiment that all people should refrain from using lethal violence in non-life-threatening situations.

2. The provocation defense endorses violence

After exhausting all other arguments, provocation critics often retreat to the safe harbor of pacifism.183 Particularly when faced with the tendency of narrowing proposals to "sacrifice" women and minority defendants, certain critics contend that nobody should engage in unnecessary acts of violence.184 This anti-violence claim has two principle bases. The first is that idea that violence is bad because it is masculinist.185 Similar to the disparity argument outlined in the last subpart, critics contend that a violence-permissive society prioritizes men's interests (in being violent) over women's interests (in being free from

179 See Broussard, supra note 155, at 186-87 (asserting that provocation "perpetuates harmful gender stereotypes" because it "privileges a type of homicide committed most frequently by men"); Tracey L. Meares et al., Updating the Study of Punishment, 56 Stan. L. Rev. 1171, 1201 (2004) (contending that provocation may "reinforce[] norms that equate male virtue with devotion to patriarchal conceptions of honor."). Cf. Kahan and Nussbaum, supra note, at 360 (asserting that broad provocation formulations send "a message that fosters and gives comfort to... reprehensible feelings").

180 See Meares et al., supra note 179, at 1201 (arguing that the defense "subordinates women by allowing this kind of crime to be recognized in the law as less heinous"); Coker, supra note 28, at 103 (contending that the provocation doctrine hides "the cultural leaps that take place when a man determines first, that his wife's behavior is worthy of his rage and second, when he translates that rage into violence"); Nourse, Passion, supra note 25 at 1335 ("Reform often seems to tie women to relationships that they do not want, in effect, enforcing a rule of 'emotional unity'").

181 See Kahan & Nussbaum, supra note 113, at 352 (noting the argument that "lenient treatment of certain offenses—whether domestic violence of hate crimes—shows that the well-being of certain persons just ‘doesn’t count’ in the eyes of the law"); Stacy, supra note 126, at 1050 (asserting that provocation law "can be seen to imply that intra-familial violence is not as wrongful as violence in other contexts").

182 See Kahan & Nussbaum, supra note 113, at 352 ("Because criminal law expresses condemnation, what a political community punishes, and how severely, tell a story about whose interests are valued and how much").

183 See Pillsbury, supra note 54, at 146 ("Several commentators have recently argued that provocation should be abolished because it weakens the law's commitment to nonviolence.").

184 See, e.g., Lee, supra note 9, at 277-78 (contending that ratcheting up "makes particular sense when the defendant has taken another human being's life").

185 See Forell, Gender Equality, supra note 140, at 65 n.199 (asserting that the defense sends "an unacceptable message—that men's anger and use of violence against women is legitimate") (quoting Dep't of Justice Canada, Consultations, Reforming Criminal Code Defences, Provocation, Self-Defence and Defence of Property, Section One: Background and Criticism, The Provocation Defense, http://canada.justice.gc.ca/en/cons/rccd/section1p1.html (Sept. 29, 2005)); see Alice Ristroph, Criminal Law in the Shadow of Violence, 62 Ala. L. Rev. 571, 589 (2011) [hereinafter Ristroph, Violence] (noting the argument that provocation is a "shield for male violence, especially violence toward women").
violence). Thus, doctrines like provocation have the effect of constructing the legal world in the image of men.

There is a second basis for anti-violence arguments, which is not necessarily grounded in gender theory. The simple and convincing assertion is that the law should not condone private violence because, quite simply, violence is bad. Some of the feminist literature adopts the general critique that provocation law is unenlightened because of its undue tolerance of private aggression. Proponents maintain that society has moved away from the times in which individuals settled disputes through contests of physical strength, and thus today "[r]easonable people do not kill no matter how much they are provoked." The foregoing argument is virtually impossible to assail. Even the most ardent civil-libertarians and defense-friendly progressives who critique mass incarceration stop short of arguing for lenient murder laws. After all, no sensible person likes violence. Adopting an anti-violence baseline, provocation critics narrow the pool of defendants, even women defendants, who deserve sympathy for their violent choices.

This Part has endeavored to summarize the claims set forth explicitly and implied by the feminist critique of provocation. I deliberately omitted some of the more simplistic utilitarian assertions, such as "narrowing provocation law will reduce intimate homicides" for a few reasons. First, such claims are, for the most part, dependent on the success of the other arguments. If, in fact, broad provocation laws do not lead to widespread underenforcement of murder laws against sexist wife killers, then there is little ground for the utilitarian speculation that impunity is increasing crime. Second, critics' empirical assertions that tougher criminal laws increase social utility generally lack

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186 See PATRICIA PEARSON, WHEN SHE WAS BAD: VIOLENT WOMEN AND THE MYTH OF INNOCENCE 7 (1997) ("Violence is still universally considered to be the province of the male. Violence is masculine. Men are the cause of it, and women and children the ones who suffer.").

187 See, e.g., Emily Miller, supra note 21 at 683 (objecting that the MPC supports norms that excuse violence).

188 See, e.g., Coker, supra note 28, at 103 (asserting that provocation law "supports a belief in the inevitability of an angry response to provoking events and then conflates anger with violence").

189 Morse, supra note 50, at 33.

190 See Ristroph, Violence, supra note 185, at 613 (noting that the "call to focus [critically] on actual physical violence has largely gone unheeded"). James Forman, Jr., Racial Critiques of Mass Incarceration: Beyond the New Jim Crow, 87 N.Y.U. L. REV. 21, 48 (criticizing liberal scholars for focusing nearly exclusively on the war on drugs even though "the state’s response to violent crime—less diversion and longer sentences—has been a major cause of mass incarceration").

191 See Dressler, Reflections supra note 13, at (noting argument that abolishing provocation "might send a useful general deterrence message that people should manage their anger and stress before emotions boil over in violence.").

192 Although Feinberg specifically disavows this claim, see infra note 323, some commentators appear to assume that criminal laws that condemn certain crimes actually reduce those crime. Without addressing the voluminous literature on deterrence, see, e.g., JAMES GILLIGAN, VIOLENCE 94-96 (1996) (critiquing deterrence as "based on complete and utter ignorance of what violent people are actually like"); Paul H. Robinson & John M. Darley, The Utility of Desert, 91 NW. U. L. REV. 453, 459-65 (1997) (advancing these criticisms); cf. Steven K. Erickson, Mind Over Morality, 54 BUFF. L. REV. 1555, 1570 (2007) (positing that deterrence criticisms "never gain much popular traction" because the public supports the criminal system), it suffices to say that in the provocation context, the claim of deterrence is not particularly supported by empirical evidence. See infra Part IV.B.
Perhaps a social scientist could demonstrate that EED jurisdictions have, on average, higher numbers of intimate homicides than similarly situated non-EED jurisdictions. However, no such study appears to exist currently, and it would certainly be a challenge to design a study that could satisfactorily demonstrate such a link. Moreover, progressives, including feminists, are generally wary of the simplistic assertion that inadequately severe prosecution and punishment is the principal cause of crime. Nevertheless, I, for one, would welcome further empirical research on the larger effects of the provocation doctrine.

PART IV: DEFENDING PROVOCATION

This Part does not intend to be a polemic against the feminist position but rather to unsettle some of the assumptions inherent in the above arguments. Here, I am certainly not claiming that the provocation defense is endemically neutral or especially resistant to gender bias. It, like any other law, can be applied in a biased manner and in a way that reflects dominant cultural paradigms. The point is that the gender arguments discussed above have combined in such protean and powerful ways that they now operatively prevent any challenge to the notion that provocation is merely a sexist relic best left in the past. In turn, progressives repeatedly expend scholarly energy on demonstrating the truth of this account. However, in doing so, we may be missing some other critical questions: Who else, other than sexist abusers, uses the provocation defense? Who are the winners and losers under narrow and broad versions of the defense? What political work is the feminist critique of the defense doing? How does the notion that increasing criminal punishment can equalize gender relationships fit in with the philosophy of the late 20th Century American penal state? To begin to consider these important questions, progressive scholars must liberate themselves from the dogma that the heat-of-passion defense is inherently a woman-hating doctrine. In problematizing the arguments in the feminist critique, this article hopes to create the conditions under which critical scholars can be more sanguine about provocation.

A. Provocation Law has a Complex History

A compelling method critics use to discredit the provocation doctrine is exposing its apparently chauvinist origins. Of course, one might argue that the interests historically served by the provocation doctrine matter far less than how the law operates in current society. Indeed, exposing a retrograde history has the potential to asperse any law with ancient origins, even an uncontentious one. History is, by definition, retrograde. Feminist provocation critics might rejoin that they use critical history to

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193 See, e.g., Richard A. Bierschbach & Alex Stein, Mediating Rules in Criminal Law, 93 VA. L. REV. 1197 (2007) (reasoning that because passion is hard to resist, "a deterrence-oriented criminal law should treat provoked murders more severely than unprovoked ones" without evidence that more severe treatment will deter). To be fair, provocation defenders sometimes simply assume that passion crimes are undeterrable, an assumption severely critiqued by feminist scholars. See Coker, supra note 28.

194 See supra note 20 and accompanying text.

195 See supra note 144 and accompanying text.

counter the assumed legitimacy and neutrality of existing law. Thus, to the extent that there may be some persuasive value in the assertion that we ought to keep the provocation defense because it has a long and venerable history, the feminist critical history serves as an important equipoise. This point is well taken; however, the current scholarly consensus seems to be, not that the provocation defense is inherently neutral, but that it is inherently biased and illegitimate. Today, the feminist alternative history of provocation is arguably the dominant account of the defense, and it is doing a lot of work. The sound bite, "provocation is sexist," leads many to reject the doctrine out of hand, regardless of its practical import. Those who favor retention of the defense must always argue in the shadow of a presumption that they are being anti-woman. Today, the critical history of provocation serves less as counter to the law's assumed validity and more as irrefutable proof of the doctrine's congenital gender defects.

The historical argument has undeniable persuasive value on an aesthetic level. Few feminists would associate themselves in any way with a doctrine tied to chastisement and the view of women as property. However, provocation's history, as one might expect, is far more complicated than a one-dimensional gender account suggests. Moreover, a myopic focus on one particular aspect of a doctrine's history can lead to an impoverished contemporary assessment of the doctrine. The official feminist story of provocation is that it was formulated to encourage exercises of masculine honor (dueling and brawling) and reinforce women's domestic inferiority. It is undeniable that in the 17th Century, the provocation doctrine gave protection to defendants who killed in ways that reflected the cultural mores of the day and that these mores were deeply influenced by gender roles and stereotypes. Nevertheless, the characterization of provocation as a doctrine whose primary purpose was to bolster gender roles and justify chastisement is far from historians' official story of the defense. Gender inequality is but one player in provocation's intricate historical libretto.

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198 Cf. supra note 11 (California Supreme Court relying emphasizing the long history of the doctrine).
199 See, e.g., HORDER, supra note 15, at 29 (retelling the history of provocation and connecting 17th Century provocation doctrine to "honour theory").
200 See, e.g., Wendy Keller, Disparate Treatment of Spouse Murder Defendants, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 264 (1996) (contending that "the notion that [sexist adultery] killings are acceptable and entitle the perpetrator to a reduction to manslaughter remains embedded in our patriarchal legal doctrines"); Forrell, supra note, at 31 ("The origins of the provocation defense are deeply gendered . . . .").
201 See, e.g., Dressler, Reflections supra note 13, at 962 (hedging his defense of provocation with the caveat that "feminist concerns regarding the defense deeply concern me").
202 In providing this historical review, I neither rely on specifically non-feminist historical accounts of provocation nor engage in original historical research, as I am not a legal historian. Simply, I look at the historical papers and cases upon which critical articles, themselves, rely.
203 For example, feminist criminal law scholars have long complained of rape law's history of sexist leniency towards rapists. However, there is a parallel history of rape law's overenforcement against African American men. See Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 600 (1990).
204 See supra Part III.B.
205 See infra notes 213–33 and accompanying text.
Historians, including Jeremy Horder, are in fair agreement that the original purpose of the defense was to protect defendants from the authority of the state. Experts characterize the emergence of provocation principles in 15th Century England as a response to the harshness of the extant murder liability and sentencing regime. At that time, nearly all killings were punishable as murders, and murder convictions necessitated the death penalty. By the 17th Century, courts solidified the legal doctrine of provocation, and claiming provocation became the principle method by which murder defendants could rebut the presumption that they acted with malice, thereby evading execution. Consequently, history bears out that the primary purpose of the doctrine was literally to mitigate the harsh effects of an unforgiving legislative regime.

According to experts, the doctrine continued to function as a counterweight to popular penal tendencies well into the 19th Century:

Reflection on this period suggests that while Parliament continued to increase the number of capital offenses, and political rhetoric required the toughest approach to crime, the judiciary sought to mitigate the severity of legislation. The emergence of the doctrine of provocation is . . . one example of this tendency.

A feminist critic might rejoin that even if subordinating women was not the doctrine's primary purpose, women nonetheless had to bear the cost of the judiciary's liberal tendencies. Because the doctrine was available to those men whose violent reactions fit the cultural standard, it inevitably benefitted murderous men who engaged in chastising violence against women. Even this account, however, does not appear a completely accurate historical depiction of the doctrine. Critics base the claim that provocation is about the domestic control of women primarily on two sources, the 17th Century Manning's Case and 18th Century Regina v. Mawgridge. In Manning, the court

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207 See, e.g., HORDER, supra note 15, at 7-9 (observing that medieval juries first developed informal provocation rules to temper the effects of extremely restrictive self-defense principles and that the 17th Century official doctrine "was fashioned almost exactly in accordance with the medieval juries' understanding of . . . excusable homicide").


209 The provocation doctrine permitted defendants to seek the "benefit of clergy," meaning they could avail themselves of more lenient sentencing principles available to clergy accused of crimes. See id. at 13-15. See also Brown, supra note 213, at 311 (describing the original purpose of provocation as protecting from execution defendants denied "the shelter of self-defence" who committed a "less morally reprehensible form of homicide than that which was long premeditated and carried out in cold blood"); Dressler, supra note, at 426 (asserting that in the 16th Century, the doctrine reflected the view that "][t]he death penalty was an inappropriate and excessive response to deaths occurring in such fights").

210 See Ashworth, supra note 30, at 292 (contending that in the 17th Century "killings were presumed to proceed from malice aforethought: if there was no evidence of express malice, then the law would imply malice").

211 Cf. HORDER, supra note 15, at 26-29 (contending that the formal provocation doctrine that emerged in the 17th Century might actually not be contiguous with past versions of provocation and may be reflective of the unique values and practices of the time).

212 GREAT BRITAIN LAW COMMISSION, REPORT ON PARTIAL DEFENCES TO MURDER 299 (2004).

213 See supra Part III.A. (discussing history of provocation and women's subordination).


stated that there "could be no greater provocation" than adultery,\textsuperscript{216} and in \textit{Mawgridge}, the court, in dicta, approved of adultery as a basis for provocation, calling it the "highest invasion of property.\textsuperscript{217} Although provocation critics place an enormous amount of weight on \textit{Manning's Case} as clear evidence of the inextricable link between the development of the doctrine and women's status as men's property, Lord Hale's \textit{Pleas of the Crown} actually does not reference \textit{Manning's Case} or the adultery category at all in its discussion of provocation.\textsuperscript{218} Rather, Hale mentions the case rather haphazardly in an unrelated section,\textsuperscript{219} leading one 19\textsuperscript{th} Century English historian to opine that Hale's discussion of the provocation doctrine reflects the "gradual and casual manner in which a large part of [provocation] law came into existence."\textsuperscript{220}

It is also noteworthy that in both \textit{Manning} and \textit{Mawgridge}, the court tolerated only male-on-male violence.\textsuperscript{221} These cases may thus reflect the norm that men are entitled to lash out against men who seduce their women, but not against the women.\textsuperscript{222} Accordingly, the dominant gender bias evidenced by the early English cases may actually be a woman-protecting bias.\textsuperscript{223} Indeed, other historical research undermines the notion that wife-killing was a legitimate and socially favored form of chastisement. Rather, it demonstrates that pre-modern Western culture regarded men who killed women with particular disdain. Legal historian Carolyn Ramsey observes:

The legal treatment of murder cases in the nineteenth and early twentieth centuries [in the United States] embodied two strands. The first strand . . . was the excusing sympathy of courts, juries, and the public for supposedly damaged, hysterical females. . . . However, a second and more remarkable strand existed, too: the moral condemnation of excessively violent men. Over the course of the nineteenth century, this strand increasingly led to

\textsuperscript{216} \textit{Manning's Case}, 83 Eng. Rep. 112 (1671).
\textsuperscript{217} \textit{Mawgridge}, 84 E.R., at 1115.
\textsuperscript{218} 1 Hale, \textit{Pleas of the Crown}, 455–57 (setting forth six illustrations of adequate and inadequate provocation).
\textsuperscript{219} Id. at 486.
\textsuperscript{221} \textit{Manning's Case}, 83 Eng. Rep., at 112 ("Manning found the person killed committing adultery with his wife in the very act, and flung a jointed stool at him, and with the same killed him"); \textit{Mawgridge}, 84 E.R., at 1115 (stating that "if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter").
\textsuperscript{222} Critics tend to make some logical leaps in the characterization of the historical adultery category as reflecting a tolerance for violence against women. The traditional adultery category excluded men who kill women, and only later did jurists extend the defense to wife killers. However, despite the fact that early provocation laws that did not sanction wife-killing developed at a time when the view of women as property was most strongly held, commentators still reason that the woman-as-property norm created tolerance of wife-killing. See, e.g., Sing, supra note 143, at 1868 (tracing the approval of wife killing to the view of women as property).
\textsuperscript{223} Horder cites a passage from an "honour theorist" portraying adulterous women in a sympathetic (though objectifying) light: "I have never known a man whose heart was in the right place bring an action for damages against another for seducing a beloved wife . . . . For these and such like offences the law can make no adequate retribution." HORDER, supra note 15, at 29 (quoting Bosquett (1817)).
murder convictions for male defendants and more lenient treatment of wronged women charged with killing their abusers.224

Such a protective and paternalistic bias is itself objectifying, stereotyping, and fully compatible with the concept of women as property. It reflects the notion that women are not legal subjects at all, but rather mere objects over which true legal subjects (husbands and male paramours) battle.225 One might think of many other problems with viewing all women as weak, nonviolent, perpetual victims.226 Nevertheless, this type of gender bias is a far cry from the pro-wife-killing bias that provocation critics seem to believe underlies the defense.227 Moreover, according to English provocation law expert A.J. Ashworth, the early cases evidence a keen awareness of the distinction between sudden provocation and killings that follow a preexisting course of conduct or emanate from a preexisting intent (like the intent to chastise).228

It may nonetheless seem fair to characterize the law’s condoning of male-on-male violence as indivisibly bound up with notions of honor.229 Yet even this account may underdescribe the doctrine’s historical underpinnings. While the early cases that endorse killings based on dignity affronts or witnessed adultery give a nod to the fragile male ego, masculine honor does not appear to account for the category of witnessing unlawful arrest.230 English judicial authorities endorsed the category on the ground that “if a man be unduly arrested or restrained of his liberty . . . this is a provocation to all other men of England.”231 This skepticism of governmental authority led jurists to apply the unlawful arrest category to defendants who resisted unlawful arrest, even when, at the time of resistance, they were unaware of the illegality.232 Compare this 17th Century English suspicion of state authority to arrest to the current laws in most American states explicitly forbidding citizens to resist unlawful arrest.233

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224 Ramsey, Domestic Violence, supra note 143, at 43.
225 See HORDER, supra note 15, at 39 (observing that the offensive act consisted of “seduction of a man’s wife” by another man, rather than the wife’s choice to commit adultery).
227 See supra note 227 & Part III.A.
228 Ashworth, supra note 30, at 294. Ashworth cites to Manning’s Case and notes that the judge instructed the jury to convict of murder if they found that Manning acted on a previous plan of revenge. Id. See supra note 140 and accompanying text.
229 But see HORDER, supra note 15, at 34 (opining that refraining from intervening in a false arrest would sully a man of honor’s reputation). However, this does not explain why a court would approve resisting an arrest that the defendant did not know was illegal. See infra note and accompanying text.
230 Ashworth, supra note 30, at 293 (quoting Hopkin Huggett (1666) Kel. 59).
231 Id. at 294 (citing Tooley (1709) 2 Ld. Raym. 1296).
232 See, e.g., HAW. REV. STAT. § 703-304(4) (a person may not use force to “resist an arrest which the actor knows is being made by a law enforcement officer”); see MILLER & WRIGHT, CRIMINAL PROCEEDURES: THE POLICE (4th ed. 2011) (“[M]ost states now require citizens to submit to unlawful arrests by police officers—about a dozen thought judicial opinions and roughly another 20 states through statutes.”).
In the end, is the provocation defense a liberty loving doctrine? Is it a male chauvinist doctrine? Does it have a venerable history? Does it have a condemnable history? The answer is yes. The provocation doctrine, like many laws, has a history including all these attributes and likely more. Whether one views provocation as historically benign or malignant depends on the aspects of the doctrine’s history one chooses to emphasize. Thus, invoking history neither demonstrates provocation’s inherent neutrality nor proves the doctrine to be irretrievably flawed from a gender perspective.

B. Provocation Law does not Necessarily Underpunish Culpable Men

Even if the historical picture does not establish provocation as an unequivocally sexist doctrine, provocation critics can still argue that the current legal regime is defectively chauvinistic because it shelters culpable male murderers. At the outset, an extremely defense-oriented commentator might dispute that the class of male defendants about whom feminists are concerned is as culpable as some other classes of killers. One could, for example, combine the factual observation that wife-killers are impassioned, angry, and hurt with the determinist claim that they are not responsible for having obsessive and dependent personalities (perhaps they had been abused as children). Accordingly, it is possible to distinguish the damaged, emotionally wounded, masculinity-norm influenced, heart-broken man who lashed out from, say, Sammy "the Bull" Gravano, who killed for money. Moreover, the concept of average culpability for murder is fairly unintelligible. All killings exist upon an intuitive, communal, legally conditioned, and socially constructed spectrum from desirable (a soldier killing an enemy?) to ultimately heinous (Jeffrey Dahmer?), with plenty of room for retributivist debate over where any given killer should fit on the spectrum. Why is it so easy to claim that battered women who kill abusers are innocents, and so difficult to contest that a gang member, who grew up in gang culture and kills a rival gang member, commits deliberate murder? There are a host of racialized, gendered, class-based, socially constructed, and 

234 See supra Part III.B.
237 See R.A. Duff, Penal Communications: Recent Work in the Philosophy of Punishment, in CRIME AND JUSTICE: A REVIEW OF RESEARCH I 7-8 (Michael Tonry ed., 1996) (“The central problem for a retributivist . . . is to explain this idea of desert . . . How does crime call for punishment or make punishment appropriate? It is not enough simply to appeal to the supposedly shared intuition that the guilty deserve to suffer, since such an intuition, however widely shared, needs explanation . . .”)(citations omitted).
238 Political leaders regularly grant pardons to women convicted of killing their partners when there is evidence of abuse. See, e.g., Chris Kenning, Some Abused Women Get Pardons, THE COURIER-JOURNAL (Dec. 10, 2007) (“Gov. Ernie Fletcher granted clemency, pardons or early parole reviews yesterday to 21 Kentucky women convicted of killing or trying to kill men they say abused them.”); Isabel Wilkerson, Clemency Granted to 25 Women Convicted for Assault or Murder, NY TIMES (Dec. 22, 1990) available at
idiosyncratic assumptions, fears, and values that influence seemingly objective retributive intuitions. Add to this multiple "interpretive constructions" like broad versus narrow time framing, and deciding in any coherent manner who is more culpable than whom becomes a near impossible task. Nevertheless, I will fully accept the claim that sexist men who kill their partners are fully culpable murders. Even so, it is still possible to defend against the claim that provocation law underpunishes this class of murderers.

The thrust of many of the critiques is that provocation relieves sexist intimate killers of murder liability at unacceptable levels. This, of course, begs the threshold question of what is an unacceptable level. One might reply that even one sexist defendant succeeding on his provocation claim is unacceptable and support the contention through narrating the facts of a particularly heinous case. However, all legal rules operate within a cultural milieu and occasionally produce undesirable results. Pointing to the fact of an unwanted result is but part of the argument. There must be another part of the equation articulating the threshold at which production of unsatisfactory results requires legal reform and describing the reform. Otherwise, the progressive feminist position on provocation is indistinguishable from the tough-on-crime conservative tactic of exposing individual cases of leniency toward "monstrous" offenders as a ground to dismantle the entire system of criminal defense protections.

See supra Part III.B.

For example, the victims' rights movement relies on the language of underpunishment to push for "longer sentences and fewer procedural protections for defendants." Tom Lininger, Bearing the Cross, 74 FORDHAM L. REV. 1353, 1396 (2005). See also Aya Gruber, A Distributive Theory of Criminal Law, 52 WM. & MARY L. REV. 1, 44 (2010) (noting that focusing on horrific offenses and the plight of victims leads policymakers to "eliminate defense-friendly rules that impede convictions, and ensure 'adequate' punishment."); Ann E. Freedman, Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses, 11 AM. U. J. GENDER SOC. POL'y & L. 567, 588 (2003). ("Dramatic cases and 'tough on crime' policies are easily communicated in the mass media and have ready appeal to voters."); Carrie T.
Provocation critics appear to assume that exonerations of sexist men occur in substantial or at least noteworthy numbers, but they provide little evidence in support. The closest to empirical confirmation is Passion’s Progress’s 1996 data set demonstrating that under the MPC’s extreme emotional disturbance law, defendants who assert they were provoked at least in part by the victim’s attempt to leave are extremely successful at getting their claims to the jury. For there to be an underpunishment problem, however, the juries must largely accept these claims and decide to mitigate. In the majoritarian story, juries feel compelled to mitigate even though they find the men despicable. It is difficult to see how the language of EED compels a jury to act against their condemnatory impulses. The defense requires a "reasonable explanation or excuse" for the defendant’s conduct, and thus a jury could easily find the sexist defendant was unreasonable. If the reasonableness requirement is defined subjectively, juries must adopt the defendant’s point of view to some extent. Even then, jurors that disbelieve and detest the defendant would have plenty of grounds to convict (they could, for example, find that there was no real emotional disturbance or the defendant lied about the alleged provoking act). To be sure, social science confirms that jurors predisposed to convict are not dissuaded by instructions about the nuances of law.

Perhaps juries do not need convincing to mitigate the charges of sexist defendants. In the anti-majoritarian story, our culture somewhat forgives jealous and controlling husbands who kill, and law must be reformed to check the majority’s discriminatory tendencies. But this story may not reflect reality. The scant evidence that exists on whether the sexist defendants about whom feminists worry actually prevail on provocation indicates that they do not. In 2004, Psychologist Stuart Kirschner and his colleagues published a paper analyzing all EED claims in New York County over a 10 year period. They reported:

[I]t is clearly true that in an EED jurisdiction, such as New York, defendants charged with murdering an actual or desired intimate partner because the victim left (or refused) a relationship can sometimes argue an EED defense before a jury. However, our data—and reported New York decisions—suggest that such claims for mitigation are very rarely successful. In 12 of our cases, the defendant killed a then current or former

Hollister, The Impossible Predicament of Gina Grant, 44 UCLA L. REV. 913 (1997) (noting in the juvenile justice context that media coverage of “repeat offenders committing horrifically violent crimes” led to a restructuring of the juvenile justice system to be “tough on crime”).

244 See supra Part III.B.
245 See supra notes 148-49 and accompanying text.
246 See supra notes 152-53 and accompanying text.
247 See supra note 45 and accompanying text (discussing EED).
248 The MPC states, “The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.” § 210.3(b).
249 See, e.g., Theodore Eisenberg & Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L. Rev. 1, 10-13 (1993) (studying South Carolina capital jurors and finding that they misunderstood jury instructions and such confusion actually enhanced their bias toward conviction and execution).
250 See supra notes 150-51 and accompanying text.
intimate partner. In only one of these cases was the EED defense successful (by plea agreement after the prosecution’s expert concluded that the defendant met the legal standard for an EED defense). While we do not have data on all the passion homicides (or attempted passion homicides) that were committed in New York County during the ten-year period that we investigated, it is certain that there were far more than twelve such cases, making the utility of an EED defense in such circumstances even more rare.252

In Kirschner’s study, prevailing EED defendants were generally those facing some physical threat.253 For example, one successful EED case involved a 67-year-old double amputee killing a younger male who had repeatedly bullied him and extorted money from him.254

If Kirschner’s study is representative of larger empirical trends, we are left with the contention that judges allow many sexist killers to argue provocation to juries and this, in itself, is problematic.255 Even accepting the empirical observation as accurate,256 it is difficult to see how “reaching the jury” is an underenforcement problem with its concurrent retributive difficulties (the guilty are not punished) and utilitarian issues (people are encouraged to commit such killings), if in fact juries convict these defendants. The problem of judges “condoning” sexist provocation claims, it seems, is an expressive one. Critics contend that the very fact that judges permit such defendants to argue heat-of-passion expresses a negative message, regardless of the jury verdict.257 The expressive argument is addressed below in subpart D.

In any case, establishing that the absolute number of sexist defendants’ provocation claims that reach jury or result in mitigation is undesirable should not be the end of the inquiry. One should also question whether the cost of that number of sexist defendants receiving a pass outweighs the benefits of a broad provocation defense. Of course, this is an impossibly obtuse query because analysts are likely to diverge on what counts as a benefit. Would provocation critics see increasing the chances of a murder conviction for defendants not in the disfavored class (i.e. women defendants, men who

252 Id. at 126 (internal citations omitted). When faced with such evidence, critics argue that juries have become enlightened despite the formal law’s failings. See, e.g., Forell, Gender Equality, supra note 140, at 61–63. They fail to entertain the possibility that there was never the widespread leniency they presumed occurred.

253 Id. at 130.

254 Id. at 120.

255 See supra notes 109–11 and accompanying text.

256 A quick perusal of Westlaw intimate homicide cases demonstrates (albeit only anecdotally and unscientifically) that judges are quite willing to deny defendant’s voluntary manslaughter instruction requests. A search for intimate homicide provocation cases revealed 753 appellate cases involving denials of requests, 572 in which the court affirmed the denial, and 181 in which the court reversed the denial. Reversals were more common in cases with female defendants (31.6%) than in cases with male defendants (23.3%). See also Kirschner, supra note 251, at 126 (“A number of New York court decisions have upheld jury or judicial verdicts rejecting claims of EED in cases involving the murder of former or desired partners.”).

257 But see Forrell, Gender Equality, supra note 140, at 44-45 (attributing the tendency of provocation claims to reach the jury to American’s "distrust of government" and prioritization of individual rights).
kill men, etc.) as a cost or benefit? Moreover, there are likely to be many disagreements about the threshold at which costs outweigh benefits. My instinct, however, is that most progressive provocation critics would be keener on the defense if provided with compelling evidence that mitigation for sexist abusers is rare, but narrowing provocation laws will significantly burden subordinated defendants, exacerbate mass incarceration, and bolster the penal state.

Although there is little empirical evidence addressing exactly who prevails on provocation and the doctrine’s general effect on sentences, one can get a sense of provocation law’s impact by looking at murder sentencing regimes and the demographics of murder defendants. I have written on this extensively in another article, and will only mention it here. Proposals to limit the provocation defense seek to increase murder convictions in a system that, over the past several decades, has seen skyrocketing murder sentences and the decimation of parole. In fairness, some feminist critics couple their arguments for narrowing provocation with a call to reform the over-punitive sentencing structure. Others, however, concentrate only on how reformed law might affect sexist intimate killers and largely disregard the broader impacts of their proposals. Sexist wife killers are not the only defendants who might benefit from provocation. According to Department of Justice statistics, from 1980 to 2008, Male-on-female intimate killings comprised less than ten percent of all homicides. After examining the demographic information, I concluded elsewhere that “the group most likely to be burdened by the elimination or limitation of the provocation defense is young men of color accused of non-intimate homicides and facing murder charges in one of the most punitive systems on earth.”

C. Claims that Provocation Law Formally Discriminates Lack Coherent Foundation

Provocation critics often purport to adopt a liberal formal equality framework that forbids law to treat men better than women or vice versa. In essence, provocation

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258 See Lee, supra note 9, at 277–78 (intimating that ratcheting up for such individuals is not a cost because they have taken another’s life).

259 For example, a dominance feminist might consider maximizing women’s protection against violence as essential to dismantling male supremacy and therefore wish to pursue it at all costs. See, e.g., ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY 23 (1988 (“Equality means someone loses power. . . . The mathematics are simple: taking power from exploiters extends and multiplies the rights of those they have been exploiting.”).

260 See generally, Gruber, Murder, supra note 30, at Part IV.B.

261 See id. (citing statutes).


263 See sources cited, supra note 21.

264 See Gruber, Murder, supra note 30, at 183-84 (citing COOPER ET AL., supra note, at 10 & 18).

265 Gruber, Murder, supra note 30, at 185.

266 The term liberal, in this section, refers to the legal theory that prioritizes rights, formal equality, and autonomy, rather than to a general left-leaning political view.

267 See Mary Becker, Patriarchy and Inequality: Towards a Substantive Feminism, 1999 U. CHI. LEGAL F. 21, 32-33 (1999) (observing that in liberal feminism, “[t]he solution to inequality between women and men is to offer individuals the same choices regardless of sex”).
doctrine should regard "similarly situated" male and female defendants in the same way. At the outset, one can note that critical legal scholars have exhaustively critiqued formal equality in many contexts. They assert, inter alia, that liberal equality does not ensure substantive justice, that "sameness" is indeterminate, and that formal legal rules operate in the shadow of preexisting social arrangements.268 In fact, second-wave feminists have persuasively argued that "[l]egal equality analysis 'runs out' when it encounters 'real' difference, and only becomes available if and when the difference is analogized to some experience men can have too."269 Thus, while frequently claiming to ground their critique in "equality," provocation critics actually find it difficult to support proposals that equally thwart or equally enable male and female defendants' provocation claims.270 Instead, feminist critics generally tailor their analyses to account for the fact that male and female defendants and victims are inherently differently situated. The problem, as we will see below, is that once critics abandon formal equality, the feminist critique has a tendency to reduce to the notion that in any given case, we should simply do whatever favors the (identified) woman.271

1. Female defendants are more successful at claiming provocation than male defendants

One of provocation critics' most persistent assumptions is that the defense inequitably favors male defendants over female defendants. They assert the doctrine excuses only masculine violence provoked by affronts to male dignity.272 It does not necessarily accommodate women, who according to critics, killing out of fear, depression, and frustration based on different types of provoking behavior.273 Commentators accordingly reason that male defendants must benefit disproportionately from the defense.274 The durable nature of this argument is particularly astounding given that the empirical evidence has never demonstrated men are more successful at defending on
prosecution grounds than women. If anything, the opposite is true. Women defendants are more successful at defending against murder charges than men, just as they are more successful at all defending against most crimes and obtaining favorable sentences.

Framing may explain the persistence of the belief that provocation favors male over female defendants. Feminist provocation critics view a man's voluntary manslaughter conviction as an undeserved victory but regard a woman's voluntary manslaughter conviction as an unjust defeat. The problem is that the doctrine gives male defendants a benefit they do not deserve (mitigation) and denies female defendants a better disposition (acquittal). Consequently, even if the provocation defense disproportionately mitigates the charges of female defendants, critics retain the feeling

See HORDER, supra note 15, at 187 (acknowledging that the "bare statistics" reveal that "it is easier for women than for men to 'get off' with manslaughter on the grounds of provocation when charged with murder"). Commentators rely on surprisingly little evidence, mainly in the form of random anecdote, to level this charge of disparity. For example, a 2010 Note critical of provocation bluntly states, "Today voluntary manslaughter continues to accommodate men who kill their wives in the heat of passion, but not women who kill their husbands for the same reason . . . ." Antonia. Miller, supra note 74, at 250. As support for this general empirical observation, the author relies solely on a 1994 newspaper article that compares the case of a New York man sentenced to 18 months imprisonment for the voluntary manslaughter of his unfaithful wife and a contemporaneous Baltimore case in which a woman who pled guilty to voluntary manslaughter for killing her abusive husband received a sentence of 3 years. See id. at 250 n.13. Later, however, the author acknowledges that the gender effects of provocation are "unclear" and more studies are needed. Id. at 252.

See LANGAN & DAWSON, supra note, at iii-iv (conducting study of spousal homicide cases in 1988 in the 75 largest urban counties and discovering that female defendants were convicted less often and sentenced to lower sentences and that unprovoked female convicts received on average 10 years less time than unprovoked male convicts); Ramsey, Provoking, supra note 262, at 43 (noting that historically "women in United States, Britain, and Australia have been acquitted of murder more often than their male counterparts").


See, e.g., Miligate, supra note 21, at 194–95 & n.7 (calling for a "reevaluation" of the provocation doctrine based on the comparison of a case in which a male defendant who killed his girlfriend's paramour was convicted of voluntary manslaughter and a case in which a woman who killed her abusive husband was sentenced to life in prison); HORDER, supra note 15, at 187 (opining that because a "very large percentage of women facing a murder charge . . . have themselves been battered" the disproportion in favor or women should be higher).

The following passage represents this logic:

Men who commit domestic homicide by killing intimate or former intimate partners often do so out of jealousy, possessiveness and rage—in the heat of passion. Women who commit domestic homicide often kill out of fear and despair—they kill their batters. Both men and women frequently assert the partial defense of provocation for this ultimate act of domestic violence. . . . Two gender equality issues are presented by this reality, both relating to domestic violence. First, why should jealous killers be allowed to argue provocation when their victims did nothing legally wrong? Second, why are most battered women who kill their batters not fully excused based on self-defense?

Forell, Gender Equality, supra note 140, at 28-29.
that it is male-friendly and female-unfriendly. Now, it could be that the majority of men who prevail on their provocation claims do not deserve it, and the majority of women who prevail on provocation actually deserved acquittal. However, the question of what any given defendant deserves is distinct from the issue of disparity. Discrimination claims rest on the logic that similarly situated individuals should be treated similarly. When male and female defendants, at the outset, are assumed to be disparately deserving of exoneration, the entire equality argument simply evaporates into a larger normative debate about how provocation law should operate. Therefore, it seems that provocation critics simply "refer[] to 'equal protection under the law' as if it were a plateglass solution to the dilemma of 'protect[ing] threatened and abused women without waiting for them to kill or be killed,' without telling us what guidance the invocation gives."

Critics censor the provocation defense adopting a "male" perspective of aggression and argue that equality demands reform of this perspective. The law, critics contend, should not condone the reasoning of aggressive men and allow their defense attorneys to put women victims on trial. At the same time, critics aspire to a provocation doctrine that vigilanty scrutinizes male victims' behavior in order to put female defendants' cases in their proper "context." Thus, "equality" apparently means that provocation law should disregard men's reasons for killing and women's precipitating behavior, but carefully consider women's reasons for killing and men's precipitating behavior. Catharine MacKinnon explains:

Put starkly, if someone comes at you with a raised knife and you shoot, you may commit self-defense. Slowly poisoning a person who repeatedly threatens you with a raised knife over a period of years looks more like murder. In a feminist context, women may be justified in both on a broad self-defense rationale. But, as a matter of fairness, if you can look into why she poisoned him, from her point of view, might you not also look at why he came at her with a knife from his? What is incitement and where does it divide from response? Social acts may not be so discrete, if one takes point of view into account. If to him, she was a nag or sleeping around, and that enrages men, how is that differently relevant than if, to her, he never listened and acted out jealous rages? If the circumstances mitigate her culpability, why is it not equitable to accord him the same? Seeing both

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280 Critics make a statistical argument that the majority of women provocation defendants are abuse victims while the majority of men are otherwise violent. See, e.g., HORDER, supra note 15, at 187.
281 See Burke, supra note 140, at 1067 (asserting that the "political view" that more male-on-female intimate homicides should be punished as murder has nothing to do with neutralizing bias).
282 See supra note 268 and accompanying text.
283 Some critics attempt to rehabilitate equality analysis by arguing that "substantive" equality demands that women defendants are treated more leniently and male defendants are treated more harshly. See, e.g., Forell, Gender Equality, supra note 140, at 29–30. But this simply begs the question of why substantive equality prescribes a proposal to treat men and women differently.
285 See supra notes 21 & 99 and accompanying text.
286 See supra note 19 and accompanying text.
287 See supra notes 79–80 and accompanying text.
from the victim's standpoint, the usual view in feminist critique, becomes less instantly compelling when she killed him.  

In the end, provocation equality arguments fall prey to the same chronic defect as other formal equality claims—they ultimately beg the question of a larger vision of the good. The directive to treat people equally simply fails to meaningfully distinguish between similarly situated and differently situated individuals, between whether to treat people identically or disparately, and between when difference means injustice and when it means liberation.

2. Leniency towards male offenders is not inherently bad for women

Provocation critics often sidestep some of the thorny issues above through bypassing questions of the relative effects of provocation on "similarly situated" male and female defendants and instead focusing on the absolute effects of the defense on the genders writ large. Sometimes the logic is that the defense on the whole is bad for women because women are more often homicide victims than defendants. Sometimes critics assert that men disproportionately benefit from the defense because the vast majority of homicide defendants are men. Thus, the crux of the absolute disparity objection is that women's interests are synonymous with victims' interests (because criminals are rarely women) and men's interests are synonymous with defendants' interests (because criminals are often men).

However, tethering women's equality interests to crime victims' (perceived) interests in harsh retribution turns each instance of leniency toward a male defendant into a case of discrimination against women. Under this reasoning, every time a male is successful at defending against state authority, it exacerbates inequality because there are not enough women defendants to similarly benefit from the law's leniency. But take a temporal step back. Maybe women are disproportionately acculturated to noncriminal

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289 See supra notes and accompanying text.
290 See Nourse, *Upending Status*, supra note 120, at 365 (asserting that equal treatment of male and female provocation defendants creates "odd results in a world where inequality is not formal and obvious, but embedded and structural").
291 See supra Part IV.C.2.
292 See id.
293 In reality, men are rarely victims or defendants. Men, especially men of color, are disproportionately both criminal defendants and victims of crime. See generally COOPER & SMITH, supra note 264.
295 See Dressler, *Reflections* supra note 13, at 976 ("That the provocation defense is primarily invoked by males is an insufficient reason to repeal it unless we are prepared as well to call into question all the other defenses... that are more often claimed by men than by women.").
behavior.\textsuperscript{296} Maybe women are disproportionately spared policing and prosecution.\textsuperscript{297} Maybe the criminal laws, having historically considered men as the only true legal subjects, disproportionately criminalize that which men, but not women, do.\textsuperscript{298} Thus, provocation critics, it seems, simply choose hyper-punitivity within the existing cultural and legal structure as the principle way to account for men's and women's differing levels of criminality.

Nearly all provocation critics set forth ratchet-up proposals that make it more difficult for defendants to obtain mitigation.\textsuperscript{299} However, any differences between male and female defendants' chances of success could arguably be leveled by ratcheting down and broadening the law to encompass behavior provoking to women and men, as Laurie Taylor suggests.\textsuperscript{300} It is true that disparities that regard the general criminality of men and women seem to be remediable only through ratchet-up solutions.\textsuperscript{301} Even so, if one adopts the view that provocation is always good for men and bad for women, abolition does not level the playing field, but simply reverses the disparity.\textsuperscript{302} To be sure, feminist commentary on criminal law tends to ignore disparity and stereotyping that lead to sympathy toward women and severity toward men and only censures differential treatment that tangibly detriments women.\textsuperscript{303} It rarely counters the women-protecting bias inherent in provocation law and criminal law in general, which is deeply tied to women's historical objectification.\textsuperscript{304} Martha Minow observes:

\begin{footnotesize}

\textsuperscript{296} See MacKinnon, \textit{Jurisprudence, supra} note 285, at 731 (“Women are socially discouraged from physical engagement.”); Kavita Ramakrishnan, \textit{Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace}, 26 BERKELEY J. GENDER L. & JUST. 291 (2011) (observing that “[m]en learn from an early age that aggression is an acceptable and even admirable form of conflict resolution” whereas women “are socialized to be passive and submissive in the face of unwanted advances”).

\textsuperscript{297} See \textit{supra} notes 277–78 (discussing disproportionate leniency toward women).

\textsuperscript{298} See \textit{supra} notes 223–26 (noting the historical legal treatment of women as objects over which men dispute).

\textsuperscript{299} See \textit{supra} notes 129–33 and accompanying text.

\textsuperscript{300} See \textit{supra} note 84 and accompanying text.

\textsuperscript{301} See \textit{supra} Part III.C.2.

\textsuperscript{302} The articles do not actually do the simple math on this point, but let us try it. Assume the world intimate homicides consists of 50 female-on-male killings and 100 male-on-female killings. In this world, the provocation defense has a net benefit of 50 for men (100 defendants minus 50 victims) and a net burden of 50 (100 victims minus 50 defendants) for women. Abolishing the defense, however, would simply invert the disproportion and women would benefit by 50 and men would suffer by 50. Consequently, in this bounded hypothetical world, the sole means of eliminating disparity would be to reduce the effectiveness of the provocation defense by 50 percent. Assuming this affected all genders equally, the change would produce the following results: 75 women benefitted (25 defendants and 50 victims), 75 women burdened (25 defendants and 50 victims), 75 men benefitted (50 defendants and 25 victims), and 75 men burdened (50 defendants and 25 victims).

\textsuperscript{303} See Margareth Etienne, Symposium, Race, Gender, and Class at a Crossroads, \textit{Sentencing Women: Reassessing the Claims of Disparity}, 14 J. GENDER RACE & JUST. 73, 77 (2010) (“Not surprisingly, when men and women receive different sentences for similar offenses, the women do not contest the apparent inequity.”); cf. Janet C. Hoeffel, \textit{The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases}, 24 U. ARK. LITTLE ROCK L. REV. 41 (2001) (observing that courts routinely disallow criminal defendants, disproportionately African American and male, to introduce psychological syndrome evidence, but generally permit the prosecution to introduce such evidence on behalf of white women victims).

\textsuperscript{304} See \textit{supra} notes 223–26 & 277–78 and accompanying text (discussing woman-protecting bias).
\end{footnotesize}
Feminists have pushed for greater retribution, including criminal prosecutions, for violence done to women, and more caring, empathic responses to women who risk criminal charges for their own conduct. This pattern smacks not only of inconsistency, but also of unreflective desires simply to advance what is good for women.305

Provocation critics' female supremacist inclinations are apparent from the very framing of the discrimination question.306 Provocation law must be reformed to condemn male perpetrators and exonerate female perpetrators. Provocation law must be reformed to ensure that female victims see retribution and that male decedents are not treated like "real" victims. Critics tend to adopt the dominance feminist view that the realm of private intimate relations is "women's realm of collective subordination."307 In turn, men who engage in intimate killings are presumptively abusers who acted in accordance with their controlling behavior patterns, whereas women intimate killers are presumptively passively responding to their subordination at the hands of a violent man. Completely left out of the picture are sympathetic male defendants, who might be unfairly burdened by narrow provocation laws, undeserving female defendants, who might be unfairly benefitted by broad provocation laws, or any male victims. In the feminist script, these characters simply do not exist (or are so negligible that they do not merit mention).308

Moreover, even if one were to agree that "equality" requires criminal doctrine to be more attuned to women's interests and less attuned to men's interests, provocation critics may be incorrect in assuming that the doctrine necessarily undermines women's interests and furthers men's interests and that men and women's interests as incontestably adverse. This assumption ignores the very heterodox nature of provocation law's variegated effects on the sexes. Women and men do not stand in uniform and immutable relationship to most legal doctrines, including provocation.309 Men and women can be both perpetrators and victims. In fact, one might argue that certain proposals to ratchet-up punishment in intimate homicide cases could disproportionately burden women.310 Unlike male killers, who largely kill in nonintimate settings, female killers generally slay intimates (lovers, family members, and children).311 Thus, a legal change directed toward reducing leniency in intimate homicides increases severity in the one realm where women

306 Janet Halley, The Politics of Injury: A Review of Robin West's Caring for Justice, 1 UNBOUND: HARV. J. LEGAL LEFT 65, 74 (2005) (calling "female supremacist" the assertion that "exceptional human good can be seen only 'from a truly woman-... centered perspective'").
308 See, e.g., Milgate, supra note 21, at 210 (stating that "for the most part, only men actually kill upon finding their spouses in bed with another").
309 See Dressler, Reflections supra note 13, at 977 (noting that the provocation defense is sometimes utilized by women).
310 See, e.g., Stacy, supra note 126, 1048–51 (proposing to treat "familial relationship" as an aggravating factor).
311 See Heather Leigh Stangle, Murderous Madonna: Femininity, Violence, and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide, 50 WM. & MARY L. REV. 699, 706 (2008) ("Unlike male violence, female violence often occurs within the confines of the home. The victims of female violence are most often spouses, children, and other family members."); Schmall, supra note, at 301 (observing that "When women are violent, their violence is usually directed against a family member" and citing statistics).
are most likely to be murder defendants, leaving untouched the nondomestic homicides perpetrated nearly exclusively by men. To be sure, women and men have various interests that overlap, conflict, and coexist with prosecutorial and defense interests. "Some women are the mothers, daughters, or sisters of men facing retributive justice, even as some women are the victims of male violence; some women are the victims of other women's violence."312 These observations lead to the conclusion that it is an exercise in futility to make a generalist discrimination case against provocation. There are hundreds of man-woman combinations one could construct where current provocation law favors the given man over the woman and hundreds of combinations where it favors the given woman over the man.

B. Provocation Law Expresses Variegated Messages

The final arrow in the feminist anti-provocation quiver is the assertion that provocation law expresses destructive messages. At the outset, those with left-liberal sensibilities could certainly make the case that expressivism, as a justification for punishment, dangerously drives criminal law toward greater punitivity.313 Like retributivism, expressivism is a fairly vague directive that may generate more questions than it answers.314 What should criminal punishment symbolize? Why should it symbolize those things? Does leniency toward criminal actors express support for their criminal activities?315 Moreover, expressivist theory does not provide a determinate method for deriving the expressive meaning of any given criminal law.316 Accordingly, a critic or proponent of a law can simply assert it sends a destructive or constructive moral message because such an assertion requires very little empiric or analytic support.317 This makes leniency-conferring criminal doctrines especially vulnerable to expressive attack.318 One can always argue that defenses or procedural doctrines favoring defendants express

312 Minow, supra note 309, at 972.
313 See, e.g., Harcourt, supra note 173.
315 Some expressivism proponents seem to answer this question in the affirmative. See, e.g., Kahan & Nussbaum, supra note 113, at 352 ("By imposing the appropriate form and degree of affliction on a wrongdoer, the political community reaffirms its commitment to the values that the wrongdoer’s own act denies.").
317 The same law might be described to express opposing messages (i.e. "capital punishment condemns killing" and "capital punishment supports killing") and the same moral message might support opposite laws. Bernard Harcourt explains, "a moral principle like 'lessening human suffering' can be deployed both in support of and in opposition to capital punishment." Harcourt, supra note 173, at 169.
318 For this reason, telling jurors to "send a message" is a favored tactic of prosecutors nationwide. See James Joseph Duane, What Message Are We Sending to Criminal Jurors When We Ask Them to 'Send a Message' With Their Verdict?, 22 AM. J. CRIM. L. 565, 581–82 (1995).
approval for their condemnable behavior. After all, is no easy feat to dispute tautological arguments like "harsh murder laws express disapproval of murder." Moreover, focusing purely on the purported communicative function of criminal law tends to deflect attention away from the fact that criminal law operates within a complex socio-legal structure, and punishment often has unpredictable and criminogenically escalatory effects.

Perhaps incarceration skeptics might also utilize the technology of expressivism by asserting that severe criminal punishment expresses authoritarian values and lenient laws symbolically support liberty. Yet, incarceration critics tend to focus more on the distributional consequences of harsh penal laws and less on what such laws communicate in some abstract sense. Indeed, the trend toward expressive justifications of punishment dovetails with Americans' increasing desire to communicate solidarity with victims rather than offenders. It also finds synergy with what philosopher Whitman identifies a basic social desire in contemporary society, not just to ostracize, but to degrade those identified as criminals. Expressivist theory thus provides a ready philosophical tool to those eager to confirm criminals' statuses as evil outliers and avoid grappling with the moral complexity of the state's increasing infliction of harm and suffering on its citizens. Consequently, critics of the carceral state tend to view expressive theories of punishment with a jaundiced eye. Bernard Harcourt, for example, points out:

Punishment usually also communicates, importantly, political, cultural, racial and ideological messages. The meaning of punishment is not so coherent or simple. Many contemporary policing and punitive practices,

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319 The malleability of retributive rhetoric has similarly given a vocabulary to those holding tough-on-crime ideals to argue that any given law inappropriately underpunishes criminals. See Alice Ristroph, *How (Not) to Think like a Punisher*, 61 FLA. L. REV. 727, 747–48 (2009) ("[G]iven that conceptions of deserved punishment are easier to expand than contract, sentencing policies originally motivated by utilitarian concerns may become immune to claims of disutility once we have convinced ourselves that the sentences are deserved."); Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 812 (2002) (lamenting that retributive rhetoric has justified a criminal "system of quarantine"); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 255–56 (asserting that retributive rhetoric "has tended to sponsor extreme policies and practices that thoughtful retributivists themselves might well renounce.").

320 Leaping from the claim "harsh murder laws condemn murder" to the claim "harsh murder laws reduce murder" happens on an almost unconscious level. Feinberg himself, however, was careful to divorce the expressive function of the law from other functions. See Feinberg, supra note, at 101 ("Symbolic public condemnation added to deprivation may help or hinder deterrence, reform, and rehabilitation—the evidence is not clear.").

321 See, e.g., Harcourt, supra note 173, at 171 ("Instead of focusing on moral principles . . . we need to look at the distributional consequences of proposed criminal sanctions and at the type of society, social relations, and subject that we are shaping with our policies.").

322 Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 9 (1999) (stating that "[t]he identification with the victim at the expense of identifying with the offender" allows society to "deny[] any similarities with the offender" and "transform[] the essentially ethical question of punishment into one of nuisance control").

323 James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. ("Degradation in punishment is a part of human nature, which has not been successfully abolished in the pursuit of our grand republican experiment in the United States.").

324 This may actually be what Feinberg hoped would not occur. See Feinberg, supra note, at 116 (expressing a preference against corporal punishment all together).
for instance, communicate a racial and political, rather than moral, message—a message about who is in control and about who gets controlled.\textsuperscript{325}

Let us now turn to the particular expressivist arguments of the feminist critique of provocation.

1. Provocation reform may stereotype more than existing provocation law

Provocation critics condemn the defense for sending retrogressive messages about men and women's natures. Even a diehard expressivism critic could agree that antiquated, openly bigoted laws (i.e. alien land laws) should not be on the books, regardless of enforceability.\textsuperscript{326} There is a powerful argument that facially discriminatory laws are unacceptable, even if they end up having positive social effects.\textsuperscript{327} A law stating, for example, "men are always justified in killing their wives," would be unacceptable even in the face of empirical evidence that such a law actually spared subordinated men from incarceration, prevented further degradation of at-risk communities, and surprisingly reduced violence against at-risk women.\textsuperscript{328} It is clear, however, that provocation law does not explicitly endorse the view that men are entitled to become murderously enraged by speculative evidence of infidelity or separation. The vast majority of provocation laws are general in nature and leave it up to jurists and jurors to fill out the content of adequate provocation.\textsuperscript{329} As a consequence, some theorists make the somewhat mystifying argument that broad versions of provocation \textit{silently} express regressive sexist values.\textsuperscript{330} In this view, the law is expressively problematic, not on its face, but in the context of its history and current operation. However, as demonstrated above, the history of the doctrine and its present effects are quite complex.\textsuperscript{331} Consequently, if the language of the

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\item[\textsuperscript{325}] Harcourt, supra note 173, at 168.
\item[\textsuperscript{327}] See id. (quoting Rep. Geller as stating that despite the Alien Land Law's ineffectiveness, "I authored the legislation because I am opposed to having organized racism in our constitution").
\item[\textsuperscript{328}] This scenario is far from fantastical given the evidence regarding the relationship between the hyperpunitive legal regimes and incidences of intimate violence among subordinated people. See Richard S. Frase, \textit{What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?}, 38 CRIME & JUST. 201, 263 (2009) (discussing the cycle of poverty and punitive policies); Zanita E. Fenton, \textit{Silence Compounded – The Conjunction of Race and Gender Violence}, 11 AM. U. J. GENDER SOC. POL'Y & L. 271, 282 (2003) (calling domestic violence a "symptom[] of living systematically deprived in a society that is designed to dominate and control third world people") (internal quotation omitted).
\item[\textsuperscript{329}] See supra notes and accompanying text (observing that only 2 jurisdictions adopt a categorical approach).
\item[\textsuperscript{330}] See, e.g., Nourse, \textit{Passion}, supra note 25, at 1385 ("In a world in which social norms are changing, not taking a position becomes a position, one that endorses the status quo even as it denies that it is endorsing anything at all.") & 1333-34 (asserting that provocation's normative messages are "disguised—and therefore rendered more powerful and resistant to change"); Forell, \textit{Gender Equality}, supra note 140, at 44 (critiquing the commentaries to the MPC on the ground that they contain "not a hint of concern about its effect on homicides involving infidelity, separation or domestic violence").
\item[\textsuperscript{331}] See supra Part IV.A. (discussing history of the doctrine) & Part IV.B. (discussing present effects of the doctrine).
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defense is neutral, its history is heterodox, and it does not disproportionately exonerate male intimate killers, it is difficult to see how the doctrine expresses that men are "women's natural aggressors."332

In addition, stereotyping, like disparity, is a two-way street. The apparent problem is that provocation law transmits the message that men are naturally aggressive, especially toward female domestic partners.333 One way to remedy this expressivist problem is to construct a legal regime that recognizes women also can be violent and men can be nonviolent.334 This might involve legal reforms (such as jury instructions) to ensure that jurors are not predisposed to automatically credit female defendants who claim they were afraid of male victims or automatically discredit male defendants who say they were afraid of women victims.335 These are, however, distinctly not the revisions sought by feminist critics of provocation. Rather, they take pains to paint a picture (one might say a stereotypical picture) of male intimate killers as violent pattern abusers and female intimate killers as true victims. In this depiction, women are nonviolent by nature and only resort to aggression after suffering horrific systematic abuse. Those who advocate for a "reasonable woman" standard assume that it will have the effect of drastically reducing the provocation defense's efficacy because everybody, including jurors, knows that women do not kill.336 The anti-stereotyping argument consequently runs up against the same dilemma as formal equality arguments.337 It is intellectually incoherent to maintain a liberal position that the law can never support stereotypes and at the same time hope to construct a provocation doctrine situated in the "woman experience."

2. Provocation reform may not send an anti-violence message

I left the anti-violence argument for last because it is the most facially persuasive argument against the provocation doctrine and thus the most difficult to refute. Again, no self-respecting progressive criminal law professor desires to write a manifesto in support of violence.338 Especially to those sensitive to gender issues, it is quite compelling

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332 HORDER, supra note 15.
333 See supra Part III.D.1.
334 Cynthia Lee has suggested "switching" instructions, whereby a jury is told to imagine a female defendant as a male and a male defendant's as female in order to reduce the potential for stereotyping. LEE, supra note 9, at 217–25 & 253–59. Ideally, a jury would then see an adultery-based killing committed by a woman as "normal." Id. at However, Lee has some trouble when it comes to battered women who kill. She does not endorse telling the jury to imagine that a battered woman as a man or, indeed, imagine a man who claims to have been beaten as a woman. Id. at 219.
335 Former prosecutor Alafair Burke discusses a self-defense case in which the female defendant threw boiling tea on her boyfriend and Burke's successful method of countering stereotypes that favor female self-defense claimants. She states, "Fearing that the jury would acquit . . .  I asked [jurors] to imagine that the defendant was a man yelling at his wife for buying a scarf at Nordstrom they could not afford, then throwing his soup on her so she would get away from him. The jury convicted after forty minutes of deliberation." Burke, supra note 140, at 1074.
336 See Forell & Matthews, supra note 133, at 172 ("Under our proposed reasonable woman standard, nothing short of actual or imminent serious bodily harm would be legally adequate provocation.").
337 See supra notes and accompanying text.
338 See Forman, Jr., supra note 190, at 49 ("Since it is especially difficult to suspend moral judgment when the discussion turns to violent crime, progressives tend to avoid or change the subject."); Gruber,Murder, supra note 30, at 155 (stating that "even in liberal criminal law discourse, critiques of the American penal state and mass incarceration tend to fade in the face of truly violent defendant behavior").
to argue that laws condoning violence reflect a male view of the world and propose legal changes to incorporate a female, nonviolent view of the world.\textsuperscript{339} However, even one who embraces the notion that the law should be constructed to serve women (or at least not disserve them) might still have issues with a female-centric, 180-degree reversal of provocation law. When female nonviolence replaces male aggression as the standard by which defendants are judged, male defendants are not the only sufferers in the change.\textsuperscript{340} Female defendants who do not "kill like a woman" (i.e. do not kill in response to horrific systematic abuse) are also the sacrificial lambs of the larger cultural feminist shift.\textsuperscript{341} So how does a critic concerned with gender account for such women? Some commentators simply ignore them or retell their stories to fit the feminist trope.\textsuperscript{342} Another popular tactic is to condemn such women for being excessively violent, just like their male counterparts.\textsuperscript{343}

At first blush, this anti-violence stance appears a progressive and pacifist position supporting a loving and peaceable world free of brutality. There is, however, good reason for critics to probe carefully the political meaning of anti-violence and question our culture's unwavering faith in punishment as means of achieving social harmony. First, the apparently pacifistic objection to provocation law actually has a conservative valence. It adopts the prosecutorial ideology that exercises of punitive authority are unquestionably legitimate when done in the name of stamping out private violence.\textsuperscript{344} Moreover, feminists, as critical scholars, should acknowledge the semiotic aspects anti-violence discourse.\textsuperscript{345} The legal discourses of violence have meaning in context and, in turn, give meaning to specific contexts. Violence does not exist in a vacuum as some immutable thing in itself—it's definition is contingent and ideologically driven.\textsuperscript{346} Anti-violence dialogue operates within a political dynamic, where multiple interests groups with different amounts of power invoke the discourse for a variety of goals.\textsuperscript{347} In criminal

\textsuperscript{339} See, e.g., Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 80 (1988) (advocating an ethic of care to "ultimately form the foundation of a feminist, maternalist (and humanist) moral theory").

\textsuperscript{340} See supra notes 310–12 and accompanying text.

\textsuperscript{341} See supra note 243.

\textsuperscript{342} See supra note 25, at 1734 (noting that the idea "that all women who kill are battered by their male victims and kill in terror . . . would doom those [women] who do not fit any of the above molds by labeling their reactions 'unreasonable'.").

\textsuperscript{343} See MacKinnon, Jurisprudence supra note 285, at 714–17 (critiquing the book, WOMEN WHO KILL for assuming the lesser culpability of all women killers).

\textsuperscript{344} See, e.g., Forell, Murder, supra note, at 617 (asserting that the law should "[m]ake it clear that infidelity is almost never an adequate excuse for killing regardless of the genders of the parties").

\textsuperscript{345} See supra note 243.


\textsuperscript{347} See Ristroph, Violence, supra note 185, at 575, (asserting that the discourse of violence does not "disentangle understandable concern for bodily safety from irrational fear, prejudice, or thoughtless punitiveness").
law, when people talk about preventing and punishing acts of violence, they do not mean that the criminal law should address any harm produced by any actor (individual or institutional). They mean a very particular thing.

The violence that merits criminal law intervention excludes entire categories of brutality and suffering. For the most part, it does not include governmental violence. The routine violence committed by prison officials in their regular management of prisoners, by police officers in their everyday interactions with citizens on the street, and even by school officials in their administration of institutional disciplinary policies is not only completely immune from governmental intervention, it is actively encouraged. Even when the violence of these institutional actors crosses some opaque line into "excessive force," the criminal law often fails to intervene. When it comes to state actors, modern American criminal law inversely shifts the presumption against aggression. Whereas private individual violence is indisputably an evil that must be stamped out by any means, state violence is presumptively legitimate and necessary. Thus, violence within modernity is usually conceived of as the erratic behavior of criminals . . . . By definition, the state becomes a protector from violence, not the perpetrator of violence; and, violence that the state does commit is veiled in legitimacy.

The violence with which criminal law is concerned also excludes the harms committed by powerful non-state actors. Today, environmental justice scholars use the term "slow violence" to describe the type of suffering that moneyed and corporate interests impose upon the world’s poor invisibly, tolerably, and across time. Rob Nixon explains:

By slow violence I mean a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all. Violence is customarily conceived as an event or action that is immediate in time, explosive and spectacular in space, and as erupting into instant sensational visibility. We need, I believe, to engage a different kind of violence, a violence that is neither spectacular nor instantaneous, but rather

348 See Angela P. Harris, Gender, Violence, Race, and Criminal Justice, 52 STAN. L. REV. 777, 799 (2000) (internal quotations omitted) ("In liberal democracies, the exercise of state violence, both in the domestic realm and in foreign relations, is justified by reference to the values of protection, security, and order.").


350 See John V. Jacobi, Prosecuting Police Misconduct, 2000 WIS. L. REV. 789, 797 (noting the "apparent impunity with which serious police violence is meted out" and citing examples).

351 David Rudovsky, Police Abuse: Can the Violence be Contained?, 27 HARV. C.R.-C.L. L. REV. 465, 467 (1992) ("Frustration with disorder and crime in turn leads to a public acceptance of extra-constitutional police practices. Because police abuse is most often directed against those without political power or social status, their complaints are often dismissed or ignored.").


incremental and accretive, its calamitous repercussions playing out across a range of temporal scales.354

Relatedly, racial scholars talk about the "slow death" of people of color and other members of the underclass from institutional and societal racism and classism.355 Far from being the solution to the slow death or "spirit murder" of the underprivileged, American criminal justice tends to be an aider and abettor of this form of violence.357 Consequently, anti-violence criminal law discourse defines a bounded space for policeable violence, thereby erasing other forms of harm, namely those produced by powerful interests, from public consciousness, political language, and legal doctrine. In this way, over-attention to "fast violence" helps perpetuate slow violence.358

In addition to rendering the violence done to subalterns invisible, anti-violence criminal law discourse creates within the public psyche a presumption that authoritarian state intervention into the lives of the underclass (especially poor men of color) is prima facie justified.359 While the harms produced by powerful interests are all but totally excluded from the concept of violence, the language of violence proves remarkably protean when it comes to harms produced by poor minorities. Violent crimes include far more than intentional homicides and beatings. Crack cocaine is an epidemic of violence.360 Gang membership is inherently violent.361 Drug addicted pregnant women commit violence against their fetuses.362 Criminal law’s campaign to end violence really boils

354 See id.
355 See, e.g., Adrien Katherine Wing & Monica Nigh Smith, Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban, 39 U.C. DAVIS L. REV. 743, 777 (2006) (“Racism, sexism, and other forms of discrimination can lead to the slow death of a person’s soul or psyche.”); Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism, 42 U. MIAMI L. REV. 127, 129 (1987) (“[S]ociety is only beginning to recognize that racism is as devastating, as costly, and as psychically obliterating as robbery or assault; indeed they are often the same.”)
356 See id.
358 See Nixon, supra note 354, at 4 (“Our media bias toward spectacular violence exacerbates the vulnerability of ecosystems treated as disposable by turbo-capitalism while simultaneously exacerbating the vulnerability of . . . disposable people.”) (internal quotation omitted).
359 See supra note 239 (discussing studies on the racialized nature of violence).
360 See supra note 239 (discussing studies on the racialized nature of violence).
361 See Richard C. Boldt, Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom, 62 S.C. L. REV. 261, 301 (2011) (observing that the "war on drugs" in the 1980s was fueled by "the news media’s preoccupation with crack cocaine and the resulting public perception that the use of crack had significantly increased the level of street violence and social disorder in American cities").
362 See Beth Caldwell & Ellen C. Caldwell, "Superpredators" and "Animals"--Images and California’s "Get Tough on Crime" Initiatives, 2011 J. INST. JUST. INT’L STUD. 61, 66 (“Influenced by exaggerated media reports about rising gang violence and the popularized image of juvenile ‘superpredators,’ California voters approved the Gang Violence and Juvenile Crime Prevention Act (‘Proposition 21’) in 2000 that made the state’s juvenile justice system markedly more punitive . . . .”); see, e.g., supra note 238 (discussing Clinton’s statement on gang member victims).
down to the hyper-policing of the type of harms caused by the most unfortunate (and thus arguably least culpable) among us.\textsuperscript{363}

One might respond to the above objections by asserting that the criminal law should punish both the slow violence perpetrated by powerful institutional actors and the fast violence that occurs in blighted communities. After all, the victims of underclass violence are likely to be members of the underclass themselves.\textsuperscript{364} However, the anti-violence justification of criminal law does only justify punishing uncontrovertibly harmful behavior. As Alice Ristroph insightfully observes, a great "innovation in the concept of violence, as far as criminal law is concerned, is a contemporary shift from threat to risk. This shift has occurred most noticeably in sentencing law, and it is helping fuel the vast expansion of the U.S. prison population."\textsuperscript{365} Moreover, anti-violence policing can be openly instrumental. The state often justifies brutal police intervention against political protestors, labor organizers, and other grassroots activists by reference to curbing violence.\textsuperscript{366} In the end, then, criminal laws purportedly executed in the name of pacifism may not reduce violence overall but simply give a monopoly on violence to the state. Jacques Derrida notes:

At its most fundamental level . . . law tends to prohibit individual violence and to condemn it not because it poses a threat to this or that law but because it threatens the judicial order itself. . . . [I]t is in the nature of its own interest to pretend to exclude any individual violence threatening its order and thus to monopolize violence . . . . Law has an interest in a monopoly of violence. This monopoly does not strive to protect any given just and legal ends but law itself.\textsuperscript{367}

Although feminists and race scholars are highly critical of systemic oppression, hidden hierarchies, and the pervasive influence of hegemonic norms, they nonetheless retain fidelity to the criminal system when faced with sexual and racialized private violence. As this article is being written, progressives throughout the nation are calling for the narrowing of self-defense laws in the wake of George Zimmerman's acquittal.\textsuperscript{368}

\textsuperscript{363} Bernard Harcourt makes a similar argument about the discourse of harm. See supra note 176, at 167-68 ("Claims of non-trivial harm have become so pervasive in political debate that the harm principle . . . no longer really excludes much conduct from the ambit of the criminal law."). See also Bernard E. Harcourt, The Collapse of the Harm Principle, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

\textsuperscript{364} See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19 (1997) (asserting that "the principal injury suffered by African Americans in relation to criminal matters is not overenforcement but underenforcement").

\textsuperscript{365} Ristroph, Violence, supra note 185, at 603.

\textsuperscript{366} See Ahmed White, Industrial Terrorism and the Unmaking of New Deal Labor Law, 11 Nev. L.J. 561, 563 (2011) (In the 1930s "employers first provoked workers to violence by denying them basic labor rights and then used this pretense to justify attacks on them. Indeed, employers could regularly expect the state to abet their use of force against unionists, however contrived the pretext or culpable the employer.").


\textsuperscript{368} See Alan Williams, Florida Democrat, Will Push 'Stand Your Ground' Repeal After Zimmerman Verdict, THE HUFFINGTON POST (July 15, 2013), http://www.huffingtonpost.com/2013/07/15/alan-williams-stand-your-ground_n_3598833.html (noting that the acquittal "brought newfound scrutiny on the [stand your ground] law").
In fact, the Trayvon Martin case highlights the problematic nature of modern American society's hysterical fear of crime and use of race as a heuristic for criminality. Nevertheless, many pay more attention to the leniency of Florida's self-defense law than the narratives of race and criminality that led jurors to buy wholesale Zimmerman's story, which if true made him not guilty under any version of self-defense law. It is not leniency that creates racialized visions of criminality. Rather, they reflect and reinforce our hyper-policing, hyper-punitive culture. It is similarly confounding that provocation critics hope to send a message of feminine passivity through increasing the reach of the U.S. penal system—a system author bell hooks describes as the embodiment of male "hierarchical rule and coercive authority."

Feminists hope to counter masculine norms by using police power to stamp out individual men's fast violence. However, broadening state criminal authority may bolster rather than curtail destructive masculine power. First, it confirms and legitimize the problematic distinction between the celebrated masculinity of white powerful men and the disparaged masculinity ascribed to underprivileged men of color. Angela Harris explains:

[W]hite heterosexual middle- and upper-class men who occupy order-giving positions in the institutions they control—particularly economic, political, and military institutions—produce a hegemonic masculinity that is glorified throughout the culture. . . . African American men have been stereotyped . . . as violent, unable to control their physical and sexual urges, and unintelligent. This latter set of stereotypes allows white men to see themselves as superior: Though African American men may possess a brutish maleness, they are lacking in the mental and moral qualities that are necessary for "civilized" men: gentlemen, patriarchs, rulers.

Second, the feminist effort to control fast violence expands the reach of the criminal system—a repository of hyper-masculinity that critics characterize as "a primary location of racist, sexist, homophobic, and class-based oppression in this country" and a system designed "to perpetuate and replicate existing power." To be sure, the critique of the

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369 See supra note 239.
370 See Williams, supra note 369 (observing that Zimmerman's defense "ultimately didn't use 'Stand Your Ground' during the court proceedings"); Kyle Hightower and Mike Schneider, Jury Acquits George Zimmerman of Second-Degree Murder, TIME (July 13, 2013), http://nation.time.com/2013/07/13/jury-acquits-george-zimmerman-of-second-degree-murder/ ("Defense attorneys said the case was classic self-defense, claiming Martin knocked Zimmerman down and was slamming the older man's head against the concrete sidewalk when Zimmerman fired his gun.").
372 HOOKS, supra note 269, at 118. For my views on this case, see generally Aya Gruber, Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand-Your-Ground, (forthcoming 2014).
373 Harris, supra note, at 783–84 (internal quotations omitted).
American penal state and mass incarceration are firmly implanted in the criminal law literature.376

Nonetheless, provocation critics might argue that one can simultaneously address over-imprisonment through reducing sentences generally and seek symbolic condemnation of masculine violence through narrowing the provocation defense.377 However, calls for greater penal severity in the wake of crimes against women may have a greater connection to mass incarceration than provocation critics realize. Certainly, theories abound regarding how the United States became the most punitive Western nation on Earth. From demographic shifts and the demise of small community solidarity378 to retributive rhetoric and victims' rights,379 scholars have amply theorized American-style penalty. Some commentators, including this author, have argued that pro-incarceration shifts in U.S. penal policy in part emanated from the transcendence of neoliberal political ideology in the latter 20th Century.380 Popular political rhetoric ascribed social problems to the actions of individual pathological actors and prescribed criminal law as the obvious remedy to such problems.381 Modern American political discourse thus makes natural, invisible, and pre-political the correlation of social


377 See supra note 263.

378 See DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 85 (2001) linking the United States’ punitive turn to the balkanization of black neighborhoods); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 31–32 (2011) (discussing the shift from localized policing to a “more centralized, more legalized, more bureaucratized” justice system in the twenty-first century as a possible explanation increased severity).

379 See supra note 263 and accompanying text.

380 See Aya Gruber, Rape, Feminism, and the War on Crime, 84 WASH. L. REV. 581, 618–20 (2009) [hereinafter Gruber, Rape] (“The tough-on-crime philosophy that overtook America was not a singular phenomenon, divorced from a larger political and economic program, but a distinct part of a neoliberal paradigm of rampant individualism, minimization of government services, and unconstrained capitalism.”) (footnote omitted); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 202–03 (2011) (asserting that the American penal state has “been facilitated by . . . the rationality of neoliberal penalty: by, on the one hand, the assumption of government legitimacy and competence in the penal arena and, on the other hand, the presumption that the government should not play a role elsewhere”); LOïC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 297 (2009) (“The widening of the penal dragnet under neoliberalism has been remarkably discriminating: . . . it has affected essentially the denizens of the lower regions of social and physical space.”).

381 See, e.g., Ronald W. Reagan, Remarks at the Annual Conference of the National Sheriff’s Association in Hartford, Connecticut (June 20, 1984), available at http://www.reagan.utexas.edu/archives/speeches/publicpapers.html (“Individual wrongdoing, [liberals] told us, was always caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions. . . . Somehow, it wasn’t the wrongdoer but all of us who were to blame. Is it any wonder, then, that a new privileged class emerged in America, a class of repeat offenders and career criminals who thought they had the right to victimize their fellow citizens with impunity.”).
problems with penal solutions. Today, people all over the political spectrum jump to criminal law resolutions when faced with individuals who commit whatever is "true" harm in their eyes, thus perpetuating the ascendency of criminal law as a primary governance structure. Critical theorists are the group of commentators that typically problematize and analyze the distributional impacts of state penal policies. When that group seeks to remedy its identified injustices through more criminal law, it gives an air of undeniable legitimacy to the notion that social problems are solely the products of individual deviant actors who must be punished or deterred.

CONCLUSION

For decades, scholars concerned with gender equality have asserted that liberal versions of the provocation doctrine unwittingly aid and abet the violent subordination of women. This article has taken a critical look at the feminist critique of provocation and uncovered the ways in which it may unwittingly aid and abet the discourses that naturalize governmental authoritarianism, bolster the penal state, and contribute to mass incarceration. Given that the history of provocation is at least in part related to women's subordination, it is fully understandable, and commendable, that feminists have endeavored to understand the doctrine's connection to social inequality. Nevertheless, when one takes a step back and divorces provocation analysis from feminist dogma, it turns out that the feminist critique may simply be a collection of solutions in search of a problem. Women are not necessarily unfairly burdened by the defense, and sexist men are not particularly privileged by it. Women's status as presumed victims rather than culpable wrongdoers largely protects them from the penal state even in this era of hyper-incarceration. Men's, especially minority men's, status as presumed criminals makes it difficult for them to exploit any lenient criminal law principle, including provocation.

It is also laudable that feminists hope to shape a criminal law that embodies values of gender equality and nonviolence. However, equality is a moving target that can be invoked to support various normative goals. If feminists are truly committed to reducing hierarchy and subordination, they should reevaluate whether pursuing the opaque mantle of equality through greater penal severity actually does so. Moreover, the commitment to nonviolence, while unquestionably noble in theory, does not necessarily lead to a world with less suffering. In fact, police, prosecutor, and politicians' efforts to control private violence through the criminal law have arguably constructed a world of acceptable, if not glorified, institutional violence. It is thus time to take a critical look at what the discourse of "violence has wrought." More importantly, I hope that this article is part of a larger conversation encouraging progressives like feminists, humanitarians, and critical race theorists to be circumspect about prosecutorial solutions to gendered

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382 See Gruber, Rape, supra note, 381, at 620–21 ("The image of the entirely culpable and irredeemable criminal allowed society to feel comfortable with ever harsher punishments while denying any responsibility for the root causes of crime.").

383 See Jonathan Simon, From a Tight Place: Crime, Punishment, and American Liberalism, 17 YALE L. & POL’Y REV. 853, 854 (1999) (asserting that crime control was one of the few government actions Bush and Reagan found defensible under their political ideology).

384 Ristroph, supra note 183, at 610.
harms and racialized violence. The link between social problems and criminal law solutions is not natural, obvious, or required. It is the product of a larger neoliberal framework that has predicated the decimation of social welfare and our current excess of imprisonment.

Today, some experts opine that we may now be "turning the corner on mass incarceration." Indeed, economic conditions, the costs of policing and prosecution, social tolerance for drugs, and the institutional demands of large scale imprisonment are causing some to attenuate the link between social ills and the need for criminal punishment. Consequently, in this watershed time, it is particularly important for progressives to resist the temptation to prescribe punishment as the primary solution to sexist or racist harms, not because such harms are acceptable, but because increased punitivity exacerbates problems of hierarchy and, in the end, fuels the carceral juggernaut.

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385 Marie Gottschalk remarks, "[F]eminists need to develop and reaffirm a feminist vision of justice that incorporates some of the key insights of critical criminology, embracing its deep skepticism of expanding the law enforcement powers of the state to deal with social problems." Dismantling the Carceral State: The Future of Penal Policy Reform, 84 Tex. L. Rev. 1693, 1726 (2006).
387 See id. at 34–39.