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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 empirical evidence available 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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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 confirmation that the defense must be abandoned. The male defendant, Tare Beltran, was a

1. *People v. Beltran*, 301 P.3d 1120 (Cal. 2013).

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, confined 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 six 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 California Supreme Court was whether the trial judge committed reversible error by initially instructing the jury that provocation can only serve as a legal defense if a reasonable person would have killed under the same circumstances (sometimes called “act reasonableness”).⁹ The defense asserted that the judge erred by implying 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 reasonableness”).¹⁰ Siding with the defense, the California Supreme Court reaffirmed “the standard for determining heat of passion that [it] adopted nearly a century ago,” namely,

2. See *id.* at 1123–24 (observing that Tare had repeatedly physically abused the decedent, 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 whether “a reasonable person in the defendant’s shoes would have responded or acted as violently as the defendant did”).

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 whether “the defendant’s *emotional* outrage or *passion* was reasonable”).

that the provocation defense does not require a 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, the law's apparent tendency to privilege men and disadvantage women 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 abundant scholarly commentary condemns the defense (or broad formulations of it).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 not-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

11. *Beltran*, 301 P.3d at 1136.

12. See Lyanne Melendez, *Justices to Decide Fate of Murder Suspect Tare Beltran*, ABC7NEWS.COM (Mar. 5, 2013, 7:15 PM), <http://abc7news.com/archive/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").

13. Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 961 (2002).

14. See *infra* Part I.

15. See Dressler, *supra* note 13, at 961 (calling the feminist critique the "[m]odern criticism of provocation law"); see also JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* (1992) (finding general support for the defense but advocating abolition after considering its gender implications).

16. The "feminist critique" referred to in this Article 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.

17. Casebooks featuring the issue prominently include JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 406–09 (4th ed. 2000); STEPHEN A. SALTZBURG ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 288 (3d ed. 2008); CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 388–91 (2005); JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 290–92 (5th ed. 2009); see also *infra* note 21.

18. Application of San Francisco Domestic Violence Consortium et al. to File Amici Curiae Brief in Support of the People of the State of California; and Amici Brief, *People v. Beltran*, 301 P.3d 1120 (Cal. 2013) (No. S192644), 2012 WL 1859371.

19. *Id.* at i–iii.

on gender altogether. After all, what could it have said? Who could sympathize with a man like Tare Beltran?

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 (MPC) expansive defense of extreme emotional disturbance (EED),²⁰ are "anti-woman."²¹ Critics make a number of explicit and implicit claims about the specially gendered nature of the defense. Some of these observations involve the chauvinistic history of the doctrine.²² Other claims are empirical and concern the numbers and types of offenders that the provocation defense serves.²³ Many of the arguments concern the messages expressed by the defense.²⁴

These arguments combine to create a formidable opponent to provocation, especially EED. The sound bite, "provocation is sexist," leads many to reject the doctrine out of hand, regardless of its practical import.²⁵ Those who favor retention of the defense must always argue in the shadow of a presumption that they are being anti-woman.²⁶

This Article picks up the gauntlet thrown down decades ago by gender-conscious scholars and defends provocation against the specific arguments

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.")

21. See Brenda M. Baker, *Provocation as a Defence for Abused Women Who Kill*, 1 CAN. J.L. & JURISPRUDENCE 193, 199 (1998) ("The conception of provocation as arousing reasonable or warranted outrage is now considered an outdated and gender-biased idea which privileges male anger."). See, e.g., Elisabeth McDonald, *No Straight Answer: Homophobia as Both an Aggravating and Mitigating Factor in New Zealand Homicide Cases*, 37 VICT. U. WELLINGTON L. REV. 223, 234 (2006) ("The provocation defense is sexist."); Fiona Sampson, *Mandatory Minimum Sentences and Women with Disabilities*, 39 OSGOODE HALL L.J. 589, 594 (2001) (observing "the sexist origins of the defence and the discriminatory way in which the defence continues to be applied today"); Nikolette Y. Clavel, Note, *Righting the Wrong and Seeing Red: Heat of Passion, the Model Penal Code, and Domestic Violence*, 46 NEW ENG. L. REV. 329, 339 (2012) (noting the doctrine's "sexist beginnings in property law and its continued accommodation toward primarily male defendants"); Deborah E. Milgate, Note, *The Flame Flickers, But Burns On: Modern Judicial Application of the Ancient Heat of Passion Defense*, 51 RUTGERS L. REV. 193, 201 (1998) (observing the "obvious 'masculine' nature" of provocation); Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 667 (2001) (stating that provocation has "never been a female-friendly doctrine"). One notable exception is Joshua Dressler, who devotes some time defending provocation in the face of widespread belief that "[p]rovocation is a male-centered and male-dominated defense." See Dressler, *supra* note 13, at 975–79.

22. See *infra* Part III.A.

23. See *infra* Part III.B & C.

24. See *infra* Part III.D.

25. See, e.g., Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27, 31 (2006) [hereinafter *Gender Equality*] ("The origins of the provocation defense are deeply gendered."); Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 263 (1996) ("[M]anslaughter is just an embodiment of men's excuses and experiences.").

26. See, e.g., Dressler, *supra* note 13, at 962 (hedging his defense of provocation with the caveat that "feminist concerns regarding the defense deeply concern me").

connecting the doctrine to sex inequality.²⁷ 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.²⁸ 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 dominance 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 problematically gendered nature, even if assumed, may *underdetermine* 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 Article consists of responses to the critique. The Article proceeds in four Parts. Part I introduces the provocation defense and briefly discusses general debates over the heat-of-passion defense. 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.²⁹ Legal psychologists question the doctrine’s assumptions about human emotion and loss of control.³⁰

27. See Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1342, 1389 (1997) (“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.”).

28. 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).

29. See Dressler, *supra* note 13, at 960 (stating that “[o]f course, one might expect law-and-order advocates to criticize a doctrine that can permit an intentional killer to avoid conviction for murder”).

30. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 91–94 (1992) (discussing the false psychological assumption about seemingly provoked men who kill); *infra* text accompanying notes 99–100.

Penal theorists argue over the defense's relationship to appropriate punishment.³¹ 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.

Writings explaining, categorizing, and dissecting the various formulations of the provocation defense litter the legal scholarship landscape.³² In brief, the provocation defense, when successful, mitigates murder to voluntary manslaughter.³³ Such mitigation can mean the difference between life and death or between a short sentence and perpetual incarceration.³⁴ The idea underlying the defense is that a provoked defendant acts without the "malice" required for murder culpability.³⁵ Consequently, the defense is not satisfied just because a defendant subjectively felt passion when provoked.³⁶ While passion can reduce a first-degree premeditated murder to a second-degree murder,

31. See *infra* notes 55–58 and accompanying text.

32. Scholarship exhaustively discussing provocation includes, but is not limited to, Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1031 (2011); Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129 (2014) [hereinafter *Murder*]. See generally HORDER, *supra* note 15; LEE, *supra* note 9; SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER (1998); Symposium, *The Nature, Structure, and Function of Heat of Passion/Provocation as a Criminal Defense*, 43 U. MICH. J.L. REFORM 1 (2009); A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292 (1976); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 422 (1982) [hereinafter *Rethinking Passion*]; Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1727–29 (2005); Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645, 652 (2003) [hereinafter *Victim Wrongs*]; Camille A. Nelson, *(En)raged or (En)gaged: The Implications of Racial Context to the Canadian Provocation Defence*, 35 U. RICH. L. REV. 1007 (2002).

33. See, e.g., GA. CODE ANN. § 16-5-2(a) (2014) (provocation is "the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person").

34. See Berman & Farrell, *supra* note 32, at 1107–1109 (appendix listing states' respective sentences for voluntary manslaughter and murder).

35. See *People v. Beltran*, 301 P.3d 1120, 1125 (Cal. 2013) (noting that provocation "precludes the formation of malice and reduces an unlawful killing from murder to manslaughter"); *Commonwealth v. Rodriguez*, 958 N.E.2d 518, 524 (Mass. 2011) (defining provocation as "a sudden transport of passion or heat of blood . . . without malice").

36. See *People v. Steele*, 47 P.3d 225, 239–40 (Cal. 2002) (noting that "the circumstances giving rise to the heat of passion are viewed . . . objectively"); *State v. Smith*, 822 N.W.2d 401, 408 (Neb. 2012) (stating that whether there is reasonable provocation is "an objective" question); *Commonwealth v. Hutchinson*, 25 A.3d 277, 314 (Pa. 2011) (adopting an "objective test").

something more is normatively required to reduce murder to manslaughter.³⁷ The passion must be triggered by “adequate provocation.”³⁸

There are a wide variety of approaches to defining adequate provocation, ranging from narrow (good for prosecutors) to broad (good for defendants).³⁹ Traditional provocation law confines the defense to categories of victim behavior considered highly offensive in Tudor-era England—namely, mutual combat, sudden injury, false arrest, and adultery.⁴⁰ These bases for the defense, also called the “nineteenth-century four,” have been criticized on many grounds, including being hopelessly outdated and overinclusive.⁴¹ In the mid-to-late twentieth century, however, the largely progressive criminal law professoriate characterized the list as underinclusive, disadvantaging defendants who may have been provoked by other circumstances.⁴² As a result, in the United States, states have all but abandoned the categorical approach for a standard that permits more flexibility in determining what constitutes adequate provocation.⁴³

The majority of jurisdictions require that the alleged provoking act be sufficient to arouse the passions of an “ordinary,” “typical,” or “reasonable”

37. However, certain states have adopted purely subjective diminished capacity defenses. *See, e.g.*, ALASKA STAT. § 12.47.020 (2012); CONN. GEN. STAT. ANN. § 53a-13 (West 2012); HAW. REV. STAT. ANN. § 704-401 (LexisNexis 2012); ME. REV. STAT. tit. 17-A, § 38 (2006); MO. REV. STAT. §§ 552.015.2(8), 552.030(3) (2012); MONT. CODE ANN. § 46-14-102 (2012); N.J. STAT. ANN. § 2C:4-2 (West 2012); UTAH CODE ANN. § 76-2-305(1) (West 2014).

38. *See* ARIZ. REV. STAT. ANN. § 13-1103(A)(2) (2010) (defining defense as “heat of passion resulting from adequate provocation by the victim”); ME. REV. STAT. tit. 17-A, § 203(1)(B) (2006) (“extreme anger or extreme fear brought about by adequate provocation”); N.M. STAT. ANN. § 20-12-50(A) (West 2003) (“heat of sudden passion caused by adequate provocation”); TENN. CODE ANN. § 39-13-211(a) (West 2011) (“state of passion produced by adequate provocation”).

39. *See* Nourse, *supra* note 27, at 1342 (observing that provocation’s “two poles” are the broad MPC formulation and the narrow categorical approach).

40. *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 32.

41. Nourse, *supra* note 27, at 1341 (calling the categories the “nineteenth century four”); *see* HORDER, *supra* note 15, at 178 (asserting that equating “action in moments of unexpected anguish” with reasonable action is a “sham”); 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).

42. *See, e.g.*, Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 733 (1995) (noting with approval states’ shift away from “rigid” categories); Richard Singer, *The Resurgence of Mens Rea: I-Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. REV. 243, 249 (1986) (asserting that the jury should decide provocation’s adequacy); *see also* MPC & COMMENTARIES § 210.3(1)(b) (1980) (“By eliminating any reference to provocation in the ordinary sense of improper conduct by the deceased, the Model Code avoids arbitrary exclusion of some circumstances that may justify reducing murder to manslaughter.”).

43. It appears that only two states, Alabama and Illinois, retain the categorical approach. *See, e.g.*, *Riggs v. State*, 138 So. 3d 1014, 1024 (Ala. 2013) (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. Ct. 1990) (enumerating the categories of substantial physical injury, mutual combat, illegal arrest, and adultery); *see also* Berman & Farrell, *supra* note 32, at 1038 (observing that “the categorical approach was replaced by a standard of reasonableness”).

person.⁴⁴ 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.”⁴⁵ A handful of states adopt the MPC’s expansive defense of EED.⁴⁶ 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.”⁴⁷ Accordingly, anything may qualify as provocation so long as it compels the requisite emotional state in the defendant and a fair reason for that emotional state exists.

Debates rage in criminal law scholarship over the morally required, socially desirable, and utile formulation of the provocation defense.⁴⁸ Instead of delving into each of these conversations, which could (and have) filled up entire volumes of law reviews⁴⁹ and are not fully germane to the Article’s main thesis, it should suffice to describe briefly the principal areas of contention. One such issue involves categorizing the provocation defense as an excuse—meaning the defendant committed a wrongful but legally excusable act; or as a justification—meaning that the defendant committed a nonwrongful act.⁵⁰ This issue is further subdivided into whether the defense should be called a justification or an excuse because calling it one or the other either is more descriptively accurate or is analytically compelled.⁵¹ Other, more normative, debates include how provocation claims should be categorized given the legal implications of calling the defense a justification or excuse, and whether it is

44. See, e.g., GA. CODE ANN. § 16-5-2 (2014) (“reasonable person”); LA. REV. STAT. ANN. § 14:31(A)(1) (2011) (“average person”); MO. ANN. STAT. § 565.002(1) (West 2012) (“person of ordinary temperament”); NEV. REV. STAT. ANN. § 200.050 (LexisNexis 2009) (“reasonable person”); WIS. STAT. ANN. § 939.44(1)(a) (West 2010) (“ordinarily constituted person”); see also LEE, *supra* note 9, at 235 (characterizing the purpose of reasonableness as creating “uniformity and fairness”).

45. *State v. Shane*, 590 N.E.2d 272, 277–78 (Ohio 1992) (“[W]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations.”); see also *Cassels v. People*, 92 P.3d 951, 960 (Colo. 2004); *Girouard v. State*, 583 A.2d 718, 721 (Md. 1991) (“Words spoken by the victim, no matter how abusive or taunting, fall into a category society should not accept as adequate provocation.”)

46. MODEL PENAL CODE § 210.3(1)(b) (1980).

47. *Id.*

48. See *infra* notes 48–55 and accompanying text. While utilitarian concerns occasionally appear in the literature, see, e.g., Berman & Farrell, *supra* note 32, at 1076 (asserting that requiring passion deters retaliatory killings); Adam Candeb, *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 also Dressler, *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.”).

49. See generally, e.g., Symposium, *supra* note 32.

50. 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).

51. See generally, e.g., Dressler, *Rethinking Passion*, *supra* note 32 (studying history and practice of provocation law and concluding that it is excuse); Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27 (2009) (asserting that logically, provocation is excuse); sources cited *supra* note 32.

appropriate to call certain categories of killings justifiable rather than excusable (and vice versa).⁵²

A related scholarly debate concerns whether the provocation defense should operate to exculpate the defendant completely, of murder only, or not 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.⁵³ Others assert that provocation as an excuse (where the defendant was “reasonably” impassioned by “innocent” victim behavior) should not even serve to mitigate murder to manslaughter.⁵⁴ Finally, some theorists argue that the justification-versus-excuse issue is irrelevant either because such categorization of provocation makes no actual difference⁵⁵ or because the doctrine’s problems do not stem from how it is categorized.⁵⁶

Another series of debates, grounded in legal psychology, questions passion as an exculpatory factor. Scholars problematize provocation’s distinction between emotion and intention,⁵⁷ and some contend that seemingly passion-crazed defendants act quite deliberately.⁵⁸ Alternatively, experts opine that homicidal reactions often stem from emotional states quite different from anger that the law ought to account for.⁵⁹ Finally, there are multiple

52. See, e.g., Ashworth, *supra* note 32, at 307 (provocation is a partial justification); Stephen J. Morse, *The Irreducibly Normative Nature of Provocation/Passion*, 43 U. MICH. J.L. REFORM 193, 205 (2009) (asserting that categorizing provocation as excuse is normatively required).

53. See A.P. SIMESTER & G.R. SULLIVAN, *CRIMINAL LAW: THEORY AND DOCTRINE* §10.5(b)(iii), at 348 (2d ed. 2003) (asserting that reasonably provoked defendants should be acquitted); Dressler, *supra* note 13, at 980, 998 (prescribing exculpation for reasonable defendants).

54. See Gruber, *Victim Wrongs*, *supra* note 32 (proposing to eliminate provocation and replace it with a defense based on wrongful victim conduct); Nelson, *supra* note 32 (favorably describing Canadian provocation law’s requirement of wrongful victim conduct); *infra* note 130 (noting abolition proposals).

55. See, e.g., Chin, *supra* note 50, at 83 (denying that the justification/excuse “distinction is important”); cf. Kyron Huigens, *A Critical Introduction to the Symposium*, 43 U. MICH. J.L. REFORM 1, 5 (2009) (observing that the taxonomic debate could “clarify the law’s moral message for the public”). But see Dressler, *Rethinking Passion*, *supra* note 32 (emphasizing the importance of distinguishing justification and excuse).

56. See, e.g., Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143 (2009).

57. See, e.g., Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 550 (2012) (observing that psychology literature suggests that the distinction between criminals who could not and did not exercise control “is immaterial”); Robert Weisberg, *The Values of Interdisciplinarity in Homicide Law Reform*, 43 U. MICH. J.L. REFORM 53, 65 (2009) (contending that the differences in psychological states underlying aggressive reaction do not map neatly on to legal intentionality divides).

58. See, e.g., Coker, *supra* note 30, at 93; Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 220–27 (2006) (asserting that people have control despite provocation and citing psychological studies).

59. See, e.g., *People v. Wu*, 286 Cal. Rptr. 868, 884 (Ct. App. 1991) (noting that “‘passion’ need not mean ‘rage’ or ‘anger’ but may be any [v]iolent, intense, high-wrought or enthusiastic emotion”) (quoting *People v. Borchers*, 325 P.2d 97 (Cal. 1958) (alteration in original)); Elise J. Percy et al., “*Sticky Metaphors*” and the Persistence of the Traditional Voluntary Manslaughter

conversations about the reasonableness requirement, including whether reasonableness should be required, how subjective the requirement should be, and how the standard impacts certain classes of defendants and victims.⁶⁰

The above debates involve many important values such as morality, legal coherency, and social utility. However, they 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 EED, as liberal versions of provocation law.⁶¹ Now, however, many left-leaning criminal theorists have abandoned civil libertarian concern for homicide defendants' interests in favor of anti-subordination concerns for female victims. Others find the entire matter steeped in an insoluble dilemma.⁶²

II.

PROVOCATION FROM A GENDERED PERSPECTIVE

Most 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*.⁶³ 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, kills the man with whom Lane serendipitously fell into a passionate, adulterous affair. Although Gere does not catch Lane in the very act of adultery,⁶⁴ he nonetheless has positive proof that infidelity occurred.⁶⁵ At the paramour's apartment, he notices a snow globe he had given Lane previously as a special gift, which triggers his passion. 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. Notably, Gere does not commit any act of violence against the diminutive Lane, who is

Doctrine, 44 U. MICH. J.L. REFORM 383, 394 (2011) (stating that "anger is not the only [passionate] emotion").

60. See *supra* notes 9–11 and accompanying text; *infra* notes 130–33 and accompanying text.

61. See Nourse, *supra* note 27, at 1384–85.

62. See *supra* note 21 (listing articles).

63. See generally Stephen Holden, *Film Review; Day in Town Takes an Unexpected Tryst*, N.Y. TIMES, May 8, 2002, <http://www.nytimes.com/2002/05/08/movies/film-review-day-in-town-takes-an-unexpected-tryst.html> (reviewing film).

64. Cf. *Mays v. State*, 14 S.E. 560, 562 (Ga. 1891) (requiring provocation defendant to find "the deceased in the very act of adultery with his wife").

65. 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").

herself highly morally conflicted over the affair.⁶⁶ Rather, he kills the paramour, an over-sexed, strikingly seductive, French Lothario.⁶⁷ To be sure, Gere generally does not have a violent 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, upper-middle class, caring husband driven by passion to uncharacteristically and almost involuntarily commit violence against an unsympathetic male victim.⁶⁸ 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.⁶⁹ The other is the person who suddenly “snaps” in the face of an emotionally charged event.⁷⁰ Previously, men exclusively occupied the media space of the reasonably provoked killer, but today, women characters are increasingly taking on that role.⁷¹ In fact, an argument could be made that the concept of a killer who “snapped” conjures up the image of a murderess.⁷² 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.⁷³ Others seek to expose the “real faces” of male intimate homicide defendants.⁷⁴ Far from being nonviolent cuckolded husbands who snapped, male intimate killers who invoke the provocation defense include batterers, jealous men speculating about adultery, controlling spouses angered by their wives’ attempts to leave,

66. See Holden, *supra* note 63 (calling Lane’s character sympathetic).

67. See *id.* (observing that the film reduces the paramour to “a generic Continental rake”).

68. See Coker, *supra* note 30, at 89–90 (observing “the popular image” of a wife-killer as someone who “suddenly cracked”).

69. See BRAVEHEART (Paramount Pictures 1995) (Mel Gibson’s character); COLLATERAL DAMAGE (Warner Bros. 2002) (Arnold Schwarzenegger’s character); PRINCESS BRIDE (Act III Communications 1987) (Inigo Montoya); DEATH WISH (Dino De Laurentiis Co. & Paramount Pictures 1974) (Charles Bronson’s character).

70. See FALLING DOWN (Canal+, Alcor Fils, Regency Enterprises & Warner Bros. 1993) (Michael Douglas’s character); SHUTTER ISLAND (Paramount Pictures & Phoenix Pictures 2010) (Leonardo DiCaprio’s character).

71. See, e.g., THE BRAVE ONE (Warner Bros. 2007) (Jodi Foster’s character).

72. There is a true crime series on the Oxygen network devoted to women killers, entitled *Snapped* (Oxygen television broadcast Aug. 6, 2004–present).

73. See, e.g., Rozelle, *supra* note 58; Milgate, *supra* note 21, at 224 (calling for “the abolishment of the heat of passion defense in spousal infidelity cases”).

74. See, e.g., Coker, *supra* note 30.

or a combination of all three.⁷⁵ Today, critics harp on the contention that the provocation defense, especially EED, “shelters” abusive and murderous men with banal frequency.⁷⁶

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.⁷⁷ The article begins with the bold empirical observations, “[h]omicide is overwhelmingly a male act,” and “[w]omen rarely kill,”⁷⁸ leading the reader to believe it will ultimately reject lenient defenses that disproportionately benefit male killers. Surprisingly, however, Taylor primarily argues that the provocation doctrine is too *narrow* and does not appropriately accommodate women who kill.⁷⁹ Thus, ironically, one of the first articles about provocation law from a gendered perspective criticizes 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.⁸⁰ 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.⁸¹ Additionally, the ways in which women develop these emotions may differ from the “snapped” scenario.⁸² 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.⁸³ Accordingly, her argument parallels the

75. See *infra* notes 128-29 and accompanying text.

76. See GR. BR. LAW COMM’N, REPORT ON PARTIAL DEFENCES TO MURDER 299 (2004); 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 “[m]ale defendants who kill”); Miller, *supra* note 21, at 666 (calling the MPC’s “expansion” of provocation doctrine “particularly disastrous for women”).

77. Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679 (1986).

78. *Id.* at 1679–80. Taylor’s actual statistics, however, do not demonstrate such a wide gap between male and female intimate killers. According to the article, 755 men killed their wives or girlfriends compared to 477 women who killed their boyfriends or husbands in 1986. *Id.* at 1680 n.9, 1681 n.10.

79. 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”).

80. 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)).

81. See *id.* 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.”).

82. *Id.* at 1717.

83. *Id.* at 1719 (“Cumulative terror should serve as an emotion adequate for heat-of-passion manslaughter.”).

feminist critiques of self-defense, which claim that the “imminent harm” requirement disfavors battered women who kill abusers.⁸⁴ 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.”⁸⁵ 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.”⁸⁶

In 1991 and 1992, a book and law review article steered the gender discussion away from provocation’s inadequate protection of sympathetic female defendants and toward its 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 persuasive gender-based case for abolishing it.⁸⁷ The book critically retells the story of seventeenth century English provocation law, which historians had previously described as grounded in mercy and the frailty of man.⁸⁸ Horder alternatively describes the doctrine as largely a product of bygone views regarding male honor.⁸⁹ Normatively, the book sets forth a searing indictment of the British provocation defense as disadvantageous to women.⁹⁰ Horder contends that discrimination occurs because deserving women (abuse survivors) are unable to utilize the defense while undeserving men (sexist men with histories of violence) use it frequently.⁹¹ Thus, Horder’s 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 argument⁹² 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

84. See, e.g., Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1194–95 (1993) (“[B]attered women may reasonably perceive themselves to be in imminent danger in situations when this may not otherwise be apparent to the outside observer.”); Richard Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 376 n.10 (1993) (citing 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c)(1) (1984)).

85. See Taylor, *supra* note 77, at 1697–98, 1718–25.

86. *Id.* at 1733.

87. HORDER, *supra* note 15, at 178.

88. See Ashworth, *supra* note 32; *infra* Part IV.A.

89. HORDER, *supra* note 15, at 26–29; *infra* note 142.

90. See HORDER, *supra* note 15, at ch. 9.

91. *Id.* at 186–87.

92. See *infra* Parts III.D & IV.D. (discussing expressivism).

in general.”⁹³ Ultimately, Horder argues that the only way to remedy provocation’s discriminatory and expressivist problems is to abolish it.⁹⁴

In a similar vein, 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.⁹⁵ 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.⁹⁶ In this reading, the only problem with the provocation defense is that the adultery category may reinforce the public’s misconceptions about wife killers and allow men predisposed to violence to claim they acted in passion.⁹⁷ Moreover, according to the article, judges and juries will be in a tolerable position to apply the defense in cases that actually merit it after public misconceptions have been corrected.⁹⁸

The article also makes some stronger claims. For example, Coker implies that male-on-female intimate homicides, even ones involving witnessed adultery, virtually never occur spontaneously.⁹⁹ They, like battering in general, are products of conscious and deliberate patterns of control and abuse.¹⁰⁰ Moreover, Coker appears to criticize provocation writ largely for its normative approval of a masculinist culture of anger and violence.¹⁰¹ Given these broad objections, one might expect Coker to advocate wholesale abandonment of the defense, or at least prohibition of the application of the defense to male-on-female intimate homicides.¹⁰² In the end, she does not recommend any specific law reform. Nevertheless, her observations about provocation’s gender

93. HORDER, *supra* note 15, at 194.

94. *Id.* at 197.

95. Coker, *supra* note 30.

96. *See id.* at 83 (asserting that the doctrine “hides the degree to which ‘adultery killings’ are really like other wife-killings”).

97. *See id.* 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”).

98. *Id.* at 129 (dispelling the “myth” that “men who kill their wives or girlfriends do so in the heat of ‘uncontrolled passion’”).

99. *See id.* at 84 (recognizing that reasonably provoked killers may exist but that this description does not apply to “men who kill their female partners”); *id.* at 94 (asserting that if the impassioned wife killer “does exist, he is apparently part of a very small group”).

100. *Id.* at 129 (contending that wife-killings are generally “planned killings” (emphasis in original)).

101. *Id.* at 102 (problematizing the assumptions that men become enraged and “that rage leads inevitably to violence”); *infra* Part III.D.2 (arguments about provocation’s pro-violence message).

102. Coker does strongly intimate that the law needs to be reformed. *See Coker, supra* note 30, at 130 (“We must . . . plac[e] the legal and cultural analysis of wife-murder squarely within that of wife-battering.” (emphasis in original)).

problems linger like a bad taste and move the reader inexorably toward an abolitionist stance.

Professor Victoria Nourse's 1997 Yale Law Journal article, *Passion's Progress: Modern Law Reform and the Provocation Defense* played the most prominent role in elevating the gender inequality argument to the primary critique of provocation.¹⁰³ The article is cited in hundreds of publications and appears in many of the leading criminal law casebooks.¹⁰⁴ 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.¹⁰⁵ 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).¹⁰⁶ Second, the article sets forth a more general argument that the law is idiosyncratic, and thus, doctrinally unsound because it protects those who react violently to "lawful" victim conduct.¹⁰⁷ Because I am primarily concerned with the gender critique of provocation, this Article will concentrate on the first claim, which also constitutes Nourse's main legacy.

Passion's Progress recognizes up front that the EED defense is neutral on its face.¹⁰⁸ The problem, it contends, is that the neutral language of EED hides normative judgments about the circumstances under which people are entitled to become emotionally disturbed.¹⁰⁹ This argument resembles Taylor's assertion, channeling MacKinnon, that apparently neutral legal rules will inevitably benefit men in male supremacist societies.¹¹⁰ 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

103. Nourse, *supra* note 27.

104. See, e.g., criminal law casebooks cited, *supra* note 17. A Westlaw keycite citing reference search on the article reveals 149 citing references.

105. Nourse, *supra* note 27, at 1332 (noting the significant number of cases involving "the desire of the killer's victim to leave a miserable relationship.").

106. *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").

107. *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") (internal citations omitted), 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.*") (emphasis in original).

108. *Id.* at 1333-34.

109. *Id.* at 1333 (stating that the MPC's seemingly 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.").

110. *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).").

reasonably provoked at all.¹¹¹ 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.¹¹² The article offers original empirical evidence in support.¹¹³ Thus, its unique concern is the underenforcement of murder laws against wife killers. Having described the problem as one of courts approving too many sexist provocation claims, Nourse proposes law reform to minimize it.¹¹⁴ She endorses a redesigned provocation doctrine that would apply only in cases where the defendant had “warranted” grounds for outrage.¹¹⁵ The killer’s emotional reaction must mirror a communal sense of morality, as enumerated by criminal laws.¹¹⁶ In other words, provocation law may not “distinguish the defendant’s sense of emotional wrongfulness from the law’s own sense of appropriate retribution . . . the defendant’s emotional judgments [must be] the law’s own.”¹¹⁷

If one interprets the proposal in *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)¹¹⁸ example of the man who kills his wife’s rapist as a paradigmatically warranted killing.¹¹⁹ Consequently, the article envisions that a defendant’s judgments could match the formal criminal law’s in a much looser sense. The limitation really boils down to the requirement that the provoking victim behavior constitute some underlying crime—though not necessarily a

111. *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).

112. *See id.* at 1343 (contending that in EED jurisdictions separation “is as likely, if not more likely” a ground for the defense than an affair or other sexual infidelity).

113. *Id.* at 1342–68.

114. *Id.* at 1338 (noting that her proposal would “bar[] manslaughter verdicts in most intimate homicide cases”).

115. *See id.* at 1392–1406 (Part IV.B).

116. *Id.* at 1392 (asserting that provocation is appropriate when the defendant “is expressing outrage in ways that communicate an emotional judgment . . . that is uncontroversially shared, indeed, that the law itself recognizes”).

117. *Id.*

118. Killing men who sexually violate women seems to be a favored example of a paradigmatically provoked killing. *See, e.g.,* Dan M. Kahan & Martha C. Nussbaum, *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”).

119. Nourse, *supra* note 27, at 1337–38, 1392.

crime punishable by death or even long-term imprisonment.¹²⁰ This requirement might exclude defendants provoked by adultery, which is only “nominally” unlawful, and separation alone, which is lawful.¹²¹ However, her proposal still allows similar defendants whose wives fought back in some way to invoke the defense. Moreover, the proposal also makes the defense unavailable to other sympathetic classes of defendants, for example, serially bullied kids, postpartum infant killers, and minorities provoked by racial epithets. Yet, Nourse holds that racial epithets can count as provocation “because they can be analogized to hate-crime offenses.”¹²² However, if analogic reasoning is fair game, Nourse’s seemingly bright-line warranted excuse/legality rule looks more akin to the MPC’s standard of a “reasonable explanation or excuse.”¹²³ Consequently, depending on its application, Nourse’s apparently neutral criterion may also hide normative judgments that reinforce social hierarchies, including gendered ones.¹²⁴

Passion’s Progress sparked an explosion of gender-based critiques of provocation that continue to proliferate today.¹²⁵ 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.¹²⁶ Many quote the early eighteenth-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.¹²⁷ Second, the vast majority of articles describe in excruciating detail the facts of individual brutal intimate killings.¹²⁸ For example,

120. Nourse notes that the lawfulness test is “not a doctrinal standard” and allows that outrage “based on conduct that appears lawful . . . may reflect warranted emotion under a different normative reconstruction of the provoking behavior.” *Id.* at 1396 n.381.

121. 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.”).

122. V. F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 364–65 n.11 (2004).

123. MODEL PENAL CODE § 210.3(1)(b) (1980).

124. As Nourse recognizes, “the ‘veil of relationship’ is extraordinarily resistant to change and will reassert itself.” Nourse, *supra* note 27, at 1403.

125. *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.

126. *See infra* Part III.A.

127. *R. v. Mawgridge*, (1706), 84 Eng. Rep. 1107, 1115 (K.B.). For a discussion of chastisement, see Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860–1930*, 86 IND. L.J. 185, 233 n.271 (2011) (discussing the relationship between voluntary manslaughter and chastisement in late nineteenth century Australia and United States); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–29 (1996) (recounting history of chastisement doctrine). *See generally infra* Part III.A.

128. *See, e.g.,* LEE, *supra* note 9, 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)); Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597, 598 (2004) [hereinafter *Homicide*] (stating that the author was “haunted” by the admittedly extreme case of Javier Romero, an abuser who stabbed his wife and son to death and received a sentence of ten years for murder); Miller,

provocation critic Susan Rozelle recounts the 1980 Arkansas case of Randall Dixon:

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.¹²⁹

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.¹³⁰ Thus, it comes as little surprise that the final common attribute in gender-based provocation critiques is that such scholarship generally proposes ratchet-up reforms, meaning reforms that make punishment harsher or more likely.¹³¹

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, 1035–36 (2001) (introducing mitigation analysis with the story of defendant Schnopps, who killed his wife after she said she was divorcing him and that she had "something bigger and better [to have sex with]" (quoting *Commonwealth v. Schnopps*, 417 N.E.2d 1213, 1216 (Mass. 1981))). Nourse quotes extensively from the fact sections of murder cases, *see* Nourse, *supra* note 27, at 1342–43, 1351–52, 1358–59, 1362–63, including the case of "Smith" who, after finding out his girlfriend Becky was leaving him, "shot through the door [of Becky's family's home], killing Becky's half-sister, then went into the house and killed Becky's mother. Some time later, as the ambulance attendants administered to the victims, Smith killed Becky and the daughter she was holding in her arms." *Id.* at 1343 (internal citation omitted).

129. Rozelle, *supra* note 58, at 201. Another extreme case that captured the scholarly imagination is the 1976 case, *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 "course of provocatory conduct." *See* 556 P.2d 777, 781 (Cal. 1976). Scholarship discussing the case includes Coker, *supra* note 30. *See also* KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 344–63 (5th ed. 2010) (excerpting and analyzing *Berry*, 556 P.2d 777); LEE, *supra* note 9, at 43–45; Forell, *Homicide*, *supra* note 128, at 605.

130. *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, *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.").

131. *See, e.g.*, Kahan & Nussbaum, *supra* note 118, at 352 (endorsing an "evaluative" formulation in which defendants' emotional reactions must stem from correct moral appraisals); Gruber, *Victim Wrongs*, *supra* note 32, at 718 (endorsing a lack of predisposition requirement); Miller,

Critics of the provocation defense have set forth various proposals for reigning in provocation. Many critics, such as Jeremy Horder, assert that eliminating the defense is the sole means of achieving gender justice.¹³² Some, like Victoria Nourse, propose to limit the defense by narrowing the definition of adequate provocation.¹³³ While Nourse creates a warranted excuse/legality test, others call for “normative” reasonable standards or the requirement of “act reasonableness,” as urged by the prosecution in *Beltran*.¹³⁴ One of the more female-centric suggestions has been a “reasonable woman” standard, requiring the defendant, male or female, to act like a reasonable woman.¹³⁵ The next Part catalogues and describes the various theoretical arguments underlying critics’ calls to narrow 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 category¹³⁶ or adopting a caveat that men with a documented history of abuse cannot argue provocation.¹³⁷ These limited reforms leave the provocation doctrine largely

supra note 76, at 274 (calling for the elimination of the provocation defense in cases involving abuse); Clavel, *supra* note 21, at 350 (same).

132. See *supra* notes 87-94 and accompanying text; see also Miller, *supra* note 21, at 692-93 (advocating abolition); Rozelle, *supra* note 58, at 232-33 (advocating abolition except for cases of excessive force in self-defense).

133. See *supra* notes 113-15 and accompanying text.

134. See *supra* notes 9-15 and accompanying text (discussing “act reasonableness” in *People v. Beltran*, 301 P.3d 1120, 1125 (Cal. 2013)); 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); Gruber, *Victim Wrongs*, *supra* note 32, at 651 (asserting that the defense should only apply to “wrongful” behavior); Pillsbury, *supra* note 56, at 144, 148 (restricting the defense to those who respond to “serious wrongs”).

135. CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 172 (2000).

136. 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 Nourse, *supra* note 27, at 1341 (observing that only two states retain a categorical approach).

137. Domestic homicide statutes narrowly address the issue of pattern abusers claiming provocation. For example, Minnesota’s statute makes it first degree murder when a defendant “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. ANN. § 609.185(a)(6) (West 2009). 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(a)(5). Such a provision may negatively affect many female defendants. See Heather Leigh

intact and address the overarching gender problem only modestly.¹³⁸ 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.¹³⁹ Accordingly, many feminist critics instead propose far-reaching changes like abolition or generalized limitations of the defense’s applicability (i.e., calling for a “warranted excuse”).¹⁴⁰ Below is a comprehensive overview 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.¹⁴¹ According to critical commentators, old English jurists created the voluntary manslaughter doctrine to protect men who responded to affronts to their honor—particularly the affront of marital infidelity.¹⁴² The doctrine is 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”).¹⁴³ 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.¹⁴⁴ Scholars also link the defense to the antiquated principle of chastisement, which prescribed low-level violence

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) (discussing intimate homicides committed by women); Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 WIS. WOMEN’S L.J. 283, 301 (1996) (same).

138. See, e.g., Miller, *supra* note 76, at 274 (proposing that the defense should not apply to cases involving abuse); Taylor, *supra* note 77, at 1718–19 (proposing that provocation law disallow defendants to argue their anger was provoked by a “course of conduct”).

139. See, e.g., Nourse, *supra* note 27.

140. See *id.* at 1338.

141. See, e.g., Miller, *supra* note 21, at 669 (observing the “masculine assumptions of the common law of voluntary manslaughter”).

142. The notion that modern provocation law is grounded in seventeenth century notions of honor can be traced to Jeremy Horder, who endeavored to demonstrate that traditional categorical provocation law, developed in the seventeenth century, was less a product of medieval juries’ inclinations toward temperance and more a product of a “quixotic” “honour theor[y]” writings. HORDER, *supra* note 15, at 25–29; see also Coker, *supra* note 30, at 79 (tracing the doctrine to the “settlement of ‘breaches of honor’”); Forell, *Gender Equality*, *supra* note 25, at 31 (“[T]he provocation defense began as a common law doctrine about men defending their honor.”). *But see* Taylor, *supra* note 77, at 1684 (“The law of manslaughter emerged in sixteenth-century England partly in reaction to the rigidity and severity of the law of homicide.”); *infra* Part IV.A.

143. See, e.g., 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.”); Milgate, *supra* note 21, at 226 (maintaining that the defense “was developed at a time in which the woman’s identity was dictated by that of her husband”); Miller, *supra* note 76, at 256 (asserting that the provocation doctrine encouraged men “to retaliate against any trespass on his most precious property: his wife”).

144. See 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”).

as an acceptable method of controlling wives.¹⁴⁵ 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."¹⁴⁶

B. *Provocation Law Underpunishes Culpable Male Murderers*

Provocation critics contend that the doctrine (especially in its broad form) prevents the state from appropriately enforcing criminal law against sexist killers who deserve punishment for murder.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ Others, most notably Victoria Nourse, endeavor to provide empirical evidence that slippage occurs in non-negligible quantities.¹⁵⁰ Nourse, for example, examined all provocation cases from MPC jurisdictions from 1980 to 1995 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.¹⁵¹

This underenforcement argument has an anti-majoritarian strain and a majoritarian strain. In the anti-majoritarian story, widespread gender bias currently exists among judges, jurors, and in our culture. Society largely

145. See Ramsey, *supra* note 127, at 233 n.271 (discussing the relationship between voluntary manslaughter and chastisement in late nineteenth century Australia and United States). See generally Siegel, *supra* note 127, at 2122–29 (recounting history of chastisement doctrine).

146. 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).

147. See, e.g., Forell, *Homicide*, *supra* note 128, 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.”) (internal citations omitted); 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).

148. See, e.g., Milgate, *supra* note 21, at 196 (contending that when provocation is applied to “romantic” cases, “the results are nearly always unjust”).

149. See, e.g., Coker, *supra* note 30, at 78 (arguing that provocation’s structure suggests “likely [underenforcement] outcomes at trial”); 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”).

150. See Nourse, *supra* note 27, 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 10 cases as with 200.” *Id.* at 1348 n.97; cf. Coker, *supra* note 30, 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 appellate information on which to rely to discern the realities of trial court practice”) (internal citation omitted).

151. In MPC jurisdictions pure separation claims constituted 26 percent of all provocation claims, 79 percent of which reached juries. See Nourse, *supra* note 27, at 1349, 1356 (charts with percentages).

tolerates male-on-female intimate killing because of misconceptions, stereotypical thinking, or plain animus.¹⁵² Broad provocation laws thus permit state actors and jurors to exercise chauvinistic empathy toward male murder defendants.¹⁵³ Consequently, a narrowed provocation law controls legal decision makers' natural inclinations to be biased. In the anti-majoritarian view, 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 by claiming that provocation law itself "perpetuates[] ideas about men, women, and their relationships that society long ago abandoned."¹⁵⁴ 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.¹⁵⁵ 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

In addition to the argument that the provocation doctrine treats too many culpable male defendants leniently as an absolute number, other feminist critics focus on the *disproportionate* leniency that the provocation doctrine confers on male defendants.¹⁵⁶ Much anti-provocation theorizing adopts a civil rights framework that law and policy should not discriminate based on gender, race, or other characteristics.¹⁵⁷ Accordingly, many feminist scholars disseminate the message that the heat-of-passion doctrine, as implemented, disparately benefits men and burdens women.¹⁵⁸ This seemingly straightforward claim of disparity is actually a collection of comparisons. I discuss the two main comparisons below.

152. See, e.g., Miller, *supra* note 76, at 250 (tracing provocation's problems to the "effects of [society's] gender bias on the concept of reasonableness").

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

154. Nourse, *supra* note 27, at 1332.

155. See Forell, *Homicide*, *supra* note 128, 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, *supra* note 122, at 369 (contending that under the MPC, "judges felt compelled to send almost any kind of a case to a jury").

156. See Sing, *supra* note 146, at 1865 (noting the feminist argument that provocation "registers an adversely disproportionate impact on women").

157. 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.").

158. See Miller, *supra* note 21, at 669; see also Nourse, *supra* note 27, at 1332.

1. *The Provocation Defense Favors Male Intimate Killers over Female Intimate Killers*

One of the earliest and most popular discrimination-based critiques of the heat-of-passion defense argues that the defense, by its nature or as applied, disproportionately favors male defendants.¹⁵⁹ In other words, the defense mitigates the charges of male intimate-partner killers at a greater rate than those of female intimate-partner killers.¹⁶⁰ At times, the literature compares male defendants' chances of successfully pleading provocation to female defendants' chances of successfully pleading self-defense.¹⁶¹ In this view, an injustice occurs when the percentage of male killers who successfully 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 (making it harder for men to claim provocation),¹⁶² a ratchet-down solution (making it easier for women to claim provocation/self-defense),¹⁶³ or a combination of both.¹⁶⁴ While a few articles prescribe a ratchet-down solution, notably the Taylor comment,¹⁶⁵ 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.¹⁶⁶

159. See, e.g., Milgate, *supra* note 21, at 201 (observing that the doctrine's "gendered perspective" "may 'favor' the male over the female defendant").

160. See Taylor, *supra* notes 77–82 and accompanying text; Miller, *supra* note 76, 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").

161. See, e.g., Stacy, *supra* note 128, at 1039 (asserting that there is "inequity" because men can assert provocation by adultery, but battered women have "great difficulty . . . convincing courts to instruct juries on self-defense and/or manslaughter"); Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1301–03 (1994) (illustrating "inequity" by comparing female intimate homicide defendants' inability to pursue self-defense with male intimate homicide defendants' ability to pursue provocation).

162. Such solution would operatively abandon women defendants. See *infra* Part IV.C.1.

163. Such solution would not address the perceived underpunishment of sexist men. See *supra* Part III.B.

164. Cynthia Lee proposes a "switching" jury instruction whereby the jury hypothetically switches the race/gender/sexual orientation of various parties to the murder case. See LEE, *supra* note 9, at 217–25 & 253–59. This would have the effect of sometimes ratcheting up (for example, when the jury has to imagine 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 have done when the wife killed the husband who committed adultery). *Id.* at 217–20.

165. See *supra* notes 83–85 and accompanying text.

166. See, e.g., FORELL & MATTHEWS, *supra* note 135, at 172 (proposing that the woman's point of view be applied in all cases).

2. *The Provocation Defense Generally Benefits Men and Burdens Women*

Many of the writings critical of provocation also make the point that homicide is largely a male phenomenon.¹⁶⁷ Based on this idea, some simply denounce provocation law for generally advantaging murder defendants, who are disproportionately men.¹⁶⁸ Critics also compare the aggregate interests of male homicide defendants and victims to the aggregate interests of female homicide defendants and victims.¹⁶⁹ 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.¹⁷⁰ 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."¹⁷¹ If it is true that men commit more intimate homicides against women than the reverse, aggregating female defendants' and victims' interests generally supports 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.¹⁷²

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

167. See, e.g., Taylor, *supra* note 77, at 1679–80; Miller, *supra* note 76, at 254 (“[T]he vast majority of homicide defendants are male.”).

168. See, e.g., Miller, *supra* note 21, at 669 (critiquing provocation doctrine on the ground that women are “socialized” to respond to events like adultery “in a non-violent manner”).

169. See, e.g., 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”); Moran, *supra* note 147, at 1258 (observing that in provocation cases, women “tend to be the victims, not the accused”); 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”).

170. See Miller, *supra* note 21, at 680 (asserting that “voluntary manslaughter continues to serve a primarily male interest”).

171. Nourse, *supra* note 122, at 365.

172. See Christina Pei-Lin Chen, Note, *Provocation’s Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL’Y 195, 220 (2000) (asserting that because women “are more frequently homicide victims than offenders,” provocation laws “greatly burden women as a group while simultaneously not benefiting them”) (footnotes omitted).

excruciatingly simple: provocation is bad, regardless of its actual effects, because it sends the wrong messages about gender, morality, and human nature.¹⁷³ This argument incorporates “expressivist” penal theory because it prioritizes the symbolic and communicative attributes of criminal law.¹⁷⁴ Penal 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.¹⁷⁵ 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.¹⁷⁶ Observing that criminal punishment “has a *symbolic significance* largely missing from other kinds of penalties,”¹⁷⁷ Feinberg asserts that philosophical accounts of punishment “that leave[] out the condemnatory function” are disappoint[ing]” and “offensively irrelevant.”¹⁷⁸ It is clear that many if not most feminist provocation critiques, at some level, set forth expressivist accounts of provocation.¹⁷⁹ The expressivist critique that the provocation defense sends a bad message requires no evidence of excessive acquittals of sexist abusers, disproportionate benefit to men, or increases in intimate homicides. Instead, it can be based on a single instance of

173. See Berman & Farrell, *supra* note 32, at 1089 (noting the argument that “the provocation doctrine reinforces beliefs that members of some groups are less worthy than the mainstream”); see also Rozelle, *supra* note 58, at 215 (contending that provocation law has sent the wrong message and “influenc[ed] behavior in an anti-social direction”).

174. See Joel Feinberg, *The Expressive Function of Punishment*, in JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 118 (1970) (“[I]t is social disapproval and its appropriate expression 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, 470–71 (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).

175. See R.A. DUFF, TRIALS AND PUNISHMENTS 1 (1986) (“It is agreed that a system of criminal punishment stands in need of some strenuous and persuasive justification.”).

176. See Carol S. 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.”).

177. Feinberg, *supra* note 174, at 98.

178. *Id.* at 105. Kahan and Nussbaum make the same assertion 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.” Kahan & Nussbaum, *supra* note 118, at 352.

179. See, e.g., Kahan & Nussbaum, *supra* note 118, at 351–53 (arguing in favor of a narrow “evaluative” provocation defense on expressivist grounds); sources cited *supra* note 21 and *infra* notes 183–87.

undeserved leniency or speculation about how the defense might be used. The argument simply says that 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 defense expresses two particularly pernicious messages, one about gender and one about violence, discussed in turn below.

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.”¹⁸⁰ In this view, broad formulations of the doctrine 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.¹⁸¹ In turn, the law encourages women to remain in unsatisfactory and even abusive relationships.¹⁸² At the very least, the doctrine expresses tolerance for or ambivalence toward male-on-female intimate homicides.¹⁸³ For many theorists, solving provocation’s expressivist problem necessarily involves abolishing or narrowing the law to signal that men should not be aggressive and that women victims “count.”¹⁸⁴

2. *The Provocation Defense Endorses Violence*

Critics of the provocation defense often contend that reforming provocation will communicate more than a message about gender. Reform would express a general sentiment that all people should refrain from using

180. PILLSBURY, *supra* note 32, at 147.

181. See Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN L. REV. 1171, 1203 (2004) (contending that provocation may “reinforce[] norms that equate male virtue with devotion to patriarchal conceptions of honor”); Broussard, *supra* note 157, at 186–87 (asserting that provocation “perpetuates harmful gender stereotypes” because it “privileges a type of homicide committed most frequently by men”); cf. Kahan & Nussbaum, *supra* note 118, at 360 (asserting that broad provocation formulations send “a message that fosters and gives comfort to . . . reprehensible feelings”).

182. See Coker, *supra* note 30, 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, *supra* note 27, at 1335 (“Reform often seems to tie women to relationships that they do not want, in effect, enforcing a rule of ‘emotional unity.’”); Broussard, *supra* note 157, at 186 (noting the argument that the defense “subordinates women by allowing this kind of crime to be recognized in the law as less heinous”).

183. See Kahan & Nussbaum, *supra* note 118, at 352 (noting the argument that “lenient treatment of certain offenses—whether domestic violence or hate crimes—shows that the well-being of certain persons just ‘doesn’t count’ in the eyes of the law”); Stacy, *supra* note 128, at 1050 (asserting that provocation law “can be seen to imply that intra-familial violence is not as wrongful as violence in other contexts”).

184. See Kahan & Nussbaum, *supra* note 118, 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.”).

lethal violence in non-life-threatening situations. In fact, after exhausting all other arguments, provocation critics often retreat to the safe harbor of pacifism.¹⁸⁵ Particularly when faced with the tendency of narrowing proposals to sacrifice women and minority defendants who might seek to use the provocation defense, certain critics contend that nobody should engage in unnecessary acts of violence.¹⁸⁶ This anti-violence claim has two principle bases. The first is that violence is bad because it is masculinist.¹⁸⁷ Similar to the disparity argument outlined in Part III.C, critics contend that a violence-permissive society prioritizes men's interests (in being violent) over women's interests (in being free from violence).¹⁸⁸ Thus, doctrines like provocation have the effect of constructing the legal world in the image of men.

The second basis for this anti-violence argument is not necessarily grounded in gender theory. The straightforward and convincing assertion is that the law should not condone private violence because, quite simply, violence is bad.¹⁸⁹ Some of the feminist literature adopts the general critique that provocation law is unenlightened because of its undue tolerance of private aggression.¹⁹⁰ Proponents of this view maintain that society has moved away from the time in which individuals settled disputes through contests of physical strength, and thus today “[t]he good person does not kill even if terribly provoked.”¹⁹¹ 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.¹⁹² After all, no sensible person likes violence. Adopting an anti-violence baseline,

185. See PILLSBURY, *supra* note 32, at 146 (“Several commentators have recently argued that provocation should be abolished because it weakens the law’s commitment to nonviolence.”).

186. 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”).

187. See Forell, *Gender Equality*, *supra* note 25, at 65 (asserting that the defense sends “an unacceptable message—that men’s anger and use of violence against women is legitimate”) (quoting VICTORIAN LAW REFORM COMM’N, DEFENCES TO HOMICIDE FINAL REPORT 30 (2004)); see also Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 589 (2011) (noting the argument that provocation is a “shield for male violence, especially violence toward women”).

188. 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.”).

189. See, e.g., Miller, *supra* note 21, at 683 (contending that the MPC supports norms that excuse violence).

190. See, e.g., Coker, *supra* note 30, 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”).

191. Morse, *supra* note 52, at 198.

192. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 48 (2012) (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”) (emphasis in original); Ristroph, *supra* note 187, at 613 (noting that the “call to focus [critically] on actual physical violence has largely gone unheeded”).

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 impliedly 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,”¹⁹³ for a few reasons. First, such claims depend for the most part 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.¹⁹⁴ Second, critics’ empirical assertions that tougher criminal laws increase social utility generally lack evidentiary foundation.¹⁹⁵ 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.

IV.

DEFENDING PROVOCATION

This Part does not intend to be a polemic against the feminist position but rather hopes 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,

193. See Dressler, *supra* note 13, at 966 (noting the 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”).

194. Although Feinberg specifically disavows this claim, *see infra* note 325 and accompanying text, some commentators appear to assume that criminal laws that condemn certain crimes actually reduce those crimes. Without addressing the voluminous literature on deterrence, see, e.g., JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 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.

195. See, e.g., Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1249 (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) (emphasis in original). To be fair, provocation defenders sometimes simply assume that passion crimes are undeterrable, an assumption severely critiqued by feminist scholars. *See Coker, supra* note 30, at 103.

can be applied in a biased manner and in a way that reflects dominant cultural paradigms. Rather, 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.¹⁹⁶ In turn, progressives repeatedly expend scholarly energy on demonstrating the truth of this account. However, in doing so, scholars 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 twentieth-century American penal state? 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.¹⁹⁷ In problematizing the arguments in the feminist critique, this Article hopes to create the conditions under which critical scholars can be more open to re-examining the merits of the provocation doctrine.

A. *Provocation Law Has a Complex History*

Today, the critical history of provocation serves less as a counter to the law's assumed validity and more as irrefutable proof of the doctrine's congenital gender defects. A compelling method critics use to discredit the provocation doctrine is exposing its apparently chauvinist origins.¹⁹⁸ 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 uncontroversial one. History is, by definition, retrograde. Some feminist provocation critics use critical history to counter the assumed legitimacy and neutrality of existing law.¹⁹⁹ 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,²⁰⁰ the feminist critical history serves as an important equipoise.²⁰¹ While this point is well taken, the current scholarly consensus seems not to be that the provocation defense is

196. See *supra* note 20 and accompanying text.

197. See *supra* note 144 and accompanying text.

198. See *supra* Part III.A; notes 124–25 and accompanying text.

199. See generally Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (mapping the arguments of critical legal theorists who retell history).

200. See *supra* text accompanying note 11 (California Supreme Court emphasizing the long history of the doctrine).

201. See, e.g., HORDER, *supra* note 15, at 25–29 (retelling the history of provocation and connecting seventeenth-century provocation doctrine to “honour theory”).

inherently neutral, but that it is inherently biased and illegitimate.²⁰² Today, the feminist alternative history of provocation is arguably the dominant account of the defense, and it is doing a lot of work. The common wisdom is that provocation is an inherently sexist doctrine.²⁰³

The historical argument, which highlights the provocation doctrine's ties to chastisement and ownership of women as property, has undeniable persuasive value on an aesthetic level. However, provocation's history, as one might expect, is far more complicated than a one-dimensional gender account suggests.²⁰⁴ Moreover, a myopic focus on one particular aspect of a doctrine's history can lead to an impoverished contemporary assessment of the doctrine.²⁰⁵ The official feminist story of provocation is that it was formulated to encourage exercises of masculine honor (dueling and brawling) and to reinforce women's domestic inferiority.²⁰⁶ Undeniably, 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 during the seventeenth century. Nevertheless, the claim that the provocation doctrine's primary purpose was to bolster gender roles and justify chastisement misaligns with historians' official story of the defense.²⁰⁷ Gender inequality is but one player in provocation's intricate historical libretto.

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.²⁰⁸ Experts characterize the emergence of provocation principles in fifteenth-century England as a response to the harshness of the extant murder liability and sentencing regime.²⁰⁹ At that time, nearly all killings were punishable as murders, and murder convictions necessitated the death

202. See, e.g., Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 263 (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").

203. See *supra* note 25 and accompanying text.

204. 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. I simply consider the historical papers and cases upon which critical articles, themselves, rely.

205. 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 P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 600 (1990).

206. See *supra* Part III.B.

207. See *infra* notes 213–33 and accompanying text.

208. 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 seventeenth century official doctrine "was fashioned almost exactly in accordance with the medieval juries' understanding of . . . excusable homicide").

209. HORDER, *supra* note 15, at 7–9; Ashworth, *supra*, note 32, at 292; Bernard Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law*, 7 AM. J. LEGAL HIST. 310, 310–11 (1963).

penalty.²¹⁰ By the seventeenth century, courts solidified the legal doctrine of provocation, and defendants claimed provocation as a matter of course to rebut the presumption that they acted with malice and evade execution.²¹¹ Consequently, history shows that the primary purpose of the doctrine was literally to mitigate the harsh effects of an unforgiving legislative regime.²¹² According to experts, the doctrine continued to function as a counterweight to popular penal tendencies well into the nineteenth 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.²¹³

A feminist critic might counter 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 only available to men whose violent reactions fit the cultural standard, it inevitably benefitted murderous men who engaged in chastising violence against women.²¹⁴ Even this account, however, does not appear to be a completely accurate historical depiction of the doctrine. Feminist critics base their claim that provocation is about the domestic control of women primarily on two sources, the seventeenth-century *Manning's Case*²¹⁵ and eighteenth-century *Regina v. Mawgridge* case.²¹⁶ In *Manning's Case*, the court stated that there "could not be greater provocation" than adultery,²¹⁷ and in *Mawgridge*, the court, in dicta, approved of adultery as a basis for provocation, calling it the "highest invasion of property."²¹⁸ Provocation critics place an enormous amount of weight on *Manning's Case* as clear evidence of the inextricable link between the

210. The provocation doctrine permitted defendants to seek the "benefit of clergy," meaning they could avail themselves of the more lenient sentencing principles available to clergy accused of crimes. See HORDER, *supra* note 15, at 13–15; see also Brown, *supra* note 209, 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, *Rethinking Passion*, *supra* note 32, at 426 (asserting that in the sixteenth century, the doctrine reflected the view that "[t]he death penalty was viewed as an inappropriate and excessive response" to deaths occurring as a result of "drunken brawls and breaches of honor").

211. See Ashworth, *supra* note 32, at 292 (contending that in the seventeenth century "[k]illings were presumed to proceed from malice aforethought: if there was no evidence of express malice, then the law would imply malice").

212. Cf. HORDER, *supra* note 15, at 26–29 (contending that the formal provocation doctrine that emerged in the seventeenth century might not actually be contiguous with past versions of provocation and, instead, may be reflective of the unique values and practices of the time).

213. GR. BR. LAW COMM'N, *supra* note 76, at 299.

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

215. [1671] 83 Eng. Rep. 112 (K.B.).

216. R. v. Mawgridge, (1706), 84 Eng. Rep. 1107, 1115 (K.B.); see *supra* notes 124–25.

217. 83 Eng. Rep. at 112.

218. *Mawgridge*, 84 Eng. Rep. at 1115.

development of the doctrine and women's status as men's property. However, Lord Hale's *Pleas of the Crown*, a seminal work in the doctrine's development, actually does not reference the *Manning's Case* or the adultery category at all in its discussion of provocation.²¹⁹ Rather, Hale mentions the case only haphazardly in an unrelated section,²²⁰ leading one nineteenth-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."²²¹

It is also noteworthy that in both the *Manning* and *Mawgridge* cases, the court tolerated only male-on-male violence.²²² These cases may thus reflect the norm that men are entitled to lash out against men who seduce their women, but not against women.²²³ Accordingly, the dominant gender bias evidenced by the early English cases may actually be a woman-*protecting* bias.²²⁴ Indeed, other historical research undermines the notion that wife killing was a legitimate and socially favored form of chastisement. Rather, it demonstrates that premodern 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 murder convictions for male defendants and more lenient treatment of wronged women

219. 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 455–57 (Philadelphia, Robert H. Small 1847) (setting forth six illustrations of adequate and inadequate provocation).

220. *Id.* at 486.

221. 3 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 63 (London, MacMillan & Co. 1883) (discussing HALE).

222. *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."); *Mawgridge*, 84 Eng. Rep. at 1115 (stating that "if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter").

223. Feminist 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 killed women, and jurists did not extend the defense to wife killers until later. 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 for wife killing. *See, e.g.*, Sing, *supra* note 146, at 1868 (tracing the approval of wife killing to the view of women as property).

224. 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 39 (quoting ABRAHAM BOSQUETT, *THE YOUNG MAN OF HONOUR'S VADE-MECUM* 17 (London, C. Chapple 1817)).

charged with killing their abusers.²²⁵

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.²²⁶ One might think of many other problems with viewing all women as weak, nonviolent, perpetual victims.²²⁷ 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.²²⁸ 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).²²⁹

It may nonetheless seem fair to characterize the law's condoning of male-on-male violence as indivisibly bound up with notions of honor.²³⁰ Yet, even this account may underdescribe the doctrine's historical underpinnings. While the early cases that endorsed killings based on dignity affronts or witnessed adultery gave a nod to the fragile male ego, masculine honor fails to account for the category of witnessing unlawful arrest.²³¹ 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."²³² This skepticism of governmental authority led jurists to apply the unlawful arrest category to defendants who resisted such arrest, even when, at the time of resistance, they were unaware of the illegality.²³³ Compare this

225. Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 43 (2010).

226. 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 Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 786 (2001) (observing the "patriarchal norms" that women are "passive, modest, and under male protection"); Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 154 (2004) (noting "the discourses which construct women as damaged, helpless . . . victims"); *infra* Part IV.D.1. See generally Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1 (1994).

228. See *supra* note 28 & Part III.A.

229. Ashworth, *supra* note 32, at 294. Ashworth cites to *Maddy's Case* and notes that the judge instructed the jury to convict of murder if they found that Maddy acted on a previous plan of revenge. *Id.* (citing *Regina v. Maddy*, 1 Vent. 158 (1671) reprinted sub. nom. *Regina v. Manning*, [1671] 83 Eng. Rep. 112 (K.B.)).

230. See *supra* note 140 and accompanying text.

231. *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 233 and accompanying text.

232. Ashworth, *supra* note 32, at 293 (quoting *Hopkin Huggett's Case* (1666) 84 Eng. Rep. 1082 (K.B.)).

233. *Id.* at 293-94 (citing *Queen v. Tooley* (1709) 92 Eng. Rep. 349 (K.B.); 2 Ld. Raym. 1296.).

seventeenth-century English suspicion of state authority to arrest to the current laws in most American states explicitly forbidding citizens to resist unlawful arrest.²³⁴

Is the provocation defense ultimately 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 history of the provocation doctrine, like many laws, includes 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, analyzing the history of the provocation defense neither demonstrates its inherent neutrality nor proves its fundamental sexism.

B. Provocation Law Does Not Necessarily Underpunish Culpable Men in Noteworthy Numbers

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.²³⁵ 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).²³⁶ Accordingly, it is possible to distinguish the damaged, emotionally wounded, masculinity-norm influenced, heartbroken man who lashed out from, say, Sammy “the Bull” Gravano, who killed for money.²³⁷

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

234. See, e.g., HAW. REV. STAT. § 703-304(4) (West 2008) (a person may not use force to “resist an arrest which the actor knows is being made by a law enforcement officer”); see MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: THE POLICE 382 (4th ed. 2011) (“[M]ost states now require citizens to submit to unlawful arrests by police officers—about a dozen through judicial opinions and roughly another twenty states through statutes.”).

235. See *supra* Part III.B.

236. See Daniella Levine, *Children in Violent Homes: Effects and Responses*, FLA. B.J., Oct. 1994, at 62, 63 (noting that in a study of batterers, 73 percent of men reported having been physically or sexually abused as children); cf. Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 291–300 (2002) (explaining that domestic violence may occur when lower-status men “subordinate others in order to compensate for their own vulnerability and powerlessness”).

237. See John J. Goldman, *Gotti Accuser Sentenced to Five Years in Plea Deal*, L.A. TIMES, Sept. 27, 1994, http://articles.latimes.com/1994-09-27/news/mn-43689_1_organized-crime (noting that Sammy “the Bull” was sentenced to five years for his involvement in nineteen murders in exchange for testifying against mobster Jon Gotti).

an enemy?) to ultimately heinous (Jeffrey Dahmer?) with plenty of room for retributivist debate over where any given killer should fit on the spectrum.²³⁸ Why is it so easy to claim that battered women who kill abusers are innocents and, yet, so difficult to contest that a gang member, who grew up in gang culture and kills a rival gang member, commits deliberate murder?²³⁹ There are a host of racialized, gendered, class-based, socially constructed, and idiosyncratic assumptions, fears, and values that influence seemingly objective retributive intuitions.²⁴⁰ Add to this multiple “interpretive constructions,” such as broad versus narrow time framing, and determining levels of culpability becomes a next-to-impossible task.²⁴¹ Nevertheless, I will fully accept the claim that sexist men who kill their partners are culpable for murder. Even so, it is still possible to defend against the claim that provocation law underpunishes this class of murderers.

238. See R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 7–8 (Michael Tonry ed., 1995) (“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).

239. 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*, COURIER-J. (Dec. 10, 2007, 3:34 AM), <http://archive.courier-journal.com/article/20071210/NEWS01/712100398> (“Gov. Ernie Fletcher granted clemency, pardons or early parole reviews yesterday to twenty-one 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*, N.Y. TIMES, Dec. 22, 1990, <http://www.nytimes.com/1990/12/22/us/clemency-granted-to-25-women-convicted-for-assault-or-murder.html?n=Top2fReference2fTimes20Topics2fSubjects2fA2fAmnestiesandPardons> (“Gov. Richard F. Celeste of Ohio granted clemency today to 25 women who had been convicted of killing or assaulting husbands or companions who the women said had physically abused them.”). Yet, they find it incredibly difficult to view people like gang members as victims. See, e.g., Bill Clinton, President of the U.S., Address in Support of a Victims’ Rights Amendment (June 25, 1996), available at http://www.pbs.org/newshour/updates/law/jan-june96/victim_06-25.html (“We sure don’t want to give criminals like gang members, who may be victims of their associates, any way to take advantage of these rights just to slow the criminal justice process down.”).

240. There is a plethora of social science research demonstrating that people’s determinations of culpability are racialized. See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (“The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.”); *id.* at 885–87 (reporting that a research subject, after being primed with crime-related words or photographs, paid more attention to black than white faces); Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315, 1315 (mock jury study finding that “[i]n general, it was advantageous for defendants to be physically attractive, female, and of high [socioeconomic status]”); Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 621 (2005) (completing meta-analysis of existing race and juror decision-making studies and concluding that race has a “significant” effect on jurors’ decisions).

241. See Kelman, *supra* note 41, at 646–47 (focusing on arbitrary temporal lines accepted by retributivism that exclude considerations of a defendant’s background).

The thrust of many of the critiques is that provocation relieves sexist intimate killers of murder liability at unacceptable levels.²⁴² This, of course, begs the threshold question of what *is* an unacceptable level. One might reply that even one sexist defendant who succeeds in his provocation defense is unacceptable and cite the facts of a particular heinous case to support this contention.²⁴³ However, all legal rules operate within a cultural milieu and occasionally produce undesirable results. Pointing to 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. 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.²⁴⁴

Provocation critics assume that exonerations of sexist men occur in substantial or at least noteworthy numbers, but they provide little evidence in support.²⁴⁵ The data set from the 1996 *Passion's Progress* resembles the closest thing to confirmation by trying to demonstrate that defendants who asserted that they were provoked at least in part by the victim's attempt to leave are extremely successful at getting their claims to the jury under the MPC's EED law.²⁴⁶ For there to be an underpunishment problem, however, juries must largely *accept* these claims and decide to mitigate. In the majoritarian story where the provocation defense itself perpetuates gender bias in favor of wife killers, juries feel compelled to mitigate even though they find the men despicable.²⁴⁷ 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.²⁴⁸ If the reasonableness requirement is defined subjectively, juries must adopt the defendant's point of

242. See *supra* Part III.B.

243. See *supra* notes 126–28 and accompanying text (discussing the use of narrative).

244. 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 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.”); 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 policy makers to “eliminate defense-friendly rules that impede convictions, and ensure ‘adequate’ punishment.”); Carrie T. Hollister, *The Impossible Predicament of Gina Grant*, 44 *UCLA L. REV.* 913, 923–24 (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”).

245. See *supra* Part III.B.

246. See *supra* notes 148–49 and accompanying text.

247. See *supra* notes 152–53 and accompanying text.

248. See *supra* note 45 and accompanying text (discussing EED).

view to some extent.²⁴⁹ 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 research on the subject confirms that jurors predisposed to convict are not dissuaded by instructions about the nuances of law.²⁵⁰

The alternative account is that 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 due to biases infused in society, and the law must be reformed to check the majority's discriminatory tendencies.²⁵¹ But this story may not reflect reality. The scant evidence that exists on whether sexist defendants who concern feminists 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 ten-year period.²⁵² 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 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.²⁵³

249. 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." MODEL PENAL CODE § 210.3(1)(b) (1980).

250. 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).

251. See *supra* notes 150–51 and accompanying text.

252. Stuart M. Kirschner et al., *The Defense of Extreme Emotional Disturbance: A Qualitative Analysis of Cases in New York County*, 10 PSYCHOL. PUB. POL'Y & L. 102 (2004).

253. *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 25, at 61–63. Critics also fail to entertain the possibility that there was never the widespread leniency they presumed existed.

In Kirschner's study, prevailing EED defendants were generally those facing some physical threat.²⁵⁴ For example, one successful EED case involved a sixty-seven-year-old double amputee killing a younger male who had repeatedly bullied him and extorted money from him.²⁵⁵

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.²⁵⁶ Even accepting the empirical observation as accurate,²⁵⁷ 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.²⁵⁸ Subpart D addresses the expressivist argument below.

In any case, this inquiry should not end with establishing that the absolute number of sexist defendants' provocation claims that reach the jury or result in mitigation is undesirable. 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 who are not in the disfavored class (i.e., women defendants, men who kill men, etc.) as a cost or benefit?²⁵⁹ Moreover, there are likely to be many disagreements about the threshold at which costs outweigh benefits.²⁶⁰ My instinct, however,

254. Kirschner et al., *supra* note 252, at 130.

255. *Id.* at 120.

256. *See supra* notes 109–11 and accompanying text.

257. A quick perusal of intimate homicide cases on Westlaw demonstrates (albeit only anecdotally and unscientifically) that judges are quite willing to deny a 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 et al., *supra* note 252, 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.") (internal citations omitted).

258. *But see* Forell, *Gender Equality*, *supra* note 25, at 44–45 (attributing the tendency of provocation claims to reach the jury to Americans' "distrust of government" and prioritization of individual rights).

259. *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).

260. For example, a dominance feminist might consider maximizing women's protection against violence as essential to dismantling male supremacy and therefore would 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 the exploiters extends and multiplies the rights of those they have been exploiting.").

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, murder sentencing regimes and the demographics of murder defendants provide insight into the law's impact. I have written on this extensively in another article, and will only mention it here.²⁶¹ 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.²⁶² In fairness, some feminist critics couple their arguments for narrowing provocation with a call to reform the over-punitive sentencing structure.²⁶³ Others, however, concentrate only on how reformed law might affect sexist intimate killers and largely disregard the broader impacts of their proposals.²⁶⁴ 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 10 percent of all homicides.²⁶⁵ After examining the demographic information, I have 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."²⁶⁶

C. *Provocation Law Does Not Necessarily Formally Discriminate Against Women*

Provocation critics often purport to adopt a liberal formal equality framework²⁶⁷ that forbids law to treat men better than women and vice versa.²⁶⁸ In essence, provocation doctrine should regard "similarly situated" male and female defendants similarly. Critical legal scholars have exhaustively critiqued

261. See generally, Gruber, *Murder*, *supra* note 32, at Part IV.B.

262. See *id.* (citing statutes).

263. See, e.g., Nourse, *supra* note 122, at 364 n.11; Ramsey, *supra* note 225, at 90 (noting provocation critics' concerns over "totally abolishing the provocation doctrine in the United States, without concurrent changes to our draconian sentencing structure").

264. See sources cited *supra* note 21.

265. See Gruber, *Murder*, *supra* note 32, at 183–84 (citing ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 10, 18 (2011)).

266. *Id.* at 185.

267. 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.

268. 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").

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.²⁶⁹ 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.”²⁷⁰ 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.²⁷¹ 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 we should simply do *whatever favors the (identified) woman* in any given case.²⁷²

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 over female defendants. They assert the doctrine excuses only masculine violence provoked by affronts to male dignity.²⁷³ It does not necessarily accommodate women who, according to critics, kill out of fear, depression, and frustration based on different types of provoking behavior.²⁷⁴ Accordingly, commentators reason that male defendants must benefit disproportionately from the defense.²⁷⁵ The durable nature of this argument is particularly astounding given that the empirical evidence has never demonstrated that men are more successful at defending on provocation

269. See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 21 (1984) (contending that liberal feminism “aims to grant women greater equality of opportunity within the present white supremacist capitalist, patriarchal state”); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 181, 182 (Wendy Brown & Janet Halley eds., 2002) (observing that liberalism adopts a “special” view of equality that does not “involve the demand for equality in the distribution of income or wealth between social classes, regions, or communities” but “equal protection” for members of certain groups); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1307 (1987) (noting the critique that formal equality does not “challenge[] the assumed gender-neutrality of social institutions”); see also Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1332–38 (2013) (discussing liberal feminism and its critics).

270. See Littleton, *supra* note 269, at 1306.

271. See *infra* Part IV.C.2.

272. See, e.g., Forell, *Gender Equality*, *supra* note 25, at 29–30 (rejecting “formal equality” and proposing to apply “substantive equality [which] would mean that killing in a heat of passion out of sexual possessiveness would no longer be an acceptable basis for a claim of provocation” but “killing one’s batterer out of fear would often be a basis for self-defense”).

273. See *supra* notes 78–79 and accompanying text.

274. See *supra* notes 80–81 and accompanying text.

275. See *supra* notes 157–64 and accompanying text.

grounds than women.²⁷⁶ If anything, the opposite is true.²⁷⁷ Women defendants are more successful at defending against murder charges than men, just as they are more successful in defending against most crimes and obtaining favorable sentences.²⁷⁸

How feminist critics frame the issue 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*.²⁷⁹ The problem is that the doctrine gives male defendants a benefit they do not deserve (mitigation) and denies female defendants a better disposition (acquittal).²⁸⁰ Consequently, even if the provocation defense

276. 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.” See Miller, *supra* note 76, 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 eighteen 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 three 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.

277. See PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES iii–iv (1995) (conducting study of spousal homicide cases in 1988 in the seventy-five largest urban counties and discovering that female defendants were convicted less often, given lower sentences, and that unprovoked female convicts received on average ten years less time than unprovoked male convicts); Ramsey, *supra* note 225, at 43 (noting that historically “women in United States, Britain, and Australia have been acquitted of murder more often than their male counterparts”).

278. See generally Laurie L. Ragatz & Brenda Russell, *Sex, Sexual Orientation, and Sexism: What Influence Do These Factors Have on Verdicts in a Crime-of-Passion Case?*, 4 J. SOC. PSYCHOL. 341 (2010) (conducting a study involving mock-passion killings and finding that “heterosexual female defendants were less guilty and received the shortest sentences” and “[b]enevolent sexism contributed significantly to guilt perceptions”); see also Amy Farrell, Geoff Ward & Danielle Rousseau, *Intersections of Gender and Race in Federal Sentencing: Examining Court Contexts and the Effects of Representative Court Authorities*, 14 J. GENDER RACE & JUST. 85, 85–86 (2010) (“[L]eniency toward women has become an almost accepted phenomenon among scholars studying criminal case processing.”); Schmall, *supra* note 137, at 288 (noting that women receive disproportional leniency in sentencing).

279. See, e.g., 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 of women should be higher); Milgate, *supra* note 21, at 194–95 & 227 (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).

280. 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 batterers. 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

disproportionately mitigates the charges of female defendants, critics retain the feeling 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.²⁸¹ However, the question of what any given defendant deserves is distinct from the issue of disparity.²⁸² Discrimination claims rest on the logic that similarly situated individuals should be treated similarly.²⁸³ 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.²⁸⁴ Therefore, it seems that provocation critics simply “refer[] to ‘equal protection under the law’ as if it were a platelass 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.”²⁸⁵

Critics censor the provocation defense for adopting a “male” perspective of aggression and argue that equality demands reform of this perspective.²⁸⁶ The law, critics contend, should not condone the reasoning of aggressive men and allow their defense attorneys to put women victims on trial.²⁸⁷ At the same time, critics aspire to a provocation doctrine that vigilantly scrutinizes male victims’ behavior in order to put female defendants’ cases in their proper “context.”²⁸⁸ 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

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 batterers not fully excused based on self-defense?

Forell, *Gender Equality*, *supra* note 25, at 28–29 (internal citations omitted).

281. 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.

282. *See* Burke, *supra* note 143, 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).

283. *See supra* note 268 and accompanying text.

284. 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 25, at 29–30. But this simply begs the question of why substantive equality prescribes a proposal to treat men and women differently.

285. Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 731 (1982) [hereinafter *Jurisprudence*].

286. *See supra* notes 21 & 99 and accompanying text.

287. *See supra* note 19 and accompanying text.

288. *See supra* notes 79–80 and accompanying text.

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 from the victim's standpoint, the usual view in feminist critique, becomes less instantly compelling when *she* killed *him*.²⁸⁹

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.²⁹⁰ 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.²⁹¹

2. *Leniency Toward Male Offenders Is Not Inherently Bad for Women*

Provocation critics often sidestep some of the thorny issues above by bypassing questions of the relative effects of provocation on similarly situated male and female defendants; instead critics focus 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.²⁹² Sometimes critics assert that men disproportionately benefit from the provocation defense because the vast majority of homicide defendants are men.²⁹³ 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).²⁹⁴

However, tethering women's equality interests to crime victims' (perceived) interests in harsh retribution²⁹⁵ turns each instance of leniency

289. MacKinnon, *Jurisprudence*, *supra* note 285, at 727–28.

290. *See supra* notes 269–70 and accompanying text.

291. *See* Nourse, *supra* note 122, 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”).

292. *See supra* Part IV.C.2.

293. *See id.*

294. In reality, women are rarely victims of crime or criminal defendants. Men, especially men of color, are disproportionately both victims of crime and criminal defendants. *See generally* ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 (2011).

295. One might argue that victims do not actually benefit from harsh punishment of offenders. *See* MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 26 (2006).

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.²⁹⁶ But take a temporal step back. Maybe women are disproportionately acculturated to noncriminal behavior.²⁹⁷ Maybe women are disproportionately spared policing and prosecution.²⁹⁸ Maybe criminal laws disproportionately criminalize male but not female behavior because men have historically been the true legal subjects.²⁹⁹ 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.³⁰⁰ 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.³⁰¹ It is true that disparities that regard the general criminality of men and women seem to be remediable only through ratchet-up solutions.³⁰² 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.³⁰³ 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

296. See Dressler, *supra* note 13, at 977 ("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.").

297. See MacKinnon, *Jurisprudence*, *supra* note 285, at 731 ("Women are socially discouraged from physical engagement."); Kavita B. Ramakrishnan, *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, 314 (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").

298. See *supra* notes 276–77 (discussing disproportionate leniency toward women).

299. See *supra* notes 223–26 (noting the historical legal treatment of women as objects over which men dispute).

300. See *supra* notes 129–33 and accompanying text.

301. See *supra* note 84 and accompanying text.

302. See *supra* Part III.C.2.

303. The articles do not actually do the simple math on this point, but let us try it. Assume the world of 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).

censures differential treatment that tangibly detracts women.³⁰⁴ 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.³⁰⁵

Martha Minow observes:

[F]eminists 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.³⁰⁶

Provocation critics' female supremacist inclinations are apparent from the very framing of the discrimination question³⁰⁷—that is, 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 dominance feminism's view that the realm of private intimate relations is "women's realm of collective subordination."³⁰⁸ 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 passive responders to subordination by a violent man. Yet, completely ignored in this framework are other affected groups: 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).³⁰⁹

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

304. See Margareth Etienne, *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. Hoefel, *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).

305. See *supra* notes 223–26, 277–78 and accompanying text (discussing woman-protecting bias).

306. Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 972 (1998).

307. See Janet Halley, *The Politics of Injury: A Review of Robin West's Caring for Justice*, 1 UNBOUND: HARV. J. LEGAL LEFT 65, 74 (2005) (finding the assertion that "exceptional human good can be seen only 'from a truly woman- . . . centered perspective'" to be "female supremacist thinking").

308. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 168 (1989).

309. 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").

necessarily undermines women's interests and furthers men's interests and that men and women's interests are 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.³¹⁰ 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.³¹¹ Unlike male killers, who largely kill in nonintimate settings, female killers generally slay intimates (lovers, family members, and children).³¹² Thus, a legal change directed toward reducing leniency in intimate homicides increases severity in the one realm where women 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."³¹³ 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.

D. *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.³¹⁴ Like retributivism, expressivism is a fairly vague directive that may generate more questions than it answers.³¹⁵ What should criminal punishment symbolize? Why should it symbolize those things? Does leniency

310. See Dressler, *supra* note 13, at 977 (noting that the provocation defense is sometimes utilized by women).

311. See, e.g., Stacy, *supra* note 128, 1048–51 (proposing to ratchet up punishment by treating "familial obligations" as an aggravating factor).

312. See Schmall, *supra* note 137, at 301 (observing that "[w]hen women are violent, their violence is usually directed against a family member" and citing statistics); Stangle, *supra* note 137, at 706 ("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.").

313. Minow, *supra* note 306, at 972.

314. See, e.g., Harcourt, *supra* note 174.

315. See Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 428–31 (2005) (asserting that expressivists provide no satisfactory answer for why society expressing disapproval for crime justifies the infliction of punishment).

toward criminal actors express support for their criminal activities?³¹⁶ Moreover, expressivist theory does not provide a determinate method for deriving the expressive meaning of any given criminal law.³¹⁷ 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.³¹⁸ This makes leniency-conferring criminal doctrines especially vulnerable to expressivist attack.³¹⁹ One can always argue that defenses or procedural doctrines favoring defendants express approval for their condemnable behavior. After all, it is no easy feat to dispute tautological arguments like “harsh murder laws express disapproval of murder.”³²⁰ Moreover, focusing purely on the purported communicative function of criminal law tends to deflect attention away from the complex socio-legal structure in which the criminal law operates, and punishment’s often unpredictable and criminogenically escalatory effects.³²¹

316. Some expressivism proponents seem to answer this question in the affirmative. *See, e.g.,* Kahan & Nussbaum, *supra* note 118, 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. *See* Gruber, *Righting Wrongs*, *supra* note 174, at 469 (“[E]xpressivism fails to answer the important question, ‘What acts ought the punishing authority condemn?’”); Hurd, *supra* note 315, at 428 (“[E]xpressivism cannot deliver up a concept of social meaning that is coherent and determinate in its implications for particular cases.”); *cf.* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1369–70 (2000) (exposing the difficulty of determining what it means to say that a law expresses a message); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 562–63 (2001) (asserting that expressivists believe that laws express “objective” meanings and thereby render the concept of meaning “unintelligible”).

318. The same law might be described to express opposing messages (e.g., “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 174, at 169 (emphasis in original).

319. 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).

320. The malleability of retributive rhetoric similarly enables those holding tough-on-crime ideals to argue that any given law inappropriately underpunishes criminals. *See* 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 (2003) (asserting that retributive rhetoric “has tended to sponsor extreme policies and practices that thoughtful retributivists themselves might well renounce”) (quoting Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1839 (1999)); Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 747 (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.”).

321. Leaping from the claim that “harsh murder laws condemn murder” to “harsh murder laws reduce murder” happens almost unconsciously. Feinberg himself, however, was careful to divorce the expressive function of the law from other functions. *See* Feinberg, *supra* note 174, at 101 (“Symbolic public condemnation added to deprivation may help or hinder deterrence, reform, and rehabilitation—the evidence is not clear.”).

Perhaps incarceration skeptics might also utilize expressivist framing and assert 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 than on what such laws communicate in some abstract sense.³²² Indeed, the trend toward expressivist justifications of punishment dovetails with Americans' increasing desire to communicate solidarity with victims rather than offenders.³²³ The trend also finds synergy with what philosopher James Whitman identifies as a basic social desire in contemporary society, not just to ostracize, but to degrade those identified as criminals.³²⁴ Expressivist theory thus provides a ready philosophical tool for 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.³²⁵ Consequently, critics of the carceral state tend to view expressivist 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, for instance, communicate a racial and political, rather than moral, message—a message about who is in control and about who gets controlled.³²⁶

Let us now turn to the particular expressivist arguments included in 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. Indeed, 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 whether they have fallen into desuetude or are rarely enforced.³²⁷ There is a powerful argument that

322. See, e.g., Harcourt, *supra* note 174, at 171 (“[I]nstead of isolating 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.”).

323. 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”).

324. James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 106–07 (2003) (“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.”).

325. This may actually be what Feinberg hoped would *not* occur. See Feinberg, *supra* note 174, at 116 (expressing a preference against corporal punishment altogether).

326. Harcourt, *supra* note 174, at 168.

327. Elysa Delcorto, *Repeal of Alien Land Law Long Overdue, Some Say*, NAPLES DAILY NEWS (Oct. 24, 2008, 8:28 PM), <http://www.naplesnews.com/news/2008/oct/24/repeal-alien-land-law-long-overdue-some-say/> (discussing advocates' efforts to take the long-unenforceable alien land

facially discriminatory laws are unacceptable, even if they end up having positive social effects.³²⁸ A law stating, for example, “men are always justified in killing their wives,” would be unacceptable even if there existed 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.³²⁹

Unlike alien land laws, however, provocation law is not facially discriminatory. The doctrine does not explicitly endorse the view that men are entitled to become murderously enraged by speculative evidence of infidelity or separation. By contrast, 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.³³⁰ Consequently, some theorists make the somewhat mystifying argument that broad versions of provocation *silently* express regressive sexist values.³³¹ 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 doctrine’s history and its present effects are quite complex.³³² If the language of the defense is neutral, its history is heterodox, and it does not currently disproportionately exonerate male intimate killers, it is difficult to see how the doctrine expresses that men are “*women’s* natural aggressors.”³³³

In addition, provocation critics’ reform proposals may compound rather than suppress provocation law’s potential to express gender stereotypes. Stereotyping, like disparity, is a two-way street. Critics contend that

laws, which prevented “aliens ineligible for citizenship” (namely Asians) from owning land, off Florida’s books).

328. *See id.* (quoting Sen. Geller, who stated that, despite the Alien Land Law’s lack of any real enforcement, “I authored the legislation because I am opposed to having organized racism in our constitution.”).

329. This scenario is far from fantastical given evidence regarding the relationship between the hyperpunitive legal regimes and incidences of intimate violence among subordinated people. *See* Zanita E. Fenton, *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 in a systematically deprived society that is designed to dominate and control third world people”) (quoting Beth Richie, *Battered Black Women: A Challenge for the Black Community*, BLACK SCHOLAR, Mar.–Apr. 1985, at 41); Richard S. Frase, *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).

330. *See* Berman & Farrell, *supra* note 32, at 1038 (observing that only two jurisdictions adopt a categorical approach).

331. *See, e.g.,* Forell, *Gender Equality*, *supra* note 25, 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”); Nourse, *supra* note 27, at 1334 (asserting that provocation’s normative messages are “disguised—and therefore rendered more powerful and resistant to change”); *id.* 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.”).

332. *See supra* Part IV.A (discussing the doctrine’s history); Part IV.B (discussing the doctrine’s effects).

333. HORDER, *supra* note 15 (emphasis in original).

provocation law transmits the message that men are naturally aggressive, especially toward female domestic partners.³³⁴ Constructing a legal regime that recognizes that women also can be violent and men can be nonviolent would be one way to remedy this expressivist problem.³³⁵ 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.³³⁶

These revisions, however, are clearly not the ones sought by feminist critics of provocation. Rather, critics take pains to portray a picture (one might say a stereotypical picture) of male intimate killers as violent pattern abusers and female intimate killers as true victims who are nonviolent by nature and only resort to aggression after suffering horrific systematic abuse. Those who advocate for a “reasonable woman” standard assume such reform will drastically reduce the provocation defense’s efficacy because everybody, including jurors, knows that women do not kill.³³⁷ The anti-stereotyping argument consequently runs up against the same dilemma as formal equality arguments.³³⁸ It is intellectually incoherent to both 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’s experience.”³³⁹

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, seemingly the most unquestionable and unassailable. Again, no progressive criminal law

334. See *supra* Part III.D.1.

335. Cynthia Lee has suggested “switching” instructions, whereby a jury is told to imagine a female defendant as a male and a male defendant as a female in order to reduce the potential for stereotyping. LEE, *supra* note 9, at 217–20 & 253–59. Ideally, a jury would then see an adultery-based killing committed by a woman as “normal.” *Id.* at 218. However, Lee has some trouble when it comes to battered women who kill. She does not endorse telling the jury to imagine a battered woman as a man or, indeed, imagine a man who claims to have been beaten as a woman. *Id.* at 219.

336. 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 for countering stereotypes that favor female self-defense claimants. Burke, *supra* note 143, at 1074. She states that “[f]earing that the jury would acquit . . . [she] 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.” *Id.* at 1074.

337. See FORELL & MATTHEWS, *supra* note 135, at 172 (“Under our proposed reasonable woman standard, nothing short of actual or imminent serious bodily harm would be legally adequate provocation.”).

338. See *supra* notes 289–92 and accompanying text.

339. See Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS* 405, 408 (1988) (observing that cultural feminists reappropriate female nature “in an effort to revalidate undervalued female attributes”).

professor desires to write a manifesto in support of violence.³⁴⁰ Especially to those sensitive to gender issues, it is quite compelling 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.³⁴¹

However, even one who believes 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.³⁴² Rather, such a large cultural feminist shift would also sacrifice the interests of female defendants who do not “kill like a woman” (i.e., do not kill in response to horrific systematic abuse).³⁴³ 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.³⁴⁴ Another popular tactic condemns such women for being excessively violent, just like their male counterparts.³⁴⁵ In this way, provocation critics maintain a commitment to women’s values even as they do harm to actual women.

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 to probe carefully the political meaning of anti-violence and question our culture’s unwavering faith in punishment as a means of achieving social harmony. First, the apparently pacifistic objection to provocation law actually has a conservative valence. The anti-violence stance adopts the prosecutorial ideology that exercises of punitive authority are unquestionably legitimate when done in the name of stamping out private violence.³⁴⁶ Moreover, feminists, as critical scholars, should acknowledge the semiotic aspects anti-violence discourse.³⁴⁷ The legal discourses of violence

340. See Forman, Jr., *supra* note 192, 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 32, 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”).

341. See, e.g., ROBIN WEST, *CARING FOR JUSTICE* 277–78 (1997) (advocating an ethic of care to “ultimately form the foundation of a feminist, maternalist (and humanist) moral theory”).

342. See *supra* notes 310–12 and accompanying text.

343. See Taylor, *supra* note 77, at 1734 (noting 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’”).

344. See MacKinnon, *Jurisprudence*, *supra* note 285, at 714–17 (critiquing ANN JONES, *WOMEN WHO KILL* (2009), for assuming the lesser culpability of all women killers).

345. See, e.g., Forell, *Homicide*, *supra* note 128, at 617 (asserting that the law should “make[] it clear that infidelity is almost never an adequate excuse for killing regardless of the genders of the parties”).

346. See *supra* note 243.

347. See Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147, 1147, 1175–83 (2001) (discussing the “theory *langue*” of critical legal studies).

have meaning in context and, in turn, give meaning to other specific contexts. Violence does not exist in a vacuum as some immutable thing in itself—its meaning is contingent and ideologically driven.³⁴⁸ Anti-violence dialogue operates within a political dynamic where multiple interest groups with different amounts of power invoke the discourse for a variety of goals.³⁴⁹ In criminal law discourse, the prevention or punishment of violence is not synonymous with reducing any harm produced by any actor (individual or institutional). Addressing violence means 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.³⁵⁰ 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 not only enjoys complete immunity from governmental intervention, but also active encouragement.³⁵¹ Even when the violence of these institutional actors crosses some opaque line into “excessive force,” the criminal law often fails to intervene.³⁵² Regarding 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.³⁵³ “Thus, violence within modernity is usually

348. See Ristroph, *supra* note 187, at 575 (asserting that the discourse of violence does not “disentangle understandable concern for bodily safety from irrational fear, prejudice, or thoughtless punitiveness”).

349. For example, media executives and politicians have deftly managed a dialogue of black violence to further their goals. See David Cohen, Book Note, *Democracy and the Intersection of Prisons, Racism and Capital*, 15 NAT’L BLACK L.J. 87, 88 (1998) (reviewing David Oshinsky, “WORSE THAN SLAVERY”: PARCHEMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996)) (“The rhetorical driving force behind [the latter twentieth century] increase in incarceration is the ‘war on crime,’ and in this so-called war, the enemy is the faceless, nameless, identity-less African-American man doing violence to white society.”). Anti-violence discourse may support other interest groups, such as security companies and land developers. Cf. Jonathan Simon, *Crime, Community, and Criminal Justice*, 90 CALIF. L. REV. 1415, 1417 (2002) (linking increased securitization to “sprawl, traffic congestion, desertion of public spaces and institutions, and a national epidemic in childhood obesity”).

350. 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.”).

351. See Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 559–75 (2001) (documenting the culture of aggression and violence in the LAPD). See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004).

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

353. 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.”).

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.”³⁵⁴

Violence proscribed by the criminal law 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.³⁵⁵ 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 incremental and accretive, its calamitous repercussions playing out across a range of temporal scales.³⁵⁶

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.³⁵⁷ Far from being the solution to the slow death or “spirit murder”³⁵⁸ of the underprivileged, American criminal justice tends to be an aider and abettor of this form of violence.³⁵⁹ 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, overattention

354. Peter Jacques et al., *Federal Indian Law and Environmental Policy: A Social Continuity of Violence*, 18 J. ENVTL. L. & LITIG. 223, 226 (2003).

355. See generally ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* (2011).

356. *Id.* at 2.

357. See, e.g., 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) (“Society 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.”); 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.”).

358. See WILLIAMS, *supra* note 357.

359. See Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 228 (2008) (citing multiple studies demonstrating that U.S. criminal justice tears apart minority communities, disrupts informal social controls, and ultimately has a “perverse escalatory effect[.]”); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298–99 (2004).

to “fast violence” helps perpetuate slow violence.³⁶⁰ Thus, provocation critics’ well-founded concerns about women’s suffering translate solely into proposals to increase the policing of bad men rather than reforms that challenge the institutional, economic, and structural inequality that makes some women vulnerable to “fast” violence and harms other women in a variety of ways.

In addition to rendering the violence done to subalterns invisible, anti-violence criminal law discourse creates a presumption within the public psyche that authoritarian state intervention into the lives of the underclass (especially poor men of color) is *prima facie* justified.³⁶¹ While the harms produced by powerful government and corporate interests are all but totally excluded from the concept of violence, the language of violence proves remarkably adaptable in describing harms that are produced by poor minorities. Violent crimes include far more than intentional homicides and beatings. Crack cocaine is an epidemic of violence.³⁶² Gang membership is inherently violent.³⁶³ Drug addicted pregnant women commit violence against their fetuses.³⁶⁴ Criminal law’s campaign to end violence really boils down to the hyper-policing of the type of harms caused by the most unfortunate (and thus arguably least culpable) among us.³⁶⁵

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

360. See NIXON, *supra* note 355, 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 citation and quotation marks omitted) (quoting KEVIN BALE, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (2004)).

361. See *supra* note 239 (discussing studies on the racialized nature of violence).

362. 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”).

363. 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 (2011) (“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 also *supra* note 238 (discussing Clinton’s statement on gang member victims).

364. Krista Stone-Manista, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823, 824 (2009) (“Prosecutors bring criminal charges against pregnant women who use illicit drugs under a wide range of state statutes, including but not limited to those governing criminal child abuse, criminal child mistreatment, and attempted first-degree intentional homicide.”) (footnotes omitted).

365. Bernard E. Harcourt makes a similar argument about the discourse of harm. See *supra* note 174, 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).

victims of underclass violence are likely to be members of the underclass themselves.³⁶⁶ However, the anti-violence justification of criminal law goes beyond punishment for uncontroversially 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.”³⁶⁷ 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.³⁶⁸ 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.³⁶⁹

Although feminists and race scholars are highly critical of systemic oppression, hidden hierarchies, and the pervasive influence of hegemonic norms, they nonetheless often retain fidelity to the criminal system when faced with sexual and racialized private violence. As this Article is being written, progressives throughout the nation continue to call for the narrowing of self-defense laws in the wake of George Zimmerman’s acquittal.³⁷⁰ 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

366. 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”).

367. Ristroph, *supra* note 187, at 603 (emphasis in original).

368. See Ahmed A. White, *Industrial Terrorism and the Unmaking of New Deal Labor Law*, 11 NEV. L.J. 561, 562–63 (2011) (From the late 1870s until at least the late 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.”).

369. JACQUES DERRIDA, *Force of Law: The “Mystical Foundation of Authority,”* in *ACTS OF RELIGION* 230, 266–67 (2002).

370. See Kyle Hightower & Mike Schneider, *Jury Acquits Zimmerman of Second-Degree Murder*, ASSOCIATED PRESS (July 13, 2013, 10:08 PM), available at <http://www.blueridgenow.com/article/20130713/ARTICLES/130719897> (“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.”); Nick Wing, *Alan Williams, Florida Democrat, Will Push ‘Stand Your Ground’ Repeal After Zimmerman Verdict*, HUFFINGTON POST (July 15, 2013, 12:04 PM), 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”).

criminality.³⁷¹ Nevertheless, many pay more attention to the leniency of Florida's self-defense law than the narratives of race and criminality that led Zimmerman to profile Martin and influenced jurors to buy Zimmerman's story wholesale, which made him not guilty under any version of self-defense law.³⁷²

It is not leniency that creates racialized visions of criminality. Rather, they reflect and reinforce our hyper-policing, hyper-punitive culture.³⁷³ The tragic Michael Brown shooting and ensuing events in Ferguson starkly illustrate the problem of relying on police and prosecution to counter violence, especially violence in minority communities.³⁷⁴ For several decades, politicians, lawmakers, and the media have portrayed certain areas, specifically low-income minority neighborhoods, as sites of rampant violence and social disarray akin to "war zones."³⁷⁵ This narrative has undergirded some of the most condemnable practices of modern policing, including race-based stops, hyper-surveillance, and the use of military weaponry and tactics.³⁷⁶ Often, those controlling the policing and prosecution of violence in these neighborhoods are socioeconomically and racially distinct from the occupants, who experience de jure and de facto disenfranchisement.³⁷⁷ Accordingly, many

371. See *supra* note 239.

372. See Wing, *supra* note 370 (observing that Zimmerman's defense "ultimately didn't use 'Stand Your Ground' during the court proceedings").

373. Ted Chiricos et al., *Racial Typification of Crime and Support for Punitive Measures*, 42 CRIMINOLOGY 359 (2004) (study finding correlation between racial typification of crime and support for punitive measures).

374. See generally Huff Post: Michael Brown, HUFFINGTON POST, <http://www.huffingtonpost.com/news/michael-brown/> (last visited Jan. 2, 2015) (online portal on the Michael Brown case and Ferguson protests).

375. See, e.g., Jim Atkinson, *In the War Zone*, TEX. MONTHLY, Nov. 1988, available at <http://www.maryellenmark.com/text/magazines/texas%20monthly/905G-000-011.html> ("Vicious Jamaican crack dealers have turned a working-class neighborhood into occupied territory."); Ronald W. Reagan, President of the U.S., 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/1984/62084c.htm> ("Th[e] rise in crime, caused by a hardened criminal class, was fostered partly from a liberal social philosophy that too often called for lenient treatment of criminals."). For a more modern version of this characterization, see Nolan Peterson, *Chicago's Murder Rate Mirrors War Zone, Federal Data Shows*, FOXNEWS.COM, <http://nation.foxnews.com/chicago/2012/05/31/chicagos-murder-rate-mirrors-war-zone-federal-data-shows> (last visited Jan. 7, 2015) (discussing Chicago murder rate in "hot zones" and endorsing New York's targeted neighborhood policing, which is credited with "reduc[ing] overall crime rates in New York by 80 percent in the 1990s"). See generally Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001).

376. See generally Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539 (2014); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381 (2002).

377. See Peter Dreier & Todd Swanstrom, *Suburban Ghettos Like Ferguson are Ticking Time Bombs*, WASH. POST, Aug. 21, 2014, <http://www.washingtonpost.com/posteverything/wp/2014/08/21/suburban-ghettos-like-ferguson-are-ticking-time-bombs/>; Sean McElwee, *Black People, White Government*, AL JAZEERA AM. (Oct. 30, 2014, 2:00 AM), <http://america.aljazeera.com/opinions/2014/10/ferguson-africanamericanspoliticalrepresentation.html>.

minorities have little faith in the criminal system's ability to meaningfully protect marginalized groups from violence. For example, queer and transgendered legal theorists have become wary of calling for more criminal enforcement in the face of widespread violence against LGBTQ individuals. As Dean Spade notes, "Many queer and trans people are increasingly critical of criminalization and immigration enforcement, and are unsatisfied by the idea that the answer to the violence we experience is harsher criminal laws or more police."³⁷⁸ Thus, race theorist's commentary in the Zimmerman case paradoxically evidences amnesia about the racial injustice of the criminal system and support for the very policemen and prosecutors criticized as racially biased. Similarly, provocation critics strangely hope to send a message of feminine passivity through increasing the reach of the U.S. penal system—a system described as the embodiment of male "hierarchical rule and coercive authority" by bell hooks, a noted feminist system author.³⁷⁹

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 legitimizes 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.³⁸⁰

Second, feminist efforts to control fast violence expand the reach of the criminal system—a repository of hyper-masculinity that critics characterize as "a primary location of racist, sexist, homophobic, and class-biased oppression in this country"³⁸¹ and a system designed "to perpetuate and replicate existing

378. Dean Spade, *Their Laws Will Never Make Us Safer*, in *AGAINST EQUALITY: PRISONS WILL NOT PROTECT YOU* 1, 7–8 (Ryan Conrad ed., 2012).

379. 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*, 68 U. MIAMI L. REV. 961 (2014).

380. Harris, *supra* note 350, at 783–84 (internal quotations omitted).

381. Mari J. Matsuda, *Crime and Affirmative Action*, 1 J. GENDER, RACE & JUST. 309, 319 (1998).

power relations.”³⁸² To be sure, such critiques of the American penal state and mass incarceration are abundant in the criminal law literature.³⁸³

Nonetheless, provocation critics might argue that one can simultaneously address excessive imprisonment by reducing sentences generally and seek symbolic condemnation of masculine violence by narrowing the provocation defense.³⁸⁴ However, the call 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 community solidarity³⁸⁵ to retributive rhetoric and victims’ rights,³⁸⁶ scholars have amply theorized American-style penalty. Some commentators, including this author, have argued that pro-incarceration shifts in U.S. penal policy emanated in part from the transcendence of neoliberal political ideology in the latter twentieth century.³⁸⁷ Popular political rhetoric ascribed social problems to the actions of individual pathological actors and prescribed criminal law as the obvious remedy to such problems.³⁸⁸ Modern U.S. political discourse thus makes natural, invisible, and

382. Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 153 (1998).

383. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 23–40 (2008) (problematizing mass incarceration); *infra* notes 385–86 and accompanying text; see also Gruber, *Murder*, *supra* note 32, at 171 (“Today, the liberal critique of mass incarceration and the American penal state, an institutional critique, is well-trodden academic territory.”); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 133–34 (2011) (observing that “mass incarceration” describes the “explosion of Americans’ reliance on imprisonment”).

384. See *supra* note 263.

385. 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 (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 for the system’s increased severity).

386. See *supra* note 244 (discussing the victims’ rights movement).

387. See 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) (“[T]he widening of the penal dragnet under neoliberalism has been remarkably discriminating: . . . [I]t has affected essentially the denizens of the lower regions of social and physical space.”); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 618–19 (2009) [hereinafter *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.”) (footnotes omitted).

388. See, e.g., Reagan, *supra* note 375 (“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,

pre-political the correlation of social problems with penal solutions.³⁸⁹ 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 ascendancy of criminal law as a primary governance structure.³⁹⁰ 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, contribute to mass incarceration, and undermine women’s formal equality under the law. 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. The defense does not necessarily burden women unfairly nor does it particularly privilege sexist men. 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

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.”)

389. See Gruber, *Rape*, *supra* note, 387, 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.”).

390. 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 Presidents Bush and Reagan found defensible under their political ideology).

nonviolence, while unquestionably noble in theory, does not necessarily lead to a world with less suffering. In fact, police, prosecutors, 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 hath wrought."³⁹¹ More importantly, I hope that this Article is part of a larger conversation encouraging progressives—including feminists, humanitarians, and critical race theorists—to be more circumspect about prosecutorial solutions to gendered harms and racialized violence.³⁹² 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."³⁹³ 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.³⁹⁴ 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.

391. Ristroph, *supra* note 187, at 610.

392. 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).

393. David Cole, *Turning the Corner on Mass incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 27 (2011).

394. *See id.* at 34–39.

