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Equality and the Defence of Provocation: Irreconcilable Differences

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Equality and the Defence of Provocation:
Irreconcilable Differences

Recent amendments to the defence of provocation have limited access to the defence to those who are provoked by conduct that, if prosecuted, would have been an indictable offence punishable by at least five years imprisonment. The paper argues that these amendments are both over- and under-inclusive and fail to confront the central problem surrounding provocation which is that it privileges loss-of-control rage often in the context of male violence against women or in response to same-sex advances. The paper supports the abolition of the defence of provocation but only if mandatory minimum sentences for murder are abolished providing trial judges sufficient discretion in sentencing to consider the relevance of provocation.

Les récentes modifications apportées à la défense de provocation ont limité son accès à ceux qui sont provoqués par une conduite qui, si elle avait fait l'objet d'une poursuite, aurait constitué un acte criminel punissable d'au moins cinq ans d'emprisonnement. L'article soutient que ces modifications sont à la fois trop et pas assez inclusives et ne s'attaquent pas au problème central entourant la défense de provocation, à savoir que sont privilégiées les accès de colère et la perte de la maîtrise de soi, souvent dans le contexte de la violence des hommes contre les femmes ou en réponse à des avances faites par une personne du même sexe. Dans l'article, nous préconisons l'abolition de la défense de provocation, mais seulement si les peines minimales obligatoires pour meurtre sont abolies, ce qui conférerait aux juges de première instance un pouvoir discrétionnaire suffisant dans la détermination de la peine pour examiner la pertinence de la provocation.

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Introduction

The defence of provocation has long been the subject of vigorous debate and calls for repeal or abolition across many jurisdictions.¹ Until recently, important developments in the law of provocation, which was added to the Canadian *Criminal Code* in 1892, have been left to the judiciary.² In July 2015, significant legislative amendments to the provocation defence came into force,³ with very little consultation or input from lawyers or scholars across the country. These changes were made in the name of preventing

1. See, e.g., Kate Fitz-Gibbon, “Provocation in New South Wales: The need for abolition” (2012) 45:2 *Austl & NZ J Crim* 194; Adrian Howe, “Provoking Polemic—Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition” (2002) 10:1 *Fem Leg Stud* 39; Andr e C t , Diana Majury & Elizabeth Sheehy, *Stop Excusing Violence against Women* (Ottawa: National Association of Women and the Law, 2000); Joanne St. Lewis & Sheila Galloway, *Reform of the Defence of Provocation* (Ottawa: Status of Women Canada, 1995). The Response of the Canadian Association of Elizabeth Fry Societies to *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, online: <<http://www.caefs.ca/wp-content/uploads/2013/04/Response-to-the-Department-of-Justice-re-Reforming-Criminal-Code-Defences-Provocation-Self-Defence-and-Defence-of-Property.pdf>>; David Plater, Lucy Line & Kate Fitz-Gibbon, *The Provoking Operation of Provocation: Stage 1* (Adelaide: South Australian Law Reform Institute, 2017).

2. For a more detailed history of the development of section 232, see Wayne Renke, “Calm like a Bomb: An Assessment of the Partial Defence of Provocation” (2010) 47:3 *Alta L Rev* 729 at 730-735.

3. SI/2015-0067.

the use of the defence in honour killings.⁴ While reform of the defence of provocation was overdue, the defence remains problematic because Parliament chose to retain a standard based on the sudden loss of self-control, changing only what types of insults could trigger the defence.

Provocation is described as a recognition of “human frailties which sometimes lead people to act irrationally and impulsively.”⁵ The result of a successful defence is to reduce what would otherwise be murder to manslaughter, giving the trial judge flexibility in sentencing which is not available under our current sentencing regime for murder.⁶ The substance of the defence of provocation, prior to the recent amendments, was provided for in ss. 232(1) and (2) of the *Criminal Code* as follows:

(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

The Supreme Court of Canada has held that there is both an objective component and a subjective component to this defence.⁷ The accused had to raise a reasonable doubt that the provocation in question was a wrongful act or insult sufficient to cause an *ordinary* person to lose self-control and that the accused actually lost self-control and acted suddenly before his or her “passion” could cool. As we will discuss below, it is the objective component of this test that has led to the most discussion and controversy. Who is this ordinary person the accused is being judged against and what characteristics can be attributed to this fictional person?

The defence of provocation is the only defence in the *Criminal Code* that applies only to murder. There is no defence of provocation for a man who, for example, loses his self-control in response to provocation, assaults his spouse, and seriously injures her but does not kill her. There is no defence where the accused tries to kill the victim and she survives

4. *House of Commons Debates*, 41st Parl, 2nd Sess, No 232 (16 June 2015) at 15122 (Hon Chris Alexander): “We are also seeking to limit the defence of provocation, because honour, in whatever form, is not an excuse for violence.”

5. *R v Thibert*, [1996] 1 SCR 37 at para 4 [*Thibert*].

6. Stephen Coughlan has suggested that s 232 may best be described as a sentencing provision, in “Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change” (2002) 7:2 Can Crim L Rev 147 at 176 [Coughlan, “Duress, Necessity, Self-Defence”].

7. *R v Tran*, 2010 SCC 58, [2010] 3 SCR 350 [*Tran*].

only through some fortuitous route.⁸ For all other crimes, we leave it to the sentencing judge to determine whether the provocative acts of the victim were in fact mitigating. The only reason to have a special defence that applies only where the accused's rage is lethal is to avoid the mandatory minimum sentences for murder and, historically, the death penalty.⁹

In 2015, Parliament amended this defence but retained its underlying premise of a sudden loss of self-control which is to be judged against the standard of the ordinary person. Subsection 232(2) now reads:

*Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.*¹⁰

The key change is that the triggering insult for the defence is now conduct of the victim that would constitute an indictable offence punishable by five years or more of incarceration instead of “a wrongful act or insult.”

In this paper we argue that there is no principled way to support a defence premised on a sudden loss of control or sudden rage, often in the context of male violence against women or homophobic rage. We share the concerns of many critics of the defence who are hesitant to recommend its abolition because the sentencing regime for murder is so inflexible and harsh. However, if the sentencing regime for murder is flawed,¹¹ we must fix it, instead of perpetuating problematic defences to prop up a sentencing structure that is too rigid. We had hoped that the clear statement by the Supreme Court of Canada in *R. v. Tran*¹² about the need to limit the defence of provocation to conform with equality rights would be a beacon for future reform of the defence. However, while the recent amendments may rule out some problematic cases, they fail to leave us with a principled way of limiting the defence to cases where the loss-of-control response is truly deserving of mitigation. Instead the amendments draw an arbitrary bright line which will likely be both over-inclusive (in the sense of problematic

8. *R v Campbell* (1977), 17 OR (2d) 673 (CA).

9. See, e.g., Isabel Grant, “Rethinking the Sentencing Regime for Murder” (2001) 39:2 Osgoode Hall LJ 655.

10. *Criminal Code*, RSC 1985, c C-46, s 232(2) [emphasis added].

11. See Elizabeth Sheehy, “Battered Women and Mandatory Minimum Sentences” (2001) 39:2 Osgoode Hall LJ 529; Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014) [Sheehy, *Defending Battered Women*].

12. *Tran*, *supra* note 7.

applications of the defence continuing) and under-inclusive (in the sense of cases that deserve our compassion not being included) in its application.

We begin with a brief history of the defence of provocation and an analysis of the problems that have arisen with its application. After a consideration of the meaning of substantive equality in criminal law, we examine the government's response to the criticisms of provocation, and assesses the extent to which the new defence heeds the call of the Supreme Court of Canada to apply the defence in a manner that is consistent with equality.¹³ In assessing options for reform, we consider the experience of other jurisdictions which have amended or repealed the defence altogether. Finally, we conclude that the defence of provocation should be abolished but only if we also abandon mandatory minimum sentences for murder which preclude trial judges from even considering whether there are mitigating factors in a particular case.

I. *Problems with the defence of provocation*

Our long-standing definition of provocation, referencing a “wrongful act or insult” demanded that courts and juries make normative assessments about the types of insults that warrant reducing an otherwise intentional killing from murder to manslaughter.¹⁴ The ordinary person standard has always set the normative threshold against which we assess the types of insults that deserve our compassion. It demands that we ask whether the accused's loss of self-control comports with the standard of human frailty that we are willing to accept as ordinary. The defence of provocation, therefore, gives a somewhat contradictory message: it calls for compassion where the ordinary person would have lost control in response to the victim's insults, even though we expect that ordinary people do not kill when insulted except in the most extraordinary circumstances.¹⁵ It is this contradiction that has led to the widespread critique of the defence¹⁶ and, in a number of jurisdictions, abolition or reform.¹⁷

13. *Ibid*; St. Lewis & Galloway, *supra* note 1.

14. Renke argues that provocation is not about compassion but rather about calibrating the stigma for murder: Renke, *supra* note 2.

15. On this point, see Victoria Nourse, “Passion's Progress: Modern Law Reform and the Provocation Defense” (1997) 106:5 Yale LJ 1331 at 1389.

16. See, e.g., Fitz-Gibbon, *supra* note 1; Côté, Majury & Sheehy, *supra* note 1; St. Lewis & Galloway, *supra* note 1; Plater, Line & Fitz-Gibbon, *supra* note 1.

17. For example, New Zealand and three Australian states have abolished the defence of provocation. See Carolyn B Ramsey, “Provoking Change: Comparative Insights on Feminist Homicide Law Reform” (2010) 100:1 J Crim L & Criminology 33; Rosemary Hunter & Danielle Tyson, “The Implementation of Feminist Law Reforms: The Case of Post-provocation Sentencing” (2017) 26:2 Soc & Leg Stud 129 [Hunter & Tyson, “The Implementation of Feminist Law Reforms”].

1. *The evolution of the defence of provocation*

The provocation defence developed at a time when murder was punishable by death and thus defences that reduced murder to manslaughter could be the difference between life and death. It was assumed that if killings were sudden, spontaneous, and in the heat of passion, they were less blameworthy and not deserving of the ultimate sentence of death. However, not all losses of self-control were equally deserving of compassion. The history of the defence sheds light on its gendered and homophobic underpinnings. Early cases centred around three types of situations considered to be provocative: (1) “chance medley” or a spontaneous fight between men; (2) a man discovering his wife in the act of adultery; and (3) a father discovering a man in the act of anal sex with his son.¹⁸ With respect to adultery, for example, a similar doctrine did not exist for a woman who found her husband in bed with another woman because the defence was related to the concept of the wife as the property of her husband, as reflected in the expression “Jealousy is the rage of a man, and adultery is the highest invasion of property.”¹⁹

Gradually, courts abandoned the category-based approach to provocation, expanding the defence to include any killing where an ordinary person, faced with a similar insult, would have lost self-control, so long as the accused actually did lose self-control. This relaxation in the rigidity of the categories led to an expansion of the defence and an increase in the types of insults that would qualify as provocation. A 1997 American study of provocation demonstrated that the category of adultery, for example, had expanded significantly to include women who were merely trying to leave a relationship:

...contrary to popular understandings, men’s provocation claims are not based on sexual infidelity, but rather 65% of men’s claim studied by Nourse were made in the context of a relationship that was over, ending, or from which the woman was attempting to exit. Twenty-six percent of the provocation claims that reached the jury involved no claim of infidelity whatsoever, but simply departure by the woman.²⁰

The issue that has attracted the most attention both in scholarship and case law is which characteristics of the accused should be incorporated into the ordinary person for purposes of the assessment. Historically, Canadian courts took a narrow approach, refusing to recognize the accused’s personal

18. *DPP v Camplin*, [1978] AC 705, Lord Diplock, cited in Toni Pickard et al, *Dimensions of Criminal Law*, 3rd ed (Toronto: Emond Montgomery, 2002) at 811.

19. *R v Mawgridge* (1708), 84 ER 1107 at 1115 (QB), cited in *Tran*, *supra* note 7 at para 15.

20. Côté, Majury & Sheehy, *supra* note 1 at 9, citing Nourse, *supra* note 15 at 1345.

characteristics and the circumstances surrounding the insult because doing so would undermine the normative function of the ordinary person test.²¹ This meant not that the ordinary person had no characteristics but rather that he (and occasionally she) was implicitly ascribed the characteristics associated with the dominant group.²² In *R. v. Hill*,²³ the Supreme Court of Canada expanded the scope of the objective test and allowed the jury to consider an ordinary person with the characteristics of the accused that “do not detract from a person’s characterization as ordinary.”²⁴ In other words, it was recognized that the ordinary person has, among other things, a sex, an age, and a race. In *R. v. Thibert*, the Court went even further in personalizing the objective test in the context of a man who killed his estranged wife’s new partner. The majority noted the ordinary person, in this case, was a married man, faced with the breakup of his marriage.²⁵

Many commentators thought it was a positive development to allow consideration of sex, age, race, and other factors into the assessment of what the ordinary person would do,²⁶ in part because no one exists in the absence of these characteristics. Yet some thought that *Thibert* went too far in this direction²⁷ because the more we subjectify the objective test to include various personal characteristics, the less it serves as a meaningful limit on the types of killings worthy of compassion.

There are contexts where adding individual characteristics to the ordinary person test could contextualize the insult. The following example was given in *Hill*: “For example, if the provocation is a racial slur, the jury will think of an ordinary person with the racial background that forms the substance of the insult.”²⁸ However, with a few notable exceptions,

21. *R v Wright*, [1969] SCR 335; *R v Parnerkar*, [1974] SCR 449.

22. Stephen G Coughlan, “Annotation: *R. v. Humaid*” (2006) 37 CR (6th) 349 at 347 [Coughlan, “Humaid”].

23. *R v Hill*, [1986] 1 SCR 313 [*Hill* SCC]. At issue in *Hill* was the availability of provocation where a 16-year-old man had killed an older man who Hill alleged had made a sexual advance.

24. *Ibid* at para 35, Dickson CJC.

25. *Thibert*, *supra* note 5 at para 24.

26. See, e.g., Don Stuart, Steve Coughlan & Ronald J Delisle, *Learning Canadian Criminal Law* (Toronto: Carswell, 2012) at 1012–1013. See also Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 4th ed (Markham, Ontario: LexisNexis Canada, 2009) at 762-764. The authors applaud the flexibility *Hill* introduced, but described the decision as being “regrettably concise” and criticized several passages for being “terribly sloppy.”

27. See, e.g., Wayne Gorman, “Provocation: The Jealous Husband Defence” (1999) 42:4 Crim LQ at 495-496.

28. *Hill* SCC, *supra* note 23 at para 35, Dickson CJC.

these are not the scenarios we are seeing in the case law.²⁹ Furthermore, sex and sexual orientation, in particular, have not always been added to the ordinary person test in a manner that reflects equality. For example, losing one's self-control out of sexual jealousy has been conceptualized as ordinary for heterosexual men. In *Hill*, taking sex into account was essentially acknowledging that it is ordinary for a (heterosexual) man, faced with a same-sex advance, to respond violently. Suggesting in *Hill* that sex was relevant implies that if the accused had been a woman, a loss of control might not have been ordinary. Justice Wilson in her dissent in *Hill* was explicit on this point: "the fact that the victim of the sexual assault, the accused, is a male and that the attack is a homosexual one may properly be considered."³⁰

In *Tran*, the Supreme Court of Canada unanimously rejected provocation as a defence in a case where a racialized man had killed his estranged wife's new partner and seriously injured her.³¹ The Court made it clear that not all losses of self-control will be excused; only those based on a "justifiable sense of being wronged."³² The defence should only be successful where, "as a result of human frailties, the accused reacted inappropriately and disproportionately, but understandably to a sufficiently serious wrongful act or insult."³³ In *Tran*, possibly in response to the criticism of *Thibert*, the Court stressed the importance of keeping provocation consistent with principles of equality:

[T]he ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*. For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial

29. For a case where the provoking insult was based on a personal characteristic of the accused as intended in *Hill*, see *R v Krasny*, 2014 MBQB 237 [*Krasny*] which involved a young male accused who had significant mental and physical disabilities. He was punched and taunted by the victim at a party [e.g. called a "retard"]. The trial judge stated at para 63:

[N]ot only did [the victim] push and shove [the accused], he was also taunting him with insults and verbal abuse including calling him names related to his mental disability. The law is clear that an insult includes injuriously contemptuous speech or behaviour, a scornful utterance, as well as an action to insult another person's self respect and cause an affront to his or her dignity.

The trial judge, after citing the passage on equality from *Tran* and section 15 of the *Charter*, accepted that the accused's mental disability was relevant to put the victim's insults and taunts into context and as to whether an ordinary person would have lost the power of self-control in response to the insults. The provocation defence was thus successful and the accused was convicted of manslaughter.

30. *Hill* SCC, *supra* note 23 at para 82, Wilson J.

31. *Tran*, *supra* note 7.

32. *Ibid* at para 22 [emphasis omitted].

33. *Ibid*.

slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance. Similarly, there can be no place in this objective standard for antiquated beliefs such as “adultery is the highest invasion of property....”³⁴

The Court was as clear as it could be here that race and sexual orientation may be relevant but only where the accused was *responding to*, rather than acting on, racism or homophobia.³⁵

Clearly, the more the objective test is personalized, and if it is only personalized in one direction, the less it serves as a tool to limit the excusing of homicidal rage. The Ontario Court of Appeal has refused to personalize the objective test in the other direction, i.e., it refused to consider the characteristics of the accused that made his loss of control *less* ordinary in the circumstances. In a 2015 case also called *R. v. Hill*,³⁶ the Court of Appeal considered the availability of provocation where the trial judge had instructed the jury to consider the accused’s considerable physical size and strength advantage over that of his female victim in assessing whether an ordinary person would have lost self-control in response to a “relatively minor assault and insults.”³⁷ The Court of Appeal found this to be in error because his provocation defence was “purely rage-based” and not based on fear of his young, pregnant victim.³⁸

There is merit to the submission that by inviting the jury to compare the respective size of the appellant and [the victim] as part of the ordinary person test, the jury may have taken the trial judge to be instructing them that the reasonableness or even justifiability of the appellant’s response to [the victim’s] provocative acts was a relevant consideration in the application of the ordinary person test. Unlike some defences, e.g. self-defence and duress, provocation does not measure the conduct of the accused against standards of reasonableness or proportionality.³⁹

The precise nature of the provocation in this case is vague at best. The victim and the accused met to discuss the victim’s pregnancy (the accused was the biological father but both were involved in relationships with other people). When the accused confessed to police, he claimed that the victim fell as they were leaving the house and then looked at him and said, “If this baby’s

34. *Ibid* at para 34.

35. See, e.g., *Krasny*, *supra* note 29.

36. 2015 ONCA 616, 330 CCC (3d) 1, 339 OAC 90 [*Hill* ONCA].

37. *Ibid* at para 70.

38. *Ibid* at paras 84-88.

39. *Ibid* at para 88.

like, this baby's gone, it's your fault, I'm telling everyone it was you."⁴⁰ He then admitted choking her for approximately three minutes. At trial, the story changed somewhat. According to his testimony, when the victim fell she claimed she would tell everyone that he had thrown her down the stairs. She was screaming obscenities at him and, after falling a second time, she struck him in the face knocking his glasses off. Regardless of which story is correct, after strangling her for three minutes he hid her body in the bushes, lied to the police and the victim's family about his actions, and forged a letter from the victim saying she had gone away for a while. The Court of Appeal acknowledged that this was a very close case but nonetheless felt that provocation should have gone to the jury without any reference to the accused's size advantage. If the Ontario Court of Appeal is correct that the accused's size and strength advantage is not relevant, and his response does not have to be subjected to a standard of reasonableness, what is the normative function played by the ordinary person test in this case? More importantly, is pure rage in the face of a minor insult really something the law should mitigate? There were many factors in *Hill* suggesting that a mandatory life sentence, and the accompanying parole ineligibility, for murder would be excessive for this accused: he was young, Indigenous, apparently "a role model for others" and described as "considerate, non-violent and kind,"⁴¹ although such descriptions are not unusual in the context of male violence against women. All of these factors might well warrant a less harsh sentence for murder than our law allows. However, they have nothing to do with provocation and the trivial insult on the part of the victim just provides an excuse to allow the Court to acknowledge in sentencing factors that our rigid law otherwise precludes. Further, the focus of the provocation defence on the victim's behaviour does imply that, to some extent, it was her behaviour that brought about the accused's violence and in this respect that she "asked for it": Given that this case allegedly involved a minor assault by the victim, the new amendments would not preclude the defence of provocation.

No area of provocation has been more controversial than its applicability in so-called "honour killing" cases where a racialized accused relies on his culture, and beliefs "typically" held in that culture, to inform the ordinary person. These cases involve lethal male violence against (almost always) a woman, often the accused's spouse or another family member, who has

40. *Ibid* at para 13.

41. *Ibid* at para 6.

allegedly departed from culturally expected norms of behaviour.⁴² Tellingly, the amendments to the provocation defence were enacted with a package of other legislative changes in the *Zero Tolerance for Barbaric Cultural Practices Act*.⁴³ The stated motivation behind the changes was to prevent use of the defence in cases of “honour killings.”⁴⁴ This is so despite the fact that Canadian courts and juries have consistently rejected such claims.⁴⁵

In fact, it is not racialized, non-Western “others” who have benefited most from the provocation defence. Successful defences have been rooted in discriminatory assumptions very much a part of Canadian culture. Provocation, to a certain extent, is always a “cultural” defence—but not one of foreign, “barbaric” cultures contemplated by the new legislation.⁴⁶ The insults that we acknowledge as justifying mitigation reflect the values that we choose to accept in Canadian society. Historically, those have not always been equality-promoting values.⁴⁷ We still see attempts to use provocation to justify killings in the face of male jealousy when women try to leave a relationship and where a man responds with deadly force to a same-sex advance. While some might argue that we have moved past these types of cases with the decision of the Supreme Court of Canada in *Tran*,⁴⁸ this problematic reasoning is still with us post-*Tran*.⁴⁹ The new amendments will not rule out the defence where, as in many of these cases, there is an allegation that the victim assaulted the accused before deadly force was used.⁵⁰

42. See, e.g., *R v Humaid*, 2006 CanLII 12287 (ONCA), 81 OR (3d) 456 (CA) [*Humaid*]; Rosemary Cairns Way, “Culture, Religion and the Ordinary Person: An Essay on R. v. Humaid” (2009) 41:1 Ottawa L Rev 1; Sherene H Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008).

43. Bill S-7, *An Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015 (assented to 18 June 2015), SC 2015, c 29, s 7.

44. Senate, Standing Committee on Human Rights, *Minutes of Proceedings and Evidence*, 41st Parl, 2nd Sess, Issue 14 (8 December 2014) [Senate Standing Committee, 8 December 2014].

45. See, e.g., *Humaid*, *supra* note 42; *R v Li*, 2007 ONCA 136, 221 OAC 179 [*Li*]; Pascale Fournier, Pascal McDougall & Anna R Dekker, “Dishonour, Provocation and Culture: Through the Beholder’s Eye?” (2012) 16:2 Can Crim L Rev 161; *R v Shafia*, 2016 ONCA 812, 341 CCC (3d) 354, [2016] OJ No 5627 (QL) [*Shafia*].

46. We are not the first to describe provocation as a cultural defence. See, e.g., Stephen G Coughlan, “The Omission of Provocation from a General Part” in Don Stuart, RJ Deslisle & Allan Manson, eds, *Towards A Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) 243 at 246.

47. Coughlan, “Humaid,” *supra* note 22.

48. Kent W Roach et al, “Vandalizing the Criminal Code with Irrational and Arbitrary Restrictions on Provocation” (2015) 62 Crim LQ 403.

49. See, e.g., *R v Raspberry*, 2017 ABCA 135 [*Raspberry*]; *R v Angelis*, 2013 ONCA 70, 296 CCC (3d) 143, 99 CR (6th) 315 [*Angelis*].

50. See *Raspberry*, *ibid*.

2. *The impossibility of incorporating equality into the defence of provocation*

Rosemary Cairns Way has argued that “the most destabilizing... truth about criminal law which has emerged over the last 30 years [of the *Charter*] is that the criminal law raises equality issues.”⁵¹ Cairns Way suggests that “incorporating equality [into substantive criminal law] requires deliberate attention to perspective, context, power, vulnerability, presence and absence.”⁵² Attention to substantive equality complicates the classic conception of the criminal law as about balancing the state power to punish against the individual rights of accused persons. It involves “thinking about the overall burdens and benefits of criminal prohibitions,”⁵³ about the unequal positions of certain groups of victims and perpetrators, and about the context of social inequality in which the criminal law has developed and is enforced. Reforms to sexual assault law in the *Charter* era have been perhaps the most salient examples of substantive equality informing criminal law doctrine.⁵⁴ But what does it mean to say that the defence of provocation must be consistent with values of equality? Formal equality would mean that the defence is equally available to all groups of accused persons. Historically, this has not been the case for provocation but the defence is now at least formally available to anyone charged with murder. However, when one examines the types of killings committed by men and women, for example, we learn that provocation is still largely a male defence because of the way the defence has been interpreted and applied in conjunction with the reality that culpable homicides, and especially those based on out-of-control rage, are overwhelmingly committed by men.⁵⁵

Substantive equality “seeks to accommodate the varied needs and experiences of subordinated groups.”⁵⁶ In “Contextualizing Criminal

51. Rosemary Cairns Way, “Attending to Equality: Criminal Law, the Charter and Competitive Truths” (2012) 57 SCLR (2d) 39 at 40 [Cairns Way, “Attending to Equality”].

52. *Ibid.*

53. Christine Boyle, “The Role of Equality in the Criminal Law” (1994) 58:1 Sask L Rev 203 at 207.

54. Cairns Way, “Attending to Equality,” *supra* note 51 at 49-51. But see Emma Cunliffe, “Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?” (2012) 57 SCLR 295 (discussing the ongoing challenge of infusing sexual assault law with equality).

55. Danielle Tyson, “Victoria’s New Homicide Laws: Provocative Reforms or More Stories of Women ‘asking for it’” (2011) 23:2 Current Issues Crim Just 203 at 208 [Tyson, “Victoria’s New Homicide Laws”]; Caroline Forell, “Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia” (2006) 14:1 Am U J Gender Soc Pol’y & L 27 [Forell, “Gender Equality”]; Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, “Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand” (2012) 34:3 Sydney L Rev 467 at 482 [Sheehy, Stubbs & Tolmie, “Defences to Homicide”]. See also Stella Tarrant, “The ‘Specific Triggering Incident’ in Provocation: Is the Law Gender Biased?” (1996) 26:1 UW Austl L Rev 190 for an analysis of whether the requirement is discriminatory under Australian law.

56. See Forell, “Gender Equality,” *ibid* at 29.

Defences,” we argued that locating a defence in its factual and social context is an important step towards achieving substantive equality.⁵⁷ We suggested that there are two ways in which context should inform an analysis of defences. First, the context should help us understand the accused’s actions. Second, and more importantly, a contextual inquiry should help “to locate the defence itself within its social and historical context and to reveal biases and inequalities reflected therein.”⁵⁸ The best example of the Court recognizing context in a defence can be found in the decision in *R. v. Lavallee*,⁵⁹ where self-defence was located within the context of the historical inequality of women, the relative inequality between men and women in terms of size and physical strength, and the history of self-defence which evolved with male-to-male combat in mind. This was easier for self-defence because it was the absence of the defence for some accused that created inequality. The task is more difficult with provocation where it is the values underlying the defence itself that challenge equality. Attempting to imbue the provocation defence with the value of substantive equality requires rejecting a number of the discriminatory assumptions about what types of conduct will lead ordinary people to lose self-control and even about whether an angry loss of self-control should be mitigating at all. Just because some men react to being rejected by women or to a same-sex sexual advance with lethal violence does not make it ordinary and does not necessarily make it worthy of our compassion. Caroline Forell argues that a more radical approach is required:

Substantive gender equality insists that the law take into account and respond to the actual effect of a rule on both men and women, thereby better assuring that justice for all is achieved. It requires more than just making the provocation defense available to both men and women who kill out of jealousy and rage, or out of fear and despair. Instead, applying substantive equality 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 because everyone has a right to sexual and physical autonomy. Applying substantive equality would also mean that killing one’s batterer out of fear would often be a basis for self-defence because everyone has a right to defend him or herself against physical harm. If substantive gender equality were considered adequately, killings out of jealousy and rage would result in murder convictions, while most killings out of fear and despair would result in acquittals.⁶⁰

57. Isabel Grant & Debra Parkes, “Contextualizing Criminal Defences: Exploring the Contribution of Justice Bertha Wilson” in Kim Brooks, ed, *Justice Bertha Wilson: One Woman’s Difference* (Vancouver: UBC Press, 2009) 153 [Grant & Parkes, “Contextualizing Criminal Defences”].

58. *Ibid* at 154.

59. *R v Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 SCR 852 [*Lavallee*].

60. Forell, “Gender Equality,” *supra* note 55 at 30 (citations omitted).

Aya Gruber suggests that attempting to bring substantive equality into defences and other criminal law doctrines “has a tendency to reduce to the notion that we should simply do whatever favours the (identified) woman in any given case.”⁶¹ But given the extent to which women have been disadvantaged by the historical development of legal doctrine around male violence, to some extent it is not surprising if reform efforts appear to be focused on maximizing protection for women and other marginalized groups, and trying to right the historical inequality. With these cautions in mind, we demonstrate that developments in the law of provocation have not yet achieved substantive equality. We examine two contexts in which inadequate attention to equality has resulted in an over-inclusive application of the defence: men killing their female partners and “homosexual panic” cases. We also briefly discuss the difficulty in raising provocation for women who kill their abusers, where the under-inclusive application of the defence has been problematic. We are not the first to critique these types of cases⁶² but it is disconcerting that the call to heed *Charter* values in *Tran* has not eliminated them.

3. *Provocation and intimate femicide*

Every year, approximately 60 women in Canada are killed by their (former) intimate partners. Women are at greatest risk when they separate, or announce their intent to separate, from their male partners.⁶³ Canadian statistics suggest that, while the number of spousal homicides has remained relatively constant in recent years, the number of female victims has increased while the number of male victims is in decline.⁶⁴ Women commit spousal homicide far less often than men⁶⁵ and for different reasons. Men are more likely to kill out of sexual jealousy, a sense of entitlement to their female partners or a twisted sense of male honour.⁶⁶ In cases where provocation is at issue, threats to leave the relationship⁶⁷ and/or taunts

61. Aya Gruber, “A Provocative Defense” (2015) 103:2 Cal L Rev 273 at 313.

62. See, e.g., The Response of the Canadian Association of Elizabeth Fry Societies to *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, *supra* note 1; St. Lewis & Galloway, *supra* note 1; Côté, Majury & Sheehy, *supra* note 1; N Kathleen (Sam) Banks, “The ‘Homosexual Panic’ Defence in Canadian Criminal Law” (1997), 1 CR (5th) 371.

63. Isabel Grant, “Intimate Femicide: A Study of Sentencing Trends for Men Who Kill Their Intimate Partners” (2010) 47:3 Alta L Rev 779 at 780 [Grant, “Intimate Femicide”].

64. Maire Sinha, “Family violence in Canada: A statistical profile, 2011” (2013) 85:2 Juristat 1 at 47. These numbers underestimate the scope of the problem because men also kill their former partner’s new male partners, which are killings that are not labelled as spousal in nature.

65. One study found that more than 75% of all spousal homicides in Canada were committed by men against women: Valerie Pottie Bunge, “National Trends in Intimate Partner Homicides, 1974–2000” (2002) 22:5 Juristat 1 at 13.

66. *Ibid* at 7.

67. *R v Pasqualino*, 2008 ONCA 554, 233 CCC (3d) 319, 239 OAC 59.

about sexual inadequacy⁶⁸ are sometimes the provoking insult. Women are more likely to raise provocation where they have killed an abusive spouse out of fear or despair where self-defence is likely the more appropriate defence, although difficulties may arise in its application.⁶⁹ As described by Danielle Tyson, provocation does not typically fit the circumstances of women who kill an intimate partner:

When women kill an intimate partner, they typically do so in circumstances where they are not responding to a specific triggering incident that is legally required before a successful defence of provocation can be made out. Rather, when women kill they are usually responding to a past history of violence and abuse by the deceased. Although deserving of mitigation, women who kill their violent abusers often fail to satisfy the rules and requirements that structure the partial defence resulting in either the distortion or exclusion of their experiences.

In contrast, men who kill their intimate partners or ex-partners usually kill in response to much slighter provocation—she either ‘nagged’, ‘taunted’, ‘insulted’ or ‘goaded’ him, ‘flirted’ with another man, ‘flaunted’ her infidelity, left the relationship or expressed a desire to leave him. Men who kill in this context, however, have been able to rely on the defence of provocation with relative ease.⁷⁰

A 1998 Canadian Department of Justice study found 115 cases in which provocation was raised:

62 involved domestic homicides: 55 in which men killed women, and 7 in which women killed men. The remaining 53 cases involved men killed by men, and of those, 16 involved allegations of a “homosexual advance”, 8 involved an altercation over intimate relations with the perpetrator’s current or estranged female partner, and the remaining 29 involved men who had no special relationships.⁷¹

Two Canadian studies have examined the success rate of the defence of provocation in cases involving gendered intimate violence. In a study of sentencing for spousal homicides committed by men, Isabel Grant found that provocation was argued in 37 of 252 spousal murder cases and was successful in only seven of the cases, although in two additional cases the Court of Appeal sent the case back for a new trial because of errors in the

68. *Ibid*; *R v Kimpe*, 2010 ONCA 812, 271 OAC 21.

69. Grant, “Intimate Femicide,” *supra* note 63; Jenny Morgan, “Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them” (1997) 21:1 Melbourne UL Rev 237 at 256-257.

70. Tyson, “Victoria’s New Homicide Laws,” *supra* note 55 at 208 (citations omitted).

71. Department of Justice, “Reforming Criminal Code Defences: Provocation, Self-defence, and Defence of Property” (1998) at 4, cited in Pickard et al, *supra* note 18 at 812.

charge on provocation.⁷² However, there were many more cases where provocation was put to the jury and was unsuccessful on the facts. Pascale Fournier and her colleagues examined honour killings in Canada which, while not all spousal in nature, are based on notions of gendered entitlement to control women's sexuality.⁷³ The authors concluded that the success rate for the defence was 11% for non-Western or Other(ed)⁷⁴ defendants and 25% for Western defendants.⁷⁵ This latter finding demonstrates the relatively high rate of success for the defence when Western men kill their spouses or other family members. The significant differential between the two groups suggests that we recognize the problematic dimensions of importing discriminatory "cultural values" into cases dealing with an accused from foreign cultures but we do not even recognize we are importing cultural values when dealing with Western accused.⁷⁶ As the authors conclude, "however right the harsh punishment of honour crimes may be, this has the potential to conceal Western femicidal behaviour, an unintended consequence we should be wary of."⁷⁷

The high point of incorporating discriminatory values into provocation was also the high point of subjectifying the ordinary person test in provocation doctrine. In *Thibert*, the accused confronted his estranged spouse and her new partner with a loaded rifle in a parking lot. He claimed he wanted to speak to his wife alone. Her new partner, the victim, told the accused, "Come on big fellow, shoot me," as he stood with the accused's wife in front of him. The accused shot him with a rifle with which he had originally planned to kill the deceased or his wife, and later apparently changed that plan to suicide.⁷⁸ The majority held that provocation should have gone to the jury, and that the ordinary person should be constructed as the married man faced with the breakup of his marriage, implying that a loss of self-control is ordinary in this context. The dissent pointed out in powerful terms that "no one has either an emotional or proprietary right

72. Grant, "Intimate Femicide," *supra* note 63.

73. Fournier, McDougall & Dekker, *supra* note 45.

74. *Ibid.* This study analyzed a series of Canadian cases of intimate femicide from 1990–2010 in which the male defendants raised the provocation defence. In categorizing the defendants' backgrounds as either "Western" or "Other"(ed), the authors relied on the names of the parties and the other information revealed in the decisions. Cases in which no mention was made of a particular "other" ethnic origin were included in the "Western" category.

75. *Ibid.* For a description of similar findings in other jurisdictions see Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (New York: Routledge, 2013) at 38-39. [Tyson, *Sex, Culpability and Provocation*].

76. Razack, *supra* note 42.

77. Fournier, McDougall & Dekker, *supra* note 45 at 188.

78. *Thibert*, *supra* note 5 at paras 26, 39, 42.

or interest in his spouse that would justify the loss of self-control that the [accused] exhibited.”⁷⁹

While this type of reasoning is less common after *Tran*, remnants of it can be seen in the post-*Tran* case law. For example, in *R. v. Angelis*,⁸⁰ the accused was charged with murdering his wife after smothering or strangling her during a physical altercation in front of their two young children. He testified that she suddenly attacked him, scratching his face and clawing his penis. His young daughter testified to the contrary that the two had been fighting about money. The context was that the accused had recently learned that the victim had been having a long-term relationship with another man and wanted out of the marriage. Apparently the accused straddled the victim, covered her mouth with his hand, and held her down to “defend” himself. She weighed 95 pounds and was 4’9” tall. He weighed 150 pounds and was 5’6” tall. After her death he did not administer CPR even though he was a trained nurse, and he waited three or four hours before calling 911. The trial judge refused to put provocation to the jury and the jury convicted the accused of murder, thus clearly rejecting both self-defence and the argument that the Crown had failed to prove *mens rea*.

The Court of Appeal held that the trial judge was wrong to refuse to put provocation to the jury. The disagreement in this case was actually about the subjective component of provocation although the Court’s analysis shed some light on the construction of ordinariness in spousal violence. The Court held that there was evidence to support the subjective component of provocation beyond the accused’s denial that he was angry.⁸¹ The Court of Appeal cited four pieces of evidence to support the assertion of provocation. First, a neighbour had heard the accused yell the word “bitch” at his wife mere moments before the struggle ended, thus suggesting the attack was sudden. Second, he killed his wife in front of their two children even though he undeniably loved his children. This fact apparently demonstrated that he was not in control when he killed his wife. Third, the killing was out of character for the accused: “it is hard to understand why a mild-mannered civil servant with no history of violence or abuse in his relationship with his wife would turn on her in an instant and then panic after—unless he acted out of such rage.”⁸² Finally, the fact that the victim had attacked the most intimate part of his body, his

79. *Thibert, ibid* at para 65.

80. *Angelis, supra* note 49.

81. *Ibid* at para 41.

82. *Ibid*.

penis, also led the Court to conclude that it could be inferred that he lost self-control. The Court would have substituted a verdict of manslaughter on the basis of these errors about provocation but because the trial judge made other errors, a new trial was ordered.

These conclusions reflect a number of problematic stereotypes about domestic violence and its perpetrators which are relied upon by the appellate court to support provocation. The suggestion that mild-mannered civil servants do not abuse their wives unless provoked belies the fact that domestic violence exists across all social groups. We also do not have access to the victim's account of their relationship. The notion that violence is "out of character" for an accused is often used to minimize the impact of domestic violence.⁸³ The horrific fact that two young children watched their mother be killed is treated as supporting a defence of provocation. In fact, social science literature demonstrates that the presence of children generally does not protect women from lethal violence and that, in fact, far too many children witness their mothers being killed.⁸⁴

In *R. v. Khairi*,⁸⁵ the accused killed his wife by brutally slicing through her neck and voicebox and stabbing her multiple times. The killing took place at the family apartment where they lived with their six children after she had told him she was going to leave the relationship and take the children with her. While the jury rejected the defence of provocation, it is concerning that the trial judge found an air of reality to the defence since there appears to be no evidence of a sufficiently grave insult that could trigger the defence. Clearly some trial judges still take the view that a woman communicating that she is leaving an abusive relationship constitutes sufficient provocation to put the defence to the jury.

Another line of cases demonstrates that alleged taunts by a woman about a man's sexual prowess can trigger a provocation defence.⁸⁶ This issue perpetuates the stereotype that men have no control over actions

83. See, e.g., *R v Pakoo*, 2004 MBCA 157, 198 CCC (3d) 122, 25 CR (6th) 277, 198 CCC (3d) 122, 25 CR (6th) 277; *R v McCowan*, 2010 MBCA 45, 251 Man R (2d) 295.

84. Grant, "Intimate Femicide," *supra* note 63 at 780-781. One study which examined intimate femicides from 1974-1994 found that 100 children witnessed their mothers being killed: Rosemary Gartner, Myrna Dawson & Maria Crawford, "Woman Killing: Intimate Femicide in Ontario, 1974-1994" (1998) 26 Resources for Feminist Research 151 at 163.

85. 2015 ONCA 279, [2015] OJ No 2054 (QL).

86. *R v Stone*, 1999 CanLII 688 (SCC), [1999] 2 SCR 290 [*Stone*] involved a man who brutally stabbed his wife 47 times in response to her alleged verbal abuse of him which included a reference to his poor sexual performance. While it is not possible to determine from the judgment whether provocation or lack of *mens rea* led to the jury verdict of manslaughter, the Supreme Court of Canada upheld the conclusion that the victim's provocation could be considered as a mitigating factor in sentencing even though the mitigation of provocation had already reduced the crime from murder to manslaughter.

related to sexual activity and that an insult about their sexual prowess necessarily makes a loss of self-control ordinary. Losing self-control over an insult to one's sexual prowess is a gendered rage response that is normalized in our law and culture. We could find no such cases involving women killing men for such insults.

The recent decision of *R. v. Evans*,⁸⁷ while not a spousal case, is instructive about the role of statements regarding the accused's sexual performance. The accused's evidence was that he was drunk and could not get an erection. The victim, a woman he had just met that night, mentioned that he was probably too drunk to get an erection. The accused argued that this comment might have been what caused him to fly into a rage and kill her, because he took her pointing out this obvious fact as "being made fun of."⁸⁸ The Court of Appeal rightly rejected her statement as the basis for a provocation defence. However, the Court suggested that, had she made fun of him, provocation might well have gone to the jury:

This [the victim's pointing out that the accused was too drunk to get an erection] is not evidence capable of supporting the objective element of the test so as to give an air of reality to the defence of provocation. It is not evidence of a wrongful insult that, in the circumstances, would deprive an ordinary person of self-control. *The evidence does not go so far as to suggest that Ms. Parisien mocked, taunted or ridiculed the appellant or that she might have done those things.*⁸⁹

Being mocked about one's sexual performance is presumably an upsetting experience, but it should be one that men are expected to withstand and not respond to with lethal rage. As will be discussed below, the new amendments may well rule out provocation in some of these cases. However, an allegation of an assault, even a minor one, against the accused by the victim may open the door to provocation in these cases.

4. *Women who kill their batterers*

Provocation also disadvantages women as accused persons in intimate partner homicides. The defence is difficult to sustain where women who have been subjected to ongoing abuse kill their abusers.⁹⁰ The loss of self-control paradigm and its corresponding suddenness requirement fail to capture the dynamics of these killings. As Jeremy Horder describes:

87. 2012 BCCA 209, 321 BCAC 295.

88. *Ibid* at para 63.

89. *Ibid* at para 64 [emphasis added].

90. See Jeremy Horder, "Reshaping the Subjective Element in the Provocation Defence" (2005) 25:1 Oxford J Leg Stud 123.

the sense of a privileged access to the defence that may be obtained by those—perhaps, mainly men—who have a ‘shoot from the hip mentality’...as compared with those—perhaps, mainly women—whose response to provocation needs to be more measured because they are confronting someone known to be stronger and more aggressive.⁹¹

Someone whose fear builds slowly over time in response to the provocative acts of the victim will lose the mitigation if she had time to for her “passion to cool.”⁹² Elizabeth Sheehy in her book on defending battered women on trial makes this point in response to a statement from the Ontario Court of Appeal in *R. v. Malott*⁹³ that the accused did not appear to act in a fit of passion:

This begs the question of what “passion” looks like for battered women who kill. Is a woman who has been psychologically damaged and numbed by violence, who appears to be emotionally detached, necessarily showing “a lack of passion”?⁹⁴

Sheehy also notes that, while men can often kill women with their bare hands, women often must resort to weapons which can work against them in the assessment of suddenness.

The difficulty in raising provocation for abused women highlights the degree to which the standard at the heart of the defence—loss of self-control—is profoundly gendered and remains rooted in the experience of heterosexual male rage that is ill-suited to providing mitigation for women accused. Problems also arise when one looks at killings by men in the context of a same-sex sexual advance to which we now turn.

5. *Provocation and “Homosexual Panic”*

As mentioned earlier, the Court in *Tran* stated that homophobia is not a characteristic that should be attributed to the ordinary person. Yet post-*Tran*, judges have found an air of reality to the defence of provocation raised by accused men in relation to vicious attacks on men they allege sexually assaulted them. We have seen three such cases, post-*Tran*, where provocation was raised and where the verdict was manslaughter or the case was sent back for new trial.⁹⁵ In one of these cases, *R. v. Bouchard*,⁹⁶

91. *Ibid* at 125.

92. In *R v Daniels*, [1983] NWTJ No 29 (CA) [*Daniels*] the court recognized this kind of slow fuse provocation after a long period of abuse by the accused’s spouse, but this case is exceptional.

93. (1996), 30 OR (3d) 609 (CA), aff’d [1998] 1 SCR 123.

94. Sheehy, *Defending Battered Women*, *supra* note 11 at 271.

95. *R v Peterson*, 2012 MBQB 305, 285 Man R (2d) 172 [*Peterson*]; *R v Bouchard*, 2013 ONCA 791, 305 CCC (3d) 240, 314 OAC 113 [*Bouchard ONCA*], aff’d 2014 SCC 64, [2014] 3 SCR 283 [*Bouchard SCC*] new trial ordered; *Raspberry*, *supra* note 49.

96. *Bouchard ONCA*, *ibid*.

the new trial was granted on the basis that the provocation was relevant to a lack of *mens rea*, and in another, *R. v. Raspberry*,⁹⁷ the accused also testified that the victim threatened to sexually assault both him and his wife. As further discussed below, in these three cases, as well as one known as *KRB*,⁹⁸ decided shortly before *Tran*, and *R. v. Rothgordt*⁹⁹ in which the defence was found to have an air of reality at the accused's first trial, the assumed ordinariness of homophobic rage played a role. Self-defence would have been a more appropriate defence in all of these cases, but the decisions are based on provocation because the excessive force used precluded self-defence. In the light of recent judicial and legislative efforts to limit the defence of provocation, it is important to consider the continued salience of "homosexual panic" as a basis for the defence, even though these cases are not numerous.

In *R. v. Peterson*,¹⁰⁰ the accused testified that he killed his friend and associate in the drug trade after the accused awoke one evening and found the victim, another man, attempting to perform oral sex on him. The accused struck the victim at least nine times with a hammer, crushing his skull. The forensic evidence showed that the victim was either incapacitated or unconscious when many of the blows were struck. Provocation was left with the jury and they convicted the accused of manslaughter. In the course of her reasons for sentence, the judge stated that the jury must have concluded that the victim attempting to perform oral sex on the accused "would have caused a reasonable person in his circumstances to lose self-control."¹⁰¹

In *Rothgordt* the accused killed a man he met in an online chat room for men interested in sex with other men.¹⁰² The accused did not testify but the defence relied on his statement to the police in which he alleged that the victim had come on to him without his consent. At the first trial, provocation was left with the jury, along with intoxication and self-defence,

97. *Raspberry*, *supra* note 49.

98. *R v KRB*, 2007 NBQB 359, 321 NBR (2d) 371, [2007] NBJ No 413 (QL) [*KRB*]. The accused successfully raised provocation in a judge-alone trial. He testified that the victim, another man who was his friend, sexually assaulted him while asleep in the friend's car. *KRB* testified that he pushed the friend away, jumped out of the car and grabbed a sawed-off .22 caliber rifle from the backseat, fatally shooting his friend in the chest. The reasons for decision do not indicate the nature of the alleged sexual assault.

99. In *R v Rothgordt*, 2013 BCCA 37 [*Rothgordt*], the defence was left with the jury at the accused's first trial, but failed on the merits. The second trial was by judge alone and Justice Arnold-Bailey found no basis for provocation. The accused has again appealed his conviction for second degree murder.

100. *Peterson*, *supra* note 95.

101. *Ibid* at para 22.

102. *R v Rothgordt*, *supra* note 99.

but the jury convicted him of second degree murder.¹⁰³ As in *Peterson*, the killing was very violent: the accused struck the victim numerous times in the head with a hammer.¹⁰⁴

Even when provocation fails, evidence that an accused was provoked is relevant to *mens rea* and may have the impact of reducing a murder conviction to manslaughter. In *Bouchard*,¹⁰⁵ for example, the accused and the victim were former coworkers and friends who often drank together. There was some evidence of prior sexual activity between the two men. On the night of the killing, the two men had gone to a concert and become “quite drunk” by the time the concert ended. The victim had allegedly made several sexual advances earlier in the evening that had been rebuffed. The provoking act occurred when the victim planted a “wet kiss” on the accused’s cheek and told the accused that he loved him. The accused then stomped the victim to death, leaving him in tall grass several metres from the road. The accused testified that the “wet kiss” brought back memories of a babysitter who had sexually assaulted him as a child. Two defences were put to the jury: a lack of *mens rea* for murder and provocation. The jury rejected both defences and convicted the accused of second degree murder. Again, we question putting provocation to the jury in this case. Is a single kiss, and a protestation of love, evidence of an insult that is sufficiently serious that it could generate a loss of self-control in an ordinary person? The jury evidently answered this question in the negative, but the Ontario Court of Appeal allowed the accused’s appeal and ordered a new trial on the basis that the victim’s conduct was relevant to the overall inquiry into whether the accused had the requisite *mens rea* for murder. In other words, provoking conduct that falls short of the requirements of s. 232 may nonetheless be sufficient to negate the accused’s *mens rea* for murder. The Court held that when evidence of provocation is used to negate the *mens rea* for murder, the limits imposed by the statutory definition of provocation, such as the “ordinary person” requirement, do not apply. This result was upheld by the SCC without reasons.¹⁰⁶

The decision in *Bouchard* is problematic for several reasons. First, allowing provocation to go to the jury in this case, necessarily embraces

103. *Ibid.* The accused was initially convicted of second degree murder, but this conviction was set aside due to improper jury instructions (2013 BCCA 37). At his second trial, the accused was convicted of second degree murder (2014 BCSC 1215, [2014] BCJ No 1398 (QL)). This decision was overruled on appeal, 2017 BCCA 230.

104. *Ibid.* See also *KRB*, *supra* note 98.

105. *Bouchard* ONCA, *supra* note 95.

106. *Bouchard* SCC, *supra* note 95. *Bouchard* was convicted of murder at the second trial: *R v Bouchard*, 2016 ONSC 4484.

homophobic assumptions about responses to non-violent same-sex advances by affirming the reasoning that it is ordinary to respond to a non-violent same-sex advance, such as a “wet kiss,” with lethal violence.¹⁰⁷ Second, *Bouchard* opens a back door into a manslaughter verdict even where an ordinary person would not have lost self-control (albeit through the doctrinal route of negating the *mens rea* for murder). This is particularly problematic because there will be no safeguard of an objective test to ensure that unreasonable responses based on toxic masculinity or homophobia will not serve as mitigating factors.¹⁰⁸

The Canadian Judicial Council’s model jury charge on provocation includes a mention in a footnote that the characteristic of homophobia should not be attributed to the ordinary person.¹⁰⁹ However, juries are to be instructed that the accused’s gender and sexual orientation should be taken into account to the extent they are relevant. Yet to do so in these cases can be problematic. In *Rothgordt*, where the defence theory was that the accused was sexually curious or confused, jury speculation about his sexual orientation (which was not at all clear) does not assist in understanding the nature of the alleged insult unless the ordinary person can be homophobic. Unspoken in these cases is the idea that, if the accused had been gay himself, provocation might not be available. The decision at the second trial in *Rothgordt* provides a rare example of a court taking these concerns seriously. Justice Arnold-Bailey stated, “Moreover, in this day and age I do not consider it likely that ‘homosexual panic’ will often, if ever, provide a valid basis upon which to find provocation.”¹¹⁰

Remember that the example given by Dickson CJ in *Hill* of when personal characteristics might be relevant was that of a racialized accused being subjected to a racist insult. The analogy for sexual orientation would be a gay man or woman losing self-control as a result of a homophobic insult. The facts in *R. v. Reid*¹¹¹ come close to the kind of insult envisioned

107. The alleged conduct by victims in other homosexual panic cases (e.g., *Peterson, Raspberry*) cannot be considered “non-violent” and we do not mean to suggest that sexual assaults—whether experienced by men or women—are not violent acts. As discussed further below, the relevant defence in such cases should be self-defence and any limitations within that defence should be addressed directly rather than through provocation.

108. If a killing is reduced from murder to manslaughter based on a lack of *mens rea*, the defence of provocation should not arise given that it only applies to killings that are otherwise murder. The first question should be the *mens rea* question and only if the intent to kill is found should provocation be considered.

109. Canadian Judicial Council, “Provocation—In force July 16, 2015,” online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_provocation_en.asp>.

110. *Rothgordt*, *supra* note 99.

111. 2015 BCSC 835 [*Reid*].

in *Hill*. The facts suggest that the accused was born intersex,¹¹² raised as a boy, and as an adult had surgery to transition to be a woman. The accused engaged in what was found to be a consensual sexual encounter with a man who, on discovering she was transgender, started berating her viciously, calling her a faggot and other epithets. The victim also allegedly assaulted her, to which she responded with deadly force, hitting him several times with a baseball bat and causing his death. The defence of self-defence failed in this case because it was found that the force used by the accused was excessive. Silverman J. recognized that one's "gender and sexual identity" is relevant to the provocation inquiry. In particular, he accepted the Crown's concession that the victim's words and actions "could be taken as a dehumanizing attack on Ms. Reid's sense of identity and self-worth, as gender is a legitimate core aspect of self-identity and self-worth."¹¹³ The accused was convicted of manslaughter on the basis of provocation. In our view, any principled basis to mitigate Reid's sentence in this case should be rooted in an understanding that she was defending herself against a man who, it seems, flew into a transphobic rage at the realization she was transgender. It is only necessary to shoehorn our desire to mitigate the sentence here into the ill-fitting defence of provocation because the mandatory minimum sentences for murder preclude consideration of the circumstances of the accused.

Self-defence should, of course, be open to both men and women who are defending themselves against sexual or other assaults but that defence requires that the defensive response be reasonable in the circumstances.¹¹⁴ We are not saying that an accused responding violently to a sexual assault should never form the basis for mitigation of a murder sentence, but rather that the presumed sexual orientation of the victim should not render a sexual assault a provocative act based on some discriminatory construction of masculinity. While women are overwhelmingly more likely to be victims

112. The decision uses the word "hermaphrodite" which is considered a stigmatizing term. See Intersex Society of North America, "On the Word 'Hermaphrodite,'" online: <<http://www.isna.org/node/16>>.

113. *Reid*, *supra* note 111 at para 100.

114. It is interesting to note that when the defence of provocation was abolished in the Australian state of Victoria, a new offence of "defensive homicide" was introduced. Ramsey, *supra* note 17. Some have argued that the notion of a mitigated form of "defensive homicide" in fact brings in through the back door values that were rejected in the provocation context: see, e.g., Tyson, "Victoria's New Homicide Laws," *supra* note 55 at 212-214; Hunter & Tyson, "The Implementation of Feminist Law Reforms," *supra* note 17.

of sexual assault, we do not see women responding to unwanted sexual advances (whether heterosexual or same-sex) with lethal violence.¹¹⁵

II. *Assessing the amendments*

On 16 July 2015 amendments to subsection 232(2) were enacted as part of the *Zero Tolerance for Barbaric Cultural Practices Act*.¹¹⁶ As mentioned above, the wrongful act or insult has been replaced by “conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment.”

The apparent justification for the changes was to prevent perpetrators of so-called “honour killings” from invoking the provocation defence. Then Immigration Minister Chris Alexander made a connection between the need to deter honour killings and the amendments before the Senate Standing Committee:

The defence of honour as a basis for provocation has been used dozens of times in Canada and its very existence under our criminal law weakens the defence that women and girls deserve to have in their own homes from their own relatives. We should not be allowing there to be any concept of family honour, however construed, as a mitigating factor for the murder of a family member...It could be used in the future and its very existence sends a message to men....That their honour is somehow at stake and could be used to defend them in a court of law from the charge of murder.¹¹⁷

When pressed on these “dozens” of cases, the only case the Minister could name was *R. v. Stone*,¹¹⁸ a case in which provocation was probably the reason for reducing a spousal murder to manslaughter but there was no evidence that the accused was a racialized man. The authors have not been able to find a single case where provocation has succeeded in the context

115. The only case that we are aware of where a woman killed in response to sexual violence is *R v Magliaro*, [1981] NSJ No 115 where the accused pleaded guilty to manslaughter after killing a man who, after apparently consensual sex, forced her to perform fellatio. The accused had been sexually assaulted as a teenager and had a history of mental health issues.

116. Bill S-7, *supra* note 43.

117. Senate, Standing Committee on Human Rights, *Evidence*, 41st Parl, 2nd Sess, Issue 14 (4 December 2014).

118. *Stone*, *supra* note 86.

of a so-called spousal honour killing.¹¹⁹ So-called honour killings do happen in Canada, although relatively rarely compared to spousal killings generally.¹²⁰ It is, therefore, important to consider the implications of this provision beyond the context of “honour” killings. Statements of the then Minister reveal that the government was trying to limit the defence to cases where the victim assaulted the accused:

On the defence of provocation, we’re very confident of the amendment that is proposed here. *We’re saying that the only provocation that might be acceptable in a court of law is very serious violence by the victim.* Indictable offences punishable by up to five years or more are violent offences.¹²¹

There are two significant changes in the new s. 232. First, the term “act or insult” has been changed to “conduct.” It is not clear whether this would rule out words alone as the basis for provocation or whether words can constitute conduct. Regardless, the second change requiring an indictable offence would mean that the only possible words that could trigger provocation would be those that constitute assault,¹²² possibly the crime of uttering threats under s. 264.1 or criminal harassment under s. 264. The second and more important change is the requirement that the conduct of the victim constitute an indictable offence subject to imprisonment of five years or more. This new criterion tells us little about how Canadian society expects an ordinary person to react. It is a somewhat arbitrary line that is devoid of context as to the types of indictable offences that

119. Fournier and her colleagues found that there were two cases (both before *Tran* was decided) in which provocation was successful for a non-Western/Canadian accused killing an intimate partner in their data but in neither of these cases was there a claim based on “honour”: Fournier, McDougall & Dekker, *supra* note 45. In *Li*, *supra* note 45 the Court of Appeal upheld a successful provocation case for a non-Western accused who killed his wife in anger after they had argued and had apparently engaged in a minor struggle. There was no mention of honour in the case, nor was there any indication that the killing was connected to the accused’s beliefs about what was acceptable in his culture. Nor was there any suggestion of culture being relevant to the defence in *R c Chouaiby*, 1994 CanLII 5910 (QCCA).

120. A rare example is the much-publicized *Shafia* case in which a young woman’s father, mother, and brother were convicted of first degree murder in her death, and the deaths of three other female family members, and those convictions upheld on appeal: *supra* note 45.

121. House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 2nd Sess, No 43 (31 March 2015). As will be discussed further below, these amendments are similar to those enacted in New South Wales, Australia in 2014, particularly with the new requirement of an indictable offence punishable by five years in prison. The five-year indictable offence rule in the New South Wales reforms was cited with approval by government Members of Parliament in the Canadian debates. See, e.g., *House of Commons Debates*, 41st Parl, 2nd Sess, No 187 (23 March 2015) at 1705 (Hon D Ablonczy). However, the Australian reforms go further than the Canadian ones. See below, the text accompanying notes 161-165.

122. Section 265 of the *Criminal Code*, *supra* note 10, includes within the definition of assault the threatened application of force.

make the subsequent homicide deserving of our compassion. For example, there are property-based offences that are subject to five years or more of imprisonment. Should lethal violence ever be mitigating in response to provocation that involves only a deprivation of property? We have the somewhat bizarre situation that a theft over \$5000 could trigger provocation whereas a theft under \$5000 could not, based on their respective maximum punishments. Minister Alexander was comforted by his assumption that these cases would not arise.¹²³ But what if, for example, a woman, on leaving an abusive spouse, takes some valuable property belonging to the accused? Will his defence of provocation be assessed only from the perspective of someone who had his property stolen or will it be seen from the perspective of a man whose property was stolen by his wife as she left him?

How will the changes to the requisite provoking conduct impact the other requirements of the defence? For example, will the ordinary person inquiry, which has played such a central role in the defence of provocation, be largely subsumed by the assessment of whether the victim committed an indictable offence? In other words, once the indictable offence threshold has been met, will that make it more likely that the ordinary person standard can be satisfied or will these two elements remain distinct?

It is likely that most of the cases arising under this new defence will involve situations where self-defence or possibly defence of property could also be argued.¹²⁴ Particularly for triggering offences like sexual assault and assault, the new provocation defence in essence becomes a defence of failed self-defence, where the excessive use of force may lead to a compromise verdict of manslaughter under the guise that the person lost self-control after being provoked by the assault. Whether we need a compromise verdict of manslaughter where excessive force is used in self-defence is a legitimate inquiry but not one that should be addressed through a distinct loss-of-control-based defence. Self-defence is based on a calculated decision about what kind of force is necessary to protect one's life or bodily integrity, not on out-of-control rage.

The interaction between self-defence and provocation under the new defence is demonstrated by the first appellate decision to address the new

123. House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 2nd Sess, No 43 (31 March 2015).

124. Roach et al, *supra* note 48 at 405, suggest that “[T]he most likely—indeed perhaps the only—offence to qualify under this provision is assault but this raises the question of why accused would rely on provocation when he or she in such a case could claim self-defence if they can argue under s. 34 that they also [were] acting to defend themselves and their acts are reasonable in the circumstances.”

amendments. The Court of Appeal in *Rasberry*¹²⁵ appears to apply the new amendments to provocation even though the killing took place in 2013 before s. 232 was amended. Because the Crown was appealing the subjective component of the defence, the appellate Court assumed that the objective component could be established through the allegation of sexual assault. Because the alleged insult in this case was sexual assault, the defence would have been available whether or not the amendments were in effect and the Crown had in fact conceded the objective component of the test. The accused in *Rasberry* was charged with the murder of a neighbour. After a friendly night of drinking with his wife, the victim, and another male friend, the accused was ultimately left alone with the victim in the *Rasberry* home while his wife was upstairs in bed. According to the accused's statement to police, the victim suddenly grabbed the accused and pushed him backwards over the kitchen counter, threatened to anally rape him, and said that if *Rasberry* didn't cooperate the victim would go upstairs and rape the accused's wife. The accused then inflicted 23 stab wounds and 14 slash wounds on the victim using three kitchen knives. The accused called 911 and said there was a man dying on his floor who had tried to have anal intercourse with him. Both men were highly intoxicated and of roughly the same size although the accused told police the victim was much stronger than him.

The trial judge was explicitly skeptical about *Rasberry's* account of the events but held that the Crown had failed to disprove provocation beyond a reasonable doubt. The Crown challenged the manslaughter verdict on appeal, arguing that there was no air of reality to the subjective component of provocation. The Court of Appeal affirmed the judge's decision that the Crown had failed to disprove the subjective component beyond a reasonable doubt. The Court also found that there was evidence on which the trial judge could conclude that what started out as self-defence evolved into provocation when the accused lost his self-control and used excessive force.

Rasberry is an example of provocation being used as a defence of excessive force in self-defence. Our concern with the new legislation is that the mere allegation of an assault on the part of the victim may be sufficient to trigger the defence of provocation. In *Rasberry*, his statements to police and the 911 operator were the only evidence of sexual assault. The accused did not testify and there was no physical evidence supporting sexual assault. Given that the accused only has to raise a reasonable doubt

125. *Rasberry*, *supra* note 49.

that an indictable offence was committed by the victim, this amendment may not be successful in significantly limiting the defence.

It is difficult to glean enough detail about the facts from the Court of Appeal judgment in *Rasberry* to give an opinion on the merits of the case, although clearly the trial judge was skeptical about Rasberry's version of the events.¹²⁶ We agree that people who are sexually assaulted have a right to defend themselves and whether the force used was proportionate must be assessed in the context of any violence the accused was experiencing. However, we worry that this will now become the paradigm case of provocation and that a mere allegation of assault or sexual assault will trigger the availability of the defence.

When one takes such a bright line approach to amending a defence as complicated as provocation, it is likely that one will close down some problematic aspects of the defence, while at the same time making the defence unavailable in cases that might warrant compassion. With respect to provocation being used to justify violence against women, superficially these changes appear to rule out some of the problematic cases. For example, announcing an intent to leave a relationship, or criticizing an accused's sexual prowess do not constitute indictable offences and thus would not trigger a defence of provocation. However, where men kill their intimate partners, there is often an allegation that she assaulted him by scratching his penis,¹²⁷ throwing a beer bottle at him,¹²⁸ coming after him with a knife,¹²⁹ or some other means.¹³⁰ The burden on the Crown to prove that the victim did not assault the accused beyond a reasonable doubt is challenging given that the victim is dead. In her study of sentencing for intimate femicide, Grant found that provocation was more likely to be successful in cases where there had been some, often trivial, act of force on the part of the deceased woman.¹³¹ In deciding whether provocation goes to the jury, a mere assertion that the victim struck the accused may be sufficient in these contexts. We also have concerns about the new limits on the defence for women who kill abusive spouses. What if the actions of the deceased were subtle words suggesting that violence would follow, in the context of an abusive relationship? Will those words alone constitute an indictable offence subject to more than five years' imprisonment? Uttering

126. *Ibid* at para 22.

127. *Angelis*, *supra* note 49.

128. *R v Strong* (1996), 17 OTC 252.

129. *R c Kenol*, 2016 QCCA 509 [*Kenol*].

130. In *R v Montgomery*, 1997 ABCA 301 the accused had "visible marks of trauma" on his face, apparently from an assault by his spouse before he killed her.

131. See Grant, "Intimate Femicide," *supra* note 63 at 810.

threats is a possibility but heavily veiled threats may not be as apparent to an outside observer. The loss of self-control framework says nothing about a woman who kills her abusive spouse while he is asleep.¹³² Is there room to look at past conduct, or potential future conduct? Such cases speak more to the inadequacy of our understanding of self-defence than to a defence of provocation. Despair, fear, and hopelessness may motivate such killings but they are rarely premised on a sudden, unforeseen loss of self-control.

The new amendments do nothing to limit the use of provocation in the context of same-sex advances. An unwanted “wet kiss” as in *Bouchard* is a sexual assault and thus does not rule out a defence of provocation where the accused responds with lethal violence even though it is unlikely such a sexual assault would ever have been prosecuted, let alone by indictment. If the doctrine of self-defence is not sufficiently flexible to address these situations, then our attention should be focused on developing that defence, and deciding when excessive force in self-defence warrants a compromise manslaughter verdict, rather than treating them as instances of provocation based on the assumption that ordinary heterosexual men fly into a homicidal rage at the thought of sex with another man.

There are numerous issues around how the defence operates that will need clarification. It is the role of the judge to decide whether there is an air of reality on every element of the defence of provocation justifying putting it to the jury. What will be required to create an air of reality that a completed or attempted sexual assault has been committed? Will *mens rea* be addressed? What if the victim of the provoked killing honestly believed that the accused was consenting to his sexual advances? Will the Crown be tasked with proving beyond a reasonable doubt that the victim took reasonable steps to inquire into consent?¹³³ Or will a mere assertion by the defence always be sufficient to raise a reasonable doubt that an offence was committed by the victim? These amendments lack the nuance and care that has gone into reforming provocation in other common law jurisdictions which provide alternatives that should have at least been considered before amending the defence. It is to these jurisdictions that we now turn.

132. See *R v Whynot* (1994), 147 NSR (2d) 111 (CA); *Lavallee*, *supra* note 59.

133. Canadian Bar Association, “Submission: Bill S-7: *Zero Tolerance for Barbaric Cultural Practices Act*” (April 2015) 1 at 13-14 (concluding that “In our view, each option for conducting the “air of reality” assessment is fraught with complexity and would add significant time to criminal trials”).

III. *Options for reform*

1. *Lessons from other jurisdictions*

England, Australia, and New Zealand have undertaken significant revisions of the provocation defence over the past decade, largely in response to concerns about men raising the defence after killing their intimate partners and the limits on the defence for battered women who kill their abusers. Any examination of potential reform options from other jurisdictions must take into account the differing sentencing regimes for the crime of murder. Abolition of provocation has a different meaning in a jurisdiction where mandatory sentences prevent meaningful consideration of mitigating circumstances in sentencing. In response largely to feminist criticism, three Australian jurisdictions and New Zealand¹³⁴ have abolished provocation. None of these jurisdictions currently has mandatory minimum sentences for murder. For example, in Tasmania, the first Australian jurisdiction to abolish provocation in 2003,¹³⁵ mandatory minimums for murder had already been abolished in 1995.¹³⁶ This context was explicitly relied on to justify abolishing the defence of provocation.

In 2005, Victoria, a jurisdiction with no mandatory minimum sentence for murder, became the second jurisdiction in Australia to abolish provocation.¹³⁷ This change was made in response to recommendations made in a Victorian Law Reform Commission Report which were critical of the gender bias inherent in the defence.¹³⁸ According to the Report, the defence was not only used to justify male violence against women, but the requirement of a sudden triggering event had made it difficult for women to successfully use it.¹³⁹ The Report also found that the defence promoted a culture of victim blaming, and that the legal test was conceptually difficult to apply.¹⁴⁰ The Law Commission recommended that “factors that decrease a person’s culpability for an intentional killing should be taken into account at sentencing rather than form the basis of a separate partial defence.”¹⁴¹

134. *Crimes (Provocation Repeal) Amendment Act 2009* (NZ), 2009/64.

135. *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

136. *Criminal Code Act 1924* (Tas), s 158.

137. *Crimes (Homicide) Act 2005* (Vic), s 3.

138. Victorian Law Reform Commission, “Defences to Homicide: Final Report” (Melbourne: Victorian Law Reform Commission, 2004) at 27-31.

139. *Ibid* at 27. The authors of the Report noted that in their review of the case law that was current at the time of the Report’s publication, only three women raised provocation at trial and none of them were successful (at 28-29).

140. *Ibid* at 32-33, 35-36.

141. *Ibid* at 55.

The Victorian Parliament's repeal of provocation was part of a package of reforms. In addition to repealing provocation, the legislature established the offence of "defensive homicide," clarified the requirements for self-defence, and broadened the scope of admissibility for evidence of abuse in relationships. The new offence of defensive homicide was intended to be, "a safety net for those who kill in response to family violence but who do not meet the test for self-defence because their belief in the necessity to defend themselves did not have reasonable grounds."¹⁴² The offence had the same maximum penalty as manslaughter. Defensive homicide was the subject of much criticism on two grounds. First, it had been suggested that this offence could have a problematic net-widening effect, resulting in manslaughter convictions for women who kill abusive partners, rather than acquittals on the basis of self-defence.¹⁴³ Second, the defence was criticized for allowing evidence of provocation for men who kill their female intimate partners, thereby reviving provocation through the back door.¹⁴⁴ Tyson, for example, points to a 2010 decision, *R. v. Middendorp*,¹⁴⁵ in which a man with a history of domestic violence was convicted of defensive homicide, and not murder, after stabbing his spouse four times in the back. This case sparked public outrage¹⁴⁶ and triggered the Department of Justice to initiate a review of how the offence was being applied, especially in the context of gendered and domestic violence. However, the consensus among feminists appeared to be that the offence should be retained, largely out of concern that self-defence alone might not be adequate to deal with cases in which women kill abusive partners.¹⁴⁷ Despite these concerns, the Victorian Parliament repealed defensive homicide in September 2014 but also strengthened the protection for battered women under the law of self-defence by making self-defence available to an accused "in the context of family violence" even where the harm threatened is not immediate and where the force used is in excess

142. *Crimes Act 1958* (Vic), s 9AD, as created by *Crimes (Homicide) Act 2005* (Vic), s 6 and repealed by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic), s 3(3); Sheehy, Stubbs & Tolmie, "Defences to Homicide," *supra* note 55 at 478.

143. Tyson, "Victoria's New Homicide Laws," *supra* note 55 at 211.

144. *Ibid* at 212-214; Tyson, *Sex, Culpability and Provocation*, *supra* note 75 at 122-124.

145. *R v Middendorp*, [2010] VSC 202.

146. Tyson, *Sex, Culpability and Provocation*, *supra* note 75 at 122-123.

147. See, e.g., Danielle Tyson, Sarah Capper & Debbie Kirkwood, *Submissions for the Review of the offence of defensive homicide* (2010), Dept of Justice, Victoria (AUS), 13 September 2011.

of the harm threatened or actually inflicted.¹⁴⁸ Finally, Victoria reformed its evidence laws to ensure that evidence about family violence would be admitted in homicide proceedings to explain the context in which the person killed as well as the social, psychological and economic factors that can affect family violence victims.¹⁴⁹ Victoria is seen to have gone further to protect women both as accused persons and as victims than any other jurisdiction and could, we believe, provide a model on which Canadian law could be based.¹⁵⁰

In Western Australia, mandatory minimums for murder were abolished along with the defence of provocation in 2008.¹⁵¹ This change was part of a package of reforms that were the result of a Law Reform Commission Report¹⁵² which noted the problematic nature of “male honour” as a source of mitigation and the complexity of the defence.¹⁵³

Several other Australian jurisdictions have limited the scope of the defence. In Queensland, for example, where the legislature was not prepared to abolish mandatory minimums, significant changes were made to the defence of provocation. Queensland has gone the furthest to deal with spousal homicides, limiting the application of the defence in the context of domestic relationships where the provocative act was done to leave the relationship, to change the nature of the relationship, or to indicate that the relationship should change.¹⁵⁴ These limits also apply where the victim has already ended the relationship.¹⁵⁵ Queensland has also put the burden of proof on the accused to prove provocation¹⁵⁶ and has explicitly provided that words alone will not constitute provocation “other than in circumstances of a most extreme and exceptional character.”¹⁵⁷

148. *Crimes Act 1958* (Vic), s 322M; *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*. To be successfully pled, the accused must prove “a subjective belief that the actions taken in self-defence were necessary, and that belief must have been based on reasonable grounds...even if the accused person is responding to a harm that is not immediate, or his or her response involves the use of force in excess of the force involved in the harm or threatened harm.” Tyson, “Victoria’s New Homicide Laws” *supra* note 55 at 210 (citations omitted); see also *Crimes Act 1958* (Vic), s 9AD, as created by *Crimes (Homicide) Act 2005* (Vic), s 6 and repealed by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic), s 3(3).

149. *Crimes Act 1958* (Vic), ss 9AH(3)(a)–(f), as created by *Crimes (Homicide) Act 2005* (Vic), s 6 and repealed by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic), s 3(3).

150. Sheehy, Stubbs & Tolmie, “Defences to Homicide,” *supra* note 55 at 483.

151. *Criminal Law Amendment (Homicide) Act 2008* (WA).

152. Austl, Western Australia, Law Reform Commission, *A review of the law of homicide* (Perth: Law Reform Commission of Western Australia, 2007), online: Law Reform Commission of Western Australia <http://www.lrc.justice.wa.gov.au/P/project_97.aspx>.

153. *Ibid* at 202-216.

154. *Criminal Code 1899* (Qld), s 304(3).

155. *Ibid*, s 304(6).

156. *Ibid*, s 304(9).

157. *Ibid*, s 304(2).

Queensland also enacted a partial defence of “killing for preservation in an abusive domestic relationship.”¹⁵⁸ This provision reduces to manslaughter killings where the deceased had a history of domestic violence against the accused and the accused believed that killing was necessary to protect herself.¹⁵⁹ Most recently, the Queensland Parliament passed a Bill aiming to abolish the “homosexual panic” aspect of the partial defence which, once in force, will amend its *Criminal Code* to specifically exclude an “unwanted sexual advance” except in cases of “exceptional character.”¹⁶⁰

Canada’s amendments to provocation appear to be modelled on those enacted in 2014 in New South Wales, creating a new defence of extreme provocation that retained a loss-of-control standard and an ordinary person test.¹⁶¹ Section 23 of the *Crimes Act 1900* provides that the conduct of the victim must be directed at the accused and must constitute a serious indictable offence.¹⁶² These reforms were largely motivated by concerns

158. *Ibid*, s 304B, introduced by *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld), s 3. This was the result of recommendations made in the report: Austl, Queensland, *Homicide in Abusive Relationships: A Report on Defences* (Report prepared for the Attorney-General and Minister for Industrial Relations) by Geraldine Mackenzie & Eric Colvin (Brisbane: 2009).

159. The provision reads:

- (1) A person who unlawfully kills another (the deceased) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—
 - (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
 - (b) the person believes that it is necessary for the person’s preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
 - (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.
- (2) An abusive domestic relationship is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other.
- (3) A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.
- (4) Subsection (1) may apply even if the act or omission causing the death (the response) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.
- (5) Subsection (1)(a) may apply even if the person has sometimes committed acts of domestic violence in the relationship.
- (6) For subsection (1)(c), without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence.

160. Plater, Line & Fitz-Gibbon, *supra* note 1 at 17-18.

161. *Crimes Act 1900* (NSW), s 23. These amendments followed the release of a report by the Select Committee on the Partial Defence of Provocation, Austl, New South Wales, Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation* (Sydney: Select Committee on the Partial Defence of Provocation, 2013).

162. A serious indictable offence is defined in s 4 of the *Crimes Act 1990* as one that is punishable by imprisonment for at least five years.

over the use of the defence by men who kill their female intimate partners.¹⁶³ Significantly, a number of other reforms to the legislation demonstrate that much more thought went into the New South Wales provisions compared to their Canadian counterpart. For example, the defence in New South Wales is limited to situations in which an ordinary person could have lost self-control “to the extent of intending to kill or inflict grievous bodily harm on the deceased.” This change directly responds to the critique that ordinary people do not respond with fatal violence except to the most extreme provoking behaviour. New South Wales is also explicit that neither a non-violent sexual advance nor conduct induced by the accused to provide an excuse can constitute extreme provocation. Further, s. 23(4) provides that the provoking conduct need not occur immediately before the act causing death. Removing the suddenness requirement in this way was intended to make the defence more available to those who have suffered ongoing abuse at the hands of an intimate partner.¹⁶⁴ However, despite removal of the suddenness requirement, a step Canada has failed to take, Kate Fitz-Gibbon argues that the new extreme provocation defence will reduce access to the defence for battered women who kill even though it was intended to retain provocation for this group.¹⁶⁵

The Australian Capital Territory¹⁶⁶ and the Northern Territory¹⁶⁷ have both limited the applicability of provocation for non-violent sexual advances. Both provisions state that a non-violent sexual advance towards the accused is not in itself sufficient to constitute provocation but may be considered along with other conduct of the deceased.

England has also taken steps to reform its provocation defence. As in Canada, a murder conviction carries a mandatory life sentence. In 2010, the defence of provocation was abolished in England and Wales and replaced with a new defence based on the loss of control.¹⁶⁸ These reforms disregarded the recommendation of Ministry of Justice Consultation Paper which urged removing loss of control as a requirement of the defence.¹⁶⁹ The new partial defence of loss of control was enacted

163. Kate Fitz-Gibbon, “Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence of ‘Extreme’ Provocation” (2017) 40 *Melbourne UL Rev* 769 at 787; *The Partial Defence of Provocation*, *supra* note 161 at 200.

164. Fitz-Gibbon, *ibid* at 779, 781.

165. *Ibid* at 789-791.

166. *Crimes Act 1900* (ACT), s 13(3).

167. *Criminal Code 1983* (NT), s 158(5).

168. *Coroners and Justice Act 2009* (UK), c 25, ss 54-56. See also Kate Fitz-Gibbon, “Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control,” (2013) 40:2 *JL & Soc’y* 280 [Fitz-Gibbon, “Replacing Provocation”].

169. UK, Law Commission, *Murder, Manslaughter and Infanticide* (Law Commission No 304) (London: Her Majesty’s Stationery Office, 2006) at 80-84.

to “better cater for the unique circumstances within which battered women kill while also providing a provision that excludes defendants who kill an intimate partner in response to alleged sexual infidelity.”¹⁷⁰ In many respects, the new loss-of-control defence, which is rather complex in its elements, resembles the defence of provocation. The accused must have a loss of self-control in response to a qualifying trigger where a person of the accused’s sex and age, with the normal degree of tolerance and self-restraint, might have acted in a similar way; essentially the same objective test as the provocation defence.¹⁷¹ Notably, the loss of self-control need not be sudden.¹⁷² The critical changes, for the purpose of this paper, relate to what is considered a qualifying trigger of the loss of self-control. In general, the defence applies where words or conduct cause the accused to have a justifiable sense of being seriously wronged,¹⁷³ language we saw in *Tran*. There is an explicit provision that the accused’s fear of serious violence from the victim will qualify, opening up the defence to women who kill their abusers.¹⁷⁴ The fact that something said or done constituted sexual infidelity is to be disregarded¹⁷⁵ as is any fear of violence or sense of being wronged that was incited by the accused to provide an excuse to use violence.¹⁷⁶

The English reforms are somewhat puzzling in that they were animated by a desire to remove the gender bias from the defence and yet, contrary to recommendations, loss of control remains the organizing principle. The UK government did respond to criticisms about this by removing the suddenness requirement for the loss of self-control and by explicitly including fear of future violence as a qualifying trigger, two reforms that we have not seen in the Canadian context. Nonetheless, concerns have been raised that requiring that an accused must lose control could limit the defence for women who kill their abusers.¹⁷⁷

2. *A new approach for Canada: abolishing provocation and mandatory minimums for murder*

In our view the approach taken by Victoria should be considered for Canada, with the abolition of the mandatory minimum sentence for murder being crucial to the reform. Through a package of reforms, Victoria

170. Fitz-Gibbon, “Replacing Provocation,” *supra* note 168 at 280.

171. *Coroners and Justice Act 2009*, *supra* note 168, s 54(1)(c).

172. *Ibid*, s 54(2).

173. *Ibid*, s 55(4).

174. *Ibid*, s 55(3).

175. *Ibid*, s 55(6)(c).

176. *Ibid*, ss 55(6)(a) and (b).

177. Fitz-Gibbon, “Replacing Provocation,” *supra* note 168 at 290-292.

abolished provocation but at the same time expanded self-defence so that the defence might still be open to a battered woman who uses excessive force to defend herself or who kills an abusive spouse while he is asleep. We recognize that persuading Parliament to abolish mandatory minimum sentences for murder would be no easy task. If abolition is not possible in Canada, we recommend that, at a minimum, reforms along the line of those adopted in Queensland be pursued. Those reforms explicitly address problems around men killing their female intimate partners and limit “homosexual panic” scenarios.

It is beyond the scope of this paper to set the precise details of an appropriate sentencing scheme for murder and other homicide offences, a complex task that requires its own paper. The current regime raises grave concerns about fairness and about the extent to which potentially innocent accused are under enormous pressure to plead guilty to manslaughter to avoid these rigid sentences.¹⁷⁸ Canada has an extremely harsh sentencing regime for murder with a mandatory life sentence attached to all murders and periods of parole eligibility from 10–25 years for second degree murder¹⁷⁹ and 25 years for first degree murder.¹⁸⁰ The Harper government took steps to make this regime even harsher and more inflexible. For example, it abolished the s. 745 procedure (the so-called “faint hope clause”) which provided an opportunity for people convicted of murder to apply for review of parole ineligibility periods greater than 15 years. Parliament also enacted legislation that allows for parole ineligibility periods to be made consecutive to one another, resulting in *de facto* life without parole sentences.¹⁸¹ The constitutionality of these new, much longer parole ineligibility periods has not yet been considered by the Supreme Court. Given the s. 12 *Charter* jurisprudence prohibiting “cruel and unusual treatment or punishment,”¹⁸² developments in the research about

178. Debra Parkes & Emma Cunliffe, “Women and wrongful convictions: Concepts and challenges” (2015) 11:3 *Intl J L in Context* 219; Elizabeth Sheehy, “Battered Women and Mandatory Minimum Sentences” (2001) 39:2 *Osgoode Hall LJ* 529 [Sheehy, “Mandatory Minimum Sentences”].

179. *Criminal Code*, *supra* note 10, s 745(c).

180. *Ibid*, s 745(a).

181. *An Act to amend the Criminal Code and another Act*, SC 2011, c 2. The faint hope clause has been abolished for all murders which are committed after 2 December 2011. See, e.g., *Criminal Code*, s 745.21(1)–745.51 and Canada, Bill C-53, *An Act to amend the Criminal Code and the Corrections and Conditional Release Act and to make related and consequential amendments to other Acts*, 2nd Sess, 41st Parl 2015. For examples of cases of 75-year parole ineligibility, see *R v Bourque*, 2014 NBQB 237, [2014] NBJ No 295 (QL); *R v Ostamas*, 2016 MBQB 136, [2016] MJ No 197 (QL), 329 Man R (2d) 203; *R v Saretzky*, 2017 ABQB 496, [2017] AJ No 831 (QL).

182. See, e.g., *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773; *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130.

the impact of long-term imprisonment,¹⁸³ and increasing international attention to the human rights implications of life sentences,¹⁸⁴ there is good reason to believe they may be unconstitutional.

Don Stuart has argued that Canada's murder sentencing regime might be unconstitutional in the absence of a provocation defence.¹⁸⁵ In our view, the constitutionality of mandatory sentences for murder does not hinge on the availability of provocation as a defence, but rather on the lack of a principled mitigation regime to account for the wide range of circumstances in which intentional killings occur.

We recognize that the abolition of provocation could result in women who kill their abusive partners losing access to the partial defence where self-defence fails. Sheehy and her colleagues in Australia and New Zealand examined how often women raised self-defence and provocation in their comparative study of defences to homicide for battered women.¹⁸⁶ The study found that, in Canada, of the 16 women who went to trial for killing their abusive spouses between 2000 and 2010, 11 were acquitted on the grounds of self-defence, a much higher rate than in Australia or New Zealand. Nineteen additional women pleaded guilty to manslaughter, although it is unclear how many of these 19 were based on the Crown assuming that a defence of provocation had a reasonable possibility of success.¹⁸⁷ Because of the high number of guilty pleas, it is difficult to assess the role of provocation in these cases. However, it does seem reasonable to posit that while provocation may play less of a role in Canada for battered women, because of the more contextual approach taken to self-defence,¹⁸⁸ provocation was probably the basis for some manslaughter verdicts.¹⁸⁹ We believe that abolishing mandatory minimums for murder would provide more flexibility for these women than the current gendered defence which favours sudden losses of self-control and has historically not served women

183. See, e.g., Serena Wright, Ben Crewe & Susie Hulley, "Suppression, denial, sublimation: Defending against the initial pains of very long life sentences" (2017) 21:2 *Theoretical Criminology* 225; Alison Liebling & Shadd Maruna, eds, *The Effects of Imprisonment* (Cullompton: Willan, 2005).

184. Dirk Van Zyl Smit & Catherine Appleton, eds, *Life Imprisonment and Human Rights* (Oxford: Hart-Bloomsbury, 2016).

185. Stuart, Coughlan & Delisle, *supra* note 26. See also Roach et al, *supra* note 48 at 406 who argue that arbitrary restrictions on the provocation defence, such as those brought in by the new amendments, are "ripe for Charter challenge."

186. Sheehy, Stubbs & Tolmie, "Defences to Homicide," *supra* note 55. See also Sheehy, *Defending Battered Women*, *supra* note 11.

187. *Ibid.* The study (at 486) found one woman who did not proceed to trial, three who proceeded to trial and were convicted of manslaughter and one who was convicted of murder. Of the 20 guilty pleas 19 were to manslaughter and one was to murder.

188. *Lavallee*, *supra* note 59.

189. See, e.g., *Daniels*, *supra* note 92.

well. We are not the first to argue that provocation should be abolished along with the harsh mandatory minimum sentences for murder. The Canadian Association of Elizabeth Fry Societies, for example, supports the abolition of provocation but only if mandatory minimums for murder are also abolished.¹⁹⁰

We are not arguing that men should be sentenced to more harsh sentences for murder nor that provoking acts of the victim will never be relevant to sentencing; but rather that the mitigation regime be redistributed so that out-of-control rage is not the sole basis for mitigation. By widening the range of factors that can be considered in mitigation, it is likely that more accused will benefit from increased flexibility in sentencing. This approach would also open up the possibility of seriously considering *R. v. Gladue*¹⁹¹ factors in sentencing for murder, rather than limiting the applicability of section 718.2(e) of the *Code* to a very cursory analysis of the appropriate period of parole ineligibility for second degree murder.¹⁹²

We recognize that a regime that provides for mitigation in the sentencing of murder shifts decision-making power from the jury to the judge to determine what types of mitigation will be recognized. This in turn raises the possibility of discriminatory narratives about violence against women or other vulnerable groups driving sentencing decisions. Hunter and Tyson, for example, have cautioned that the stereotypes and victim blaming that animated provocation could well shift into sentencing decisions given “the tendency for sentencing in cases of domestic homicide to undermine legal reforms designed to benefit women.”¹⁹³ However, in their study examining the impact on sentencing for intimate partner killings in Victoria after the abolition of provocation they found “a mixed picture in relation to concerns about the reintroduction of problematic, gendered provocation narratives at the sentencing stage.”¹⁹⁴ In general, they found such narratives had a minimal impact on sentencing outcomes in domestic homicide cases. Overall, courts were able to distinguish cases where the defendant had “a justifiable sense of being wronged” from those where the alleged mitigation was based on male control over their female partners.¹⁹⁵ However, at the level of discourse, problematic provocation narratives

190. The Response of the Canadian Association of Elizabeth Fry Societies to *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, *supra* note 1, recommendation 38.

191. *R v Gladue*, 1999 CanLii 679 (SCC), [1999] 1 SCR 688.

192. See, e.g., *R v Paul*, 2014 BCCA 81.

193. “The Implementation of Feminist Law Reforms,” *supra* note 17 at 132.

194. *Ibid* at 152.

195. *Ibid*.

were evident and defence counsel continued to raise such narratives in sentencing submissions. At the same time, they also saw the emergence of new discourses denouncing male violence against women, particularly from women judges.

Conclusion

We have seen some improvements in the way courts have infused meaning into the defence of provocation over the past decade. Judges are beginning to reject cases where a woman leaves her spouse,¹⁹⁶ threatens to have an abortion,¹⁹⁷ or challenges his sexual prowess.¹⁹⁸ Judges are also beginning to recognize that a non-violent same-sex advance should not cause someone to lose their self-control and kill.¹⁹⁹ However, these positions are not uniformly applied and, as *Raspberry* reveals, are always a matter of interpretation.

By prioritizing rage over other extreme emotions like fear and despair, the defence of provocation has historically been more applicable to male rage than to the realities of women who kill. Jurisprudence under the previous provocation provision demonstrated three problematic themes: it permitted the excuse of homicidal rage against intimate partners based on discriminatory assumptions about what is an “ordinary” response to a woman leaving, or threatening to leave, a relationship, and it permitted men to argue that lethal violence in response to an advance from another man was “ordinary.” By contrast, abused women who kill their abusers have had limited access to the defence. While the amendment to subsection 232(2) narrows the qualifying triggers to more serious conduct by the victim, and may preclude the defence where the only provocation is a woman leaving a relationship, it does nothing to limit the defence where there is an allegation by the accused that the victim assaulted him or made a same-sex advance triggering the loss of self-control. We doubt that the defence of provocation as it exists can be applied in a manner that is consistent with substantive equality. The Australian experience, particularly that in Victoria, demonstrates that reform of provocation is best done in a comprehensive context that looks at all aspects of the crime of murder, keeping the sentencing regime front and centre in developing defences and substantive doctrine. This is not how law reform relating to homicide has proceeded in Canada in recent years. Instead, sentencing provisions have been added on a piecemeal basis in response to public

196. *Kenol*, *supra* note 129.

197. *R v Barrett*, 2016 ONCA 12.

198. *R c Godbout*, 2015 QCCS 6265.

199. *R v Brewer*, 2016 BCSC 1291.

outcry over particular cases and have consistently ratcheted sentences up, while individual defences are amended without consideration of other defences. The defence of provocation will, in our view, remain both over- and under-inclusive due to the problematic foundation on which it rests. We thus urge the government to undertake a re-examination of the defence of provocation (and potentially self-defence) and the sentencing regime for murder to consider in a more principled way what kinds of killings are deserving of our compassion.