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## Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia

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# GENDER EQUALITY, SOCIAL VALUES AND PROVOCATION LAW IN THE UNITED STATES, CANADA AND AUSTRALIA

CAROLINE FORELL\*

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## ABSTRACT

*This article examines and compares the partial defense of provocation as it applies to domestic homicide in the United States, Canada and Australia. It looks at both the male-gendered basis for provocation of jealous rage and the female-gendered basis of fear. The article explains why substantive equality, prevalent under Canadian constitutional law, has not resulted in woman-friendly provocation rules in Canada. It also explains why Australia, instead of*

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\* Clayton R. Hess Professor of Law. Thanks to Cass Skinner Lopata for her outstanding research assistance and to Professors Leslie Harris and Rebecca Bradfield for their helpful comments.

*the United States or Canada, is the leader in incorporating substantive equality into its provocation doctrine. It concludes that the main reason that some Australian jurisdictions have abolished provocation and others have woman-friendly versions of the doctrine is because, unlike Canada and the United States, some Australian states do not have mandatory minimum sentencing for either murder or manslaughter. It further concludes that current social norms have incorporated substantive equality into the application of provocation law in all three countries, and that therefore, there may not be as great a need to reform the law of provocation as there has been in the past.*

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The laws that are going to be amended in this area will one day, in the not-too-distant future, be spoken about by me and other people to the amazement of our daughters and their friends. They will be amazed that these laws ever existed. I will talk about the fact that a law existed that provided . . . a partial excuse, for killing a domestic partner . . . based on the notion that it was understandable that the accused lost control and became so violent as to kill their partner because their relationship was under threat.<sup>1</sup>

#### INTRODUCTION

Men who commit domestic homicide by killing intimate or former intimate partners often do so out of jealousy, possessiveness and rage—in the heat of passion.<sup>2</sup> Women who commit domestic homicide often kill out of fear and despair—they kill their batterers.<sup>3</sup> Both men and women frequently assert the partial defense of provocation for this ultimate act of domestic violence.<sup>4</sup> If provocation

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1. *Crimes (Homicide) Bill: Parliamentary Debates (Hansard) Before the Victorian Legislative Assembly*, 55th Parliament, 1838 (Oct. 26, 2005) (Vic.) (statement of Maxine Morand, Member of Victoria's Legislative Assembly) (commenting on Victoria's Crimes (Homicide) Bill during the debate over abolishing provocation).

2. See Jenny Morgan, Critique and Comment, *Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them*, 21 MELB. U. L. REV. 237, 256 (1997) (citing NEW SOUTH WALES LAW REFORM COMM'N, DISCUSSION PAPER 31, PROVOCATION, DIMINISHED RESPONSIBILITY & INFANTICIDE 3.98 (1993) [hereinafter NEW SOUTH WALES LAW REFORM COMM'N]).

3. See *id.* at 256-57.

4. The other situation where provocation is frequently asserted is homicide as a result of a fight between men. See, e.g., NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 2, at 3.8.

is found, it reduces murder to manslaughter, which usually results in a substantially shorter prison sentence.<sup>5</sup> Two gender equality issues are presented by this reality, both relating to domestic violence. First, why should jealous killers be allowed to argue provocation when their victims did nothing legally wrong? Second, why are most battered women who kill their batterers not fully excused based on self-defense?

Two visions of gender equality, formal and substantive,<sup>6</sup> can be used to analyze the criminal defense of provocation as applied in domestic homicide cases. Formal equality means equality of treatment so that like cases are treated alike. Under formal gender equality, the same legal rule applies to men and women when both sexes engage in similar conduct or are similarly situated.<sup>7</sup> This is often effective in breaking down gender stereotypes, for example, by allowing women to be executors of estates<sup>8</sup> or attend state military academies.<sup>9</sup> However, formal equality is problematic when used to justify retaining certain male-biased defenses, and expanding their application to women rather than abolishing them. Provocation, when applied in domestic homicide cases, is such a defense.

Unlike formal equality, substantive equality seeks to accommodate the varied needs and experiences of subordinated groups.<sup>10</sup> Substantive gender equality insists that the law take into account and respond to the actual effect of a rule on both men and women,

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5. See CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 173-74 (New York Univ. Press 2000).

6. See KATHARINE T. BARTLETT ET AL., *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 265 (3d ed. 2002) (distinguishing between the two visions of equality described by one group of commentators as follows: “[w]hile formal sex equality judges the *form* of a rule, requiring that it treat women and men on the same terms without special barriers or favors on account of their sex, substantive equality looks to a rule’s *results* or *effects*.”).

7. See FORELL & MATTHEWS, *supra* note 5, at 14 (explaining that although the same laws are applied to men and women under formal gender equality, the laws may punish women for not being men in areas “where consensus and commonality between men and woman simply do not exist”).

8. See, e.g., *Reed v. Reed*, 404 U.S. 71, 77 (1971) (applying heightened scrutiny for the first time to gender discrimination where a statute gave mandatory preference to fathers over mothers as administrators of deceased child’s estate). The Court held that dissimilar treatment for men and women who are similarly situated violates the Equal Protection Clause. *Id.*

9. See, e.g., *United States v. Virginia*, 518 U.S. 515, 557-58 (1996) (applying heightened scrutiny to Virginia Military Institute’s sex-based admissions policy and holding that denying women admittance because of their gender violates the Equal Protection Clause).

10. See Claire L’Heureux-Dubé, *A Conversation About Equality*, 29 DENV. J. INT’L L. & POL’Y 65, 69 (2000) (remarking that: “equality isn’t just about being treated the same, and it isn’t a mathematical equation waiting to be solved. Rather, it is about equal human dignity, and full membership in society.”).

thereby better assuring that justice for all is achieved.<sup>11</sup> 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-defense because everyone has a right to defend him or herself from physical harm. If substantive gender equality were considered adequately, killings out of jealousy and rage would result in murder convictions,<sup>12</sup> while most killings out of fear and despair would result in acquittals.<sup>13</sup>

With these desired substantive gender equality outcomes in mind, this article examines and compares the law of provocation as it applies to domestic homicide in United States, Canada and the Australia.<sup>14</sup> Every state, province and territory, with the exceptions of the Australian states of Tasmania and Victoria, retains some form of the provocation defense or, in some American states, the Model Penal Code's even more pro-defendant extreme emotional disturbance defense.<sup>15</sup> This article examines why substantive equality, prevalent under Canadian constitutional law,<sup>16</sup> has not resulted in more woman-friendly provocation rules in Canada and why Australia is the leader in incorporating substantive equality into its provocation doctrine.

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11. See *id.* (noting that an examination of substantive rights violations must consider the treatment of the different groups within the context of society, as differential treatment in some instances may lead to substantive equality, while similar treatment in other cases may lead to substantive inequality).

12. See *id.* at 178; see also VICTORIAN LAW REFORM COMM'N, DEFENCES TO HOMICIDE FINAL REPORT xv (Oct. 2004) [hereinafter VICTORIAN LAW REFORM COMM'N], [http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Homicide\\_Final\\_Report/\\$file/FinalReport.pdf](http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Homicide_Final_Report/$file/FinalReport.pdf).

13. See FORELL & MATTHEWS, *supra* note 5, at 214.

14. Provocation is an area where the constitutional doctrine of equal protection has played little or no part in the development of the law. Therefore, this article examines whether the statutes and case law in these areas are gender-biased and how much formal or substantive gender equality exists.

15. See MODEL PENAL CODE § 210.3(1)(b) (2004). The Code prescribes that:

(1) Criminal homicide constitutes manslaughter when . . . (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

*Id.*

16. See *infra* notes 69-74 and accompanying text.

## I. PROVOCATION OVERVIEW

The origins of the provocation defense are deeply gendered; it was created for and has always been used far more often by men than women. Well before any of the three countries achieved independence from England, the provocation defense began as a common law doctrine about men defending their honor.<sup>17</sup> Until the nineteenth century, provocation rules explicitly treated men and women differently. In the domestic homicide context, the defense was limited to men and was only available when husbands killed after finding their wives in the act of adultery.<sup>18</sup> Over time, the defense of provocation came to excuse “heat of passion” rather than honor.<sup>19</sup> The defense has further evolved so that today any form of perceived infidelity or attempt to leave an intimate relationship may suffice to support a “heat of passion” claim.<sup>20</sup> Thus, the provocation defense has

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17. See Bernard J. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law*, 7 AM. J. LEGAL HIST. 310, 312-13 (1963) (noting that killing during “embroilments to settle so-called ‘breaches of honour’” was excusable during the sixteenth and seventeenth centuries in England because of the absence of malice and the existence of provocation serious enough to deprive one of their self-control).

18. See *R. v. Mawgridge*, (1707) 84 Eng. Rep. 1107, 1114-15 (K.B. U.K.) (including provocation in the adultery context for the first time). Lord Holt CJ defined the categories of conduct for which provocation was available to include “when a man is taken in adultery . . . with another man’s wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property.” *Id.* at 1115; Ian Leader-Elliot, *Passion and Insurrection in the Law of Sexual Provocation*, in *SEXING THE SUBJECT OF LAW* 149, 153 (Ngairé Naffine & Rosemary J. Owens eds., LBC Information Services 1997) (suggesting that originally provocation based on witnessing adultery was only available to the husband for killing his sexual rival not his wife). Leader-Elliot refers to two English cases, *R. v. Pearson*, (1835) 168 Eng. Rep. 1133 (U.K.) and *R. v. Kelly*, (1848) 175 Eng. Rep. 342 (Monmouth Assizes U.K.), where the law allowed provocation for killing the unfaithful wife. *Id.* at 157; see also CYNTHIA LEE, *MURDER AND THE REASONABLE MAN* 19 (New York Univ. Press 2003) (describing other bases for provocation that do not involve domestic homicide such as aggravated assault or battery, mutual combat, commission of a serious crime against a close relative of the defendant and illegal arrest). Today, provocation is often argued in the context of mutual combat situations such as bar brawls. In these contexts, both the parties are usually male.

19. Many provocation statutes expressly include the phrase “heat of passion.” See, e.g., Criminal Code, 1913, § 281 (W. Austl.) (stating that “[w]hen a person who unlawfully kills another . . . does the act which causes death *in the heat of passion* caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.”) (emphasis added); Canada Criminal Code, R.S.C., ch. C-34, § 232 (1974) (determining that “[c]ulpable 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.”) (emphasis added); see also ALASKA STAT. § 11.41.115(a) (1980) (asserting that “[i]n a prosecution [for murder], it is a defense that the defendant acted *in a heat of passion*, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.”) (emphasis added).

20. See Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1355-56 (1997).

continued to be specially designed for men.

Despite the intent of the provocation defense to provide a concession to a human frailty that is more typically male, today the rare woman who kills out of rage and jealousy, theoretically, can also use the defense.<sup>21</sup> Therefore, even though the vast majority of people who kill their partners or former partners out of rage, jealousy or hurt pride are men, provocation law now provides a version of formal equality.<sup>22</sup> However, equality considerations under the provocation doctrine have not been limited solely to allowing women to assert the same heat of passion rationale as men. Substantive equality has played an important role in the recent development of provocation doctrine. In all three countries, the provocation defense can now be asserted when a person kills in an emotional state other than rage and jealousy, most notably fear, which is much more likely to be an emotion on which a battered woman would base her claim.<sup>23</sup> Expanding provocation's rationales to mitigate the punishment of these women, rather than exonerating them through self-defense, amounts to only partial progress towards full substantive equality.<sup>24</sup> However, progress it is.

Another area where substantive equality may have influenced the provocation doctrine is the relaxation or elimination of the traditional requirements that there was no time to cool off between the provocation and the killing,<sup>25</sup> and that there was some particular triggering incident.<sup>26</sup> These changes, which have been recognized in some American and many Australian jurisdictions,<sup>27</sup> sometimes work

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21. See LEE, *supra* note 18, at 26; see also Morgan, *supra* note 2, at 256 (noting that the author "found no reported Australian cases where women were provoked into killing men who left them or who 'confessed adultery.'"). I say "theoretically" because there is evidence that juries are less sympathetic to women than to men who kill intimates out of rage and jealousy. LEE, *supra* note 18, at 52. It was not until 1946 that England acknowledged that a woman who killed her husband when he was engaged in adultery could use the provocation defense. See *Holmes v. Dir. of Pub. Prosecutions*, [1946] A.C. 588, 592 (U.K.).

22. See Victoria Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 365 (2004). See generally FORELL & MATTHEWS, *supra* note 5.

23. See, e.g., *Van Den Hoek v. The Queen* (1986) 161 C.L.R. 158, ¶ 17 (Austl.) (Mason, J.). See generally Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597 (2004) (reviewing CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (New York Univ. Press 2003)).

24. See *infra* notes 34-39 and accompanying text.

25. See LEE, *supra* note 18, at 44 (noting that the requirement that there be no time to cool off is part of the modern test for provocation except under the Model Penal Code's extreme emotional disturbance test).

26. See, e.g., Crimes Act, 1900, § 13(2)(b) (Austl. Cap. Terr.) (stating that the provoking conduct can have "occurred immediately before the act or omission causing death or at any previous time.").

27. See, e.g., Crimes Act, 1900, § 23(2) (N.S.W.); Crimes Act, 1900, § 13(2)

in favor of battered women who kill—for example, in cases where a battered woman kills her batterer while he is asleep.<sup>28</sup> However, because these changes are not limited to situations where a battered woman kills out of fear, they also benefit people who kill out of jealousy. One of the most notorious and oft-discussed provocation cases is *People v. Berry*.<sup>29</sup> In *Berry*, expanding the cooling off period under the traditional provocation test benefited a man who killed his wife in the heat of passion.<sup>30</sup> In another case involving male rage and jealousy, *Parker v. R.*,<sup>31</sup> the Privy Council reversed the majority decision of the Australian High Court, agreeing with the dissenting judges that provocation's "no time to cool off" requirement be relaxed.<sup>32</sup> Thus, these changes are not particularly good examples of substantive equality.

## II. THE PROVOCATION DIVIDE

Today, both men and women can base their provocation claim on either jealous rage or fear. However, the gendered reality is that the bases for asserting the provocation defense in domestic homicide cases are sex-segregated. Men almost exclusively use heat of passion based on jealousy while women almost exclusively use fear. For different reasons, both male-gendered heat of passion and female-gendered fear are likely to continue to be allowed as justifications for a provocation defense in the United States, Canada and most Australian jurisdictions.

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(Austl. Cap. Terr.); see also VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 24, 52.

28. See, e.g., *R. v. Mui Ky Chhay* (1994) 72 A. Crim. R. 1 (Austl.) (finding that cumulative acts of domestic violence could cause sufficient loss of control that a woman could be acting in self-defense when she kills her sleeping husband); see also *State v. Felton*, 329 N.W.2d 161, 174 (Wis. 1983) (holding that a long history of abuse, and provocation on day of the shooting, was sufficient to raise a jury question as to heat of passion despite the fact the victim was asleep when his wife shot him).

29. 556 P.2d 777 (Cal. 1976). Some of the recent California cases that discuss *Berry* involve heat of passion killings where the jury was instructed on provocation, yet found that the evidence supported a murder verdict. This bolsters the argument I make later in the article, see *infra* notes 90-103 and accompanying text, that even though juries are being given provocation instructions, they are finding that heat of passion is not a valid basis for finding provocation. See, e.g., *People v. Williams*, No. A094710, 2003 WL 21246611 (Cal. App. Dep't Super. Ct. May 30, 2003); *People v. Pemberton*, Nos. C036700, C037010, 2002 WL 436959 (Cal. Ct. App. Mar. 21, 2002).

30. See LEE, *supra* note 18, at 44 (noting that the cooling off period in *Berry* was so elastic as to allow a husband to claim heat of passion two weeks after learning of his wife's infidelity); see also Rebecca Bradfield, *Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife*, 19 U. TAS. L. REV. 5, 13 (2000). Under the more modern and pro-defendant Model Penal Code the cooling off period requirement has been completely eliminated. See LEE, *supra* note 18, at 44 (noting that had *Berry* arisen in a Model Penal Code state, no cooling off period would have been required).

31. See (1964) A.C. 1369, *rev'g* (1963) 111 C.L.R. 610 (Austl.).

32. See *Parker* (1964) A.C. at 1369.



In all three countries, approximately three-quarters of the perpetrators of domestic homicide are male.<sup>33</sup> Many of these men have previously committed violence against their female victims.<sup>34</sup> Nevertheless, they are frequently permitted to use the provocation defense even when the female victims' "provoking" conduct was a lawful exercise of sexual or personal autonomy, such as sexual intercourse with another or leaving the relationship.<sup>35</sup> Most jurisdictions continue to provide this broadened version of the traditional provocation defense as a "concession to human frailty."<sup>36</sup> As this article will show, the harshness of lengthy mandatory minimum sentences for murder is likely the decisive reason why this trend has continued unabated in Canada and the United States, but not in some Australian jurisdictions where such determinate sentencing has been abolished.

Women commit domestic homicide much less frequently than do men.<sup>37</sup> When they do kill, they usually kill their batterers out of fear and despair. In all three countries, battered women who kill routinely rely on provocation or some other basis for reducing murder to manslaughter<sup>38</sup> because their often more appropriate claims of self-

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33. See CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME DATA BRIEF, NCJ 197838, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003) [hereinafter CRIME DATA BRIEF], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> (last visited Nov. 13, 2005); see also ANDRÉE CÔTÉ ET AL., NAT'L ASS'N OF WOMEN AND THE LAW, STOP EXCUSING VIOLENCE AGAINST WOMEN 1.2 (2000), available at <http://www.nawl.ca/provocation.htm> (last visited Nov. 13, 2005); Morgan, *supra* note 2, at 239. Men most frequently commit homicides of both sexes, while the vast majority of homicide victims are male. See, e.g., JOHN KAPLAN ET AL., CRIMINAL LAW, CASES AND MATERIALS 388-89 (Aspen Publishers 2000) (1986); JENNY MOUZOS, 2003-2004 NAT'L HOMICIDE MONITORING PROGRAM ANNUAL REPORT, HOMICIDE IN AUSTRALIA 11, 17 (2004).

34. See CÔTÉ ET AL., *supra* note 33, at 1.2 (noting that one third of women killed by their spouses in Ontario had previously reported domestic violence to the police, and that if unreported cases were included, a large majority of cases of spousal homicide would be preceded by male violence).

35. See Nourse, *supra* note 20, at 1407-08.

36. VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 23 (citing *R. v. Kirkham*, (1837) 173 Eng. Rep. 422, 424 (U.K.)); see also *Parker* (1963) 111 C.L.R. at 652 (quoting *East's Pleas of the Crown* (1803) vol. 1, 238) (stating to have received "such a provocation as the law presumes might in human frailty heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact.").

37. See CRIME DATA BRIEF, *supra* note 33.

38. For example, in Australia, battered women who kill may also argue lack of intent to kill, diminished responsibility and excessive self-defense. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 97-98; FORELL & MATTHEWS, *supra* note 5, at 164; Rebecca Bradfield, *The Treatment of Women Who Kill Their Male Partners Within the Australian Criminal Justice System* 104-08 (2002) (unpublished Ph.D. thesis, University of Tasmania) (on file with the American University Journal of Gender, Social Policy & the Law).

defense, that would result in acquittal, fail.<sup>39</sup> Thus, provocation is usually viewed as a backup defense for battered women.

Battered women's self-defense claims too frequently fail because, like provocation, self-defense was designed with men's conduct in mind. Self-defense is based on a "male code of combat."<sup>40</sup> Thus, when a battered woman uses a gun or knife to kill her unarmed batterer, or kills him when he is asleep or otherwise unaware of her attack, a judge may decline to give a self-defense jury instruction because the defendant's conduct fails to fit the requirements of the jurisdiction's self-defense rule. Similarly, if a judge gives a self-defense instruction to a jury, the jury may find that the defendant's conduct does not meet the requirements of the rule. Even if a battered woman's conduct does fit within the jurisdiction's self-defense rule, a jury may decide that her deadly response was not justified under current social norms.<sup>41</sup> As one commentator notes:

The continued association of self-defence with a . . . confrontation will continue to make it difficult for jurors to identify actions taken in self-protection as 'self-defence' outside this context. This may particularly disadvantage those responding to an ongoing threat of harm, rather than a single attack or threat of violence, and those who kill in non-confrontational circumstances.

. . . [In the context of family violence] where a person's actions have been carried out in fear for their lives and under a belief there is no alternative, self-defence should not be excluded simply because he or she killed in non-confrontational circumstances or in response to an ongoing threat of violence, rather than an immediate attack.<sup>42</sup>

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39. See *R. v. M.*, [1998] D.L.R. (4th) 513 (Can.) (L'Heureux-Dubé, J., concurring); ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 118-20 (Yale Univ. Press 2000).

40. See FORELL & MATTHEWS, *supra* note 5, at 201; see also REGINA GRAYCAR & JENNY MORGAN, *THE HIDDEN GENDER OF LAW* 438-40 (2d ed., The Federation Press 2002).

41. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 83; see also FORELL & MATTHEWS, *supra* note 5, at 216-17.

42. VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 68; see FORELL & MATTHEWS, *supra* note 5, at 201-02; see also *Osland v. R.* (1998) 197 C.L.R. 316, 375-76 (Austl.) (footnotes omitted) (expressing concerns among both laypeople and those that are legally trained that too liberal a self-defense rule would allow battered women to engage in violent self-help). Justice Kirby of the Australian High Court held:

No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their version of the facts. The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances. Whilst these circumstances may be affected by contemporary conditions and attitudes, there is no legal

Rebecca Bradfield's study of sixty-five Australian Supreme Court cases<sup>43</sup> where battered women killed their husbands over the period between 1980 and 2000 illustrates the difficulties in obtaining a self-defense verdict.<sup>44</sup> Of the twenty-one cases where battered women raised self-defense, only nine were acquitted, while eleven were convicted of manslaughter and one of murder.<sup>45</sup> Obviously, a successful provocation claim, while perhaps not providing a battered woman with complete justice, will often provide a fairer result than a finding of murder.

Bradfield's study further demonstrates the importance of provocation to battered women. In all twenty-two cases where a battered woman claimed provocation at trial, she was successful.<sup>46</sup> The provocation defense, therefore, provided battered women an important fallback option. However, this was not true for men who claimed provocation.<sup>47</sup> Men received a manslaughter verdict in only eight out of fifteen cases where provocation based on jealous rage was argued at trial.<sup>48</sup>

Although imperfect, the provocation defense makes manslaughter, which carries a substantially shorter sentence than murder, a viable outcome for battered women. This presents a dilemma for those who seek to reform criminal law to ensure that battered women who kill are treated justly, while at the same time eliminating the jealous heat of passion basis for a manslaughter verdict. What happens to battered women if provocation is abolished and therefore no longer available to them? One possibility is that acquittal based on a successful self-defense claim will replace it as the most common outcome. Another possibility is that other defenses such as diminished capacity will take up the slack for provocation. However, another possibility is the substantial increase in murder convictions.

Men's heat of passion and women's fear are both likely to continue

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carte blanche, including for people in abusive relationships, to engage in premeditated homicide. Nor in my view should there be.

*Id.* at 375.

43. See generally Australian Gov't, Attorney-General's Dep't, *Australia's Legal System*, <http://www.nla.gov.au/oz/law.html> (last visited Feb. 27, 2006) (explaining that Supreme Courts are the highest state appellate courts in Australia).

44. See Bradfield, *supra* note 38, at 194.

45. See *id.*

46. See *id.* at 144-45. Bradfield also notes that in sixty-five out of seventy-six cases where a woman killed her husband or ex-husband, there was a history of physical violence. *Id.* at 22.

47. See *id.* at 145.

48. See *id.*; see also Elizabeth Sheehy, *Battered Women and Mandatory Minimum Sentences*, 39 OSGOOD HALL L.J. 529, 531 (2001) (noting that "none [of the many strategies to reform self defense] can be credited with achieving any marked increase in acquittals for battered women on trial.").

to be allowed as bases for provocation in most jurisdictions because lengthy mandatory minimum sentences for murder are deemed too harsh. These mandatory sentences, along with the frequent failure of self-defense claims when battered women kill out of fear, make a manslaughter option necessary.<sup>49</sup> However, permitting both heat of passion and fear as bases for a provocation defense may be less problematic than it first appears. There is intriguing evidence that even in Canada and the United States, where the goal of substantive gender equality has had little effect on the *law* of provocation, the feminist critiques of the past thirty years have combined with changing social values to influence the *application* of the provocation defense by prosecutors, judges, and juries. As this article will show, evolving community assessments of violence arising out of possessiveness and violence resulting from fear may frequently be resulting in substantive gender equality under provocation and other criminal law rules that were created with men in mind.

### III. DIFFERENCES AND SIMILARITIES AMONG THE THREE COUNTRIES

Certain commonalities exist that may be relevant to how provocation claims are treated. All three nations have their legal roots in English common law and have constitutions creating federal systems that divide government between the centralized national government and states or provinces. As a result, a variety of different jurisdictions within each country make and apply criminal law, including the provocation defense. In all three countries, feminist legal scholars, lawyers and jurists have vigorously critiqued the traditional provocation doctrine,<sup>50</sup> and thus, helped shape both current provocation law and social norms concerning violence based on jealousy and violence based on fear.

Differences among the three legal systems may affect their provocation rules. While Canada has one federal provocation statute

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49. See Bradfield, *supra* note 38, at 108-28 (contending that lack of intent is the most frequent basis for domestic homicide manslaughter conviction for women).

50. See, e.g., CÔTÉ ET AL, *supra* note 33 (writing in the United States); FORELL & MATTHEWS, *supra* note 5, at 196; Adrian Howe, *Provoking Comment: The Question of Gender Bias in the Provocation Defence—A Victorian Case Study*, in AUSTRALIAN WOMEN: CONTEMPORARY FEMINIST THOUGHT 230-31 (Norma Grieve and Ailsa Burns eds., 1994) (writing in Australia); LEE, *supra* note 18, at 276-78; STANLEY M.H. YEO, UNRESTRAINED KILLINGS AND THE LAW: A COMPARATIVE ANALYSIS OF THE LAWS OF PROVOCATION AND EXCESSIVE SELF-DEFENSE IN INDIA, ENGLAND, AND AUSTRALIA 182-83 (Rajeev Dhavan et al. eds., Oxford Univ. Press 1998); Bradfield, *supra*, note 30, at 5; Wayne Gorman, *Provocation: The Jealous Husband Defence*, 42 CRIM. L. Q. 478, 499-500 (1999) (writing in Canada); Edward M. Hyland, *R. v. Thibert: Are There Any Ordinary People Left*, 28 OTTAWA L. REV. 145, 168-69 (1997); Morgan, *supra* note 2; Nourse, *supra* note 20, at 1339-42; Gary T. Trotter, *Anger, Provocation, and the Intent for Murder*, 47 MCGILL L.J. 669, 688 (2002).

for the entire nation, separate provocation rules exist in each of the fifty American states and eight Australian states and territories. As a result, in the United States and Canada there is an opportunity for concurrently developing different legal rules concerning domestic homicide.<sup>51</sup> Furthermore, as courts of final review of state criminal cases, Australia's and Canada's highest federal courts have decided a number of provocation cases, providing guidance on the issue at a national level. In contrast, the United States Supreme Court lacks jurisdiction to review homicide cases concerning provocation because provocation typically does not involve a constitutional or federal issue.<sup>52</sup> Because criminal law is an area traditionally reserved to the states, in the United States there is little judicial guidance concerning provocation doctrine from federal courts.

A potentially important difference when it comes to gender and equality analysis is the gender make-up of the judiciary, especially the highest appellate court.<sup>53</sup> Even when, as in the United States, the highest federal court does not review provocation cases, the Court's views on gender equality influence other legal decision-makers. The women who have been on the bench have often been staunch proponents of gender equality and, therefore, their presence may make a difference in how equality analysis applies to gender discrimination and evolves over time.<sup>54</sup>

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51. In the United States, there are two sets of "heat of passion" rules: traditional provocation rules and the Model Penal Code's Extreme Emotional Disturbance provision. See *infra* Part IV. In Australia there are at least four different ways that states deal with provocation. See *infra* Part VI.

52. U.S. CONST. art. III, § 2 (noting the power of Supreme Court and other federal courts to adjudicate constitutional and federal claims; claims between states; claims between a state and citizens of another state; claims between citizens of different states; and claims between a state or its citizens and foreign governments or their citizens). But see *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (holding that due process mandates that the prosecution bear the burden of proving the absence of provocation).

53. See generally Fred O. Smith, Note, *Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?*, 57 Stan. L. Rev. 2087, 2090-97 (2005).

54. Female Justices have played major roles in cases that favor women's rights. See, e.g., *Jackson v. Birmingham Bd. of Ed.*, 125 S. Ct. 1497, 1509-10 (2005) (upholding a suit for retaliation under Title IX, where Justice Ginsburg joined Justice O'Connor's five to four opinion allowing a male coach to sue after he was allegedly fired for complaining about sex discrimination against his public high school female basketball team); *United States v. Virginia*, 518 U.S. 515, 557 (1996) (shifting the line between intermediate scrutiny for gender and strict scrutiny for race in Justice Ginsburg's majority opinion requiring an all-male state military school to admit women); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, 25 (1993) (exemplifying Justice O'Connor and Justice Ginsburg's commitment in advancing women's interests in the area of sexual harassment); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (showing Justice O'Connor's influence in preserving the right to abortion by upholding *Roe v. Wade*, 410 U.S. 113 (1973)); see also Diana Majury, *The Charter, Equality Rights, and Women: Equivocation and Celebration*, 40 OSGOODE HALL L.J. 297, 312-13 (2002) (recounting female judges making a difference in Canadian

The gender make-up of the highest courts in Australia, Canada and the United States is quite different. While the Australian High Court has previously included one female member,<sup>55</sup> currently there are none.<sup>56</sup> At present, the United States Supreme Court includes only one female member, Justice Ruth Bader Ginsburg. She is one of America's leading proponents of feminist formal equality that focuses on eliminating gender stereotypes.<sup>57</sup>

The membership of the Canadian Supreme Court differs significantly from the Australian High Court and the United States Supreme Court. Currently it has four female members, including the Chief Justice.<sup>58</sup> Furthermore, up until Justice Claire L'Heureux-Dubé's retirement in 2002, she was a highly influential judicial proponent of substantive equality.<sup>59</sup> The difference in representation of women on each nation's highest court is consistent with the differences in overall representation of women as senior judges in the three countries. In 2003, only 14.6% of the Australian senior judiciary was female<sup>60</sup> while women represented 24% of the U.S. federal judiciary in 2005<sup>61</sup> and 26% of the Canadian appellate bench in 1999.<sup>62</sup>

The three countries also differ on how constitutional law treats gender equality. Although the different impact that the provocation defense has on women and men is not likely to be considered a

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equality analysis). See generally Jennifer L. Peresie, Note, *Female Judges Do Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (finding that female judges mattered to outcomes in Title VII sexual harassment and sex discrimination cases).

55. Justice Mary Gaudron was the only female justice sitting on the Australian High Court. See generally *Osland v. R.* (1998) 197 C.L.R. 316 (Austl.) (Gaudron, J.) (expounding on provocation and battered women).

56. See Rachel Davis & George Williams, *A Century of Appointments but Only One Woman*, 28 ALTERNATIVE L.J. 54, 54 (2003) (noting that since Justice Mary Gaudron's retirement in 2003, no other women have joined the court).

57. See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829-31 (1990); see also Kathryn A. Lee, Note, *Intermediate Review "With Teeth" in Gender Discrimination Cases: The New Standard in United States v. Virginia*, 7 TEMP. POL. & CIV. RTS. L. REV. 221, 225, n.35 (1997). Justice Sandra Day O'Connor, the first woman appointed to the United States Supreme Court, submitted her resignation in 2005 and was replaced by Justice Samuel Alito in February 2006.

58. The nine current Justices of the Canadian Supreme Court include the following female justices: Chief Justice Beverly McLachlin, Justice Marie Deschamps, Justice Rosalie Abella and Justice Louise Charron.

59. See Majury, *supra* note 54, at 311.

60. See Davis & Williams, *supra* note 56, at 56.

61. See FEMINIST MAJORITY FOUND., WOMEN STILL UNDERREPRESENTED ON THE FEDERAL BENCH, July 5, 2005, <http://www.feminist.org/news/newsbyte/printnews.asp?id=9138> (citing the New York Times).

62. See Claire L'Heureux-Dubé, *Outsiders on the Bench: The Continuing Struggle for Equality*, 16 WIS. WOMEN'S L.J. 15, 16-17 (2001).

constitutional equality issue,<sup>63</sup> it is useful to consider the amount of protection the federal constitutions provide for women because this may influence how gender equality is viewed in non-constitutional law areas such as the provocation defense. Neither the United States nor Australian Constitutions expressly provide for equality of the sexes. However, even though it includes no reference to sex equality, the U.S. Constitution's Fourteenth Amendment Equal Protection Clause<sup>64</sup> has been interpreted to require close scrutiny of cases in which the government discriminates based on gender.<sup>65</sup> Under the U.S. Constitution, gender equality is formal.<sup>66</sup> Thus, only when men and women are not viewed as similarly situated is sex discrimination permissible.<sup>67</sup> Unlike either the United States or Canada, Australia's Constitution has neither an equal protection clause nor any other provision that has been used to address gender inequality. As a result, Australia has neither formal nor substantive constitutional gender equality jurisprudence.<sup>68</sup>

Canada, under its 1982 Charter of Rights and Freedoms, treats gender equality quite differently from Australia and the United

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63. See CÔTÉ ET AL., *supra* note 33, at 1.2 (indicating that at least one set of Canadian feminist commentators, on behalf of Canada's National Association of Women and the Law, has proposed that the provocation defense, as it now exists in Canada, violates the Canadian Charter of Rights and Freedoms sex equality provision).

64. See U.S. CONST. amend. XIV, § 1 (declaring that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

65. See, e.g., *United States v. Virginia*, 518 U.S. 515, 519 (1996).

66. See, e.g., KATHERINE BARTLETT ET AL., *GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY* 117-18 (3d. Ed. 2002).

67. See *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974). On at least one occasion, Congress has stepped in to provide substantive equality concerning pregnancy when the Supreme Court had insisted on formal equality. See, e.g., *Pregnancy Discrimination Act of 1978*, 42 U.S.C. § 2000(e)(k) (current through P.L. 109-65 (excluding P.L. 109-59) approved Sept. 20, 2005) (legislation pending) (rejecting the Supreme Court's holding in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), that discrimination on the basis of pregnancy was not sex discrimination under Title VII); see also *Michael M. v. Super. Ct. of Sonoma County*, 450 U.S. 464, 476 (1981) (allowing for gender distinctions in a statutory rape statute because women and men bear different burdens in sexual intercourse and pregnancy).

68. See SURI RATNAPALA, *AUSTRALIAN CONSTITUTIONAL LAW: FOUNDATIONS AND THEORY* 274 (Trischa Baker ed., 2002); see also GRAYCAR & MORGAN, *supra* note 40, at 211 (concluding that lack of any federal constitutional gender equality doctrine and stating that "[i]n Australia, because of the absence of a constitutional right to 'equality', it is not easy and probably not even possible to present an equality argument to a court in the context of, say, a criminal prosecution of a doctor for performing an abortion."). The federal Sex Discrimination Act of 1984 provides the primary protection against discrimination on the basis of sex. This Act has been described as taking "a formal equality approach." See GRAYCAR & MORGAN, *supra* note 40, at 28-29 (quoting the examination of deficiencies in formal equality or gender neutral treatment from AUSTRALIAN LAW REFORM COMM'N, FINAL REPORT 69, *EQUALITY BEFORE THE LAW: WOMEN'S EQUALITY*, Part II 3.9 (1994)).

States.<sup>69</sup> The Charter explicitly provides for sex equality free from government discrimination.<sup>70</sup> This has been interpreted to mean substantive equality<sup>71</sup> based on equal human dignity and full membership in society.<sup>72</sup> Retired Supreme Court Justice Claire L'Heureux-Dubé describes Canada's equality provision "as combining the [United States Constitution's] Equal Protection Clause . . . and an equal rights amendment."<sup>73</sup> Justice L'Heureux-Dubé, who helped shape Canada's constitutional jurisprudence from a substantive equality perspective, emphasizes how different Canada's provision demanding "equality without discrimination" is from the same-as-men formulation that is the prevailing equality analysis in Australia and the United States.<sup>74</sup>

Canada's embrace of substantive equality and its high percentage of female appellate judges led me originally to predict that Canada would treat any issue where the victims are overwhelmingly female and the perpetrators overwhelmingly male as meriting a substantive equality analysis. If not, I at least expected that Canada's law would be more feminist and protective of women's rights and interests than Australia or the United States. Therefore, I expected that traditional provocation doctrine, which so clearly favors male rage and jealousy over other emotions, would have been found to be a form of gender discrimination that needed to be either substantially revised or abolished, especially since Canadian courts have held that the values set out in the Charter should influence how statutes and the common law are interpreted.<sup>75</sup> However, this has not been the Canadian

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69. See Constitution Act, 1982, 79 enacted as Schedule B, Canada Act 1982, ch. 11, § 15(1) (U.K.).

70. See *id.*

71. See Majury, *supra* note 54, at 305 (stating that: "equality writing accepts that substantive equality is the operative model in Canadian law.").

72. See Canada Act 1982, ch. 11, § 15(1) (declaring that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.") (emphasis added); see also *id.* § 28 (stating, "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.").

73. L'Heureux-Dubé, *supra* note 62, at 20.

74. See *id.*

75. See Cloutier v. Langlois, [1990] 1 S.C.R. 158 at 184. The Canadian Supreme Court stated:

Though the parties have not relied on the Charter, and have simply referred to the common law sources in examining the scope of the power to search, I feel that the courts should "apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."

*Id.* (quoting Retail, Wholesale & Dep't Store Union, Loc. 580 v. Dolphin Delivery, Ltd., [1986] 2 S.C.R. at 603); see also Dir. of Family and Children's Servs. v. E.I.,



experience with provocation law even though Charter-based substantive equality arguments have been made.<sup>76</sup> Instead, Canada, much of Australia and the slim majority of American states that do not apply the Model Penal Code's extreme emotional disturbance test that is even more solicitous of male rage and jealousy,<sup>77</sup> have similar traditional provocation rules.<sup>78</sup>

Notably, however, two Australian states have completely rejected this traditional approach: Tasmania, where the provocation defense was abolished in 2003,<sup>79</sup> and Victoria, where the provocation defense was abolished in November 2005.<sup>80</sup> Both jurisdictions' explanations for abolition highlight the decisive impact that elimination of statutorily imposed limits on judges' sentencing discretion can have on the retention of a provocation rule.

In the next three sections, I examine in detail how provocation is treated in the United States, Canada and Australia. I conclude that the preference for formal or substantive equality in a jurisdiction's constitutional jurisprudence seems to have no influence on its provocation rules. Instead, the differing amounts of judicial sentencing discretion in each jurisdiction provide the greatest influence on how fully substantive equality is incorporated into a jurisdiction's handling of the provocation defense. In particular, I demonstrate that presence or absence of mandatory minimum sentencing, especially regarding murder, has been highly influential in shaping each country's provocation rules.

#### IV. UNITED STATES PROVOCATION LAW

Because of the severe limitations on judicial discretion concerning sentencing, the United States presents a bleak picture regarding incorporating substantive equality into its provocation doctrine.<sup>81</sup>

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[2005] YKSC 4, ¶ 47 (explaining that "statutory interpretation can and should be done in a manner consistent with the fundamental values enshrined in the *Charter*.").

76. See CÔTÉ ET AL., *supra* note 33, at 1.2 (noting that the primary beneficiaries of the expanded provocation defense in Canada have been men, sometimes allowing them to "get away with murder").

77. See LEE, *supra* note 18, at 34-39 (describing this male-biased code as allowing mitigation whenever a defendant can show he is suffering from extreme emotional distress at the time of the homicide). But see MODEL PENAL CODE § 210.3(1)(b) (2004).

78. See Forell, *supra* note 23, at 608-09.

79. See Criminal Code Act, 1924, § 160 (Tas.) *amended by* Criminal Code Amendment (Abolition of Defence of Provocation) Act, 2003 (Tas.) (removing § 160, which contained the defense of provocation, from the Criminal Code).

80. See Crimes (Homicide) Act, 2005, No. 77/2005, § 3B (Austl.) (amending Crimes Act, 1958).

81. But see *United States v. Booker*, 543 U.S. 220 (2005) (calling into question

Currently, for violent crimes such as manslaughter and murder, all fifty American states have some form of determinate sentencing, most frequently mandatory minimum sentences and sentencing guidelines.<sup>82</sup> This often gives American trial judges substantially less room to factor in circumstances using their own discretion than exists in Australia or Canada. American juries (through more gradations in crime such as manslaughter, degrees of murder, and, in certain cases, application of the death penalty), prosecutors (through deciding what crime to charge) and legislatures (through mandatory minimum sentences, sentencing grids and sentencing guidelines),<sup>83</sup> determine the length of time a convicted murderer will serve instead of trial judges.

Most American trial judges have little or no discretion to provide for a suspended or short murder sentence.<sup>84</sup> This may explain why American legal commentators are highly critical of current provocation rules, yet fail to urge that provocation be abolished entirely.<sup>85</sup> Abolition is too risky and punitive for battered women who kill, and perhaps, even for homicides committed out of rage and jealousy.

Nevertheless, questions remain concerning why two sets of provocation rules that permit male-bias are so firmly entrenched in the United States. Despite widespread criticism of these existing

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the constitutionality of mandatory sentencing guidelines); *State v. Barker*, 692 N.W.2d 755, 761 (Minn. Ct. App. 2005) (demonstrating the way mandatory minimum sentences and sentencing guidelines have been under sustained attack for years). It was further noted that they finally appear vulnerable. *Id.*

82. See Ben Trachtenberg, *State Sentencing Policy and New Prison Admissions*, 38 U. MICH. J.L. REFORM 479, 487 (2005).

83. See, e.g., GA. CODE ANN. § 17-10-6.1 (2005) (providing that “no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court.”). This statute, which includes murder and felony murder, is known as Georgia’s “Seven Deadly Sins” statute. *Id.*; see also OR. REV. STAT. § 137.700 (stating, “the court shall impose, and the person shall serve, at least the entire term of imprisonment”). The statute provides for a minimum sentence of three hundred months (twenty-five years) for murder and one hundred and twenty months (ten years) for manslaughter. *Id.* However, there are certain specific exceptions under OR. REV. STAT. § 137.712 (2003).

84. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1476 n.28 (2001); see also Bill Bishop, *Man Who Killed Former Lover Gets Life*, EUGENE REG. GUARD, Feb. 4, 2005, at C3 (demonstrating that a trial judge’s lack of discretion can lead to desired outcomes). In this case, an Oregon man who brutally killed his ex-girlfriend for breaking off her relationship with him received a mandatory minimum twenty-five year term after he was convicted of murder by the jury. *Id.*

85. See, e.g., LEE, *supra* note 18, at 217-25 (recommending gender switching as a device to enable juries to recognize their own prejudices); Nourse, *supra* note 20, at 1395-97 (recommending that provocation not be allowed when the conduct was lawful); see also Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 963 (2001-02) (recommending modifications to the existing provocation doctrine).

rules, traditional provocation,<sup>86</sup> and the even more lenient Model Penal Code's ("MPC") extreme emotional disturbance rules ("EED"),<sup>87</sup> are still available to men who kill women who seek to exercise their autonomy through infidelity or leaving.<sup>88</sup> Formal equality allows the rare woman who kills for the same reasons as men to rely on these rules, as well. Substantive equality is limited to allowing other emotions besides rage and jealousy to be considered.

Particularly troubling for achieving meaningful substantive equality for women is the widespread enactment of the MPC, first adopted by the American Law Institute in 1962.<sup>89</sup> The highly subjective EED provision predates the dramatic switch from indeterminate judge-based sentencing to legislatively mandate determinate sentencing and the social and legal revolution concerning the rights of women, both of which occurred in the 1970s. The shift to mandatory sentencing pushes in the direction of allowing the EED's subjectivity in order that more defendants can avoid the draconian sentences for murder. In contrast, social norms and the goal of substantive gender equality make the EED's similar treatment of battered women who kill and domestic homicides based on jealous rage seem unjust. The MPC authors' failure to factor in how EED impacts women is reflected in the commentaries to the MPC, issued in 1980, which contain not a hint of concern about its effect on homicides involving infidelity, separation or domestic violence.<sup>90</sup>

In addition to determinate sentencing, there may be another reason for American law's extreme willingness to allow juries to partially excuse men who kill out of jealousy and rage. Compared to Australia or Canada, Americans have a greater distrust of government

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86. See *State v. Viera*, 787 A.2d 256, 264 (N.J. Super. Ct. App. Div. 2001) (listing the four elements of a typical non-MPC provocation rule: (1) the provocation must be adequate; (2) the defendant must not have had time to cool off between the provocation and the slaying; (3) the provocation must have actually impassioned the defendant; and (4) the defendant must not have actually cooled off before the slaying); see also LEE, *supra* note 18, at 25 (describing the elements of a modern provocation defense as: "(1) the defendant was actually provoked into a heat of passion, (2) the reasonable person in the defendant's shoes would have been so provoked, (3) the defendant did not cool off, and (4) the reasonable person in defendant's shoes would not have cooled off.").

87. See MODEL PENAL CODE § 210.3(1)(b) (1962) (requiring that the jury find that the killer acted: "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.").

88. See Nourse, *supra* note 20, at 1349.

89. See LEE, *supra* note 18, at 33 (stating some form of this provision is in effect in almost half the states).

90. See MODEL PENAL CODE § 210.3 cmts. at 44-65 (1980).

and value individual over group rights. As Paul Marcus and Vicki Waye observe in an article comparing Australia's and America's criminal justice systems, these different values have led to a much stronger attachment in the United States to the jury system.<sup>91</sup> They note:

From independence, the American jury has been seen as a political weapon. . . . [In contrast], [a]lthough the jury is also valued in Australia by accused persons for peer empathy, it is not so highly valued as an essential component of the democratic system. Except for the most serious criminal cases, jury trials are rare.<sup>92</sup>

Similar distinctions can be drawn between Canada and the United States.<sup>93</sup>

This stronger attachment to letting the jury decide the seriousness of the crime might make it difficult for Americans to give up the provocation defense altogether. Even if mandatory minimum sentencing eventually is rejected and, therefore, judges are allowed to tailor sentences to make them longer or shorter than currently permitted, the provocation defense may not disappear. Provocation is a classic jury question, one where the jury is asked to determine what the ordinary person would do under the circumstances. Abolishing provocation would leave this decision solely to a judge's discretion in sentencing. Considering the sharp swing away from broad judicial sentencing discretion, which was the norm up until the 1970s, to highly restricted judicial discretion today, it is hard to imagine American jurisdictions returning to unfettered judicial discretion

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91. See Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. INT'L & COMP. L. 27, 96-97 (2004) (noting that while Australia and the United States both use the jury system, the United States views the jury as guaranteeing transparency and accountability while Australia does not view the jury as so fundamental to the democratic process); see also NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 2, at 3.133.

The jury has traditionally been and remains the appropriate arbiter of community values. To remove fundamental issues of culpability from the jury and to pass them on to the sentencing judge undermines its role. In addition, a jury finding of manslaughter enables the public to understand why a seemingly lenient sentence has been proposed. It therefore aids community understanding of the law.

*Id.*; VICTORIAN LAW REFORM COMM'N, *supra* note 6, at 37-38 (explaining that, in Australia, concern about loss of jury involvement was one of the more compelling objections made to the abolition of provocation in Victoria because juries reflect "community values and standards" which promotes "community confidence in the justice system" and that abolition "would place too much power in the hands of judges"). But see *Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003* (No. 15): *Parliamentary Debates Before the Tasmanian House of Assembly*, 59-74 (Mar. 20, 2003) (Tas.) (failing to mention concern about the roles of juries and judges in the discussion in Parliament before it unanimously abolished provocation).

92. See Marcus & Waye, *supra* note 91, at 97.

93. See generally Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 JUDICATURE 249 (1996).

while also abolishing provocation.<sup>94</sup>

#### V. CANADIAN PROVOCATION LAW

Even though Canada's constitutional jurisprudence embraces substantive equality and its case law urges that non-constitutional issues be determined "in a manner consistent with the fundamental values enshrined in the Constitution,"<sup>95</sup> the law of provocation has remained distinctly traditional and masculine. Unlike Australia and the United States, Canada has a single nationwide provocation statute.<sup>96</sup> Therefore, there is no room for experimentation with different provocation rules in different provinces. The federal statute's language, includes both the term "heat of passion" and a "no time to cool off" requirement.<sup>97</sup> It has been interpreted much like provocation law in the United States. In other words, it empathizes with men who commit domestic homicides in the heat of passion.

It is important to note that in Canada, murder carries a mandatory life sentence with the possibility of parole after twenty-five years for first degree and after ten years for second degree.<sup>98</sup> There is a four-year mandatory minimum sentence for manslaughter using a firearm<sup>99</sup> and no minimum for other methods of killing.<sup>100</sup> Thus, like many American jurisdictions,<sup>101</sup> the sentencing differences

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94. See Trachtenberg, *supra* note 82, at 484.

95. Retail, Wholesale & Dep't Store Union, Loc. 580 v. Dolphin Delivery, Ltd., [1986] 2 S.C.R. 573, 603.

96. Can. Crim. Code, R.S.C., ch. C-46, § 232 (1985).

97. See *id.* The statute provides that:

(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 an 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*.

(3) For the purposes of this section, the questions (a) whether a particular wrongful act or insult amounted to provocation, and (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, *but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do*.

*Id.* (emphasis added).

98. See DEP'T OF JUSTICE CANADA, A CRIME VICTIM'S GUIDE TO THE CRIMINAL JUSTICE SYSTEM, LIFE SENTENCES AND SECTION 745.6 OF THE CRIMINAL CODE (2003), [http://canada.justice.gc.ca/en/ps/voc/guide/sec\\_m.html](http://canada.justice.gc.ca/en/ps/voc/guide/sec_m.html) (last visited Oct. 28, 2005); see also Sheehy, *supra* note 48, at 530.

99. See Can. Crim. Code, R.S.C., ch. C-46, § 236(a).

100. See *id.* at § 236(b).

101. See, e.g., Conn. Stat. Ann. §§ 53a-35a (2) (mandatory minimum of twenty-five years for murder); §§ 53a-35a (4) (mandatory minimum of five years for first-degree manslaughter with a firearm); §§ 53a-35a (5) (mandatory minimum of one year for first-degree manslaughter without a firearm).

between manslaughter and murder are extreme.<sup>102</sup> As a consequence, complete abolition of provocation would result in lengthy murder sentences for both battered women who kill out of fear and men who kill in the heat of passion who could otherwise, through a manslaughter conviction, have a much shorter sentence, subject to greater judicial discretion. Even feminist critics of Canada's provocation defense, such as the National Association of Women and the Law, only recommend abolition of provocation if mandatory minimum sentences for murder are also abolished.<sup>103</sup>

While it is understandable that, due to mandatory minimum sentencing, abolition of provocation is currently unthinkable in Canada, it is disturbing that the Canadian Supreme Court has continued to excuse male rage and jealousy by retaining its expansive reading of heat of passion to cover situations well beyond those called for by the statute's language. In 1941, the Canadian Supreme Court, faced with a statute similar to the one that is in effect today, expanded provocation to include a situation where a husband was told of his wife's infidelity and her desire to leave him.<sup>104</sup> This expansion was in line with how courts in other common law countries were then treating the defense of provocation. More troubling is the post-Charter, 1996 decision, *R. v. Thibert*.<sup>105</sup> The *Thibert* facts closely resemble those of the 1990 Australian High Court decision *Stingel*, discussed in the next section.<sup>106</sup> Both courts applied very similar traditional versions of provocation law yet reached different outcomes.<sup>107</sup>

In *Thibert* the defendant stalked his estranged wife and tried to

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102. See Can. Crim. Code, R.S.C., ch. C 46, § 718.2(a)(ii) (1996) (embodying feminist sentencing provisions by requiring courts, when sentencing, to consider abuse of "the offender's spouse or common-law partner or child" to be an aggravating factor in domestic homicide cases).

103. See, e.g., CÔTÉ ET AL., *supra* note 33, at § 3; accord Gorman, *supra* note 50, at 479 (stating that "[i]f the mandatory sentence for murder did not exist, the defence of provocation would disappear. The outdated thinking found in *R. v. Thibert* would simply be reflected in sentencing.").

104. See *R. v. Krawchuk*, [1941] D.L.R. 353, 358-59 (Can.).

105. [1996] S.C.R. 37 (Can.); see Trotter, *supra* note 50, at 671 (describing *Thibert* as "a highly questionable claim of provocation in a spousal homicide case.").

106. See *infra* notes 123-133 and accompanying text.

107. See Criminal Code Act, 1924, § 160 (Tas.) amended by Criminal Code Amendment (Abolition of Defence of Provocation) Act, 2003 (Tas.) (embodying the provocation statute current when *Stingel* was decided). The statute provided:

Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

*Id.*

corner her in her workplace parking lot.<sup>108</sup> When her boyfriend intervened, saying, “Come on big fellow, shoot me,”<sup>109</sup> the defendant shot and killed the man.<sup>110</sup> The Canadian Supreme Court required that the ordinary person “be of the same age, and sex, and share with the accused such other factors as would give the act or insult in question a special significance.”<sup>111</sup> Thus, the *Thibert* test is quite subjective, allowing an unlimited number of individual factors to be considered on the issue of how the ordinary person would respond.<sup>112</sup>

The *Thibert* Court viewed marital status and gender as relevant individual factors. It therefore stated that the standard was “an ordinary person who was a married man, faced with the break-up of his marriage.”<sup>113</sup> The Court further observed, “there is no doubt that the relationship of the wife of the accused with the deceased was the dominating factor in the tragic killing.”<sup>114</sup> Therefore, it held that the murder conviction must be reversed because a provocation instruction was required.<sup>115</sup>

Canada’s provocation statute did not mandate this outcome; its ordinary person test’s language is strictly objective. In particular, it is disturbing that the Court found the statutory language that says that provocation cannot be based on something someone has a legal right to do, did not mean what it said. Acknowledging that “the actions of the deceased . . . were clearly not prohibited by law,” the *Thibert* Court still held that, because the deceased’s actions could be found to be insulting, the law might not approve of them, and therefore, the jury could find the deceased had no “legal right” to insult the defendant.<sup>116</sup> However, as the dissent noted, “no one has either an emotional or proprietary right or interest in a spouse that would justify the loss of self-control that the [defendant] exhibited.”<sup>117</sup>

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108. See *Thibert*, S.C.R. at 52.

109. See *id.* at 53.

110. See *id.*

111. See *id.* at 49.

112. See NEW SOUTH WALES LAW REFORM COMM’N, *supra* note 2, at 3.121 (highlighting that unlike in Australia, “Canadian law does not require the provocation to be sufficient to make the ordinary person act as the accused did—it is sufficient that the loss of self control be *caused* by the provocation.”) (emphasis in the original). The Commission also noted that Canada did not require proportionality while Australia did. *Id.*

113. See *Thibert*, S.C.R. at 52.

114. See *id.* at 50.

115. See *id.* at 55-56.

116. See *id.* at 55.

117. See *id.* at 65 (McClung, J.A., dissenting); cf. Nourse, *supra* note 20, at 1394-97 (proposing that provocation only be available for “warranted excuse,” where law or

The *Thibert* Court did not consider whether substantive equality was satisfied when it held that provocation could be asserted in this case of killing out of rage and jealousy.<sup>118</sup> The disproportionate impact of the provocation defense on men and women in the context of heat of passion killings clearly indicates that the heat of passion defense does not satisfy substantive equality. According to one Canadian commentator, the Canadian Supreme Court in *Thibert* “elevate[d] jealous husbands to a class or group with special characteristics that must be considered when determining if murder was a reasonable response to a deceased’s words.”<sup>119</sup> Since this decision, the Canadian Supreme Court has had opportunities to modify its view that requires provocation be considered in cases of rage and jealousy; it has not done so.<sup>120</sup> Clearly, the Charter’s substantive equality values have had no influence on Canada’s law of provocation.

## VI. AUSTRALIAN PROVOCATION LAW

Among the three countries, Australia is the trend-setter on the law of provocation. Both in its national case law and in the statutes in a

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social norms deem the conduct to be punishable).

118. See Hyland, *supra* note 50, at 164-65 (using *Thibert* to discuss formal and substantive equality). Hyland argues that the majority attempted to balance equality and individual responsibility but that the *Thibert* holding “seems to undermine the very principles of equality and individual responsibility it seeks to uphold.” *Id.* at 168. Hyland concludes:

The evidence points to Norman Thibert seeking to maintain an unequal relationship of domination of his wife, a refusal on his part to recognize and accept her freedom within the relationship, including the freedom to leave it for another man. In other words, Thibert’s actions leading up to the murder betray the democratic and universal ideal of gender equality, which provide the social and cultural context within to assess his responsibility for Sherren’s murder.

*Id.* at 169.

119. See Gorman, *supra* note 50, at 499.

120. See *R. v. Stone*, [1999] S.C.R. 290, 304 (Can.) (deciding a case where a man stabbed his nagging wife forty-seven times); see also *R. v. Parent*, [2001] S.C.R. 761, 763 (Can.) (deciding a case where a man shot his wife six times during an argument). The non-provocation treatment in *Parent* was criticized as avoiding the issue of provocation when in fact it “was more authentically a case about the operation of the partial defence of provocation in section 232 of the *Criminal Code* than about intent.” Trotter, *supra* note 50, at 688 (emphasis in original). In contrast to the disappointing response to feminist concerns about provocation, the Canadian Supreme Court has responded to battered women and self-defense in a way that is more consistent with its endorsement of substantive equality. See, e.g., *R. v. Malott*, [1998] S.C.R. 123, 124 (Can.) (stating juries must assess the perceptions of a battered woman who has killed her abuser in light of the history of her abuse when determining if the woman’s actions were reasonable); *R. v. LaVallee*, [1990] S.C.R. 852, 854 (Can.) (permitting an appeal against a guilty verdict based on expert testimony indicating that battered women can discern when their batterers intend life-threatening violence through the cycle of violence).



number of its states, Australian criminal law has been much less supportive of traditional provocation doctrine and more willing to incorporate substantive equality into the law of domestic homicide. In Australia, as in the United States, each state provides its own statutory or common-law definition of crimes and defenses. Until recently, all Australian states provided a partial excuse for killing in the heat of passion. However, Australian courts and legislatures have become far less willing to excuse domestic homicides committed in the heat of passion.

In 1995, Australia's High Court held in *Masciantonio v. R.* that the rules for provocation were uniformly traditional throughout Australia.<sup>121</sup> The High Court's test requires the jury to decide whether the victim's provocation could cause an ordinary person to lose self-control and kill.<sup>122</sup> Under this test, one might expect that men who commit domestic homicide out of rage or jealousy would be quite successful in seeking to assert a provocation defense. Surprisingly, the appellate case law suggests otherwise.

The most important High Court decision concerning provocation in the context of domestic homicide is *Stingel v. R.*, in which a young man killed his former girlfriend's current lover.<sup>123</sup> The defendant in *Stingel* stalked his former girlfriend and found her having sex with her new boyfriend.<sup>124</sup> When he told the defendant to "piss off you cunt," the defendant stabbed him to death.<sup>125</sup> The facts of this case were quite similar to those in the Canadian Supreme Court's *Thibert*

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121. (1995) 129 A.L.R. 575 (Austl.).

122. See *id.* The test for provocation is:

The provocation must be such that it is capable of causing an ordinary person to lose self-control and to act in a way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has had the opportunity to regain his composure.

*Id.*; see also VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 23 (summarizing the High Court's test for provocation as requiring evidence: (1) of something accepted as provocation; (2) that the accused lost self-control as a result of provocation; and (3) that the provocation was capable of causing an ordinary person to lose self-control and form an intent to inflict grievous bodily harm or death).

123. See (1990) 171 C.L.R. 312 (Austl.) (applying only to Queensland and Western Australia, states that base provocation statutes on the Griffith Criminal Code enacted in Queensland in 1899 and Western Australia in 1903); see also DESMOND O'CONNOR & P.A. FAIRALL, CRIMINAL DEFENCES IN AUSTRALIA, PROVOCATION 202 (4th ed. 2005). For more information on the Griffith Code, see generally The Honourable Sir Harry Gibbs, *The Queensland Criminal Code: From Italy to Zanzibar*, July 19, 2002, [http://www.courts.qld.gov.au/library/exhibition/crimcode/20020719\\_Harry%20Gibbs.pdf](http://www.courts.qld.gov.au/library/exhibition/crimcode/20020719_Harry%20Gibbs.pdf).

124. See *Stingel*, 171 C.L.R. at 317-18. Killing the male lover is another all too common form of domestic homicide.

125. See *id.* at 319-20.

case.<sup>126</sup> However, unlike the *Thibert* Court, the Australian High Court held that, as a matter of law, the ordinary person test was not satisfied.<sup>127</sup> Therefore, the Court in *Stingel* found that the trial court's refusal to give a provocation instruction was correct.<sup>128</sup> The Court concluded, "no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the [defendant's] reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary nineteen-year-old."<sup>129</sup> This decision was based on Tasmania's then existing provocation statute,<sup>130</sup> which the High Court noted was similar to Canada's federal provocation statute.<sup>131</sup>

The High Court set out a hybrid two-step test for provocation that has been widely criticized in Australia as being too complex and hard to follow.<sup>132</sup> After factoring in any relevant personal characteristics of the defendant in determining the *gravity* of the provocation, the only attribute of the defendant that is to be considered in deciding whether such provocation could cause an ordinary person to lose control is the defendant's age.<sup>133</sup> Compared to provocation tests used in the United States<sup>134</sup> and Canada,<sup>135</sup> Australia's test is somewhat less subjective because the accused's gender and other personal characteristics are not as fully factored in to how an ordinary person would respond to the provocation.<sup>136</sup> Applying this test, numerous

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126. See *supra* notes 105-111 and accompanying text.

127. See *Stingel*, 171 C.L.R. at 336-37.

128. See *id.*

129. *Id.* at 337-38.

130. See Criminal Code Act, 1924, § 160 (repealed 2003) (stating that a jury could find manslaughter if the accused caused death "in the heat of passion" caused by "any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of self-control."); see also *Stingel*, 171 C.L.R. at 320.

131. See *Stingel*, 171 C.L.R. at 320-21.

132. See VICTORIAN LAW REFORM COMM'N, *supra* note 5, at 34-35.

133. See *Stingel*, 171 C.L.R. at 329.

134. See, e.g., *People v. Berry*, 556 P.2d 777, 780 (Cal. 1976) (measuring the defendant's reaction to his victim's alleged provocation against that of "an ordinary man of average disposition."); accord *People v. Lujan*, 112 Cal. Rptr. 2d 769, 786 (Cal. Ct. App. 2001).

135. See, e.g., *R. v. Thibert*, [1996] D.L.R. (4th) 675, 683 (Can.) (summarizing that the ordinary person test should consider the accused's age, sex and "other factors" in order to determine the reasonableness of the loss of self-control). But see *R. v. Hill*, [1986] S.C.R. 313, 314 (Can.) (affirming that age and gender were the only necessary factors to be considered for the ordinary person test in this gay panic case). *Hill* is the basis for the test applied in *Stingel*; however, Australia limits the test to age only, not gender. *Id.* See generally Morgan, *supra* note 2, at 258.

136. See *Stingel*, 171 C.L.R. at 331 (holding that the ordinary person test can include the age of the accused and that other relevant qualifying attributes may be considered when evaluating the gravity of the provocation); see also VICTORIAN LAW REFORM COMM'N, *supra* note 5, at 25-26 (providing an example of how this test would

Australian lower appellate courts have also upheld trial courts' refusals to give provocation instructions in cases involving male rage and jealousy, including cases involving husbands killing their wives.<sup>137</sup> Some of these cases openly acknowledge that the provocation defense is gender-biased.<sup>138</sup> Thus, it appears that Australian courts, when faced with a traditional provocation rule, usually look unfavorably on allowing provocation in cases of male rage and jealousy.<sup>139</sup>

There are exceptions, however. Recently, an Australian jury in Victoria was instructed on and accepted a provocation claim by James Ramage, who killed his wife Julie because she told him that she had found someone else and that sex with Ramage repulsed her.<sup>140</sup> The jury verdict and the eleven-year sentence led to national outcry and public debate over the appropriateness of the provocation defense.<sup>141</sup> During this debate, the Victorian Law Reform Commission released

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be applied). For example,

[I]f a [thirty-three]-year-old white man with a stutter killed his estranged wife after she had made disparaging remarks about him and teased him about his stutter, in determining the gravity of the provocation, the jury may consider how an ordinary [thirty-three]-year-old white man with a stutter might have viewed those comments. The jury would then have to consider how an ordinary adult not sharing any of the accused's characteristics, such as his stutter or sex, might have reacted to provocation of that gravity.

*Id.*

137. See, e.g., *Hart v. The Queen* (2003) 139 A. Crim. R. 520, 545 (Austl.) (affirming the trial court's conclusion that the appellant husband failed to demonstrate any issue of provocation when he killed his estranged wife after seeing her kiss another man); *R. v. Kumar* (2002) 133 A. Crim. R. 245, ¶ 3 (Austl.) (affirming the trial court's withdrawal of provocation from the jury where a husband killed his de facto wife after she insulted him); see also *R. v. Leonboyer* (2001) V.S.C.A. 149, ¶ 72 (Austl.) (affirming the trial judge's conclusion not to leave provocation to the jury where a man killed his girlfriend after allegedly hearing of her infidelity). But see *R. v. Yasso* (2004) V.S.C.A. 127, ¶¶ 48-50 (Austl.) (granting an appeal against applicant husband's murder conviction to allow the defense of provocation to be open to the jury).

138. See *Yasso*, V.S.C.A. at ¶ 43 (acknowledging that it is justifiable to assert that the provocation defense is "imbued with gender bias"); see also Morgan, *supra* note 2, at 255 (discussing gender bias in provocation cases).

139. See, e.g., *R. v. Muy Ky Chhay* (1994) 72 A. Crim. R. 1 (Austl.) (citing *Stingel* and extending the provocation defense to battered women, even where the battered woman killed her batterer while he was asleep).

140. See *Victoria Considers Reform of Provocation Defense* (ABC radio broadcast Dec. 9, 2004), available at <http://www.abc.net.au/pm/content/2004/s1261755.htm> (describing anger and political mobilization in Victoria due to the reduced sentence given to James Ramage, who killed his estranged wife); see also *R. v. Butay* (2001) V.S.C. 417, ¶ 2 (Austl.) (finding the husband guilty of manslaughter by way of provocation because his wife taunted him about her affair); VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 280-81 (discussing *Butay* as part of a case study).

141. See *Govt Abolishes Provocation Defence*, THE AGE (Austl.), Jan. 20, 2005 [hereinafter *Govt Abolishes*] (noting that Julie Ramage's death became a focal point for reform with more than 3,500 letters sent to her family urging government action); see also Ian Munro, *The World's Best Justice?*, THE AGE (Austl.), Nov. 17, 2004, at A3, 4.

its final report on defenses to homicide that included a recommendation that the state parliament abolish provocation entirely.<sup>142</sup> In January 2005, the political leader of Victoria, Acting Premier John Thwaites, promised to introduce legislation to abolish the defense;<sup>143</sup> in November 2005, the Victorian Parliament abolished provocation.<sup>144</sup> Previously, Tasmania was the first Australian state to abolish the defense, in 2003.<sup>145</sup>

Australia is the only country in which any of its jurisdictions have abolished provocation altogether.<sup>146</sup> It is not a coincidence that Victoria and Tasmania are two of the four Australian states that have abolished mandatory minimum sentencing for murder.<sup>147</sup> The ability of trial judges to tailor murder sentences,<sup>148</sup> along with concerns about the provocation defense's unfairness to women,<sup>149</sup> were

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142. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 20.

143. See Press Release, Office of Premier, Abolition of Provocation as a Defence to Homicide (Jan. 21, 2005 Austl.) (on file with the American University Journal of Gender, Social Policy & the Law).

144. See Crimes (Homicide) Act, 2005, No. 77/2005, § 3B (Austl.) (amending Crimes Act, 1958).

145. See Criminal Code Act, 1924 (Tas.), *amended by* Criminal Code Amendment (Abolition of Defence of Provocation) Act, 2003 (Tas.).

146. See Criminal Code Act, 1995 (Austl.) (demonstrating that the Commonwealth of Australia does not have a provocation defense as part of its criminal law). Because the Commonwealth has never had a provocation defense, it is technically the first jurisdiction not to allow provocation. However, since homicide is rarely prosecuted as a federal crime, the lack of a provocation defense has little practical impact.

147. See Crimes Act, 1900 (N.S.W.) (containing no mandatory minimum sentence for murder in New South Wales); Crimes Act, 1900, § 13 (Austl. Cap. Terr.) (containing no mandatory minimum sentence for murder in the Australian Capital Territory); VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 51 (discussing both states' modified provocation rules that make it easier for battered women to assert the defense); see also *infra* notes 239-240 and accompanying text.

148. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 33 (asserting that because judges can tailor sentences, provocation should be taken into account at sentencing along with other mitigating factors instead of existing as an independent defense). See generally *Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003(No. 15): Parliamentary Debates Before the Tasmanian House of Assembly*, 59-74 (Mar. 20, 2003) (Tas.).

149. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 27-28; see also *Govt Abolishes*, *supra* note 141 (quoting Victoria's Attorney-General Rob Hulls as saying: "[p]rovocation is a hangover from a bygone era where women were actually treated as chattels."). The debate in the Tasmanian Parliament was more divided. The Attorney General Judith Jackson, who introduced the bill to abolish provocation, spoke explicitly about provocation being "gender biased and unjust." See *Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003(No. 15): Parliamentary Debates Before the Tasmanian House of Assembly*, 60 (Mar. 20, 2003) (Tas.). However, two of the three legislators who commented on the bill, Michael Hodgman and Mr. McKim, while supporting it, expressly rejected gender-bias as a reason for repeal. *Id.* Their responses were in terms of formal equality, arguing that both women and men use the defense and are capable of similar violence. *Id.* However, like the Victorian Law Reform Commission, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General cited gender

influential in both states' decisions. However, while both states have justified abolition by focusing on judicial discretion in sentencing as a substitute for the ameliorating effect of the provocation defense in some intentional homicide cases, their approaches to abolition differ.

#### A. Victoria's Approach

In addition to abolishing provocation, the Victorian Law Reform Commission's recommendations included reintroducing the partial defense of excessive self-defense.<sup>150</sup> It did this for the express purpose of allowing those battered women who kill, but who are unable to obtain an acquittal for self-defense because their response to their fear was found unreasonable, to still be able to prove the lesser crime of manslaughter.<sup>151</sup> One reason for urging the reintroduction of excessive self-defense was to influence battered women who, under the then existing system, might choose to plead guilty to manslaughter based on provocation out of concern that going to trial on self-defense could result in a murder conviction. The Commission believed that after the abolition of provocation such women would more likely risk going to trial on self-defense, knowing that a jury could find the back-up partial defense of excessive self-defense.<sup>152</sup> Thus, under the Commission's proposal, manslaughter

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bias as a major reason for its recommendation that the provocation defense be abolished. See MODEL CRIMINAL CODE, OFFICERS COMM. OF THE STANDING COMM. OF ATTORNEYS-GENERAL, DISCUSSION PAPER, MODEL CRIMINAL CODE, CH. 5, FATAL OFFENCES AGAINST THE PERSON 103 (June 1998) [hereinafter MODEL CRIMINAL CODE].

150. See *Zecevic v. Dir. of Pub. Prosecution* (1987) 162 C.L.R. 645, ¶ 13 (Austl.) (abandoning the excessive self-defense doctrine because the difficulty and risk of error in applying it to the facts of a given case proved greater than any advantages of its use).

151. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 269. Recently, a simplified modern version of excessive self-defense was enacted in New South Wales which provides:

- (1) This section applies if: (a) the person uses force that involves the infliction of death, and (b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary: (c) to defend himself or herself or another person, or (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.
- (2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

Crimes Act 1900, § 421 (N.S.W.). Excessive self-defense has an American analogue in the partial defense of imperfect self-defense, which is allowed in a minority of American jurisdictions. See, e.g., Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1707-08 (1986).

152. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 102 (acknowledging that this decision could backfire, and a jury that would otherwise have acquitted based on self-defense, might opt for excessive self-defense instead, resulting in a manslaughter conviction).

would be available for fear, the emotion that motivates more women who commit domestic homicide, but no longer allowed for rage and jealousy, the emotions that motivate more men who commit domestic homicide. As the Commission noted: “Excessive self-defence would seem to better fit the circumstances of women who kill in this context than . . . the existing partial defence of provocation . . . [because t]here is no need, as for provocation, to establish that the accused acted due to a ‘loss of self-control.’”<sup>153</sup>

The Victorian Parliament heeded the Commission’s advice, but instead of reintroducing the partial excuse of excessive self-defense, it enacted a new crime called “defensive homicide.”<sup>154</sup> This crime has no minimum sentence and provides a maximum sentence of twenty years,<sup>155</sup> the same penalty that applied to the manslaughter based on provocation before it was abolished.<sup>156</sup> Defensive homicide is committed when a person kills another while believing the conduct was necessary to defend herself or another from death or “really serious injury” where she did not have reasonable grounds for this belief.<sup>157</sup> This new crime was enacted to address family violence situations where the defendant killed out of fear but is unable to meet the reasonableness requirement for self-defense.<sup>158</sup> As Attorney

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153. *See id.*

154. *See Crimes (Homicide) Act, 2005, No. 77/2005, §§ 4, 9AD (Austl.)* (amending Crimes Act, 1958).

[Defensive homicide is] similar in some ways to the common-law rule of ‘excessive self-defence’ that existed prior to 1987 but was abolished by the High Court’s decision in *Zecevic’s* case.

Under the earlier common-law rule of excessive self-defence, and the provisions of other jurisdictions, a person who has a genuine belief that his or her conduct is necessary in self-defence, but who is not considered to have acted reasonably is guilty of the lesser offence of manslaughter. However, there could be confusion about the basis of the jury’s verdict, as there were several potentially inconsistent ways that a jury could reach a manslaughter verdict. The new offence of defensive homicide will clearly indicate the basis of the jury’s verdict to the sentencing judge. This will enable the sentencing judge to impose a sentence that accurately reflects the crime that the person committed.

*Crimes (Homicide) Bill: Parliamentary Debates (Hansard) Before the Victorian Legislative Assembly, 55th Parliament, 1789 (Oct. 27, 2005) (Vic.)* (statement of Honourable J.M. Madden, Minister for Sport and Recreation).

155. *See Crimes (Homicide) Act at § 9AD.*

156. *See VICTORIAN LAW REFORM COMM’N, supra* note 12, at 274.

157. *See Crimes (Homicide) Act at §§ 9AC, 9AD.*

158. Most commentators describe provocation as a partial excuse because the actor is not entirely to blame for what happened: He either could not control his desire to kill, or demanding such control would be unfair in light of the provocation. A few commentators describe provocation as a partial justification because the adequately provoked killer’s conduct has committed a lesser crime than one who intentionally kills without provocation. *See* Stephen P. Garvey, *Passion’s Puzzle*, 90 Iowa L. Rev. 1677, 1680-82, 1693-00 (2005); *see also* LEE, *supra* note 18, at 227-30. The new crime of defensive homicide is a lesser crime than murder that appears to be a partial

General Rob Hulls noted in his discussion of this crime before the Legislative Assembly: "This is a reform that is aimed at removing entrenched bias and misogynist assumptions from the law to make sure that women who kill while genuinely believing it is the only way to protect themselves or their children are not condemned as murderers."<sup>159</sup>

The Victorian Parliament's abolition of provocation and enactment of the new offense of defensive homicide are clear examples of lawmakers choosing to substitute substantive for formal gender equality.<sup>160</sup> As a result, the punishment for defensive homicide will be similar to what was available through provocation to battered women who kill but are unable to prove they acted in self-defense. However, punishment for people who kill out of anger and possessiveness may be substantially greater under a murder conviction than it was when provocation made the lesser crime of manslaughter available to them. Victoria's new laws provide an opportunity to determine whether expressly feminist legislation that seeks to provide substantive equality, in practice changes how men and women who kill out of jealousy and anger, or fear and despair, are treated by a common law criminal justice system.

### B. Tasmania's Approach

The Tasmanian approach to abolishing provocation differed substantially from that of Victoria. While there had been cases<sup>161</sup> and

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justification because the killing, though unreasonable, was committed for the morally defensible motive of fear.

159. *Crimes (Homicide) Bill: Parliamentary Debates (Hansard) Before the Victorian Legislative Assembly*, 55th Parliament, 1844 (Oct. 26, 2005) (Vic.) (statement of Honourable R.J. Hulls, Attorney General, Minister for Industrial Relations and Minister for Planning). Other provisions of the Crimes (Homicide) Bill also were adopted with family violence in mind: First, self defense was codified in § 9AC and a special provision, § 9AH(1) provides rules concerning lack of immediacy and excessive force that apply solely where family violence is alleged. Second, § 9AH(2)-(4) expressly describes certain kinds of evidence that may be introduced in domestic homicide cases. See Crimes (Homicide) Act at §§ 9AC, 9AH(1)-(4).

160. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 15 (providing a substantive equality rationale for its recommendations). The Commission noted:

Defences and/or partial defences to homicide should not be based on abstract philosophical principles, but should reflect the context in which homicides typically occur. In particular, the law should deal fairly with both men and women who kill and defences should be constructed in a way that take account of the fact they tend to kill in different circumstances.

*Id.*

161. See, e.g., *Hutton v. The Queen*, (1986) 20 A. Crim. R. 315 (Austl.) (expanding the scope of provocation in cases involving male rage and jealousy) discussed in detail *infra*, notes 209-213, and accompanying text; see also *R. v. Franke* (Aug. 22, 1984) 2 (Tas.) (on file with the American University Journal of Gender, Social Policy & the Law) (convicting a battered woman of manslaughter). In this case, preceding *Hutton*, the defendant was being sexually assaulted by her husband

commentary<sup>162</sup> demonstrating that Tasmania's traditional provocation rule could produce distressingly male-biased results,<sup>163</sup> there was no law reform report or specific case that provided either a feminist or other impetus for eliminating the defense of provocation. Furthermore, unlike the Victorian Law Reform Commission, Tasmanian Attorney General Judith Jackson's proposal to abolish provocation was unaccompanied by any other recommendations.<sup>164</sup> Instead, Jackson, as a Member of Parliament for the majority Labor Party, simply brought her proposal to abolish provocation to Parliament for their consideration.<sup>165</sup> She asserted that abolition would not "in any way" be detrimental to battered women.<sup>166</sup> After a lively discussion, the Tasmania Parliament voted unanimously to abolish provocation.<sup>167</sup>

Tasmania's abolition of provocation appears to be a positive step on behalf of women. The shift in power from the jury to the judge assumes that judges, through sentencing discretion, will be more likely to punish severely those murderers who kill out of rage and jealousy while providing only light sentences when murderers are battered women who kill out of fear. It remains to be seen whether this assumption proves correct. Especially uncertain is how battered women, who would have previously relied on provocation, will fare without this defense. Will the lack of either this backup partial defense, or a substitute such as the defensive homicide crime enacted in Victoria, cause more battered women to go to trial on complete self-defense because the only option for a plea is murder?<sup>168</sup> Will

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with the handle of a claw hammer when she seized it, struck and killed him, and then disposed of the body. *Id.* at 3. The decedent was reported to have been cruel to defendant and their children. *Id.* The Court accepted that defendant "lost the power of self-control and caused her husband's death in the heat of sudden provocation." *Id.*; see also Bradfield, *supra* note 30, at 15. The defendant was sentenced to three years imprisonment. KATE WARNER, SENTENCING IN TASMANIA 275, n.43 (2d ed. 2002).

162. See, e.g., Bradfield, *supra* note 30, at 5-7.

163. On the other hand, Tasmania was the jurisdiction out of which *Stingel* arose. The trial judge and Tasmanian appellate court both held that a provocation instruction should not have been allowed. See Stanley M. H. Yeo, *Power of Self-Control in Provocation and Automatism*, 14 SYDNEY L. REV. 3, 3 (1992).

164. See *Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003(No. 15): Parliamentary Debates Before the Tasmanian House of Assembly*, 59-74 (Mar. 20, 2003) (Tas.) (indicating that the Attorney General had the support of the Tasmanian Director of Public Prosecutions, Mr. Ellis, in his 2000-01 report where he questioned retaining provocation).

165. See *id.*

166. See *id.*

167. See *id.*

168. Diminished responsibility, another partial defense that is often used to reduce murder to manslaughter in the domestic homicide context, is not available in either Tasmania or Victoria. See VICTORIAN LAW REFORM COMM'N, *supra* note 12.



juries convict them of murder or, instead, be more inclined than when provocation was a middle ground, to acquit them based on complete self-defense?<sup>169</sup> Because Tasmania has so few homicides, these concerns are unlikely to be resolved for some time.<sup>170</sup>

Two effects of Victoria's and Tasmania's abolition of provocation are clear. Juries no longer have a say in the assessment of culpability among those killers committing intentional homicide based on heat of passion. Furthermore, killers who previously would not have been labeled murderers will now bear that label. The difference, however, between the two states is that in Tasmania both heat of passion and fear-based domestic homicides will be treated as murder while Victoria will allow juries to find a lesser crime for the fear-based homicides.

In a few years time a comparison can be made between the domestic homicide decisions and sentencing in Victoria and Tasmania and also between their outcomes and those in jurisdictions that retain the provocation defense. It may then be possible to determine whether Victoria's lesser crime of defensive homicide is beneficial for battered women and therefore whether it is important to provide such an alternative to murder instead of simply, as in Tasmania, abolishing provocation. Whether it is beneficial will depend on what prosecutors and juries do. Will Victorian prosecutors and juries simply substitute defensive homicide for provocation, and therefore, routinely find this lesser crime or will they more frequently opt for acquittal based on complete self-defense?<sup>171</sup> Will prosecutors and juries in Tasmania more frequently opt for murder or complete self-defense for battered women who kill? In time, it should also become apparent in both states whether judges are sentencing men who murder in the heat of passion more severely than was the case for similarly situated men who were previously convicted of manslaughter.<sup>172</sup>

The abolition of provocation is unlikely to sweep Australia. The critical reason is that while no Australian state has a mandatory

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169. See Rebecca Bradfield, *The Demise of Provocation in Tasmania*, 27 CRIM. L.J. 322, 324 (2003).

170. According to the author's review of all of Tasmania's domestic homicide cases and sentences between June 1, 2003 and March 31, 2005, Tasmania has very few homicide cases each year. Since provocation was abolished, there have been no convictions or sentences involving domestic homicide as of March 2005.

171. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 103-04 (recommending that if excessive self-defense is enacted, then in five years the Victorian Department of Justice should review the interaction of the defense with complete self-defense and with plea and trial practices to make sure it is having the desired effect).

172. See Bradfield, *supra* note 169, at 324.

minimum sentence for manslaughter, unlike Victoria and Tasmania, some Australian states have mandatory minimum sentences for murder.<sup>173</sup> Abolishing provocation leaves only the options of acquittal or murder unless some other basis for manslaughter such as excessive self-defense or a lesser crime such as defensive homicide is created. The mandatory sentencing requirement for murder then prevents judges from tailoring murder sentences to take into account circumstances surrounding the killing, such as whether there was any violent provocation or merely an attempt to exercise sexual autonomy or leave the relationship.

## VII. CHANGING SOCIAL NORMS

Even though the criminal law *doctrine* differs, sometimes dramatically, social norms appear to be affecting the *outcomes* in domestic homicide cases involving heat of passion and fear in all three countries. For example, while substantive equality has had little influence on the statutes and appellate case law in Canada concerning the heat of passion basis for provocation, its impact on sentencing in Canadian cases indicates that excusing men who kill in a jealous rage has become less socially acceptable. Once a jury finds provocation, Canada only minimally restricts sentencing discretion<sup>174</sup> and therefore judges can factor in the circumstances surrounding the killing in deciding the appropriate punishment to impose. Currently, Canadian judges appear to be sentencing men who kill out of rage and jealousy quite differently than they sentence battered women who kill. In a recent Canadian case study, men who successfully used provocation in plea-bargaining or at trial were sentenced to six to twelve years, with no man receiving less than two years.<sup>175</sup> In contrast, most of the women who successfully used provocation received sentences ranging from two years to suspended sentences; the longest sentence for any woman was five years.<sup>176</sup> Thus, because of the flexibility of sentencing for manslaughter in Canada, judges are tailoring the punishment in provocation cases to fit the crime.

There have been similar sentencing outcomes in provocation cases in Australia.<sup>177</sup> One Australian study found that the average sentence

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173. See, e.g., Criminal Code, 1899, § 305 (Queensl.); Criminal Code Act Compilation Act, 1913, § 282 (W. Austl.).

174. See *supra* notes 98-103, and accompanying text.

175. See DEP'T OF JUSTICE CANADA, REPORT ON SENTENCING FOR MANSLAUGHTER CASES INVOLVING INTIMATE RELATIONSHIPS (2003), [http://canada.justice.gc.ca/en/dept/pub/smir/ms\\_int\\_rel\\_report\\_lawrev.html](http://canada.justice.gc.ca/en/dept/pub/smir/ms_int_rel_report_lawrev.html) (last visited Oct. 28, 2005).

176. See *id.*

177. See VICTORIAN LAW REFORM COMM'N, *supra* note 12, at 275-83. The Commission also noted, "juries in recent years may have become more reluctant to

length for women guilty of manslaughter was three to five years.<sup>178</sup> In contrast, the average length for men guilty of manslaughter was six to eight years.<sup>179</sup> The study also found that thirty-three percent of the women received non-custodial sentences, compared with ten percent of the men.<sup>180</sup> The likely reason for the different sentences for men and women is that existing provocation rules are at odds with the social norms concerning both killing out of possessiveness and anger and killing out of fear and despair. Further evidence that provocation rules do not represent current values is provided by Rebecca Bradfield's study, discussed earlier, where battered women were highly successful in their use of provocation while men who killed in the heat of passion were much more likely to be found guilty of murder.<sup>181</sup>

Substantive equality may be making inroads in the United States as well. Because of the evolution of social norms concerning appropriate responses to sexual jealousy, I suspect that juries, and prosecutors through plea-bargaining, are today more likely to opt for murder over manslaughter for rage-based domestic killings than in the past.<sup>182</sup> A recent study of extreme emotional disturbance (EED) pleas and verdicts in New York City by Kirschner, Litwack and Galperin, provides intriguing evidence supporting this suspicion.<sup>183</sup> This study looked at all cases where defendants pleaded EED to "charges of intentional murder or attempted intentional murder in New York County over a [ten]-year period (1988-1997)."<sup>184</sup> The authors' "major finding" was "that jurors, judges, and prosecutors were much more likely to accept a defense of EED when the defendant's homicidal behavior was motivated significantly by an understandable fear . . . than when the defendant acted out of anger without fear of physical harm."<sup>185</sup>

The sample in the study was small, consisting of twenty-four cases where defendants argued EED in murder.<sup>186</sup> Nine defendants were

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accept the partial defence of provocation. The discretion of the trial judge not to leave provocation for the jury's consideration has also been relied upon in a number of recent Victorian cases." *Id.* at 41.

178. See NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 2, at 3.99.

179. See *id.*

180. See *id.*

181. See *supra* notes 45-47 and accompanying text.

182. See LEE, *supra* note 18, at 66.

183. Stuart M. Kirschner et al., *The Defense of Extreme Emotional Disturbance*, 10 PSYCHOL. PUB. POL'Y & L. 102 (2004).

184. See *id.* at 102.

185. See *id.*

186. See *id.* at 108

found guilty of, or pled guilty to, manslaughter; fifteen were found guilty of, or pled guilty to, murder.<sup>187</sup> Only two of the twenty-four were female; they both pled guilty to manslaughter in cases where the dominating emotion was fear rather than anger.<sup>188</sup> Only one of the nine manslaughter outcomes involved a man committing a domestic homicide.<sup>189</sup> In contrast, ten of the fifteen cases where the outcome was murder involved men committing domestic homicides where the dominating emotion was anger.<sup>190</sup> Overall, the authors noted that “[i]n no case in our sample was pure rage viewed as reasonable.”<sup>191</sup>

The authors noted that the concern that EED *allowed* cases of killing out of possessiveness and rage to reach the jury was justified.<sup>192</sup> However, based on their findings, they suggested, “the problems [that commentators] perceive with the EED defense may be problems in theory rather than in practice.”<sup>193</sup> They also noted that New York appellate decisions have upheld jury or judicial verdicts rejecting EED in heat of passion domestic homicide cases.<sup>194</sup> Finally, they pointed out that New York appellate courts have also upheld trial judges’ refusals to allow a jury to consider EED in such domestic homicide cases.<sup>195</sup>

Further empirical research is needed to determine whether these findings from one county in New York are representative of how prosecutors, juries and judges are applying the provocation defense and EED in United States’ jurisdictions. Considering the changes in recent years in the acceptability of jealous rage compared to fear as bases for a manslaughter outcome,<sup>196</sup> however, it seems likely that these findings are representative. In particular, since the EED defense is more sympathetic to defendants than traditional provocation, one would expect similar pro-fear and anti-jealousy results when a provocation defense was used. If this turns out to be correct, it will mean that while juries are still being allowed to find manslaughter in domestic homicide cases based on rage and those based on fear, the latter emotion is much more likely to lead to a manslaughter verdict. Thus, substantive gender equality may be

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187. *See id.* at 110.

188. *See id.* at 109, 116-17; *see also supra* notes 34-39 and accompanying text.

189. *See Kirschner et al., supra* note 183, at 116-17.

190. *See id.*

191. *See id.* at 127.

192. *See id.* at 125-26.

193. *See id.* at 126.

194. *See id.*

195. *See id.*

196. *See LEE, supra* note 18, at 66.

occurring in practice even though it does not appear to be in theory. However, so long as determinate sentencing continues to be the norm in the United States, any attempt at substantive equality will be a blunt instrument. Fear-based killings may more likely result in a substantial sentence for manslaughter (when acquittal based on self-defense is the fairer outcome), while killings out of possessiveness may more likely result in a much longer sentence for murder.

Another indicia of changing social norms include public outcry concerning publicized cases where killing in the heat of passion results in a manslaughter verdict. For example, the *Ramage* case, discussed earlier,<sup>197</sup> galvanized Victoria's political leadership to seek to abolish provocation.<sup>198</sup> In Canada, there also has been adverse public reaction to several high profile cases where men who committed domestic homicide out of jealousy and rage were able to rely on the provocation defense.<sup>199</sup> Perhaps the most famous American case in recent years that led to public outcry about men who kill in the heat of passion were the murders of OJ Simpson's ex-wife and her male friend. Even though Simpson was acquitted because the State did not prove beyond a reasonable doubt that he was the killer (but later found him civilly liable for both victims' wrongful deaths), the evidence presented as to motive provided a classic example of provocation of a violent, jealous and possessive man.<sup>200</sup>

The recent negative public responses to, and harsher sentencing of men who kill in the heat of passion, is based on a significant shift in values over the past half-century. In the mid-twentieth century, the

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197. See *supra* notes 140-145 and accompanying text.

198. See *Crimes (Homicide) Bill: Parliamentary Debates (Hansard) Before the Victorian Legislative Council*, 55th Parliament, 1924 (Nov. 15, 2005) (Vic.) (statement of Ms. Jenny Mikakos, Member of Victoria's Legislative Council). Ms. Mikakos noted:

I was very touched by the fact that Jane Ashton also participated in those discussions. Members might be aware that Jane Ashton is the twin sister of Julie Ramage, who was murdered by her husband, James Rampage, after she allegedly told him that their marriage was over. Jane Ashton has been a very keen advocate for these reforms and has publicly welcomed the legislation and the changes the government is seeking to pass through the Parliament today.

*Id.*

199. See DEP'T OF JUSTICE CANADA, CONSULTATIONS, REFORMING CRIMINAL CODE DEFENCES, PROVOCATION, SELF-DEFENCE AND DEFENCE OF PROPERTY, SECTION ONE: BACKGROUND AND CRITICISM, THE PROVOCATION DEFENSE, <http://canada.justice.gc.ca/en/cons/rccd/section1p1.html> (Sept. 29, 2005) (citing *R. v. Stone*, [1999] S.C.R. 290 (Can.), *R. v. Thibert*, [1996] S.C.R. 37 (Can.) and *R. v. Klassen*, [1997] W.C.B. 210 (Can.), as recent cases stirring "considerable public concern that the alleged provocation was inadequate to justify reducing the charge.") (on file with the American University Journal of Gender, Social Policy & the Law).

200. See FORELL & MATTHEWS, *supra* note 5, at xx.

law of provocation in Australia, Canada and the United States, became substantially more subjective and individualized,<sup>201</sup> thereby, making the defense available to more killers by allowing juries to consider various aspects of their “human frailty.”<sup>202</sup> The killers in the 1940s through 1980s for whom the broader subjective definition of provocation was created were overwhelmingly male.

Language in the 1963 Australia High Court opinion in *Parker v. R*<sup>203</sup> demonstrates the use of changing values rationale for such expansion. The wife of the defendant Parker had left him for another man, Dan Kelly.<sup>204</sup> Parker’s wife and Kelly had departed together and were traveling on a public street when Parker, who pursued them, seriously injured his wife and killed Kelly.<sup>205</sup> Relying on the defendant’s “human frailty” Chief Justice Dixon noted:

We are not living in the conditions of the sixteenth, seventeenth or eighteenth century. According to the standards governing our society in the later nineteenth century and the twentieth century the succession of events and the conduct of Dan Kelly brought a very strong provocation to an emotional nature, a provocation still in actual operation when Parker came upon Dan Kelly with his wife.<sup>206</sup>

Chief Justice Dixon ended up in the dissent in the High Court’s decision in *Parker*; however, his view was vindicated when this case was reversed on appeal to the Privy Council.<sup>207</sup> Throughout the 1960s through the 1980s, a number of Australian commentators advocated that the law of provocation become more subjective, taking into account the emotional equation of the individual killer who killed in the heat of passion. As Stanley Yeo noted in an article published in 1987, “judges, reform commissioners and academic commentators alike have called for [elimination of the objective test] and replacement by a purely subjective test.”<sup>208</sup>

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201. *But see* *Bedder v. Dir. of Pub. Prosecutions*, (1954) 2 All ER 801 (H.L. U.K.) (presenting one high-water mark case where the test for provocation was said to be purely objective).

202. *See* VICTORIAN LAW REFORM COMM’N, *supra* note 12, at 23-24 (indicating that acceptance of emotions other than jealousy and rage is a recent development).

203. (1963) 111 C.L.R. 610, *rev’d by* *Parker v. R.*, (1964) A.C. 1369 (Austl.).

204. *See id.* at 619 (Dixon, C.J. dissenting).

205. *See id.* at 619-20 (Dixon, C.J. dissenting).

206. *See id.* at 628-29 (Dixon, C.J. dissenting) (quoting from William Shakespeare’s “Othello,” that “passion having (his) best judgment collied assayed to lead the way.”).

207. *See* *Parker v. R.*, (1964) A.C. 1369 (Austl.).

208. Stanley M.H. Yeo, *Ethnicity and the Objective Test in Provocation*, 16 MELB. U. L. REV. 67, 67 (1987-88) (providing citations to a number of such authorities); *see* MODEL CRIMINAL CODE, *supra* note 149, at 83.

There are clear indications that some lawmakers are currently responding to a different social climate that is more sensitive to gender inequalities and less tolerant of the emotions of possessive rage and jealousy. The dramatically different view and corresponding legal treatment of provocation in Australia today, compared to twenty to fifty years ago, demonstrates this point.

In Tasmania, as recently as 1986, the highest state appellate court reversed the decision by the trial court, which had refused to allow the defendant to argue provocation.<sup>209</sup> The defendant had shot and killed the woman he had been living with, who was married to another man at the time, and her new lover in a sudden rage.<sup>210</sup> In its unanimous reversal, the court substantially broadened its interpretation of the statutory language, “wrongful act or insult,”<sup>211</sup> to allow the defendant’s former lover’s “scornful laugh” to provide sufficient insult to require consideration of provocation in both homicide cases.<sup>212</sup> In defending this expansion, the court explained, “changing community values may render conduct not considered sufficient to raise the defence in one age sufficient in another to deprive an ordinary person of the power of self-control.”<sup>213</sup>

Seventeen years after this decision, the Tasmanian Parliament unanimously abolished provocation.<sup>214</sup> Attorney General Judith Jackson (a member of the majority Labor Party) explained that “[t]he law has changed and society has changed. An outdated and inappropriate defence for murder should not be retained in the twenty-first century.”<sup>215</sup> The leaders of the minority Liberal and Green parties also voiced their support for the abolition of provocation.<sup>216</sup> These leaders expressly noted that their support was based how society had changed and argued that provocation’s “concession to human frailty” was neither a necessity nor “consistent

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209. See *Hutton v. The Queen* (1986) 20 A. Crim. R. 315, 331 (Austl.).

210. See *id.*

211. See *id.*; see also Criminal Code Act, 1924 (Tas.), amended by Criminal Code Amendment (Abolition of Defence of Provocation) Act, 2003 (Tas.).

212. See *Hutton*, 20 A. Crim. R. at 318.

213. See *id.* at 321.

214. See *supra* notes 161-167 and accompanying text.

215. *Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003(No. 15): Parliamentary Debates Before the Tasmanian House of Assembly*, 60 (Mar. 20, 2003) (Tas.). She gave the following reasons for abolition: (1) provocation can be factored into sentencing since a mandatory life sentence for murder no longer exists; (2) the defense is outdated and not in keeping with social change; and (3) the defense is gender-biased. See *id.*; see also Bradfield, *supra* note 169, at 323.

216. See *Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003(No. 15): Parliamentary Debates Before the Tasmanian House of Assembly*, 59-74 (Mar. 20, 2003) (Tas.).

with the expectations of a civilised society” especially in light of Tasmania’s abolition of a mandatory life sentence for murder.<sup>217</sup>

What had happened between 1986 and 2003 that led lawmakers to go from expanding the application of provocation to abolition? One major change during this time has been the growing awareness and understanding by lawmakers and the public about gender inequality and domestic violence. The other was the abolition of the mandatory life sentence for murder.

The recent Victorian Law Reform Commission’s report combined with the adverse public and political reaction to the *Ramage* case is further evidence of how domestic homicide in the heat of passion is no longer viewed as deserving of compassion and empathy in Australia. The Commission’s Report, in urging that provocation be abolished, emphasized the changed values of the twenty-first century:

Historically, an angry response to a provocation might have been excusable, but in the [twenty-first] century, the Victorian community has a right to expect people will control their behaviour, even when angry or emotionally upset—particularly when the consequences are as serious as homicide.<sup>218</sup>

It also emphasized that the provocation defense is gender-biased:

[P]rovocation is most often raised by men in the context of a relationship of sexual intimacy in circumstances involving jealousy or an apparent desire to retain control. The continued existence or availability of provocation in these circumstances may therefore be seen as sending an unacceptable message—that men’s anger and use of violence against women is legitimate and excusable. Some people have questioned ‘how, in a supposedly “civilised” society, can the desire to leave a relationship constitute behaviour which would provoke anyone to kill?’<sup>219</sup>

The political leaders of Victoria agreed with the Commission’s views on both changed social norms and gender bias. Attorney-General Rob Hulls stated, “the justice system had to be brought up to date with modern community values.”<sup>220</sup> He also noted, “[p]rovocation is a hangover from a bygone era where women were actually treated as chattels.”<sup>221</sup> The Acting Premier John Thwaites echoed the Attorney-

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217. *Id.* at 61 (statement of Michael Hodgman, member of the Liberal Party) (quoting Mr. Ellis, the Director of Public Prosecutions, from his annual report in 2000-01); *accord id.* (statement of Franklin McKim, member of the Green Party).

218. See VICTORIAN LAW REFORM COMM’N, *supra* note 12, at xxi; see also MODEL CRIMINAL CODE, *supra* note 149, at 103 (recommending that provocation be abolished and noting that “[i]t cannot be escaped that this issue must . . . be decided by reference to society’s values.”).

219. See VICTORIAN LAW REFORM COMM’N, *supra* note 12, at 30 (footnotes omitted).

220. See *Govt Abolishes*, *supra* note 141.

221. See *id.*



General, noting that “the law of provocation was an anachronism that no longer had a place in modern, civilised society.”<sup>222</sup> He added that the “provocation defence was gender-biased and it promoted a blame-the-victim culture.”<sup>223</sup> *The Age*, the leading newspaper in Victoria, in an editorial, also agreed that social norms no longer can tolerate the defense of provocation, describing it as “archaic” and urging it be “abandoned.”<sup>224</sup> The editorial noted, “we no longer live in a time when ‘hot-blooded’ male violence is considered acceptable.”<sup>225</sup> It concluded that “the law should reflect a society’s values” and, therefore, “[c]hange in this area is long overdue.”<sup>226</sup>

The Parliamentary debate in Victoria over abolishing provocation also frequently referred to changing social values. One legislator, after referring to the *Ramage* case, noted that abolition “is essential in bringing our laws into line with community thinking and standards.”<sup>227</sup> Another legislator said that abolition was “yet another step forward in the removal of that old-fashioned view that women were property and therefore men could do with women what they wished.”<sup>228</sup> Yet another commented that “[t]he law surrounding defences to homicide have not kept up with the pace of social change and changes to social values.”<sup>229</sup>

As the studies of sentencing, plea-bargaining and jury verdicts indicate, the change in social values in Tasmania and Victoria has also occurred in other Australian states, and in Canada and the United States. Yet abolition of provocation has occurred in two Australian states without a mandatory life sentence for murder but not in any state that does impose such a sentence. This suggests that the will to incorporate substantive equality into the criminal law surrounding domestic homicide exists, but not at the price of increasing the risk of a life sentence for murder for either women who kill out of fear or, perhaps, even for men who kill out of anger and jealousy. Because of the lack of mandatory minimum sentences for manslaughter in other

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222. *See id.*

223. *See id.*

224. *See Time to Abolish the Provocation Defense*, THE AGE (Austl.), Oct. 30, 2004, at 10.

225. *See id.*

226. *See id.*

227. *Crimes (Homicide) Bill: Parliamentary Debates (Hansard) Before the Victorian Legislative Council*, 55th Parliament, 1839 (Oct. 26, 2005) (Vic.) (statement of Ms. Maxine Morand, Member of Victoria’s Legislative Assembly).

228. *Id.* at 1841 (statement of Ms. Louise Asher).

229. *Crimes (Homicide) Bill: Parliamentary Debates (Hansard) Before the Victorian Legislative Council*, 55th Parliament, 1923 (Nov. 27, 2005) (Vic.) (statement of Ms. Jenny Mikakos, Member of Victoria’s Legislative Council Privileges Committee).

Australian states and only modest minimum manslaughter sentences in Canada, trial judges have been able to incorporate these social values and the resulting substantive equality into the sentencing discretion that judges have once provocation has been found. In the United States, which provides a greater variety of determinate sentencing for both murder and manslaughter, there is less ability to provide women who kill out of fear, but fail to prove self-defense, to be given a non-custodial or very short sentence. Therefore, the values favoring people who kill out of fear and disfavoring people who kill out of anger and possessiveness may mainly be reflected in jury verdicts and plea bargains.<sup>230</sup>

#### VIII. IS ABOLITION OF PROVOCATION NECESSARY?

There is much to be said for allowing juries to decide the provocation issue rather than leaving it solely to judges through sentencing discretion as has been done in Tasmania through its abolition of provocation. There is even reason for concern when the only emotion to be considered in allowing a lesser offence to be decided by a jury is fear, as has been done in Victoria. Professor Cynthia Lee in her book, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom*, provides a number of reasons why juries should still be allowed to find provocation.<sup>231</sup> Most convincing is her claim concerning the civic educational value of juries deciding provocation.<sup>232</sup> She notes that “[j]urors should be encouraged to deliberate explicitly about social norms, stereotypes, and bias when deciding what constitutes reasonable provocation . . . [because they] deliver . . . commonsense justice . . . [and] serve as a bulwark against overzealous government prosecutors and cynical judges.”<sup>233</sup>

While reviewing Lee’s, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom*, I considered whether to recommend abolishing provocation.<sup>234</sup> Lee’s argument for continuing to include the jury in the normative decision of how to treat men who kill out of rage and jealousy helped convince me that abolition is probably the wrong response. Both Lee and I prefer that

230. See *supra* notes 39-47, and accompanying text.

231. See LEE, *supra* note 18, at 247-50 (discussing some reasons why juries should still be allowed to finding provocation). Two of the reasons are that juries provide individualized justice and that the elimination of provocation limits what kinds of arguments and evidence a criminal defendant can present when a criminal defendant is at a huge disadvantage vis-a-vis the prosecution from the start. *Id.*

232. See *id.* at 247.

233. *Id.*

234. See Forell, *supra* note 23, at 599.

the court educate the jury about the gender and other biases stemming from existing social norms that provocation law elicits.<sup>235</sup> Our goal is to enable the jury to recognize the prejudices that exist in our society, and thereby, encourage them to empathize with parties who are not from the traditionally dominant groups.

Very few courts do the kind of explicit gender and other-bias education of the jury that Lee and I advocate.<sup>236</sup> However, perhaps this is less necessary than in the past. The provocation *rules* in the United States, Canada and much of Australia continue to represent formal gender equality that allows jury empathy for men who kill in a jealous rage. Nevertheless, changes in social norms have allowed substantive gender equality to be incorporated in provocation law's *application* by juries, as well as judges and prosecutors. When given the choice between manslaughter and murder for battered women who kill, juries prefer manslaughter; in contrast, when given that choice for killings in the heat of passion, juries prefer murder.<sup>237</sup> Therefore, in jurisdictions with mandatory minimum sentences for murder, domestic homicide law may be as fair and equal as is currently possible. Until judges are given greater discretion in sentencing, and the law and application of self-defense is more understanding of battered women's situations, current provocation law, as applied, may be the best that it can be.

Now that two common law jurisdictions have abolished provocation it is particularly important to consider whether abolition is in fact the most effective method for achieving maximum substantive gender equality. In addition to leaving a traditional jury function to judges and legislatures, abolition runs two risks concerning domestic homicides: juries acquitting jealous killers rather than convicting them for murder, and juries convicting battered women of murder instead of acquitting them. Finally, it labels all convicted intentional killers, including battered women, as murderers.<sup>238</sup> While replacing provocation with excessive/imperfect self-defense or Victoria's new

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235. See LEE, *supra* note 18, at 217-20 (switching the genders of the parties in a case involving provocation); see also Forell, *supra* note 23, at 614-18 (applying the reasonable woman standard as to what is ordinary in provocation cases regardless of the gender of the parties).

236. See LEE, *supra* note 18, at 256-58 (describing a rare example of a judge instructing a jury in a way that enables them to empathize with the member of the non-dominant group).

237. See *supra* notes 46-49 and accompanying text.

238. There are also serious implications for heat of passion killings outside the domestic homicide area. Abolition of provocation removes it as a partial defense for these kinds of killings as well. Whether this is a good idea received no consideration in the deliberations by the Tasmanian and Victorian parliaments when they voted to abolish provocation. For examples of non-domestic homicide situations, see Stephen P. Garvey, *Passion's Puzzle*, 90 Iowa L. Rev. 1677, 1679 (2005).

crime of defensive homicide that only apply to killing out of fear solves half the problem, it leaves only an all or nothing solution for people who kill in the heat of passion regardless of whether the killing was a domestic homicide or not.

Canada and some Australian states' current treatment, which allows juries to find provocation that results in a manslaughter verdict and then gives trial judges broad discretion to tailor the sentence, may, in fact, work better than abolition, *so long as* most prosecutors, juries and judges have embraced the view that jealousy and rage are less deserving emotions than fear and despair. Jurisdictions that have enlightened provocation rules may provide greater protection for battered women who kill while also allowing severe punishment of people who kill out of possessiveness. In particular, two Australian jurisdictions, Australian Capital Territory<sup>239</sup> and New South Wales,<sup>240</sup> may have the best solution currently possible. Both have provocation statutes that have attempted to account for the problems battered women who kill face when trying to claim provocation. In addition, neither has a mandatory minimum sentence for manslaughter or murder. Thus, regardless of whether a jury finds a battered woman guilty of manslaughter or murder, the trial judge still has the ability to tailor the sentence to take her circumstances into account.

While changes in the law of provocation may no longer be as crucial to assuring substantive gender equality, even greater efforts

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239. See Crimes Act, 1900, § 13 (Austl. Cap. Terr.).

(1) If, on trial for murder (a) it appears that the act or omission causing death occurred under provocation; and (b) apart from this subsection and the provocation, the jury would have found the accused guilty of murder; the jury shall acquit the accused of murder and find him guilty of manslaughter.

(2) For subsection (1), an act or omission causing death shall be taken to have occurred under provocation if (a) the act or omission was the result of the accused's loss of self-control induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and (b) the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control (i) as to have formed an intent to kill the deceased; or (ii) as to be recklessly indifferent to the probability of causing deceased's death; whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

....

(4) For the purpose of determining whether an act or omission causing death occurred under provocation, there is no rule that provocation is negated if (a) there was not a reasonable proportion between the act or omission causing the death and the conduct of the deceased that induced the act or omission; or (b) the act or omission causing the death did not occur suddenly; or (c) the act of omission causing the death occurred with any intent to take life or inflict grievous bodily harm).

*Id.*

240. See Crimes Act, 1900, §§ 23, 421 (N.S.W.) (containing substantially similar content to the provocation statute in the Australian Capital Territory).

should be made to ensure battered women receive substantive equality under self-defense law so that more often, when battered women kill out of fear, they are either not charged or are acquitted. Unfortunately, regardless of enlightened reforms of both provocation and self-defense rules, social norms, or as Wendy Williams calls them, “cultural limits,” may continue to stand in the way of complete substantive equality for battered women.<sup>241</sup> Prosecutors, judges and jurors may still refuse to fully excuse intentional killing based on fear where the killing occurs outside the traditional male-biased circumstances for which self-defense was designed, making retention of a manslaughter-like option necessary, whether it be provocation, excessive/imperfect self-defense<sup>242</sup> or defensive homicide.

### CONCLUSION

Currently, in determining the severity of the punishment for domestic homicides based on jealous rage or fear, the emphasis is on different legal actors in different jurisdictions. Some Australian states, by abolishing provocation, are limiting the participation of the jury in favor of the trial judge through sentencing.<sup>243</sup> Canada and some Australian states and territories are allowing juries to decide the issue of provocation, but then giving judges substantial ability to tailor the sentence for manslaughter to fit the circumstances.<sup>244</sup> Finally, in the United States, juries are allowed to decide whether provocation existed.<sup>245</sup> However, because of the greater variety of determinate sentencing for both manslaughter and murder, in some states there may be substantial room for judges to distinguish among people who plead to or are convicted of manslaughter based on domestic homicide.<sup>246</sup> In others states, regardless of whether the defendant is a battered woman or a jealous man, a manslaughter sentence is legislatively determined to be lengthy but less severe than a murder sentence.<sup>247</sup>

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241. Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 176 (1982).

242. See *supra* notes 150-152 and accompanying text.

243. See generally VICTORIAN LAW REFORM COMM'N, *supra* note 12.

244. See, e.g., Crimes Act, 1900, § 23(2) (N.S.W.); Crimes Act, 1900, § 13(2) (Austl. Cap. Terr.); Criminal Code Act Compilation Act, 1913, § 281 (W. Austl.); Criminal Code, 1899, § 304 (Queensl.).

245. See generally LEE, *supra* note 18.

246. See *supra* note 101.

247. See, e.g., CAL. PENAL CODE § 190(a) (first degree murder minimum is twenty-five years); § 193 (a) (noting that “voluntary manslaughter is punishable by imprisonment in the state prison for three, six, or eleven years); see also NEV. REV. STAT. § 200.030(4)(b)(3) (first-degree murder sentence minimum is fifty years with eligibility for parole after twenty years served); § 200.080 (voluntary manslaughter

Since social values that are more sympathetic to battered women than jealous men appear to have taken root in all three countries, it is highly probable that the main reason for Australia's greater emphasis on substantive equality in its provocation law, including the willingness to abolish provocation in some Australian states, is a convergence of strong feminist advocacy and, in Tasmania, Victoria, New South Wales and the Australian Capital Territory, the lack of mandatory minimum sentencing rules for either manslaughter or murder.

Australian jurisdictions have provided a fascinating new chapter in the history of provocation. Currently in Australia four quite different provocation regimes exist: (1) Tasmania's abolition without making any other changes; (2) Victoria's abolition while replacing manslaughter with defensive homicide; (3) New South Wales and Australian Capital Territory's retention of a relatively enlightened version of the traditional provocation defense without a mandatory minimum sentence for murder; and (4) the rest of Australian jurisdictions' retention of traditional provocation rules and mandatory minimum sentences for murder. Assessing over time how each of these different treatments affects pleas and verdicts involving domestic homicides will provide evidence of whether one regime clearly assures substantive equality better than others.

Changing social values have allowed substantive gender equality to finally make its way into the law of provocation. In all three countries, the willingness to make concessions for male anger as a human frailty in domestic homicide cases appears to be far less prevalent than in the past, while empathy for battered women who kill has led to substantive changes in provocation law and in its application. Until changes in law and social norms relating to determinate sentencing and self-defense occur, this may be as good as it gets.

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minimum is one year).