

**Submission
No 4**

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Name: A/Professor Julia Tolmie

Date received: 27/07/2012

The Director
Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie st
Sydney NSW 2000

22 July 2012

Dear Sir or Madam,

Re: The Partial Defence of Provocation

I attach an article I have written making a case for the retention of the partial defence of provocation in New Zealand. As you will be aware, since this article has been published we have abolished the defence of provocation in New Zealand. In my opinion this was a mistake.

Provocation was a defence that was originally intended to acknowledge the reduced liability of those caught up in truly exceptional life circumstances in which the use of lethal violence, whilst not justifiable, is understandable. The problem, of course, is that it has been regularly applied to justify male violence against women in life circumstances that are unexceptional – instances where relationships break down or do not progress as one partner would wish. These are experiences that happen to almost everyone at some point and cannot be judged to be exceptional. Even if the defence has not been successful it has been argued, almost without exception, in these kinds of circumstances as though they are appropriate circumstances in which to raise it. There is therefore a very strong case for the reform of provocation.

My own view is that the defence still serves a useful function for some defendants, however, who are caught up in exceptional circumstances and for whom the use of the defence is appropriate. In my own searches in New Zealand I noted that it has been successfully raised in two cases involving teenagers in respect of their killing of a violent father in one instance and a violent step father in another instance (see *R v Raivaru* (HC Rotorua, 5 August 2005, CRI 2004-077-1667; *R v Erstich* (2002) 19 CRNZ 419). It has also been successfully raised by battered woman defendants. It is fallacious to assume that every battered defendant is necessarily acting from a position of self-defence when she retaliates against her violent partner (for the purposes of being able to raise the defence of self-defence or even partial self-defence). It seems to me that women who are trapped in extremely violent relationships and unable to obtain protection in spite of their help seeking behaviours, and unable to escape, deserve a defence when they retaliate against the person who has oppressed them in this

manner. Indeed, myself and my colleagues, Professor Julie Stubbs and Professor Liz Sheehy, have noted that the defence of provocation is still commonly used in order to plea bargain manslaughter results in cases involving battered defendants in those jurisdictions in Australia that retain it and in Canada, as well as being successfully used at trial in such cases in these jurisdictions. I believe that you have been provided with access to our article documenting this phenomenon: "Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand" (forthcoming in the Sydney Law Review).

I hope these comments and the attached article are of assistance to you in your deliberations.

Kind regards,

Associate Professor Julia Tominic

Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation

JULIA TOLMIE*

This article examines the recommendations of both the New Zealand Law Commission and the Ministry of Justice to abolish the partial defences to murder. It argues that, in spite of the more flexible sentencing regime for murder now contained in the Sentencing Act 2002, the partial defences still have significant advantages for defendants. The article concludes that there are defendants in homicide cases, in particular battered defendants, who have a strong moral claim to these advantages. Finally, having raised the possibility that the defence of provocation has a useful function to perform for battered defendants, the article argues that reform of this defence is both necessary and possible.

Introduction

It is sometimes acknowledged that, in spite of the deep social prohibition against homicide, most people, given an extreme enough set of circumstances, could be pushed beyond the bounds of human endurance and kill. New Zealand, like many other legal jurisdictions, officially recognises this in the form of the partial defence of provocation.¹ The essence of the defence is that

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1 Section 169(2) of the Crimes Act 1961 states: "Anything done or said may be provocation if — (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide."

the accused killed while he or she was emotionally out of control, triggered by provocation from the victim, and that the circumstances would have been sufficient to cause an ordinary person similarly to lose emotional control. If successfully raised, the defence, like any other partial defence, does not produce a complete acquittal. Instead, it reduces what would otherwise be a murder conviction to manslaughter.

New Zealand law is short on other partial defences. Neither diminished responsibility² nor excessive self-defence³ are available, although there is provision for infanticide⁴ and suicide pacts⁵ (which some would argue are effectively specialised partial defences).⁶

The partial defence of provocation is itself notoriously difficult to understand and apply in its present form. Cogent arguments exist that it has been used to condone male violence against women in circumstances where such behaviour is normalised although far from acceptable.⁷ In consequence, there

2 The defence of diminished responsibility applies where the accused has significantly impaired mental responsibility for his or her act of killing but it is either not comprehensive enough, or not cognitive in nature, so as to qualify for the defence of insanity. The defence exists in England and four Australian jurisdictions. See Homicide Act 1957 (UK), s 2; Crimes Act 1900 (ACT), s 14; Crimes Act 1900 (NSW), s 23A; Criminal Code (NT), s 37; Criminal Code Act 1899 (QLD), s 304A.

3 The defence of excessive self-defence applies where the force used is excessive but the defendant is facing a serious attack and honestly believes that he or she is responding with force reasonably necessary to repel the attack. The defence first existed at common law in Australia but was abolished by the High Court in *Zecevic v DPP* (1987) 162 CLR 645. It has subsequently been reintroduced in New South Wales (Crimes Act 1900 (NSW), s 421) and South Australia (Criminal Law Consolidation Act 1935 (SA), s 15(2)).

4 Crimes Act 1961, s 178.

5 Crimes Act 1961, s 180(1).

6 Neither infanticide nor suicide pacts are technically considered to be defences; however, they both have the effect of reducing what would otherwise be a murder conviction to a conviction for a lesser offence. Infanticide is itself an offence carrying a maximum penalty of three years under s 178 of the Crimes Act 1961. Killings in the course of a suicide pact produce a manslaughter conviction under s 180 of the Act. I do not propose to specifically address either of these "defences" in this article. However, I would note that the Ministry of Justice has recommended the abolition of the former but not the latter (although failure to recommend abolition of the latter appears to be by oversight rather than deliberation). See Ministry of Justice, *Criminal Defences Discussion Paper: Provocation and Other Partial Defences, Self-Defence, and Defences of Duress* (2004) 2, 7.

7 Morgan, "Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them" (1997) 21 MULR 237; Model Criminal Code Officers Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person Discussion Paper* (1998) 89; Victorian Law Reform Commission,

have been calls over the years in New Zealand (and other jurisdictions) for reform of the provocation defence or, more radically, its abolition.⁸

The most recent calls come as part of a law reform process initially set up to examine how the criminal defences are working (or, more accurately, not working) for battered defendants. The New Zealand Law Commission first reported in 2001.⁹ It recommended, among other things, that the defence of provocation be abolished and the partial defences of excessive self-defence and diminished responsibility not be enacted. The recommendations were contingent on the introduction of a flexible sentencing regime for murder. Since 2001, the New Zealand Ministry of Justice has responded with a discussion paper endorsing the Law Commission's position on these issues.¹⁰ Subsequently, the Victorian Law Reform Commission in Australia has also recommended the abolition of provocation, although it favours the introduction of excessive self-defence and retaining the defence of infanticide.¹¹

In this article, I caution against too hastily concluding that there are no good reasons to retain and/or introduce the partial defences in New Zealand, including provocation, the least defensible of them all. I first argue that the partial defences still have advantages for defendants compared to shifting the issues of moral culpability that they contain to the sentencing process. These are reduced social stigma and potentially lesser sentences in deserving cases, as well as a more transparent and principled process of decision-making. I next point out that there are defendants in homicide cases, in

Defences to Homicide: Final Report (2004) 27–30; Gorman, "Provocation: The Jealous Husband Defence" (1991) 42 *Criminal Law Quarterly* 478; English Law Commission, *Partial Defences to Murder* (Consultation Paper No 173: 2003) para 1.66; English Law Commission, *Partial Defences to Murder* (Final Report No 290: 2004); Edwards, "Abolishing Provocation and Reframing Self-Defence — The Law Commission's Options for Reform" [2004] *Criminal Law Review* 181; McDonald, "Provocation, Sexuality and the Actions of 'Thoroughly Decent Men'" (1993) 9 *Women's Studies Journal* 126.

8 New Zealand Criminal Law Reform Committee, *Report on Culpable Homicide* (1976); Crimes Consultative Committee, *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991) 45–46; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (1992) 105; Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (1990) para 13.56; Law Reform Commission of Canada, *Recodifying Criminal Law* (R31: 1987); Wells, "Provocation: The Case for Abolition" in Ashworth & Mitchell (eds), *Rethinking English Homicide Law* (2000) 94; Horder, *Provocation and Responsibility* (1992) 197.

9 New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (R73: 2001).

10 See Ministry of Justice, *Criminal Defences Discussion Paper*, above note 6.

11 See Victorian Law Reform Commission, *Defences to Homicide: Options Paper* (2003); Victorian Law Reform Commission, above note 7.

particular battered defendants (although there may also be others), who have a strong moral claim to these advantages. Finally, having suggested that even the defence of provocation may still perform a useful function for certain defendants, I briefly address some shortcomings of that particular defence.

Does the New Sentencing Act 2002 Obviate the Need for the Partial Defences in New Zealand?

What was apparently decisive for the Ministry of Justice in supporting the abolition of provocation was the idea that, under the new Sentencing Act 2002, reforms to the sentencing regime for murder have rendered the partial defences somewhat redundant.¹² The argument is twofold. First, that the social stigma attached to the label "murderer" is overstated. Secondly, that the new sentencing discretion for murder, which replaces the previous provision for mandatory life imprisonment, removes the need for a partial defence because judges can now respond to provocation as a mitigating circumstance at the sentencing stage of a murder case.

I shall address both of these arguments in turn, suggesting that, in fact, shifting issues from the trial to the sentencing stage is not a neutral exercise. It will have costs for both the public, in terms of generally increased sentences for some types of homicides, as well as for individual defendants.¹³

A. Social stigma

It is generally thought that the label "murderer" is the most heinous one that the criminal justice system can attach to an individual. It belongs to those who commit the very worst kinds of homicide, itself the worst kind of crime.

12 Above note 6 at 2. The New Zealand Law Commission (above note 9) made its recommendations prior to the passage of the Sentencing Act 2002. However, the Commission recommended that the partial defences be abolished conditional on introducing the kind of sentencing flexibility subsequently adopted for murder cases in the Sentencing Act.

13 See Bagaric & Edney, "The Sentencing Advisory Commission and the Hope of Smarter Sentencing" (2004) 16 *Current Issues in Criminal Justice* 125. Commenting on the limits of retribution as a theory of punishment, the authors state (at 130): "Every dollar spent on jails is a dollar less for education and health. There is nothing new about this equation. What is new is the magnitude of the sums involved — now reaching into the billions of dollars nationally. Ultimately the magnitude of the figures gets so immense that even lay people will start to question the desirability of a policy which leads to sanctions of ever-increasing severity."

The partial defences reduce a murder conviction to manslaughter, a label that has different connotations.¹⁴ The reduction of stigma is intended to reflect the fact that all killings do not carry the same level of moral culpability.

However, in its 2001 report on criminal defences, the New Zealand Law Commission did not accept that there is less social stigma attached to a manslaughter conviction. It concluded:¹⁵

The true stigma arises from the perceived circumstances of the crime, not from the label attached to the crime. A person thought to have “got off on manslaughter” would not escape stigma.

The Law Commission cites no research to support this controversial assertion.¹⁶ Indeed, if sentencing judges — who presumably are particularly attuned to the unique circumstances of the offending — think that the label “murder” carries a greater moral opprobrium than that of “manslaughter”, then it is hard to see how these labels would carry different levels of social stigma in the eyes of the public. It is possible to find cases demonstrating that the moral opprobrium attached to a conviction for murder over manslaughter matters to sentencing judges, *even where* the context of the particular offending sits uneasily with the defendant’s conviction. A good example of this is the Australian case of *R v Burke*.¹⁷

Stubbs and I conducted an overview of spousal homicide cases in Australia between 1999 and 2002.¹⁸ Seven of these cases involved Aboriginal

14 Note that the *Collins English Dictionary* (Wilkes (ed)) (2001) defines murder as “the unlawful *premeditated* killing of one human being by another” (emphasis added). This suggests that an unpremeditated killing — one committed, for example, in the kind of circumstances required by the defence of provocation — is not necessarily understood in common parlance as murder.

15 Above note 9 at 40. This position was endorsed by the New Zealand Ministry of Justice, which stated in its 2004 paper on criminal defences (above note 6 at 3): “Arguably public stigma is primarily determined by the circumstances in which a crime is committed rather than its legal label: for example, a drunk driver who crashes and kills a family (manslaughter), compared to the elderly spouse (murder).”

16 See Brown, *Shibboleths of Law: Reification, Plain-English and Popular Legal Symbolism* (1987) 34. See also Cato, “Criminal Defences and Battered Defendants” [2002] NZLJ 35, 37. It is worth noting that there are a number of theoretical movements (for example, “labelling theory” or “social reaction theory” in criminology) that place a great deal of significance on the labels that society attaches to people, and on the words used to describe reality actually “creating” reality. See, eg, Young, “Thinking Seriously About Crime: Some Models of Criminology” in Fitzgerald, McLennan & Pawson (eds), *Crime and Society: Readings in History and Theory* (1981) ch 14.

17 [2000] NSWSC 356.

18 Stubbs & Tolmie, “Defending Battered Women on Charges of Homicide: The Structural

women defendants who had killed their violent partners under circumstances of extreme stress.¹⁹ In six out of the seven cases the prosecution accepted a guilty plea to a manslaughter charge, and the case proceeded to sentencing on that basis. In the seventh case, *R v Burke*, the prosecution refused to accept a guilty plea to manslaughter and the defendant eventually pleaded guilty to murder. She did this despite the fact that, on the night in question, her extreme levels of intoxication, total memory failure, and bizarre behaviour all strongly suggested that she was incapable of forming the mens rea for murder. The case is interesting for present purposes because, at sentencing, the Judge acknowledged that he was effectively dealing with a case of manslaughter. He stated:²⁰

Its particular culpability, however, as will be seen from the facts to which I turn and the peculiar circumstances of the prisoner, is not unlike the culpability which attaches to serious manslaughter occurring in circumstances of intoxication and domestic violence.

Later he remarked:²¹

I am required to sentence the prisoner for murder, not manslaughter. There are many cases which, although they do not establish any tariff for sentences in such circumstances, for a crime of manslaughter, do give some indications of an appropriate range of sentence. There are few, very few indeed, remotely similar where there has been a plea of guilty to murder.

In the end, acknowledging the "tragic" nature of the case, the Judge sentenced the defendant to nine years' imprisonment with a non-parole period of five years.²² Although this may seem like a lenient sentence for murder, the defendant received the highest sentence of the seven Aboriginal battered women in our study. This was apparently in sole recognition of the fact that her conviction was for murder and not manslaughter.²³ Moreover, such

and Systemic Versus the Personal and Particular" in Chan, Chun & Menzies (eds), *Women, Mental Disorder and the Law: A Feminist Reader* (2005) ch 10.

19 *R v Burke* [2000] NSWSC 356; *R v Thompson* (discussed in *The Western Australian*, 2 Feb 2001); *R v Kennedy* [2000] NSWSC 109; *R v Kirkwood* [2000] NSWSC 184; *R v Fox* [2001] NSWSC 573; *R v Melrose* [2001] NSWSC 847; *R v Churchill* [2000] WASCA 230.

20 [2000] NSWSC 356 at para 4.

21 *Ibid* at para 59.

22 *Ibid* at para 68.

23 The other sentences were as follows: *R v Thompson* (discussed in *The Western Australian*, 2 Feb 2001) (suspended sentence of 15 months); *R v Kennedy* [2000] NSWSC 109, para

sentence was imposed despite the fact that, in New South Wales at the time, judges possessed a full sentencing discretion for murder not dissimilar to the sentencing range for manslaughter.²⁴

B *Sentencing lengths in provocation cases*

R v Burke illustrates how a murder conviction will operate as a consideration that dictates a higher sentence independently of the context of the killing and any facts in mitigation. This point is also demonstrated by the fact that defendants still argue the defence of provocation in those Australian jurisdictions where there has never been a mandatory life sentence for murder and where, in fact, there is more of a genuinely discretionary sentencing range for murder than currently exists in New Zealand.²⁵ The significance of such observations is that, without a change of approach to sentencing, abolishing the partial defences will raise the sentencing tariff for those homicide cases that currently might fall within such defences.²⁶ This issue was addressed by the Victorian Law Reform Commission in its 2004 report on defences to homicide.²⁷ The Commission was not concerned with all sentence increases, just those that it determined to be unfair. In particular, it was concerned that victims of domestic violence, who killed in response to that violence, did not end up receiving heavier sentences because they would no longer be able to raise a provocation defence.²⁸ Accordingly, the Commission made

61 (good behaviour bond for four years with deferred sentence); *R v Kirkwood* [2000] NSWSC 184, para 35 (a minimum term of 12 months' imprisonment with an additional 18 months); *R v Fox* [2001] NSWSC 573, para 17 (five years' imprisonment with a non-parole period of two years); *R v Melrose* [2001] NSWSC 847, para 32 (good behaviour bond for four years); *R v Churchill* [2000] WASCA 230, paras 20, 27 (three and a half years' imprisonment but with immediate parole).

24 At the time, New South Wales had a flexible sentencing scale for both murder and manslaughter. In 2002, it subsequently introduced standard minimum sentences for a range of offences, including murder but not manslaughter. See Crimes Act 1900 (NSW), ss 54A–54D.

25 Such as, for example, New South Wales prior to the recent introduction of standard minimum sentences for murder. *Ibid.*

26 See Cato, above note 16 at 35: “[A] jury finding of diminished responsibility or provocation provides a firm basis for a Judge to sentence for the lesser offence of manslaughter. If issues of mitigation are determined solely by a Judge on sentence for murder, Judges are likely to find themselves embroiled in a far greater measure of controversy than is the case today.”

27 Above note 7.

28 *Ibid* at 39–40, 290–293.

a range of recommendations designed to counter any such trend, including recommending that:²⁹

In sentencing an offender for murder in circumstances where the accused might previously have been convicted of manslaughter on the grounds of provocation, judges should consider the full range of sentencing options.

The Commission also recommended that a statistical sentencing database be set up so that sentence lengths could be monitored after the implementation of any reforms in order to ensure that unfair increases were not occurring.³⁰

By way of contrast, neither the New Zealand Ministry of Justice nor the New Zealand Law Commission has addressed such important matters. In fact, the situation in New Zealand should give graver cause for concern than that in Victoria because, under the recently passed New Zealand Sentencing Act 2002, there is now a *presumption* of life imprisonment for murder that must be displaced if a lesser sentence is to be imposed.³¹ Under s 102(1), the presumption can be displaced if "given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust". Thus, the standard for rebutting the presumption is high,³² and a sentencing judge must give written reasons for doing so under s 102(2). What this means is that, should the provocation defence be abolished, there will be minimal sentencing flexibility in respect of most cases currently involving provocation. As a result, most defendants sentenced for murder under the new regime will be considerably *worse off* than if they had been convicted of manslaughter. The result of this is likely to be longer sentences in respect of homicide cases that come before trial courts.

Furthermore, those defendants who do manage to secure sentences of less than life will, with the abolition of the partial defences, potentially have an additional burden placed upon them to arrive at this result. Under the current law, all the defendant has to do is point to some evidence that the defence of provocation is an issue. The onus then falls on the prosecu-

29 *Ibid* at 293.

30 *Ibid*. Further recommendations were: the introduction of expert evidence about domestic violence at sentencing; greater public education on sentencing in homicide cases (in order to counter possible public pressure on judges to increase sentences simply because cases involving provocation would result in a murder conviction); guidelines for sentencing judges in cases of provocation where domestic violence was a key aspect of such provocation; up-to-date sentencing statistics to be made available to judges; and provision for judicial education on sentencing.

31 Sentencing Act 2002, s 102(1).

32 *R v Mayes* [2004] 1 NZLR 71 (CA).

tion to disprove the defence beyond a reasonable doubt.³³ In its 2004 paper on criminal defences, the New Zealand Ministry of Justice addressed the concern that shifting considerations of provocation to the sentencing stage will involve shifting the burden of proof. It noted:³⁴

[W]here facts pertinent to sentencing are in dispute, the onus [under s 24 of the Sentencing Act 2002] is on the prosecution to prove any aggravating factors beyond reasonable doubt, and negate mitigating factors to the same standard. This means that if provocation was abolished as a defence, but relevant evidence was adduced at the sentencing stage, the prosecution would continue to bear the burden of disproving its existence as a mitigating factor beyond reasonable doubt; in other words, defendants would not be disadvantaged.

What this point does not address is that, although the onus of proving that there was *in fact* provocation will not shift under the Sentencing Act 2002, the implications of the existence of provocation will potentially raise an entirely new onus. This is the onus of demonstrating that factors going to provocation should displace the presumption in favour of life imprisonment in the circumstances of any particular case.³⁵

The Different Nature of Decision-making at Trial and Sentencing

The sentencing stage of the criminal justice process is necessarily discretionary. The trial stage is more rule-based and publicly visible. The result is greater public and expert scrutiny (and input) if issues of moral culpability are reflected in criminal defences, rather than being relegated to mitigating factors at sentencing.

Discretion is a necessary part of the sentencing process because it is the stage of a trial at which the response of the criminal justice system is tailored

33 Simester & Brookbanks, *Principles of Criminal Law* (2nd ed, 2002) 38.

34 Above note 6 at 3. The relevant part of s 24(2)(c) of the Sentencing Act 2002 states: "If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other ... the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate any disputed mitigating fact raised by the defence ...".

35 In other words, because the presumption in favour of life in s 102(1) of the Sentencing Act 2002 can only be displaced by means of making a normative judgment, rather than determining a factual question, s 24 is arguably silent about who has the burden of proving that it would be manifestly unjust to hand out a life sentence. In practice, this burden may possibly fall on the defendant.

to the unique circumstances of the offender and the crime. There is a range of (sometimes inconsistent) considerations that go into the sentencing mix, and their weighting will depend, to one extent or another, on the individual judge making a particular decision. The Victorian Law Reform Commission expressed the point as follows:³⁶

Although the judge must take account of the principles set out in the Sentencing Act, sentencing involves the exercise of the judge's discretion to produce an "instinctive synthesis" of all the relevant factors ... In other words, sentencing is not a mechanical process which leads to a single "right" answer.

While a discretionary process at sentencing is necessary, it is not without its drawbacks. The major difficulty is achieving consistency.³⁷ There is obviously a limit to the guidance that can be given to judges in the exercise of their discretion without introducing rigidity into the sentencing process.

An illustration of the individualised and normative nature of sentencing is provided by an Australian study designed to test judicial and magisterial responses to the issue of intoxication at the sentencing stage of a criminal trial.³⁸ Judicial officers were given a series of sentencing problems and asked to indicate the weight they would give in sentencing to the different factual matters involved.³⁹ While there were majority clusters of responses, it is noteworthy that individual responses ranged from viewing the involvement of alcohol as a *mitigating* factor to viewing it as an *aggravating* factor with respect to identical fact scenarios.⁴⁰ Indeed, when dealing with a discretionary process that necessarily involves a measure of normative judgment, it is unsurprising that educated and reasonable people will legitimately disagree about the exact weighting and response to be given to certain facts.

One difference, therefore, between considering provocation (or excessive self-defence) at sentencing and including it at trial as a criminal defence

36 Above note 7 at 273. See also Bagaric & Edney, above note 13, ss 7–9 of the New Zealand Sentencing Act 2002.

37 See Prison Reform Trust, *Sentencing: A Geographical Lottery* (1997) (available at: <http://www.pcnlex.org.uk/pages/prtlotte.html>). See also Bagaric & Edney, above note 13.

38 Potas & Spears, *Alcohol as a Sentencing Factor: A Survey of the Attitudes of Judicial Officers* (1994).

39 Note that, under s 9(3) of the New Zealand Sentencing Act 2002, voluntary intoxication cannot be taken into account as a mitigating factor at sentencing.

40 This held true except in relation to one of the fact situations involving intoxication. That set of facts dealt with an orange drink being spiked with vodka. The offender was deliberately not drinking because he was on prescription drugs and knew that even a small amount of alcohol could cause him to become inebriated. See above note 9 at 15–16.

is that, if it is contained in a defence, there is no discretion as to whether the issue will be considered as a mitigating factor. If it is relevant, it must be taken into account. Furthermore, the shape of the defence is fixed in that the finder of fact will be directed to find certain requirements present (or not) on the facts of a particular case.⁴¹ This suggests that, if there is community agreement on considerations that significantly diminish criminal culpability, the interests of certainty and consistency weigh in favour of encapsulating those considerations in defences, rather than relegating them to the sentencing mix.

Attempting to counter this argument, the New Zealand Law Commission responds:⁴²

Matters of moral accountability, such as motives and characteristics of the offender, are typically taken into account at sentencing. A judge exercising a discretion must do so within established principles, in open court and must state reasons. If either the offender or the Crown think the discretion was misapplied, and the sentence excessive or inadequate, they can appeal.

However, the Commission's analysis does not address the true issue. If the "instinctive synthesis" of an individual judge downplays the issue of provocation, or gives great emphasis to a particular interpretation of what amounts to provocative conduct by the victim,⁴³ or discounts the fact that the defendant's actions were an honest but unreasonable overreaction to the need for self-defence, then such responses may not involve a misapplication of the judge's discretion but, in fact, a legitimate exercise of the discretionary process.

A related point is that the discretionary and individualised nature of sentencing renders it a more secret and private process than the conduct of a criminal trial.⁴⁴ Sentencing decisions are less likely to be reported because,

41 Although it must be acknowledged that all of the criminal defences involve, to some degree or another, normative judgments and assessments of the facts.

42 Above note 9 at 56.

43 For example, the judge might view a woman's decision to separate from her husband and re-partner as amounting to grave provocation mitigating her husband's decision to kill either her or his competitor. See below notes 89 and 90.

44 Moreover, jury involvement in the trial could mean that there is greater public ownership in the adjudication phase of the criminal process. Furthermore, because a criminal trial involves an original finding of guilt, and thus sets the context in which the sentencing hearing takes place, trial adjudication may have a greater symbolic significance in the public consciousness. The result is that "a trial is more likely to receive public attention than a sentencing hearing, and the matters that go into making a determination of fact are more likely to be exhaustively explored by counsel than matters that go to mitigation": above note 9 at 55.

as individualised responses to particular sets of facts, they are less likely to contain statements of general principle that advance the law. In addition, sentencing decisions are discretionary judgments less likely to be scrutinised on appeal. The appeal court is unlikely to overturn an exercise of discretion, even if it disagrees with it, so long as the sentence falls within a range of acceptable outcomes.⁴⁵

It follows that sentencing decisions are not as open to public scrutiny and academic critique as decisions made during the trial process. They are also harder to successfully appeal or reform.⁴⁶ Thus, if injustices occur — like those that have historically taken place in relation to battered defendants⁴⁷ or battered victims⁴⁸ — it is difficult to know what is taking place and what might be done. By contrast, applications of principle in the form of a criminal defence can be measured against the statistical realities of women's lives and adapted in ways that cannot take place with a series of individualised, sentence-based responses to the facts of particular cases.

The Special Circumstances of Battered Defendants

Homicide, like other crimes of interpersonal violence, does not take place in a social vacuum. Though it may look personal to the parties involved in individual cases, it is inseparable from the social, economic, and cultural milieu in which it takes place. It is, therefore, not surprising to see broader social issues reflected in patterns of offending, such as power imbalances contained in current social relations that construct and attach to gender.⁴⁹

45 See, eg, *R v Churchill* [2000] WASCA 230, para 27.

46 See Stubbs & Tolmie, above note 18.

47 See, eg: Schneider, *Battered Women and Feminist Lawmaking* (2000); Tolmie, "Provocation or Self-Defence for Battered Women who Kill?" in Yeo (ed), *Partial Excuses to Murder* (1991) 61; Sheehy, Stubbs & Tolmie, "Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations" (1992) 16 *Criminal Law Journal* 369; Seuffert, "Battered Women and Self-Defence" (1997) 17 *NZULR* 292; McDonald, "Defending Abused Women: Beginning a Critique of New Zealand Criminal Law" (1997) 27 *VUWLR* 673; Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense" (1985) 8 *Harvard Women's Law Journal* 121.

48 Below notes 89 and 90.

49 Kimmel, "'Gender Symmetry' in Domestic Violence" [2002] *Violence Against Women* 1332; Dobash, Dobash, Wilson & Daly, "The Myth of Sexual Symmetry in Marital Violence" (1992) 39 *Social Problems* 71; Stewart, "Who Are the Respondents of Domestic Violence Protection Orders?" (2000) 33 *The Australian and New Zealand Journal of Criminology* 77; Johnson, "Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women" (1995) 57 *Journal of Marriage and the Family* 283; Flood, "Claims About Husband Battering" (available at: <http://www.anu.edu.au/~a112465/XY/husbandbattering.htm>).

Domestic violence is a widespread problem in New Zealand society.⁵⁰ Like many other jurisdictions, the New Zealand legal system struggles to offer victims safety.⁵¹ For example, in 2004, Judge Russell Johnson (of the Manukau District Court) commented to the media:⁵²

Just imagine the reaction if 400 women were punched, kicked, stabbed or beaten at Manukau shopping centre every month ... What an outcry there would be ... And what if each week 50 cases reached the courts, but only a few stayed in the system long enough to produce an outcome ... There would be outrage in the papers, on the talkback, in Parliament.

Domestic violence is closely related to spousal homicide in that a subset of the cases involving severe interpersonal violence will escalate to killings.⁵³ Thus, in 2004, there were three high-profile media cases involving women who had left their abusive partners, as well as engaging in numerous other efforts to negotiate safety, being horrifically burned or stabbed to death by those partners.⁵⁴ Comprehensive studies of homicide do not exist in New Zealand. However, those that exist in closely related jurisdictions, such as Australia, find that, in a significant proportion of cases involving spousal homicide, there is a history of domestic violence, almost exclusively male-on-female.⁵⁵ The majority of these cases involve men killing their wives. In a smaller proportion of these cases, the women have fought back and killed their husbands. The extreme brutality that some of these situations of domestic violence involve, combined with the ineffectual nature of the remedies on offer to protect the victims, make the line between perpetrator and victim in these latter cases a blurred one.⁵⁶

50 Morris, "Victims of Crime: The Women's Safety Survey" (1998) NZLJ 46; Morris, "The Prevalence in New Zealand of Violence Against Women by Their Current Male Partners" (1998) 31 *The Australian and New Zealand Journal of Criminology* 267; Leibrich, Paulin & Ransom, *Hitting Home: Men Speak About Abuse of Women Partners* (1995); Fanslow & Robinson, "Violence Against Women in New Zealand: Prevalence and Health Consequences" (2004) 117 *NZ Medical Journal* 1.

51 Busch, Robertson & Lapsley, *Protection from Family Violence: A Study of Protection Orders Under the Domestic Protection Act* (1992).

52 Tunnah, "Judge: A mall full of family shame", *New Zealand Herald*, 22 May 2004, A1.

53 Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989-1999* (Australian Institute of Criminology Research and Public Policy Series No 28, 2000) 118-119.

54 See, eg, Wane, "Possession", *Sunday Star-Times*, 30 May 2004, C1.

55 See, eg, Wallace, *Homicide: The Social Reality* (1986); Mouzos, above note 53; Hore, Gibson & Bordow, *Domestic Homicide* (1996); Easta, *Australian Studies in Law, Crime and Justice: Killing the Beloved: Homicide Between Adult Sexual Intimates* (1993).

56 In "A Provocation Defence for Battered Women Who Kill?" (1989) 12 *Adel LR* 145, Green

The partial defences are designed to deal with a grey area of criminal culpability: cases where the choice between outright acquittal and a murder conviction is too stark. The question is whether this grey area currently offers something useful and necessary in relation to battered defendants.

Historically, there have been New Zealand cases involving battered women who killed their perpetrators and successfully raised a provocation defence. One could read these cases as instances where provocation has been doing the work of the non-existent defence of excessive self-defence. For example, in *R v Wang*⁵⁷ the defendant killed her abusive husband who had threatened her before falling asleep. The Court of Appeal accepted that she honestly believed she was under serious threat. Moreover, evidence suggested that Wang may have thought that the only means to deal with the threat was homicide. However, the Court was of the opinion that self-defence was not available because the force used was not reasonable in the circumstances that Wang believed she faced. This was because alternative, non-violent courses of action were available. In effect, this amounts to a finding that Wang was acting in excessive self-defence.⁵⁸ Accordingly, self-defence was not left to the jury and she was convicted of manslaughter on the basis of provocation.

Despite their outcome, cases like *Wang* lend themselves to other interpretations. *Wang* might be viewed as an instance where the defence of provocation did some of the work that should have been accomplished by the complete defence of self-defence.⁵⁹ In other words, if the Court in *Wang* had been more educated about the phenomenon of domestic violence, more attuned to the particular issues facing Wang as an immigrant woman, and less rigid about the application of self-defence, it might not have been so confident that Wang's assessment of her circumstances was unreasonable.⁶⁰

remarks (at 146 and 148): "An alternative justification for the defence of provocation is that certain categories of people are placed by society itself in situations in which they well might be provoked to kill. Victims of domestic violence, for example, suffer directly at the hands of their abusers. Indirectly, however, battered women and children are victimised by widespread societal acceptance of wife and child beating coupled with the failure of the legal system to effectively intervene on their behalf. Society therefore ought not to be heard to condemn completely the battered wife or child who is provoked to kill his or her abuser ... [S]ociety cannot justly insist on giving full weight to its own concerns with preserving human life and social order when these are counterbalanced by society's having placed the defendant at high risk of being provoked to kill."

57 [1990] 2 NZLR 529 (CA). See also *R v Pita* (1989) 4 CRNZ 660 (CA).

58 Above note 3.

59 See the discussion in Seuffert, above note 47.

60 See the analysis in Tolmie, "Pacific Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity" (1997) 19 Syd LR 473; Stubbs & Tolmie, "Battered Woman Syndrome in Australia: A Challenge

While there are now a few New Zealand murder cases involving battered defendants who have successfully raised self-defence,⁶¹ it is still too early to be complacent about the adaptability of this defence to such defendants. Indeed, successful cases still involve traditional self-defence scenarios: they reflect the kinds of life circumstances men are more likely to experience as threatening, and the manner in which they are likely to respond to those circumstances.⁶² There is also no definitive judicial or legislative pronouncement making it clear that self-defence does not contain a legal requirement that the defendant be responding to a threat of "imminent harm".⁶³ In addition, numerous judgments exist, in homicide trials and other contexts, where judges handling the case make remarks demonstrating a limited understanding of, and sensitivity to, the dynamics

to Gender Bias in the Law?" in Stubbs (ed), *Women, Male Violence and the Law* (1995) 192; MacDonald, above note 47.

61 *R v Zhou* (HC Auckland, T 7/93, 8 October 1993, Anderson J); *R v Stephens* (HC Whangarei, T 011676, 8–12 April 2002, O'Regan J).

62 In both *Stephens* (ibid) and *Zhou* (ibid), the defendant was in the process of being attacked when she reacted with deadly force in self-defence. Accordingly, each accused was able to satisfy the requirement that the threat to which she was responding was "imminent" — a prerequisite that New Zealand courts have read into s 48 of the Crimes Act 1961 since *R v Wang* [1990] 2 NZLR 529 (CA). This requirement was correctly recognised by the New Zealand Law Commission (above note 9 at 9–12) as being one of the major hurdles for many battered defendants attempting to argue self-defence. Indeed, in the context of extremely violent relationships, some women who choose to fight back do not wait until they are being or just about to be attacked. For obvious reasons, most women will not fare very well in hand-to-hand combat with a man. Therefore, it is very common to find that women have armed themselves in advance of being attacked, conducted a surprise attack when their partner was off-guard, or killed their partner during a lull in any ongoing violence. However, each of these circumstances makes it extremely difficult to prove that a battered defendant was responding to an "imminent" threat, as noted in *Lavallee v The Queen* (1990) 55 CCC (3d) 97 at 115–121.

63 See, eg, the comments of Kirby J in *Osland v R* (1998) 159 ALR 170 (HCA). He remarked (at 221): "The significance of the perception of danger is not its imminence. It is that it renders the defensive force really necessary and justifies the defender's belief that he or she had no alternative but to take the attacker's life." At least four Australian cases have explicitly allowed battered women to successfully raise self-defence in circumstances where there was no imminent attack and where immediate retreat could therefore have been argued as a possibility on the facts. In these cases, it was still essential for the accused to demonstrate that her defensive action was necessary in the circumstances she faced. See *R v Tassone* (Supreme Court, NT, SCC No 36 of 1993, 20 April 1994, Gray J); *R v Secretary* [1996] 5 NTLR 96 (discussed in Tolmie, "Secretary" (1996) 20 Crim LJ 223); *R v Stjernqvist* (Circuit Court, Cairns, 180696 D.2 Turn 9 mc, 18 June 1996, Derrington J); *R v Kontinnen* (Supreme Court of South Australia, 26 March 1992, Legoe J) (discussed at Greene, "Kontinnen" (1992) 16 Crim LJ 360).

of domestic violence.⁶⁴ Finally, experiences in related legal jurisdictions give no cause for confidence that the New Zealand law on self-defence is operating in a genuinely equitable manner for battered defendants.⁶⁵ Given such circumstances, it seems premature to propose the abolition of those partial defences that have served an important stopgap function for these types of accused.

In jurisdictions like Australian and Canada, there is also an emerging trend for cases involving battered defendants who have killed their abusers to be settled by plea negotiations.⁶⁶ Typically, the prosecution accepts a guilty plea in respect of manslaughter in exchange for murder charges being dropped. While most of these negotiations appear to be on the basis that defendants lacked a sufficient *mens rea* for murder (but exhibited demonstrable criminal negligence for the purposes of manslaughter), some are still based on the likely success at trial of a provocation defence. There are, however, many problematic features of such plea-bargaining,⁶⁷ including the fact that women who appear to have strong, although not necessarily traditional, self-defence cases are not claiming self-defence. One consequence of this is that the case law on self-defence is not given the opportunity to develop so that it can accommodate the circumstances of battered defendants in an appropriate way.

The pressures on battered defendants to plea-bargain are numerous. In Canada, a feature that has been isolated as significant is the criminal justice system's poor track record in responding sensitively to fact situations involving battered defendants — and their resulting lack of success in raising claims of self-defence — combined with the imposition of mandatory life sentences for murder.⁶⁸ This combination makes the risk of arguing self-defence unacceptable for many women. In Canada, The Honourable Justice Ratushny, chairing the Canadian Self-Defence Review, called upon prosecutors to

64 See, eg, Busch & Robertson, "'What's Love Got to Do With It?' An Analysis of an Intervention Approach to Domestic Violence" (1993) 1 *Waikato LR* 109; Busch, "Was Mrs Masina Really Lost?: An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence" (1993) 8 *Otago LR* 17; Busch & Robertson, "The Gap Goes On: An Analysis of Issues Under the Domestic Violence Act 1995" (1997) 17 *NZULR* 337; Seuffert, above note 47; *R v Oakes* [1995] 2 *NZLR* 673 (CA); *Attorney-General v Hewitt* [2000] 2 *NZLR* 110 (Full Court HC); *R v Maurirere* [2001] *NZAR* 431 (CA); *Police v Kawiti* [2000] 1 *NZLR* 117.

65 Stubbs & Tolmie, "Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome" (1999) 23 *MULR* 709.

66 Above note 18.

67 *Ibid.*

68 Sheehy, "Battered Women and Mandatory Minimum Sentences" (2001) 39 *Osgoode Hall LJ* 529.

charge battered defendants in homicide cases with manslaughter if they were willing to accept a guilty plea to that offence.⁶⁹ Such individuals would thus be relieved of the risks of a murder conviction resulting from a potentially unsuccessful claim of self-defence at trial.

Lack of information about what is occurring in pre-trial hearings, as well as the unreported nature of most court decisions, makes it difficult to determine whether a similar phenomenon is occurring with respect to plea-bargaining in New Zealand today. What can be said with certainty is that, in relation to battered defendants, the same pressures exist here that have produced the phenomenon elsewhere: a patchy success rate of self-defence claims for battered defendants combined with a traditional mandatory life sentence for murder (now commuted to a presumptive life sentence under the Sentencing Act 2002).

In Australia, considerations like these have resulted in the Victorian Law Reform Commission recommending the introduction of the partial defence of excessive self-defence.⁷⁰ The advantage of having such a defence is that it might encourage battered defendants to go to trial, rather than to plea-bargain, because self-defence will no longer be an all-or-nothing proposition. It might also encourage the prosecution to lay manslaughter rather than murder charges if there is reasonable evidence of self-defence.⁷¹ While provocation currently performs a type of halfway house function for battered defendants, it is not as useful as the defence of excessive self-defence. Indeed, one of the major problems with the provocation defence is that it may actually undercut, and thus be inconsistent with, the presentation

69 The Hon Justice Ratushny, *Self-Defence Review: Final Report* (submitted to the Minister of Justice and the Solicitor General of Canada, 11 July 1997) (available at: http://canada.justice.gc.ca/Publications/defence/rtush_en.html); Sheehy, "Review of the Self-Defence Review" (2000) 12 CJWL 197, and *ibid.* See also Victorian Law Reform Commission, above note 7 at 105–110.

70 Above note 7.

71 The Victorian Law Reform Commission (above note 7 at 101) likewise took the view that the defence of excessive self-defence is easier to justify morally than either provocation or diminished responsibility. It noted: "[A]n accused who kills due to provocation or diminished responsibility 'intends to do something that is unlawful'. An accused who resorts to the use of force in self-defence, which is later judged to be excessive or otherwise unreasonable, 'intends to do something that is lawful within limits'." An obvious concern is that juries will use the defence of excessive self-defence as an easily agreed upon result in hard cases, thus undercutting the process of adapting self-defence to battered defendants in non-traditional self-defence cases. To counter this problem, the Victorian Law Reform Commission recommended comprehensive changes to the rules of evidence to permit decision-makers at all levels of the criminal justice system to be educated about the realities of domestic violence. It also recommended a review of the operation of excessive self-defence after it had been in force for five years.

of a self-defence case. Defence counsel are unlikely to feel comfortable arguing that, on the one hand, the accused was reasonable in perceiving the need to use lethal force in self-defence but, on the other, was emotionally out of control. By contrast, excessive self-defence is not strategically difficult to argue as an alternative to self-defence. Moreover, unlike provocation, it acknowledges the defensive nature of the accused's actions.⁷²

However, it is also important to acknowledge that not all battered defendants who have been the victims of ongoing and severe violence, and who finally respond to that violence, will be purporting to act in self-defence.⁷³ For these defendants provocation might be an appropriate defence. For example, in *R v Epifania Suluape*⁷⁴ the defendant, who successfully claimed the defence of provocation, killed her husband against a background of physical and emotional abuse, infidelity, and degradation. However, she was responding to emotional rather than physical abuse at the time she killed him.⁷⁵ Indeed, it is not uncommon for victims of domestic violence, including victims of severe physical abuse, to observe that the physical abuse is easier to withstand than the emotional abuse experienced in such a relationship.⁷⁶

For both the New Zealand Law Commission and the New Zealand Ministry of Justice, an argument in favour of the elimination of partial defences was that such defences could not be designed to accommodate every factor capable of reducing culpability in respect of a murder charge.⁷⁷

72 I would note that, while not denying that it might occasionally be relevant to an individual defendant, I am generally opposed to the use of diminished responsibility as an appropriate defence for battered defendants. This is because, like the use of battered woman syndrome, it shifts the focus of inquiry onto the mental state of the woman as opposed to realistically examining the circumstances that led to her actions. See above note 18. See also Sheehy, Stubbs & Tolmie, above note 47.

73 See Kirkwood, "Female Perpetrated Homicide in Victoria Between 1985 and 1995" (2003) 36 *The Australian and New Zealand Journal of Criminology* 152, 158 ("The findings show that it was not always the case that women killed partners in response to physical abuse. Some women killed partners in response to non-physical forms of abuse ...").

74 (2002) 19 CRNZ 492 (CA). See also *R v Sarah* (1990) 5 CRNZ 663 (CA); *R v Yeoman* [2003] NSWSC 194.

75 The gravity of the provocation that the defendant in *Suluape* experienced was assessed from the point of view of a traditional Samoan woman who was very isolated in New Zealand society and who cared for 17 children of her own, other family members, and her husband's immobilised mother.

76 See, eg, Kaye, Stubbs & Tolmie, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence: Research Report 1* (2003).

77 This point was particularly persuasive for the New Zealand Law Commission, which has stated (above note 9 at 41): "There are many circumstances that may reduce the

The obvious response to this is that theoretical consistency, at the most abstract level, must sometimes give way to the practical complexities of dealing with actual trials and the difficult social issues that they often raise.⁷⁸ A similar argument could, in fact, be made in a number of other legal contexts. For example, based on this logic, all aggravated offences should be repealed. Instead, the aggravating factors should simply suggest the need for a higher sentence following a conviction for the basic offence. Nonetheless, the fact that we cannot list in advance every possible aggravating factor does not stop us from taking advantage of the benefits involved in dealing with issues of aggravation at trial rather than at sentencing.⁷⁹ Indeed, taken to an extreme, one could also argue that the complete defences, such as self-defence, should be dealt with at the sentencing stage by the use of options such as suspended sentences and discharges without conviction. Yet no one seriously suggests that, when presented with complex and difficult decisions on criminal culpability, facts traditionally decided at trial should be left to a sentencing judge.

Although we might want some criminal consequences to follow, cases of genuine euthanasia present a compelling situation where consensus may exist that attaching the label "murderer" to an accused's behaviour is unduly harsh. The Law Commission used euthanasia to support its argument that it is both unfair and illogical for partial defences to reduce the liability of some defendants when defendants in these equally worthy cases have no defence.⁸⁰ Of course, this could also be an argument not for abolishing those partial

culpability of an intentional killer and it seems unfair and illogical to single out one particular situation. The 'lesser culpability' argument would in logic require a partial defence for every set of circumstances which renders intentional killing less culpable or a system of degrees of murder which recognizes all the levels of seriousness, from an aged pensioner assisting a spouse to gain release from an excruciatingly painful, incurable condition, to an armed robber callously killing a policeman in order to gain access to a bank vault."

78 The Victorian Law Reform Commission (above notes 7 and 11) was also committed to addressing features of the defendant's moral culpability at the sentencing stage. Nonetheless, it still took the view that there were compelling arguments for retaining the partial defence of excessive self-defence and the offence of infanticide. The Commission adopted this position because it was willing to grapple with the particular social context in which homicides take place, as opposed to approaching its reform task at an abstract and decontextualised level.

79 See, for example, Crimes Act 1961, ss 191, 192, 235, and 240A. It is worth pointing out that murder and manslaughter have a special relationship in that both are sometimes viewed as versions of the same offence, namely, homicide. On this view, it could be said that murder is an aggravated version of manslaughter.

80 Above note 9.

defences that currently exist, but rather for developing others that do not (including one that encompasses situations of genuine euthanasia).

Interestingly, the defence of provocation appears to have developed enough flexibility to operate in those euthanasia cases that are capable of being adapted to fit within its particular requirements. In *R v Simpson*,⁸¹ Simpson was charged with murdering his mother who was in the final stages of terminal bowel cancer. The jury rejected his insanity plea and convicted him of manslaughter on the basis of provocation. Simpson's bipolar disorder made him particularly susceptible to the provocation and released an overwhelming and irresistible desire in him to alleviate his mother's suffering. The provocation consisted of her terminally ill state, the pitiful sight of her as she was dying, and her words: "Kit, Kit, I am in such pain. Do something."⁸² One interpretation of the result in *Simpson* is that provocation was being used as a de facto diminished responsibility defence.⁸³ Another interpretation is that the defence was actually acting to alleviate culpability in respect of what was, in fact, a euthanasia case.⁸⁴

Specific Problems with the Defence of Provocation

I agree with the Victorian Law Reform Commission that reform of the law of self-defence, as well as the introduction of excessive self-defence, are the main keys to providing battered women in homicide cases with equitable access to the homicide defences. However, I have also suggested that there will still be battered defendants for whom provocation is a more appropriate and useful defence. Accordingly, in the final section of this article, I want to canvass briefly the possibility that the two main problems identified with the operation of the defence of provocation — that it has been used to normalise male violence and is conceptually difficult to apply — present reasonable opportunities for reform and are not necessarily obstacles to retaining the defence.

81 (HC Auckland, T 010609, 12 November 2001, Potter J).

82 Ibid.

83 See also *R v Aston* (1989) 4 CRNZ 241 (CA); *R v McCarthy* [1992] 2 NZLR 550 (CA) per Cooke P; Brown, "Provocation, 'Characteristics', and Diminished Responsibility" (1983) 10 NZULR 378.

84 Obviously, addressing the issue of euthanasia by means of the defence of provocation is going to privilege those defendants, like Simpson, who demonstrate emotional loss of control and irrationality in their actions over those who exercise their compassion in a more considered fashion.

A *The normalisation of male violence*

Like most of the defences to homicide, the defence of provocation has gendered origins. It arose historically out of a recognition that men had the right to defend their honour — both against slights by other men and, at some point, acts of “challenge” by their female partners.⁸⁵ Many have argued that the original model for the defence — a sudden explosion of anger in response to an act of provocation — best fits a male psychological profile.⁸⁶

The origins of the defence, and the social normalisation of some level of male violence against women,⁸⁷ mean that the history of provocation is strewn with deeply problematic applications. It is still possible to find recent New Zealand cases where the jury has accepted that the ordinary man will fly into a homicidal rage over his partner’s actions — actions that are no more than what every New Zealand woman has a right to do (such as reporting his severe physical assault on her to the police, leaving him, or forming a liaison with another man).⁸⁸ Referring to these kinds of cases in Canada, Gorman remarks:⁸⁹

85 See *R v Mui Ky Chhay* (1994) 72 A Crim R 1, 11 per Gleeson CJ (“The law developed in days when men frequently wore arms, and fought duels, and when, at least between men, resort to sudden and serious violence in the heat of the moment was common. To extend the metaphor, the law’s concession seemed to be to the frailty of those whose blood was apt to boil, rather than to those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.”).

86 See, eg, Victorian Law Reform Commission, above note 7 at 27–28 (“A sudden violent loss of self-control in response to a particular triggering act is seen to be the archetypal male response to provocative conduct.”).

87 Above note 50.

88 *R v Tepu* (HC Wellington, T No 889/98, 11 December 1998, Neazor J). See Tolmie, “What Provocation Justifies Killing?” *New Zealand Herald*, 26 May 1999, A15. See also *R v Paniani* [2000] 1 NZLR 234 (CA); *R v Nepia* [1983] NZLR 754 (CA). In *Nepia*, the Court of Appeal held that a trial judge had been wrong in holding that there was no evidence of provocation to leave to the jury. The Court stated (at 757): “They [the jury] might think it reasonably possible, even in this day and age, that the sudden intimation or threat of the loss of a loved wife and children could cause an ordinary person to go berserk as this accused may have done.” In this case, the wife had separated from the husband, formed a liaison with another man and allegedly “snapped” at the husband during a child contact changeover: “I hope you enjoyed the children because you won’t be seeing them again” (ibid).

89 Gorman, above note 7 at 479; Edwards, above note 7; Cote, Sheehy & Majury, *National Association of Women and the Law’s Brief on the Defence of Provocation: Stop Excusing Violence Against Women* (2000) (available at: <http://www.nawl.ca/provocation.htm>); Morgan, above note 7; Victorian Law Reform Commission, above note 7.

[Provocation] could now more accurately be called the defence of jealousy or anger. In its present state its primary purpose appears to be to reward men who are so possessive of their spouses that they are willing to kill in order to ensure that their spouse does not leave them for another man.

Bradfield comments similarly that, in Australia:⁹⁰

The law of provocation endorses outmoded attitudes that women are the property of their husbands, attitudes that continue to permit men who kill their partners following sexual provocation such as rejection, a partner's unfaithfulness or jealousy to be accommodated within the defence of provocation. The defence of provocation operates as a "licence" for men to kill their female partners who dare to assert their own autonomy by leaving or choosing a new partner.

In some of these cases, the defendant's homicidal rage appears to be the culmination of years of domestic abuse. It is motivated by the desire for power and control that often lies at the heart of a perpetrator's actions.⁹¹ Examining cases where the defence of provocation has been used to legitimate male violence against women can make the argument for abolition compelling. Indeed, it is important to emphasise that, if this issue cannot be satisfactorily addressed, the case for abolition is overwhelming.⁹²

However, the law on provocation, like other aspects of culture, is not fixed in stone. Rather, it is articulated in an organic and evolutionary fashion as part of a dynamic social process.⁹³ Thus, in spite of its origins,

90 Bradfield, "Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife" (2000) 19 *University of Tasmania LR* 5, 35.

91 See, eg, *R v Tepu* (HC Wellington, T No 889/98, 11 December 1998, Neazor J); *R v Singh* (2003) 86 SASR 473; *R v Paniani* [2000] 1 NZLR 234 (CA).

92 The Canadian National Association of Women and the Law (above note 89 at 17 and 22-23), adopted this view and recommended abolition accordingly. The Association stated: "We note that the expansion of the defence of provocation is systematically justified ... by invoking the drama of battered women who kill their husbands, and who cannot benefit from self-defence. It would be ironic if a reform that makes it much easier for men to be excused for crimes of violence against women were to be achieved on the backs of abused women!" See also Edwards, above note 7.

93 See Kirkwood, above note 73 at 168-169 ("The significance of Horder's work is to show how defences (specifically provocation) change over time in line with changes in perceptions of what violence is and what forms of violence are understandable and therefore excusable. [While] such conceptions are based on men's experiences, the fact that they change over time indicates that the laws are not based on universal, given notions of behaviour. A better understanding of women's violence and of violence

the defence has been subject to considerable reinterpretation.⁹⁴

For example, the emotion of anger is no longer the only foundation for the defence. Panic, fear, and distress are heightened emotional states that could also form the relevant loss of control.⁹⁵ Furthermore, there is growing support for the fact that delayed responses, and "slow burn" or simmering responses, can also be "out of control" reactions recognised by the law.⁹⁶ Moreover, while there still needs to be an act of provocation on the part of the victim, this can be either: (1) an innocuous act that becomes provocative only when interpreted in the overall context in which it takes place;⁹⁷ or (2) a series of accumulated actions that have gathered emotional force for the defendant.⁹⁸

Bradfield notes that the "stock stories" of jealous husbands are long-established legal narratives attended by an automatic credibility not possessed by those of violent women.⁹⁹ While this point is irrefutable, it is also the case that, with respect to understandable emotional breakdowns triggered by extraordinarily stressful circumstances, many of the changes described

generally should contribute to more appropriate laws and a more consistent application of them in the courts.").

94 Once again, the judgment of Gleeson CJ in *R v Mui Ky Chhay* (1994) 72 A Crim R 1, is an interesting and nuanced account of this process. See also Bradfield (above note 90 at 10), who traces these developments but also argues that "the battered woman has considerable difficulty relying on the defence of provocation in Tasmania, [while] the jealous husband's claim to the provocation defence is naturally accepted".

95 In *R v Van Der Hoek* (1986) 23 A Crim R 98, the High Court of Australia held that loss of control due to overwhelming panic or fear would be an appropriate basis for arguing provocation. This also seems to have been implicitly accepted in *R v Wang* [1990] 2 NZLR 529 (CA) and *R v Pita* (1989) 4 CRNZ 660 (CA). However, see Edwards, above note 7.

96 *R v Taaka* [1982] 2 NZLR 198 (CA); *R v Savage* [1991] 3 NZLR 155 (CA); *R v Parker* [1964] AC 1369.

97 *R v Queen* (1981) 28 SASR 321; *R v Rongonui* (2000) 17 CRNZ 310 (CA); *R v Cornick* (Court of Criminal Appeal, Tasmania, BC8700051, 28 July 1987).

98 *R v Mui Ky Chhay* (1994) 72 A Crim R 1.

99 Above note 90. Note that this point has implications for the suggestion that considerations of provocation should be moved to the sentencing stage. If (1) the limits of what is understandable human behaviour in the context of intimate relationships will need to be determined at the sentencing stage, (2) a history of culturally normalised male violence in the domestic context survives to some degree in contemporary form, and (3) judges are not detached from but rather are embedded in their own culture, it becomes apparent that shifting the issues involved in the defence of provocation to the sentencing stage will not necessarily halt the egregious decisions associated with the application of the provocation defence. What it will do is simply render such cases less visible. See Coss, "Editorial: Provocation, Law Reform and the Medea Syndrome" (2004) 28 Crim LJ 133, 137-140.

above have made the defence of provocation more generally available. In New Zealand, the adaptability of the defence is illustrated by the fact that it has increasingly been called upon to do the work of non-existent partial defences. The same may be said of some of the complete defences that, arguably, do not function effectively at trial.

However, the origins and recent application of the defence of provocation mean that legislative clarification is imperative. The defence should be unavailable in circumstances where the act of the victim is provocative because it challenges the power and control that the offender believes he is justified in exercising over another person. This includes behaviours that women, as independent and autonomous actors, are entitled to do, such as leaving their relationship with the offender, partnering or re-partnering, making access arrangements in relation to their children, or reporting acts of violence against them to the police.

The defence of provocation has always been subject to policy limitations in respect of the kinds of actions that are legally capable of triggering the defence. For example, the New Zealand legislature has determined that some acts will not amount to provocation as a matter of law. Section 169(5) of the Crimes Act 1961 provides:¹⁰⁰

No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

In the past, the judiciary has, as a matter of policy, excluded other kinds of provocative behaviours from the defence. An example would be confessed, as opposed to witnessed, adultery.¹⁰¹ While this is no longer a limitation on provocation, courts have begun to articulate others. In *R v Tai*,¹⁰² the Court of Appeal commented that an ordinary New Zealand person would never respond by killing a woman who was terminating a relationship with him, as this was something that every New Zealand woman was free to do.

Gorman suggests that restricting the defence in such a fashion would return it to what it was designed to be, purged of "16th and 17th century

100 Non-violent sexual advances (without more) are also excluded in the Australian Capital Territory as provocative acts. See Crimes Act 1900 (ACT), s 13.

101 See, eg, *Holmes v Director of Public Prosecutions* [1946] AC 588.

102 [1976] 1 NZLR 102 (CA); *Arrowsmith v The Queen* (1994) 55 FCR 130 (GD); *R v Yasso* (2002) 136 A Crim R 1 at 5; *R v Smith* [2000] 3 WLR 654, 674 per Lord Hoffmann ("Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover.").

thinking” about gender roles, male violence, and the nature of intimate relationships.¹⁰³ Thus, “[p]rovocation should be limited to those who would not normally murder but who do so in extraordinary circumstances”.¹⁰⁴ By contrast, Gorman notes that cases in which provocation is commonly argued — those involving homicidal jealousy and anger by husbands towards their wives — are “depressingly unexceptional”.¹⁰⁵ The circumstances of separation or infidelity involved are not extreme enough partially to excuse what is, in fact, a murder. Nor do they leave us reassured that the “chance of such an exceptional event occurring again is indeed a remote one”.¹⁰⁶

B The conceptual difficulties presented by the ordinary person test

One reason given by the New Zealand Ministry of Justice for abolishing the defence of provocation is that the correct interpretation of s 169(2)(a) of the Crimes Act 1961 — which sets out the objective, “ordinary person” test to be used in applying the defence — is quite controversial.¹⁰⁷ Furthermore, the literal interpretation of this provision, which is currently the authoritative legal interpretation,¹⁰⁸ is extremely difficult for judges to explain and juries to apply. In support of this argument, the Ministry observed that, in the most recent and definitive Court of Appeal¹⁰⁹ decision on the subject, “[f]our out of the five judges noted that the law of provocation is unsatisfactory as currently drafted, and called for legislative reform”.¹¹⁰

Obviously, a need for reform would only be an argument in favour of abolition if satisfactory reform were impossible. However, because it is not, it is unclear how this point supports the Ministry’s position.

103 Above note 7 at 479.

104 *Ibid* at 478.

105 *Ibid* at 493. See, eg, Polk & Rason, “Homicide in Victoria”, in Chappell, Grabosky & Strang (eds), *Australian Violence: Contemporary Perspectives* (1991) 80–81. Bradfield (above note 90 at 8, n 12) remarks that men tend to kill their female partners as expressions of power and control: “Polk and Ranson conclude that their study confirms the conclusions of the earlier study by Wallace [above note 55] that ‘either separation (including its threat) or jealousy were the major precipitating factors, and thus the homicide can be viewed as an expression of the male’s attempt to exert ... their power and control over their wives’.”

106 Above note 7 at 496.

107 The crucial phrase for interpretation is: “a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender” (above note 1).

108 *R v Rongonui* (2000) 17 CRNZ 310 (CA).

109 *Ibid*.

110 Above note 6 at 3.

In its current manifestation, the main reason why the defence of provocation is conceptually unworkable is because of the manner in which the ordinary person test is constructed. Specifically, the difficulty involves the division of the test into two limbs. The current position, endorsed by the majority of the Court of Appeal in *R v Rongonui*,¹¹¹ is that specific characteristics of the accused are permitted to modify the ordinary person test for the purposes of measuring the gravity of the provocation offered by the victim. However, such characteristics cannot be considered with respect to the degree of self-control expected of the ordinary person in response to provocation of that gravity. This makes the test highly complex and artificial to apply.¹¹²

For example, if the accused suffers from alcoholism, a jury is entitled to consider the gravity of the provocation offered by the victim from the point of view of the ordinary alcoholic. However, having determined the seriousness of this level of provocation from that point of view, the jury must then consider how a person with ordinary powers of self-control would respond to provocation of that gravity. The accused's alcoholism, in so far as it diminishes his or her emotional self-control, must be disregarded.

I have taught provocation in its current form for many years. My experience is that the bifurcated nature of the defence is what law students uniformly struggle to understand.¹¹³ And if law students must grapple with it, what comprehension can be expected of the average member of the community sitting in the jury box?

This problem, however, is easily rectified. The dissent of Elias CJ in *R v Rongonui*¹¹⁴ provides a workable solution to the complications of the current provocation defence. Her view would allow the personal characteristics of the accused to modify the "ordinary person" test in relation to assessing both the gravity of the provocation offered to, and the degree of self-control expected by, the accused. Thus, in the example just provided, one simply asks the jury to make a judgment about whether the ordinary (sober)¹¹⁵ alcoholic would have lost self-control in response to the provocation offered.

Elias CJ adopted a broad and normative standard to determine which personal characteristics may modify the ordinary person test. Disallowed are

111 (2000) 17 CRNZ 310 (CA).

112 The description adopted by Elias CJ in her dissenting judgment in *Rongonui* is "inconsistent, unrealistic and unjust": *ibid* at 421.

113 My experience is gleaned from teaching the provocation defence for 10 years at the University of Sydney Law School and for the last six years at the University of Auckland Faculty of Law. See also *R v Mankotia* (2001) 120 A Crim R 492, 495 per Smart AJ.

114 (2000) 17 CRNZ 310, 314 (CA).

115 Actual intoxication is not a characteristic that ever modifies the ordinary person test. See *R v Barton* [1977] 1 NZLR 295 (CA).

those features that people within the community might ordinarily experience but should be given the incentive to keep under control (such as "ill-temper, irascibility, impulsiveness, violence, or intoxication").¹¹⁶ Such an approach avoids the complications of *R v MacGregor*¹¹⁷ — complications generated by the need to prove that the characteristic marked the offender as different from ordinary people, constituted part of his or her character or personality, and made the provocation more serious to the offender because of such a characteristic.¹¹⁸ Crucially, and consistently with the suggestions made in the preceding section of this article, it also ensures that a propensity for violence, jealousy, or bigotry is something that will be excluded as a characteristic for the purposes of applying the ordinary person test. The reason is that such characteristics are something that the defendant should have an incentive to keep in check.¹¹⁹

In the English case of *R v Smith*,¹²⁰ the House of Lords subsequently adopted a similar approach to the minority in *Rongonui*. Furthermore, two of the three majority Judges in *Rongonui* would have apparently agreed with Elias CJ, had not the literal meaning of s 169(2)(a) and the weight of authority dictated against doing so (at least for them). Both of these Judges called on the legislature to reword the provision in question. Thus, Blanchard J said:¹²¹

I would very much like to feel free to approach the question of provocation as the Chief Justice has done but, as Tipping J points out, it involves a reversal of the sequence of words adopted by Parliament.

Tipping J, who set out the majority position, also went on to express what was, in effect, a preference for the approach of the Chief Justice:¹²²

The mental gymnastics involved in this exercise simply serve to underline the desirability of achieving conceptual simplification of the law in this area. A humane way of approaching that task and one which is consistent with the essentially subjective approach which the criminal law takes to mental states, would be to allow as a characteristic any mental state which

116 (2000) 17 CRNZ 310, para 120.

117 [1962] NZLR 1069 (CA).

118 *Ibid* at 1081–1082.

119 Burton, "Intimate Homicide and the Provocation Defence — Endangering Women? *R v Smith*" (2001) 9 *Feminist Legal Studies* 247.

120 [2000] 3 WLR 654. See also Burton, *ibid*.

121 (2000) 17 CRNZ 310, para 211.

122 *Ibid* at para 236.

generally reduces the accused's power of self-control, provided that state was neither self-induced such as intoxication, nor was simply a personality trait like short temper.

Conclusion

The recommendations of the New Zealand Law Commission and the Ministry of Justice give little confidence that the abolition of provocation will be a positive development for battered defendants. In fact, it is disturbing that the paper produced by the Ministry of Justice stems from a reference designed to investigate the inequities experienced by battered defendants in accessing homicide defences. Aside from the recommendations made in relation to duress (a defence unlikely to be relevant to most battered defendants), the only recommendations for change made in that paper — the abolition of provocation and infanticide — are deleterious to battered defendants. This is particularly so because the Ministry of Justice, unlike the Law Commission, recommends no reform to the doctrine of self-defence.

The Victorian Law Reform Commission, by contrast, has conducted a nuanced and realistic inquiry into the social context in which homicide takes place. Accordingly, it has recommended the introduction of the partial defence of excessive self-defence, along with the repeal of provocation and reforms to the law of self-defence not dissimilar to those recommended by the New Zealand Law Commission.

Self-defence, in both its full and partial manifestations, is the appropriate law to focus upon in respect of most battered defendants charged with killing their batterers. Nonetheless, I have suggested in this article that provocation still has a role to play for some of these accused. My position is contingent on satisfactory reform of the defence of provocation, so that it is both easier to apply and not available to condone the actions of batterers.