National Association of Women and the Law

Association nationale de la femme et du droit

STOP EXCUSING VIOLENCE AGAINST WOMEN

NAWL's Position Paper on the Defence of Provocation

April 2000

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ISBN: 1-895996-55-4

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Acknowledgments

We would like to thank the following for their comments on specific sections of a previous draft:

Christine Boyle, Professor, Faculty of Law, University of British-Columbia
Pamela Cross, Legal Director, METRAC
Anne Derrick, Beaton, Derrick & Ring, Halifax, N.S.
Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies

We would also like to thank ***Action ontarienne contre la violence faite aux femmes*** for allowing us to use a section of their 1999 brief to the Department of Justice entitled "*Réforme des moyens de défense visés par le Code criminel: provocation, légitime défense et défense des biens*".

Ce document sera bientôt disponible en français

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Introduction

Historically, the criminal law system has justified and condoned male violence against women. It allowed a man to use "reasonable" force to ensure the respect and obedience of his spouse; it immunized husbands from prosecution for rape of their wives; it did not sanction the rape of "bad girls;" and it ignored most forms of child abuse. Our law did not even recognize the existence of sexual harassment until the mid-eighties, and the use of professional and religious power to sexually exploit subordinates has only recently been acknowledged and condemned by our justice system.

More specifically, special evidentiary and substantive rules were developed for cases of wife-assault. Indeed, a woman cannot be compelled to testify against her husband, even in a case where he is accused of assault against her. This principle of "marital unity" historically "privatized" her complaint and forced her to bear the onus of any criminal proceeding in the matter. If found guilty of assault, a husband would benefit from a more lenient sentence if the victim of the crime was his wife. Wives were forbidden to file civil suits against their husbands for damages until at least 1982 in Québec, until 1990 in Saskatchewan, and may still be so barred in New Brunswick, according to a 1994 Queens Bench decision.[1] Even today, women who decide to file a police complaint against their husbands face a criminal law system that often re-victimizes them and cannot ensure their basic security and freedom.

Violent men who assault their wives have benefitted from a variety of specific excuses afforded by different components in the legal system. The excuse that we want to address specifically in this brief is codified as the defence of provocation in s. 232 of the *Criminal Code*.[2] Our analysis of the defence of provocation is inspired by the egalitarian human rights standards entrenched in the *Canadian Charter of Rights and Freedoms*,[3] as well as by international human rights law.

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[1] For a discussion of the legislation and the case law on interspousal immunity, including *Khoury* v. *Khoury*, [1994] N.B.J. No. 188 (Q.B.), see W. Wiegers, "Compensation for Wife Abuse: Empowering Victims?" (1994) 28 U.B.C.L. Rev. 247 at 265-66.

[2] R.S.C. 1985, c. C-46, s. 232 reads: (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or insult that is of such a nature as to be sufficent 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 he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that the he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) [omitted]

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Since the end of World War II, egalitarian principles and the recognition of the universality of human rights have been the touchstone of international law. The *Universal Declaration of Human Rights*[4] and other international law instruments are premised on the right to equality. Women's equality has been proclaimed numerous times, and many instruments have set out principles and specific mechanisms to give it practical effect, including the *Convention on the Elimination of All Forms of Discrimination Against Women*[5] and the *Declaration on the Elimination of Violence Against Women.*[6]

In Canada, formal recognition of women's equality rights was achieved in 1982 with the adoption of the *Charter* and more particularly with the inclusion of ss. 15 and 28, which provide equality rights for women and other historically disadvantaged groups. The introduction of the *Charter* has fundamentally altered Canadian law, since the primacy attributed to egalitarian values marks a break with the colonialist, pro-slavery, and patriarchal heritage of the common law and the civil law. By making equality a fundamental value in the Canadian Constitution, the constitutional reform initiated a radical rejection of a system of rights based on domination and subordination.

The principle that government action must benefit all groups equally without further exacerbating existing inequalities means that the government's mandate has been radically redefined. It must broaden the scope of its action to benefit groups that have historically been excluded from the social contract, and mobilize its resources to govern the state in the best interests of all men and women, from all conditions and communities, without discrimination. The constitutionalization of equality rights has also created new obligations for the government, since it must not only refrain from discriminating, but it must also take concrete steps to ensure that disadvantaged groups receive full and equal protection and benefit of the law.[7]

NAWL claims that, in the context of policies against violence against women, in order to fully ensure equal benefit and equal protection of the law for all women, government must also take concrete action to reduce patriarchal control over women's lives and minimize social relations based on dominance. In addition, it must remedy social, economic, political, and other disadvantages that result from sexual and other forms of discrimination.

In this context of reform, NAWL notes that piecemeal reforms to the criminal law pose significant hazards for women's equality interests. A fragmented approach fails to question the basic building blocks of criminal law that perpetuate inequality, such as the doctrine of intent or *mens rea*; it may miss inequalities created by the interaction of various doctrines

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4 GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

5 GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, UN Doc. 1249 (1979) 14, into force 1981, and into force in Canada in 1982.

6 GA Res. 48/104, UN GAOR, 48th Sess., UN Doc. A/Res/48/104 (1994) 1.

7 *Eldridge* v. *British Columbia*, [1997] 3 S.C.R. 624.

such as *mens rea* and the defence of provocation; and it may generate problems in other doctrinal areas by the response chosen for a discrete issue. For these reasons, NAWL urges the federal government to undertake a consultation and reform process that looks at the larger criminal law picture, including the very question of whether codification of general principles is a law reform approach that is consistent with women's equality rights.

In carrying out its *Criminal Code* reform project, the government must, at a concrete and not merely theoretical level, ensure that it respects and promotes the egalitarian principles guaranteed in the *Charter* and international human rights law. The *Declaration on the Elimination of Violence Against Women* provides that member states of the UN should "pursue by all appropriate means and without delay a policy of eliminating violence against women." States must not only develop sanctions to punish and redress the wrongs caused to women who are subjected to sexual violence, but must also provide these women with access to the mechanisms of justice and to just and effective remedies for the harm that they have suffered. They must ensure that the re-victimization of women does not occur because of laws insensitive to their impact upon women, biased enforcement practices, or other interventions that perpetuate women's inequality.

In this brief, we use this egalitarian legal framework to argue for the abolition of the defence of provocation, because of its sexist, homophobic, racist, and patriarchal ramifications. We also argue for the abolition of all mandatory minimum sentences, in order to eliminate an arbitrary and unjust rule and to ensure that the individual circumstances of the offence and of the accused are appropriately considered. In the context of reform of defences to homicide, NAWL calls specifically for the repeal of the mandatory life sentence for murder, as well as the repeal of the new mandatory minimum sentence of four years imprisonment for those who use a firearm in the commission of a number of specific offences, including manslaughter. In addition, we will suggest ways of improving section 718 of the *Criminal Code*, which deals with sentencing, to provide fuller protection against bias at the stage of determining the sentence. We want to avoid the trivialization of the death of women and other persons vulnerable to bias and stereotyping, and conversely we want to ensure that abusers do not benefit from mitigation based on excuses arising out of prejudice and collective self-interest.

1. The problems with the defence of provocation

1.1 Summary of the defence

In Canadian criminal law the defence of provocation is a defence recognized by s. 232 of the *Criminal Code*. The defence of provocation can be invoked exclusively for a charge of murder; it cannot be invoked as a defence in any other criminal context, but it can be taken into consideration at the time of sentencing, to mitigate the severity of the penalty for other kinds of crimes.

To benefit from the defence of provocation, the accused must show that the victim proffered an insult or committed a wrongful act of such a nature that an "ordinary person," in the same

circumstances as the accused, would have lost the ability of self-control. He or she must also have killed in the "heat of passion," under the impulse of the moment and before the emotions could cool down. Provocation is thus essentially a defence that excuses murder committed while under the influence of anger (indeed, in the French version of the *Code*, paragraph 232(1) refers to an act committed in an "accès de colère"). Given the fact that motive is not normally a factor in assessing guilt, provocation bestows on anger a special status in criminal law.[8]

The defence of provocation recognizes that the killer is morally culpable and had the intention to cause the death of the victim (it is a crime "that otherwise would be murder"), but the model of loss of self-control invites compassion for the violent man who "couldn't stop himself" from killing. The defence of provocation is thus founded on the idea that the victim has "caused" the murderer to lose his self-control. If the judge or the jury accepts the defence of provocation submitted by an accused, s/he will be found guilty of the offence of manslaughter, instead of murder. S/he would therefore likely benefit from a much less severe penalty since there is only a mandatory minimum sentence for manslaughter when it is committed with a firearm, and then that minimum is four years, rather than life imprisonment.

1.2 A patriarchal excuse for crimes of violence against women

Before turning to the legal context for the defence of provocation, we must first examine the social context that produces intimate femicides for which this defence is available.

Women are nine times as likely to be killed by their intimate partners as by a stranger and are disproportionately the victims of intimate homicide at a rate of 3.2:1.[9] In 1997, Statistics Canada reported that while 18% of homicides involved spousal homicide, 88% of these homicides were of women. Over the past twenty years, three times as many wives have been killed by their husbands as have husbands been killed by their wives.[10] In Ontario, the 1997 report *Woman Killing: Intimate Femicide in Ontario 1991-94*[11] established that 71% of all women who are homicide victims are killed by an intimate partner. Woman-killing is thus clearly marked by a gender dynamic: it is men who are killing women, not *vice versa*. According to this study, 159 women were killed by an intimate partner, whereas this was the case for only 19 men in Ontario between 1991 and 1994. One third of the women who were killed by their spouse had previously reported assault by their partner to police, and, if unreported wife assault were to be included, we expect to find that the vast majority of

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[8] A. Côté, *The Defence of Provocation and Domestic Femicide* (LL.M. Thesis, University of Montreal, Faculty of Graduate Studies, 1994) [unpublished].

[9] M. Wilson and M. Daly, "Spousal Homicide" (1994) 14: 8 Juristat at 1.

[10] Statistique Canada, *La Violence familiale au Canada: Un profil statistique* (Ottawa: Ministre de l'industrie, 1999) at 5.

[11] M. Crawford, R. Gartner, and M. Dawson, *Woman Killing: Intimate Femicide in Ontario 1991-94*, Volume 2 (Toronto: Women We Honour Action Committee, 1997).

intimate femicides are preceded by male violence.

Woman-killing is also distinguished from husband-killing not just by its magnitude in terms of numbers, but also in terms of the motivations behind such killings. The work of Alison Wallace in Australia,[12] Martha Mahoney in the U.S.,[13] and Statistics Canada[14] demonstrate that men's killings of women are, by and large, motivated by jealousy and claims to possession. Situationally, men are most likely to kill when a woman leaves or attempts to end the relationship. The attack is a final assertion of control over the woman.[15] In contrast, women are most likely to kill in response to violence by their mates.[16]

This social context of homicide and women's vulnerability to intimate femicide translates into a legal context in which the defence of provocation is offered frequently by men charged with intimate femicide, often successfully. A Québec study on spousal homicide indicates that at least one third of the men who are tried for the murder of their intimate partners invoke "provocation" as a defence to criminal prosecution, usually in the plea-bargaining stage.[17] This same study found that while 90% of the men who killed their intimate partners were charged with murder, only 18% were convicted of this offence: the majority were instead convicted of manslaughter. In Ontario, 93% of men were charged with murder, and 43% were convicted of this offence. Indeed, most of the legally significant Supreme Court of Canada rulings on provocation involve intimate femicide.

Historically, the defence of provocation was constructed on the paradigm of the "crime of passion:" the husband who kills in "hot-blood" because he finds his wife in the act of adultery. The right of men to appropriate the woman of their choice and to respond violently to any threat to their control and possession of her, was the underlying rationale for the defence. Adultery was a favorite theme for provocation law of the nineteenth century, but until the First World War only married men could "justifiably" be provoked by a spouse's infidelity; that "right" was not granted to men in relation to mistresses or girlfriends over whom they had no legal "claim."[18]

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[12] A. Wallace, *Homicide: The Social Reality* (Sydney: New South Wales Crime Statistics and Research, 1986).

[13] M. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 Michigan L. Rev. 1.

[14] Wilson and Daly, *supra* note 9.

[15] *Ibid.* at 5-8.

[16] *Ibid.* at 7.

[17] A. Côté, *La rage au coeur. Rapport de recherche sur le traitement judiciaire de l'homicide conjugal au Québec* (Baie-Comeau: Regroupement des femmes de la Côte-Nord, 1991).

[18] *Supra* note 8.

However, since the Second World War, the scope of provocation has been expanding steadily. In her study of fifteen years of provocation defence litigation in the United States, Victoria Nourse charts the shift in theory underlying this defence:

> The history of the provocation defence ... is the history of passion that is increasingly private and personal. Once an honour code, then heated blood, now a state of mind, the idea of passion has moved steadily inward. That move has fundamentally altered the shape of the defence. When honour ruled, courts imposed categories of wrongs defined by social relationships. When passion became a natural force within the "blood," all the important doctrinal limitations focused on when the blood could cool. When passion became mental distress, our questions delved into the minds of ordinary persons to provide answers. ... It took the "reasonable person" model a step further by asking juries not only to look into persons' minds but also to identify their personal characteristics. What has moved from norm to body to mind [is] now a question of *identity*.[19] [italics in original]

Indeed, the defence has been widened to encompass a great variety of scenarios. Nourse notes that in the U.S. context it now includes situations where

> the victim left, moved the furniture out, planned a divorce, or sought a protective order. Even infidelity has been transformed under reforms' gaze into something quite different from the sexual betrayal we might expect–it is the infidelity of a fiancée who danced with another, of a girlfriend who decided to date another, and of the divorcée found pursuing a new relationship months after the final decree. [20]

Canadian courts have similarly broadened provocation to the benefit of men who kill their intimate partners. For example, in 1942 in the case of *Krawchuk*,[21] the Supreme Court of Canada first expanded provocation beyond its historic limits to include a situation where the accused was told of (rather than witnessing) his wife's infidelity and where the wife had announced her intention to leave the marriage. The Court ordered a new trial for the killer, ruling that provocation should have been offered to the jury on the basis that "this episode [constituted] the ultimate destruction of the distracted husband's hopes that he might yet rescue his wife from the temptations, to which she had yielded, and thus preserve her love and affection --a blow administered by the wife herself--."[22]

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19 V. Nourse, "Passion's Progress: Modern Law Reform and the Provocation Defense" (1997) 196 Yale L.J. 1331 at 1384.

20 *Ibid.* at 1332-33.

21 (1941), 75 C.C.C. 219 (S.C.C.).

22 *Ibid.* at 221.

In 1947 in another case called *Taylor*,[23] the Supreme Court again ordered a new trial for a man who killed his wife so that provocation could be put to the jury based on the wife's disobedience. Here the defence had originally been put to the jury on the basis that she had allegedly slapped the accused in response to his accusation that she had engaged in "marital misconduct."Taylor was allowed a new trial so that the jury could also consider the impact of her refusal to obey the "injunction" of her husband (not to associate with a certain man), and the fact that she implied that he could not force her to obey by her response, "So what? Harry Holmes is all right."

In 1972 in a case called *Galgay*[24] the Ontario Court of Appeal ordered a new trial for a man who killed his girlfriend so that provocation could be put to the jury based upon the reasons she gave the accused for ending their relationship. The victim had told the accused, who was serving a one year reformatory term and was unlawfully at large, that she did not intend to wait for him, that she had begun seeing someone else, and that "You are not going to be any good. You are drinking all of the time. You are stealing." The jury at the new trial was to focus on the alleged "insult" delivered to the accused through the deceased's words and the implicit comparison to her new boyfriend.

More recently, in *Carpenter*,[25] decided in 1993, the Ontario Court of Appeal quashed a guilty verdict and ordered a new trial for an accused who had admitted during trial to having beaten his partner "ten or fifteen times." Three weeks before the murder, a witness heard him say to the victim "I have to kill you, you fucking squaw." On the night of the crime, he assaulted her and she angrily retaliated by trying to hit him with a vase. The Court of Appeal found that the swing of the vase was "provocation" sufficient to be presented to the jury.

In *Trecroce*[26] and *Munroe*,[27] while this same court affirmed the accuseds' murder convictions, it did not question the fact that the defence of provocation had been put to the jury in these cases. In *Trecroce*, the accused and the deceased had separated three times, she had called the police on several occasions to remove him for fear of his violence, and her final affront was that she "stayed out late." In *Munroe* the victim's "provocation" was her threat to denounce her husband to the police for having physically abused her and having committed incest against his daughter from his first marriage.

In 1996, the Supreme Court considerably enlarged the availability of the defence by further subjectivizing the "ordinary person" test, by ignoring evidence of premeditation, and by

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23 [1947] S.C.R. 462.

24 [1972] 2 O.R. 630 (C.A.).

25 (1993), 14 O.R. (2d) 641 (C.A.).

26 [1980] O.J. No. 1352 (C.A.).

27 (1995), 96 C.C.C. (3d) 431 (C.A.).

enlarging the notion of an "insult." In *Thibert*,[28] the accused's wife had just left him for another man. Not accepting that she refused to see him, the following morning he packed his gun and some ammunition in the car. He stalked her, called her many times at work, told her that he had a gun in the car and that he would bring it into her workplace if necessary to gain access to her, and tried to corner her into talking to him, in her workplace parking lot. When her lover intervened, saying "Come on big fellow, shoot me," Thibert shot and killed him. The Supreme Court ruled that the standard by which Thibert should judged was that of "an ordinary person who was a married man faced with the break-up of his marriage." The specific "provocation" here was that the victim was "mocking him and preventing him from his private conversation with his wife which was so vitally important to him."[29]

In 1999 in *Stone*,[30] the Supreme Court did not question the appropriateness of submitting a defence of provocation to the jury in a case that was framed as "a nagging wife" scenario and furthermore ruled that an accused who benefits from a provocation defence that reduces his offence from murder to manslaughter is also entitled to rely on that same "provocation" to mitigate his sentence for manslaughter. The accused's wife was angry at her husband, allegedly insulted his virility, threatened to denounce him to the police for wife-assault, told him that she wanted a divorce, and that she would be suing him for spousal and child-support. Stone testified that he started thinking about what people would say if he were arrested, and then felt a "whooshing" sensation; when his eyes focused again, he was holding a knife and his wife was dead, stabbed 47 times. He put the body in the toolbox, in the back of his truck, drove home, cleaned up, left a note for his step-daughter saying "sorry Nicole, but she just wouldn't stop yelling at me." He then collected an outstanding debt, sold his car, and took a plane to Mexico. He turned himself in a few weeks later and at trial was acquitted of murder and convicted by a jury of manslaughter, either on the basis of provocation or "no intent" to kill.

Finally, there are several court of appeal decisions[31] where the court has held that an accused man must be able to advance an alternative defence of no intent to kill based on "rage." In the more recent of these decisions, *Wade*,[32] the accused's wife had announced her intention to leave him and had gone to sleep in her child's room that night. Hours later, in the middle of the night, Wade burst into the room, screamed at her "I told you not to fuck with me," and proceeded to attack her violently. She fled the house with serious wounds to her abdomen, but he caught her and continued his attack by smashing her head against the sidewalk until she stopped moving. When neighbours intervened, he dragged her body to the porch and began hitting her head against the door frame. He did not stop until the police arrived. At his trial he

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28 (1995), [1996] 1 S.C.R. 37.

29 *Ibid.* at 51-52.

30 [1999] 2 S.C.R. 290.

31 *R.* v. *Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.); *R.* v. *Listes* (1994), 95 C.C.C. (3d) 178 (Que. C.A.).

32 (1994), 18 O.R. (3d) 33 (C.A.).

was convicted of murder, the jury having apparently rejected the defence of automatism. On appeal, the court held that Wade should have a new trial at which he could argue that he failed to form the intention to kill because he was overwhelmed by rage such that he was unable to appreciate the consequences of his actions. Although the Supreme Court of Canada reversed the decision to order a new trial,[33] it did so by concluding that in light of the whole of the evidence, the judge had not erred in instructing the jury: it did not specifically reject the emerging defence of "rage."

These cases point to a jurisprudence that considers a woman's autonomy --her drive for independence, self-respect, and security-- as provocative insults, which call for compassion for the accused. While occasionally the courts have refused to allow men to put provocation before a jury on the basis that allowing this defence for minor slights or relationship termination would be contrary to public policy,[34] the trend, including Supreme Court decisions such as *Thibert*, points in the opposite direction. As many authors have argued, this jurisprudence vindicates men's proprietary interest in their spouses and legitimates murderous "loss of self control" as a response to a woman's attempts to assert her autonomy.[35]

The primary beneficiaries of the expanded provocation defence are men, and contrary to popular understandings, men's provocation claims are not based on sexual infidelity, but rather 65% of men's claims studied by Nourse were made in the context of a relationship that was over, ending, or from which the woman was attempting to exit.[36] Twenty-six per cent of provocation claims that reached the jury involved no claim of infidelity whatsoever, but simply departure by the woman.[37]

The exculpatory defence of provocation literally allows men to get away with murder, reducing their conviction from intentional, sometimes pre-meditated murder, into one for manslaughter. Thus, the most violent forms of patriarchal crimes are reduced to an infraction akin to an accident, or a negligent act. This legal characterization trivializes femicide, and signals our criminal law system's tolerance of wife-assault.

Nourse points out that since law reforms in the twentieth century have affirmed the lawfulness of women's independence, choice, and freedom from abuse and control, and

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33 [1995] 2 S.C.R. 737.

34 See, for example, *R.* v. *Landry* (1978), 40 C.C.C. (2d) 384 (B.C.C.A.); *R.* v. *Young* (1993), 117 N.S.R. (2d) 166 (C.A.).

35 E. Hyland, "*R.* v. *Thibert*: Are There Any Reasonable People Left?" (1996-97) 28 Ottawa L. Rev. 145; J. St. Lewis and S. Galloway, *Reform of the Defence of Provocation* (Toronto: Ontario Women's Directorate, 1995); A. Côté, *supra* note 8; A. Côté, *supra* note 17; S. Bandalli, "Provocation– A Cautionary Note" (1995) 22 J. Law & Soc. 398; J. Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992).

36 Nourse, *supra* note 19 at 1345.

37 *Ibid.* at 1352.

indeed have facilitated women's exit from violent and unhappy relationships, the law is contradictory at the least in de-criminalizing private homicidal violence that casts women's acts as "wrongful" or "provocative." She writes, "To maintain its monopoly on violence, the State must condemn ... those who take the law into their own hands."[38] Provocation law elevates and de-contextualizes the idea of "relationship," even long-dead ones and ones to which the woman herself has no allegiance, and permits even trivial slights to men's rights to possess women and to hang onto "relationships" that women do not want to undergird this defence.

By construing attempts by women to affirm their liberty or their dignity as provocation, our law not only legitimates sexist attitudes and patriarchal claims of violent men, but it also undermines women's rights to liberty of expression, association, and movement and indeed the right to life and to security of the person, as guaranteed by ss. 2 and 7 respectively of the *Charter of Rights and Freedoms*. The law supports the cause of the violent man by interpreting the defence in a way that increases the power of all men and reinforces the inequality of women, in violation of s. 15 of the *Charter*. It is in this sense that it is truly a patriarchal excuse.

1.3 Sexist bias in the application of the defence

In English common law, the doctrine of "petit treason" had for centuries provided for aggravating penalties --indeed, these were specific forms of torture, such as burning at the stake-- for women who had committed the crime of attacking spousal government, their husbands.[39] Historically, women were practically barred from the provocation defence because men's provocative acts --the use of physical force to "chastise" their wives and sexual infidelity-- were not "wrongful" in the eyes of the law when committed by husbands.[40]

But just a few years after the expansion of the defence to women, the *Duffy* case established a rule banning any consideration of past abuse in the availability of the defence of provocation. In that case, the English House of Lords showed an astonishing degree of compassion for the accused's abuser, a man who had violently assaulted his wife on several occasions:

> Severe nervous exasperation or a long course of conduct causing anxiety are not by themselves sufficient to constitute provocation in law. A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here--the blame attaching to the dead man. You are not standing in judgment of him. He has not been heard in this court. He cannot now ever be heard. He has no defender here to argue for him. It does not matter how cruel he

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38 *Ibid.* at 1393.

39 See S. Gavigan, "Petit Treason in Eighteenth Century England: Women's Inequality Before the Law" (1989-1990) 3 C.J.W.L. 335.

40 S. Bandalli, *Women, Spousal Homicide and the Doctrine of Provocation in English Criminal Law* (LL.M. Thesis, Graduate Programme in Law, Osgoode Hall Law School, 1993) [unpublished] at 73.

was, how much or how little he was to blame, except in so far as it resulted in the final act of the appellant.[41]

This case set the law for years to come, and it was not until 1995 that in England, the courts acknowledged the role that cumulative abuse can play in framing a defence of provocation in the cases of *Humpfrys*[42] and *Thornton (No.2)*.[43] These decisions followed the ruling in *Ahluwalia*,[44] where the Court of Appeal broadened the requirement that the accused respond to provocation "on the sudden" and stated that an accused would not be barred from the defence simply because she experienced a delayed reaction to the provocation.

However, these recent U.K. cases should not be viewed as having remedied the discrimination against women inherent in the provocation defence. Most of the very few successful invocations of the provocation defence on behalf of women are based on facts that are strongly suggestive of self-defence, which should have resulted in complete acquittals rather than the compromise of a manslaughter conviction.[45] Women's use of this defence is more common where the accepted facts suggest a physical confrontation precipitated by the deceased man, where self-defence for the woman would be a more appropriate characterization of the defence.[46]

Second, most of those cases where women have successfully used provocation are simply not comparable to men's use of provocation: to suggest that a man's gloating over the sexual abuse of a child or threatening to kill a woman is analogously "provocative" to a woman's announcement of the end of a relationship or even her alleged "sexual taunting" is to encode discriminatory and dangerous double standards. The unreported decision in *Smith* and the reported case of *Malott* make the comparison vivid.

In the *Smith* case, a woman who killed her ex-partner after he told her that he had had sex with her 5- year-old daughter and that the child "tasted better" than she did, was allowed to plead guilty to manslaughter and sentenced to three and a half years of penitentiary. The trial

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41 *R.* v. *Duffy*, [1949] All E.R. 932 (C.A.).

42 [1995] 4 All E.R. 1008 (C.A.).

43 [1996] 2 All E.R. 1023 (C.A.).

44 [1992] 4 All E.R. 889 (C.A.).

45 See for example, J. Tolmie, "Provocation or Self-Defence for Battered Women Who Kill?" in S. Yeo, ed. *Partial Excuses to Murder* (Sydney: Federation Press, 1990) 61 and the cases discussed in E. Sheehy, *What Would a Women's Law of Self-Defence Look Like?* (Ottawa: Status of Women Canada, 1995) at 7-19.

46 See, for example, *R.* v. *Ferguson*, [1997] O.J. No. 2488 (Ct. Just. Gen. Div.) (Guilty plea to manslaughter based on either provocation or no intent); *R.* v. *Drake*, [1995] O.J. No. 4375 (Ct. Just. Gen. Div.) (Guilty plea based on provocation or no intent).

judge said that he could not imagine a more serious provocation.[47] It thus must be emphasized here that the insult in this case comprehended an admission and boast of child sexual assault, which clearly sets it apart from the trivial insult cases advanced by men.

The *Malott* case, albeit a difficult case, is a distressing Supreme Court decision on the possibility for women to use the defence of provocation. Ms. Malott was married 20 years to an extraordinarily abusive man who tortured her sexually, beat, whipped and choked her, and engaged in unusually cruel emotional and psychological abuse. Peter Jaffe, an expert on violence against women, testified that he had never seen a worse case of abuse. A few months before the homicide the victim had left his wife, but he came home almost everyday with his lover, insisting that Ms. Malott cook and clean for them. He was also involved in the drug trade, and he forced her to supply him with prescription drugs that she would get in different pharmacies. She had tried denouncing him to the police, but her husband was a police informant, and they refused to intervene. On the day of the crime, the deceased was driving his wife to a drug-store, insisting that she relinquish her mother's allowance, so that he could claim his daughter as an income tax deduction. Malott refused, and he assaulted her in the car, choking her. She then got out of the car to get the prescription drugs, but the store was closed. On her way back, her husband moved in a way that lead her to believe that he was going to assault her again. She shot 5 times, at close range, killing her husband. She then got into a taxi, went to his lover's trailer and attempted to kill her. At her trial, she put forward the defences of provocation, self-defence, and intoxication.

The trial judge refused to put provocation to the jury, and the Ontario Court of Appeal endorsed this decision, the majority of the bench stating:

> It is difficult to see what acts of the deceased could be considered provocation. The argument and the choking were relatively distant in time from the shooting, which cannot be said to have followed `on the sudden.' It is unlikely that the deceased's actions in opening the door and beginning to step out would be sufficient to provoke the normal 'ordinary person' mentioned in section 232(2).[48]

The Supreme Court did not reject this ruling on provocation, focusing its analysis on issues pertaining to self-defence, and it upheld Malott's conviction for second degree murder.[49] The contrast between the sympathy extended by the courts to Thibert, a man who killed to protect his proprietary interest in his wife and who insisted on "speaking" to her alone with a loaded rifle, and the insensitivity of the courts in this truly horrifying case of extreme spousal abuse, indicates the operation of sexist bias in the interpretation of what constitutes provocation and whose "human frailty" warrants compassion.

Third, women are rarely successfully invoke provocation for infidelities, departure, or "mere

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47 "Smith gets 3 1/2 years" *The [Belleville] Intelligencer* (22 August 1995).

48 (1996), 30 O.R. (3d) 609 at 631 (C.A.).

49 [1998] 1 S.C.R. 123.

words." For instance, in the *Di Taddeo*[50] case, a jealous wife who suspected her husband of adultery, shot him when he smirked at her after she had asked him if he thought that she was beautiful. The defence of provocation was put to the jury, but she was convicted of second degree murder.

To the extent that women have successfully argued provocation, the cases are usually plea negotiations that are unreported judgments. Reported or not, such decisions in favour of women stand out as anomalous. *Daniels,*[51] a North West Territories Court of Appeal case and *Lane,*[52] a British Columbia Court of Appeal case, are two rare examples of cases where a court of appeal has ordered a re-trial so that a woman could forward a defence of provocation to the jury based on a man's sexual infidelity. Daniels had experienced a long history of physical and psychological abuse, but who she killed was her husband's woman lover. Lane had killed her mate after confronting him as he returned to his apartment early in the morning with another woman.

To our knowledge, there are very few Supreme Court of Canada or Court of Appeal decisions in Canada where a woman has been allowed to put the defence of provocation with respect to husband-killing before a jury. The exceptions are *Malott*, where the defence was ultimately rejected by a jury, and *Lane*. This is a surprising record, considering the extremely high incidence of wife-abuse in Canadian society that might "provoke" women to kill.

1.4 A homophobic construction of the defence

Provocation has been used as a defence in circumstances in which a "homosexual advance" is constructed as the precipitating act of "provocation." In other words, a "homosexual advance" is considered a "wrongful act or insult...sufficient to deprive an ordinary person of the power of self-control." According to this use of the provocation defence, it is seen as understandable that the mere act of a sexual advance[53] made by one man to another[54] gives rise to such uncontrollable rage, fear, or panic that the recipient is driven to kill the man who made the advance. In reality, this is homophobia accepted as a (partial) defence to murder.

This defence, known as the homosexual advance or panic defence, has been recognized in

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50 See Côté, *supra* note 17 at 119: file no. 500-01-014200-841 (Montréal).

51 (1983), 7 C.C.C. (3d) 542 (N.W.T.C.A.).

52 *R.* v. *Lane*, [1997] B.C.J. No. 849 (C.A.).

53 The cases usually refer to homosexual "advances." They rarely make any attempt to distinguish between a sexual assault and a sexual advance, although on the facts of some of these cases such a distinction would be warranted. A sexual assault, regardless of the sexual identity of the assaulter, should unquestionably constitute a wrongful act. For an example of a man's provocation defence that was based on an alleged sexual assault by another man see *R.* v. *Valley*, [1986] O.J. No. 77 (C.A.).

54 All of the cases that we are aware of involve allegations of sexual advances by men toward men.

Canadian courts. One of the leading Canadian cases on the defence of provocation, *R.* v. *Hill*,[55] is a homosexual advance case. Although the homosexual advance defence has more often than not been turned down by Canadian juries, the denials of the defence have been due to the implausible facts of the particular cases,[56] and do not signify rejection of the defence. The fact that homosexual advance/panic as an excuse for murder can be left with the jury indicates that homophobia continues to be regarded as a legitimate basis for provocation. There is no way of knowing in how many cases a guilty plea to manslaughter has been accepted on the basis of a homosexual advance defence.[57] In retaining this defence, the criminal justice system demonstrates its empathy for "murderous homophobia."[58]

However, while the courts show empathy for heterosexual males who kill gay men, fueled by homophobic myth and hatred, they may be less able to identify with lesbians who kill in response to aggressive heterosexual advances. In *Emsley*,[59] the Court of Appeal of Alberta affirmed a trial judge's ruling that an advance in such circumstances could amount to provocation, but dismissed the accused's appeal from her murder conviction because it was said that the trial judge was correct in concluding that there was an insufficient temporal link between the advances and her assault upon the deceased. In fact, it was her female lover who commenced the assault upon the deceased, possibly on the basis of his advances towards her.

Whether as victims or offenders, lesbians and gay men are discriminated against; homophobia dictates both the acceptance and the denial of the defence.

1.5 A racist interpretation of the defence

To our knowledge, there are no studies on the recourse to the defence of provocation in reaction to a racist insult by men or women of colour or from First Nations communities. An examination of the reported cases where racist insults were clearly at issue reveals that the courts have rarely shown empathy in this scenario.

In *Parnerkar*, the accused was a South-Asian man who killed his fiancée when she ripped up his letters to her. The son of the deceased testified that she had said to the accused, "I won't marry you because you are black." However, at trial the accused denied having heard this

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55 [1986] 1 S.C.R. 313.

56 See for example *R.* v. *Friesen* (1995), 101 C.C.C. (3d) 167 (Alta. C.A.) in which the accused killed the victim while he was asleep, and *R.* v. *Tomlinson* (Sask. Q.B. 1998) [unreported] in which the accused had successfully rebuffed sexual advances from the victim on a number of prior occasions.

57 Kathleen Banks, in her article "The 'Homosexual Panic' Defence in Canadian Criminal Law" (1997) 1 C.R. (5th) 371, documents one such case.

58 R.B. Mison, "Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation" (1992) 80 Cal. L. Rev. 133.

59 (1980), 21 A.R. 145 (C.A.).

statement. The trial judge had provided the jury with a provocation instruction, and the accused had been acquitted of murder and convicted instead of manslaughter. The Saskatchewan Court of Appeal held that the instruction had been in error, and ordered a new trial, ruling that the tearing of the letters was not a wrongful act and that the insult recounted by the boy would not have provoked a reasonable [white] person. The Supreme Court affirmed the Saskatchewan Court of Appeal[60] decision on the basis that tearing the letter could not constitute provocation and the insult could not be relied upon because the accused did not claim to have heard it.

In the *Olbey* case, the Supreme Court refused to order a new trial so that the defence of provocation could be the subject of a more specific jury instruction, despite the fact that the victim had called the accused a "two bit nigger punk."[61] The Court of Appeal acknowledged that the statement was capable of constituting a provocative insult, but it stated and the Supreme Court agreed, that the defence was unavailable because too much time –five minutes– had elapsed between the insult and the fatal assault. Other constructions of the evidence, including that of Justice Wilson of the Ontario Court of Appeal [as she then was], presented the insult as part of a continuous and escalating confrontation that would have permitted a provocation defence.[62]

It was not until 1986 that the Supreme Court explicitly ruled in *Hill* that the "ordinary person" the *Criminal Code* refers to in s. 232 must not be constructed only as a reasonable male, but must include the perspective of a woman, or a reasonable person of colour, as required by the circumstances of the accused and the nature of the insult. "For example, if the provocation is a racial slur, the jury will think of an ordinary person with the racial background that forms the substance of the insult."[63]

Defence lawyers report that since the *Hill* decision, they are able to invoke outright racist provocation to attenuate the criminal liability of African-Canadian accused in plea negotiations. However, if the courts can identify the explicit racist insult, it is less certain that they can be sympathetic to the accused when the racism is not overt or when the circumstances in which the provocation defence is invoked is "foreign" to them. Indeed, when immigrant men argue provocation the courts seem less likely to extend compassion.

A recent Manitoba Court of Appeal decision in the *Lei* case demonstrates the judicial difficulty in identifying (with) the circumstances that are the basis of the plea of provocation. The accused Lei and his finacee Kwan were Chinese foreign students, in love and engaged to marry. The young man's father objected to this union, flew into Winnipeg, took possession of

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60 *Parnerkar* v. *R.*, [1974] S.C.R. 449.

61 *Olbey* v. *R.*, [1980] 1 S.C.R. 1008.

62 *R.* v. *Olbey*, [1977] O.J. No. 1199 (C.A.) (Wilson, J.A. dissenting).

63 *Hill, supra* note 55 at 331.

his son's passport, and ordered him home to China. As the three of them where in a car, going to the airport, the son tried to get a hold of his passport in his father's travel bag. A battle ensued, and the son stabbed his father to death. The court held that "there was no evidence of a wrongful act or insult of such a nature as to deprive an ordinary person of the power of self control. There was no air of reality to the defence."[64] How can the bench conclude that being "kidnaped," prevented from marrying the person of one's choice, and forcibly taken out of a chosen country of residence are not evidence of some form of "provocation"?

In *Ly*, the British Colombia Court of Appeal refused the defence of provocation to a Vietnamese man who claimed to have lost control when, suspecting that his wife was having an affair, he asked her why she had come home late at night. She replied that it was none of his business, and he strangled her. It was argued that the trial judge should have directed the jury to interpret the objective test from the perspective of an ordinary Vietnamese man's reaction to his wife's conduct. The court ruled that the accused's ethnic origin was not relevant since the wrongful act or insult was not directed specifically against his ethnicity.

The debate on the cultural and ethnic relativity of the objective test raises the thorny issue of the universal application of rights[65] and is beyond the scope of this brief. But at first glance, it would seem that the adoption of a "relative"objective test would run counter to the right of *all* women to benefit from equal protection under the law in accordance with s. 15 of the *Charter*. Cultural relativism would make women even more vulnerable to physical and sexual attacks, and the right of women to physical security would be determined according to the dominant --and sexist– values, behavioral norms, and ideology of the community to which their partners belonged.[66]

But what is troubling with the *Ly* decision, is why was he not successful with the defence of provocation, in circumstances where many white men have successfully argued it? Unfortunately, a violent response by a man to his wife's insubordination is as typical of the ordinary anglo- or franco-Canadian male as it is of the Vietnamese man. And, while we do not support a specific cultural direction on the objective test, we must acknowledge a pattern of withholding "compassion" for a certain category of accused.

1.6 The federal consultation document

To its credit, the federal government has acknowledged the discriminatory use and interpretation of the defence of provocation in the consultation document dated October 1998 and entitled *Reforming Criminal Code Defences: Provocation, Self-Defence, and Defence of Property*. In this document, the Minister of Justice has proposed two options with respect to

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64 *R.* v. *Lei* (1997), 120 C.C.C. (3d) 441 (Man C.A.).

65 C. Bunch and R. Carillo, *Gender Violence: A Development and Human Rights Issue* (Fredricton: Centre for Women's Global Leadership, 1991).

66 St. Lewis and Galloway, *supra* note 35 at 27.

the defence of provocation. The first --NAWL's preferred option-- is to abolish the defence; the second proposes ways of amending s. 232 of the *Criminal Code*.

We share the concerns that were expressed by Action ontarienne contre la violence faite aux femmes, in a brief entitled *"Réforme des moyens de défense visés par le Code criminel: Provocation, légitime defense et défense des biens. Commentaires de l'Action ontarienne contre la violence faite aux femmes"*, dated February 1999, concerning the proposals that were submitted in this second option. We believe that many of them would have a negative impact on the constitutional rights of women. Indeed, they would allow for expanded circumstances in which men may be excused for crimes of violence against women; they will make it easier for men to invoke the defence; and they would further erode the objective limits that are set on the legitimate resort to violence. We believe that these proposals would ultimately be used to further excuse and trivialize violence against women and, more specifically, patriarchal femicide.

1.6.1 Expansion to other motives

The consultation document proposes to eliminate the reference in s. 232 to "in the heat of passion" or "colère," in the French version. This would allow an accused to invoke the defence of provocation not only because his motive was anger, as is now the case, but for any sudden emotional state that arises from the provocation.

Presumably, the defence would therefore be available where a person has killed another out of fear, terror, jealousy, or hatred or "rage." Far from protecting women against violence by dominant and possessive men, this proposal would normalize violent reactions precipitated by an increasingly wide range of difficult emotions. It might also effectively transform the defence of provocation into a defence of diminished capacity, which has always been rejected in Canadian criminal law.

1.6.2 Expanding the temporal space within which the defence can be invoked

At the present time, the defence of provocation can only be invoked if an accused committed the murder "on the sudden and before there was time for his blood to cool," the idea being that otherwise the offender should have had time to regain control of himself. Noting that all people do not react in the same manner in response to provocation and that some people's anger builds over a period of time, the consultation document proposes to eliminate the reference to murder committed "on the sudden." The Minister's document explains that this proposal can be justified by the fact that it would "broaden the defence to abused people, particularly women, who kill after repeated incidents of abuse and provocative insults."[67]

NAWL does not believe that broadening the defence of provocation can be justified on this basis. Abused women who kill their abusers in self-defence or defence of others are entitled

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[67] *Reforming Criminal Code Defences. Provocation, Self-Defence and Defence of Property. A Consultation Paper* (Ottawa: Department of Justice, 1998) at 15.

to the full defence of self-defence, not the partial defence of provocation. The defence of self-defence needs to be reformed to ensure that it fully accounts for the social and psychological reality of the woman in these circumstances. Provocation is not an appropriate construct to respond to the complex emotions and other factors that might motivate someone not acting in self-defence to kill her abuser. These factors can best be taken into consideration in the context of sentencing.

The elimination of the suddenness requirement would make the defence of provocation much more easily available to an accused, and could sometimes be used to excuse premeditated murder. Indeed, it would be difficult to draw a line between acts committed under the effect of provocation and pre-meditated murder, committed to avenge a real or perceived affront.

1.6.3 The subjectivization of the defence

The consultation document proposes to add "subjective elements" to the ordinary person test, "when they bear on the adequacy of the provocation."[68]

This proposal would again broaden access to the defence of provocation by allowing an accused to invoke an unlimited number of personal characteristics (nervousness, fear, intoxication, cognitive difficulties, and presumably culture, beliefs and values), to justify his reaction to the victim's "provocation." This proposal would again facilitate an accused's access to the defence of provocation, since it would become easier to establish that there was indeed adequate provocation.

This impact was recognized in the consultation document: "the expansion of the ordinary person test to include subjective elements, could lower the threshold level of self-control . . . and might no longer provide a reasonable level of protection to all members of society."[69] NAWL forcefully disagrees with this proposal, as it would endanger the right to life, liberty, and security of women.

NAWL believes that the "contextualization" of the objective criteria for the defence of self-defence that was proposed by the Supreme Court of Canada in the case of *Lavallee*[70] already permits a fair appraisal of a reasonable response to provocation.

1.6.4 Appropriating women's tragedies

We note that the expansion of the defence of provocation is systematically justified in the consultation document by invoking the drama of battered women who kill their husbands, and who cannot benefit from the defence of self-defence. It would be ironic if a reform that makes

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68 *Ibid.* at 14.

69 *Ibid.*

70 [1990] 1 S.C.R. 852.

it much easier for men to be excused for crimes of violence against women were to be achieved on the backs of abused women!

NAWL agrees that there are significant problems facing battered women who kill their abusive spouses. But the solution does not reside in an enlargement of the defence of provocation; rather it lies in the careful tailoring of the defence of self-defence in order to respond to the tragic situation in such cases. In this regard, NAWL fully endorses the proposals to amend the *Criminal Code* provisions on this defence that have been put forward by the Canadian Association of Elizabeth Fry Societies (CAEFS) in its brief submitted on the reform of provocation and self-defence.

In conclusion, NAWL considers that the options for reform proposed for the defence of provocation in the federal consultation document risk making it easier for violent men to benefit from judicial compassion for their crimes of violence against women. Such proposals are incapable of guaranteeing the integrity and security of women: indeed, they would exacerbate women's actual vulnerability to male violence. They would have a discriminatory impact by heightening men's sense of entitlement and immunity for their patriarchal violence. They would represent a legislative normalization of violence as an acceptable human response in the face of difficult emotions with which all people must grapple, at one moment or another, in their lives.

NAWL does not believe that the defence of provocation can be reformed or improved.

2. The abolition of the defence of provocation

The abolition of the defence of provocation is presented as one option in the Department of Justice consultation paper. Many feminists have called for the abolition of the defence of provocation in the last five years. For example, in 1995, Action ontarienne contre la violence faite aux femmes submitted a brief to the Department of Justice calling for the abolition of the defence, in the context of an egalitarian reform of the criminal law.[71] In the 1997 National consultations on Violence Against Women held by the Department of Justice, representatives of front-line anti-violence services and national feminist organizations also recommended this option. More recently, two consultations held in 1999 by LEAF and by CAEFS indicated a strong consensus in favor of abolishing the defence.

Feminist activists are not the only ones proposing this option. Indeed, many academics have also come to the conclusion that this defence is not redeemable and must be abolished. In his exhaustive study of the defence of provocation, Jeremy Horder concludes that the doctrine of provocation "cannot survive an attack mounted from the broader perspective of gender politics." He writes "one must ask whether the doctrine of provocation, under the cover of an alleged compassion for human infirmity, simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors and in particular, women's natural

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[71] A. Côté, *Violence against women and criminal law reform: Recommendations for an egalitarian reform of the criminal law* (Ottawa: Action ontarienne contre la violence faite aux femmes, 1995).

aggressors. Unfortunately, the answer to that question is yes."[72] He adds:

> The use of the provocation defence is dominated by men, for whom the use of violence (as often in the first as in the last resort) to secure what Tov Ruach calls a women's "unconditional, unjudgmental, attentive acceptance" is all too commonly regarded as natural or understandable - perhaps even appropriate. It is thus largely from a male-centered perspective that the reduction of an intentional killing from murder to manslaughter is capable of being regarded as a compassion to human infirmity.[73]

He concludes that the defence should be abolished, writing "provocation ought no more to be regarded as inviting personal retaliation than a women's style of dress invites rape. It is one thing to feel great anger at provocation; but quite another (ethical) thing to experience and express that anger in retaliatory form."[74]

Others have also supported the abolition of this defence, including Professor Joanne St. Lewis and Sheila Galloway on behalf of the Ontario Women's Directorate,[75] Professor Adrian Howe[76] of LaTrobe University, the Gibb's Report out of the Office of the Attorney General of Australia,[77] the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General in Australia,[78] the New Zealand Law Reform Committee and the New Zealand Crimes Consultative Committee,[79] the British Columbia Ministry of Women's Equality,[80] an NDP Private Member's Motion,[81] and a Yukon petition to the House of Commons that prompted the Minister of Justice for the Yukon, Lois Moorcroft, to seek a

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72 Horder, *supra* note 35 at 192.

73 *Ibid.* at 194.

74 *Ibid.* at 197.

75 *Supra* note 35.

76 A. Howe, "*Green* v. *The Queen*: The Provocation Defence: Finally Provoking Its Own Demise?" (1998) 22 Melb. U. L. Rev. 466.

77 Attorney General, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (Canberra: Australian Government Publication Service, 1990).

78 See Chapter Five, "Fatal Offences Against the Person" in *Discussion Paper: Model Criminal Code* (Barton, ACT: Attorney General's Department, 1998).

79 New Zealand Law Reform Committee, *Report on Culpable Homicide* (1976); New Zealand Crimes Consultative Committee, *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991).

80 News Release, "Hammell urges federal government to abolish provocation as a defence" (Victoria: B.C. Ministry of Women's Equality, 31 May 1999).

81 See Motion No. 265 to bring in a bill to abolish provocation defence, as discussed in House of Commons Debates, March 3, 1999, May 11, 1999.

review of the defence at the justice ministers' meetings in February 1997. In addition, the Law Reform Commission of Canada in its 1984 Working Paper on *Homicide* recommended a new categorization of murder that would avoid reliance on the defence of provocation: it suggested the adoption of two forms of murder –reckless and intentional murder– with no mandatory minimum sentence for such "ordinary" murders, and acknowledged that "provoked" murders would fall within the intentional murder category.[82] Notably, the defence of provocation was absent from its 1987 report[83] on recodifying the *Criminal Code*.

The patriarchal, sexist, homophobic, and racist interpretation of the defence of provocation by both higher and lower courts in Canada is itself a reason to abolish the defence. In addition, the defence of provocation essentially rests on an approach that blames the victim for male violence. It is founded on the myth of loss of self-control, which has been often criticized in literature on violence against women. And it introduces an unjustifiable bias in favour of anger as an exculpating emotion, when our criminal law has systematically refused to take into consideration other emotions such as fear or compassion.

2.1 Victim blaming

The judicial discourse on women's propensity to "cause" male homicidal rage and men's inability to control their anger is fraught with sexist assumptions that lay the blame for male violence on female behaviour.

Provocation has been a constant theme in a wide-range of crimes of violence against women from rape, to sexual harassment, wife assault and incest.[84] As Dobash and Dobash write: "The idea of provocation is a very powerful tool used in justifying the husband's dominance and control and in removing indignation about his resort to force in securing, maintaining and punishing challenges to his authority."[85]

By placing the focus on the victim's behaviour, the law capitalizes on historic judeo-christian ideologies that blame women for the evils of mankind, and that immunize men from responsibility for their behaviour.[86] The plausibility of the provocation hypothesis in spousal femicide cases rests on sexist assumptions about female maliciousness and male vulnerability. It excludes the real context and dynamic of male domination and patriarchal

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82 *Homicide* (Ottawa: Law Reform Commission of Canada, 1984) at 73-74.

83 *Recodifying Criminal Law* (Ottawa: Law Reform Commission of Canada, 1987).

84 See G. Larouche, *Agir contre la violence* (Montréal: Éditions de la pleine lune, 1985); E. Dobash and R. Dobash, *Violence Against Wives* (London: The Free Press, 1979) at 45; L. Henderson, "Rape and Responsibility" (1992) 11 Law and Phil. 127 at 135.

85 Dobash and Dobash, *ibid.* at 136.

86 Côté, *supra* note 8 at 2; see also A. Côté "Violence conjugale, excuses patriarcales et défense de provocation" (1996) 29 *Criminologie* 89, 93.

violence.

It is particularly distressing to note that in recent case law, women's threat to denounce male violence to legal authorities, whether it be spousal assault or incest, has been interpreted as a form of provocation,[87] despite the fact that s. 232 explicitly states that what one has a "legal right" to do cannot be equated with provocation. This trend in the case law illustrates the incapacity --we say the bias-- of the judiciary to recognize the patriarchal dynamics that are involved in these crimes.

The defence of provocation violates the principle of the rule of law and suggests a bias in the male-dominated judiciary in favour of male accused, which survives decades of egalitarian law reform. From women's perspective, the very existence of the defence of provocation renders us vulnerable to the arbitrary whims of unreasonable men, who have a legal, albeit partial excuse to subject us to abuse based on their personal and self-interested interpretations of events. This partial legalization of private violence is a threat to our constitutionally protected security and liberty interests, and instills a climate of insecurity --sometimes terror-- that is detrimental to the achievement of even symbolic equality for women.

2.2 The myth of loss of self-control

The defence of provocation is predicated on the motion of "loss of self-control," since the accused is considered unable to prevent himself from committing the crime. Legal literature is rife with references to men who became "slaves" to their emotions, under the thrall of a "passion" that dethrones their reason. The language that is used evokes cultural clichés that go as far back as Shakespeare (*Othello*), and that betray a romanticized understanding of the dynamic involved. Indeed, there is a complete absence of psycho-legal support for the defence of provocation. The psychological state of accused in these circumstances does not correspond to any legally recognized form of incapacity or mental disorder.

We argue that the defence of provocation is inherently constructed on a masculine vision of how to deal with difficult emotion and that the defence cannot be redeemed. At its heart, it is a defence that excuses murder when it is "caused" by angry feelings that are produced by the accused's interpretation of his victim's conduct. The defence is premised on the notion that one can "cause" another person to kill. Our criminal law is premised on the understanding that we should be held accountable for our actions and there is no justification for deviating from this principle on the basis of loss of self-control.

Indeed, the "loss of self-control" in issue is not an "involuntary" act, as defined by case law, since the Crown *must* prove that the accused *intended* to cause the death of the victim before the defence can even be invoked. The loss of self-control at issue here is not comparable to the type of involuntary act encompassed by the defence of non-insane automatism, which takes the form of total or partial unawareness caused by a factor other than mental illness. Nor is the mental state contemplated by provocation akin to insanity, where the accused is

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[87] See, for example, *Munroe* and *Stone*, discussed above, *supra* notes 27 and 30, respectively.

incapable of appreciating the nature and the quality of the act he commits, or of knowing that it is wrong.

To the contrary, in the scenario of a murder committed upon provocation, the crime is committed by a person aware of what he is doing, who is overtaken by an unbridled desire to kill. As the American jurist Joshua Dressler writes: "Provocation not only causes anger, it motivates the actor to want to kill the provoker. Proof of adequate provocation does not negative intent. It magnifies it."[88]

In addition, the notion of "loss of self-control" is highly problematic in the context of crimes of violence against women. Indeed, while violent men routinely argue that they lost control of themselves before assaulting an intimate partner, social science research indicates that this type of violence is instrumental, and that it is used precisely to re-establish control over a woman.[89] As Daniel Weler-Lang writes, recourse by men to violence in the context of a spousal relation is a deliberate and conscious process, intended to ensure their control over the women that they have appropriated.[90]

The notion that a man who is angry (because his wife has decided to leave him, has criticized him, or has threatened to report him to the police etc.) "loses control" when he decides to kill is not only a misrepresentation of the facts, but it also feeds into the traditional explanations that have been used to excuse male violence. It is time that legal discourse stopped endorsing myths and stereotypes that have such a detrimental impact on women's constitutionally protected human rights.

2.3 Why excuse anger, but not other emotions?

If there is one rule that is unequivocally accepted in criminal law, it is that the motive for a crime --the reason, purpose, or emotions leading up to a proscribed behaviour-- is not relevant

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88 J. Dressler, "Rethinking Heat of Passion: A Defense in Search of a Rationale" (1982) 73 J. Crim. L. & Criminology 421 at 462.

89 P. Karli, *L'homme agressif* (Paris: Odile Jacob (Points), 1987); R. Gelles, "An Exchange/Social Control Theory of Inter-Family Violence" *in D. Finkelhor et al., Dark Side of Families* (Beverley Hills: Sage, 1983) 51; M. Strauss, "Sexual Inequality, Cultural Norms and Wife Beating" (1976) 1 Victimology 54; E. Gondolf, "Anger and Oppression in Men Who Batter: Empiricist and Feminist Perspectives and Their Implications in Research" (1985) 10 Victimology 311; M. Bograd, "How Battered Women and Abusive Men Account for Domestic Violence: Excuses, Justifications and Explanations" in G. Hotaling *et al.* eds., *Coping With Family Violence: Policy and Perspectives* (Beverley Hills, Calif.: Sage, 1988) 60; E. Adler, "The Underside of Married Life: Power, Influence and Violence" in L. Bowker, ed., *Women and Crime in America* (New York: Macmillan, 1981) 300; J. Dankwort, "Une conception alternative de la violence conjugale: vers une intervention efficace auprès des conjoints violents" (1988) 37 Service social 86.

90 D. Weler-Lang, *Arrêtes! Tu me fais mal! La violence domestique, 60 questions, 59 reponses...* (Montréal: VLB Éditeurs, 1992) at 63.

in determining criminal liability.[91] Thus a person may have thoroughly commendable motives for committing an illegal act and may be without a reprehensible mental state (e.g. someone who steals medication for a sick child), but will nonetheless be found guilty if he or she has intentionally perpetrated the offence. Awareness of the circumstances and foresight as to the consequences are the central elements in the definition of an intentional act. As one author tersely emphasizes "the definition of intention is not an investigation into psychological facts."[92] Chief Justice Dickson of the Supreme Court of Canada --as he was then-- summed up the issue in this way, "motive is no part of the crime and is legally irrelevant to criminal responsibility."[93] There are few exceptions to this rule: courts have occasionally been willing to excuse mischief or theft if committed as a "prank," but they are generally reluctant to do so.[94] And while the *Criminal Code* exculpates acts committed to ensure respect for the law such as self-defence and defence of family members or property, in these cases there is technically no *actus reus*, hence the act is not criminal *per se.* In other words, it is not a case of motive excusing the crime, but rather of specific circumstances in which the act is legitimate and justifiable, not criminal.[95]

The exclusion of motive from any discussion of the guilt or innocence of an accused has very concrete ramifications, since our criminal law will not exculpate crimes committed out of emotions such as fear or compassion. Indeed, the rules governing duress impose a heroic conception of human behaviour: s.17 of the *Criminal Code* states that the defence of duress can never be invoked by a person who commits murder, sexual assault, forcible abduction, or a series of other crimes against a third person, even if the offence was committed under threats of immediate death or bodily harm by someone else. The prohibition on using the defence in such cases is absolute. As Louise Arbour has written "under section 17 of the *Code*, a person must prefer losing his or her life to committing arson."[96]

Similarly, s. 241 of the *Criminal Code* prohibits assisted suicide, and in the *Rodriguez*[97] case,

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91 J. Fortin et L. Viau, *Traité de droit pénal général* (Montréal: Thémis, 1982) at 149; G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983) at 48; J.W.C. Turner, *Kenny's Outlines in Criminal Law,* 19th ed. (Cambridge: University Press, 1966) at 36; G. Cote-Harper et A. Manganas, *Droit pénal canadien* (Cowansville: Yvon Blais, 1984) at 235-36; and J.W.C. Turner, *Russell on Crime*, 12th ed. (London: Stevens & Sons, 1964) at 41.

92 Williams, *ibid.* at 34.

93 *Lewis* v. *R.*, [1979] 2 S.C.R. 821 at 833.

94 M. Wasik, "Mens Rea, Motive, and the Problem of `Dishonesty' in the Law of Theft", [1979] Crim. L.R. 543 at 544.

95 Fortin et Viau, *supra* note 91; *R.* v. *Baker* (1989), 45 C.C.C. (3d) 368 (B.C.C.A.).

96 L. Arbour, "La contrainte sans limites" (1977) 39 C.R.N.S. 264. See also I. Grant, "Exigent circumstances: The Relevance of Repeated Abuse to the Defence of Duress" (1997) 2 Crim. L. Rev. 331.

97 *Rodriguez* v. *British Columbia*, [1993] 3 S.C.R. 519.

the Supreme Court of Canada refused a plea for a constitutional exception to allow a third party to assist a woman with an incurable and fatal illness to end her life. Invoking the sanctity of human life, and the fact that participating in the death of another ---even on request-- is "[i]ntrinsically, morally and legally wrong," the majority of the Court not only confirmed that anyone who ventured to assist Ms. Rodriguez in ending her life could be charged under s. 241, but that he or she could also be prosecuted for murder. Such an uncompromising position does not hesitate to sacrifice compassion in the name of the protection of "public policy."

How can we reconcile the intransigent posture of our criminal law in cases of crimes committed out of fear or compassion, with the readiness to excuse violent crimes committed out of anger? Why does anger benefit from a special status, and not other emotions? This question is deeply troubling, particularly because the emotions that drive men to kill their spouses have nothing noble about them. On the contrary, their anger is constructed on outmoded, sexist, and misogynist values. It is because they believe that they have a right to appropriate a woman's sexuality, labour, and love that these men became angry in the first place. As Horder writes: "Unless there is something morally thought to be mitigating about killing in anger in certain circumstances, there could be no more reason to have a defence to murder focussed on provocation than there could be reason to have a defence focussed on envy, lust or greed."[98]

Furthermore, we should note that crimes of violence committed in anger do not simply result from "human" frailty: indeed it is almost exclusively men who are committing these crimes and given the extremely restrictive interpretation of the defence when women do try to invoke it, it is fair to say that this is a defence that benefits men.

2.4 The difficulty in reforming the defence

Given the historic and current interpretations of the defence of provocation, the underlying inconsistencies between general criminal law principles and the discriminatory effect of the defence on women and other oppressed communities, NAWL is of the opinion that it would be extremely difficult to implement a satisfactory reform of provocation law.

In our view, the only acceptable reform would be to exclude the defence in any circumstances where it would be used to maintain or bolster existing relations of domination, subordination, or inequality. This approach would be consistent with s. 15 of the *Charter* and is one that has been endorsed by St. Lewis and Galloway, for the Ontario Women's Directorate, by Nourse, and by Hyland as well.

St. Lewis and Galloway suggest that, consistent with an equality analysis,

> [t]his approach would assume that the reasonable person would or should have knowledge of and behave consistently with the *Charter*, including ss. 15, 27 and 28. This would mean that in addition to setting out the requirements of the *Code*, the

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98 Horder, *supra* note 35 at 194.

> judge would then make specific reference to the *Charter* and the right of all persons to be free from discrimination on its enumerated grounds, and that the reasonable person is presumed to hold these values or be aware of the legal strictures. The judge would then inform the jury that the behaviour of the victim, as a member of an equality-seeking community as enumerated in the *Charter* and engaged in lawful activity consistent with that membership, does not fall within the definition of "wrongful act or insult" for the purposes of the *Criminal Code*.[99]

Nourse argues that provocation should only be available to protect emotions of an accused that warrant our compassion because they put him or her in a position of normative equality in relation to the victim, and that "[a] strong measure of that equality can be found by asking whether the emotion reflects a wrong that the law would independently punish."[100] This analysis takes her to the conclusion that the defence should not be available for men who kill departing wives or for men who allege that they were provoked by "homosexual advances."

Hyland argues that "[t]he principle of equality requires of everyone that their actions promote equitable relations between and among people," suggesting, for example, that in the context of *Thibert*, "his killing of Alan Sherren was part of an overall effort on his part to maintain his wife in an unequal relationship, and that the use of the defence in this instance would have served that purpose and aided him in evading full responsibility for his actions ... and undermined other dimensions of equality which individuals, especially women, are entitled to have respected."[101]

Using this equality analysis, NAWL suggests that several specific limitations must be imposed upon a reformed defence of provocation. First, it must not be available in cases of violence against women where gender relations are engaged by a man's sexual appropriation of the victim, a sexual relationship between them, or his desire for her. This restriction would encompass not only wife-killing, but the killing of girlfriends, would-be-girlfriends, women working in prostitution, former mates, dates, and common law partners. The definition of violence against women should depend on that provided by the International Declaration on the Elimination of Violence Against Women, UN General Assembly, 1994. Gender-neutral wording must not be used, as this brief has demonstrated that intimate homicide is not gender-neutral, nor is the legal system's rendering of the doctrine of provocation.

Second, provocation must not be available for crimes of homophobia. This restriction would encompass the alleged "homosexual advance" and "homosexual panic" cases, leaving only self-defence for those men who allege a sexual assault by another man.

Third, provocation must not be available to excuse racist anger when it entrenches current

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99 *Supra* note 35 at 16.

100 *Supra* note 19 at 1396.

101 *Supra* note 35 at 165, 169.

patterns of racist supremacy.

These restrictions would leave the defence open in other cases where, for example, women kill abusive men or racial minorities kill in response to racist provocation. The defence should be available only to the extent that it is consistent with an equality-based definition of the ordinary person, which incorporates *Charter* values into the objective test. Can the white legal "fraternity" do this?

2.5 The risks associated with the abolition of the defence

In light of NAWL's belief that in fact, the white legal fraternity cannot implement equality values in the law of provocation, NAWL remains committed to a position favouring abolition of the defence.

NAWL appreciates that there are risks associated with the abolition of the defence of provocation. The removal of this defence to murder means that more individuals are likely to be convicted of a more serious offence, with a substantially increased penalty. The symbolism of abolishing such a long-standing defence may lend weight to an increase in criminal repression, coercion, and law and order initiatives. As well, NAWL is cognizant of the fact that criminal laws are often applied in ways that reproduce systemic racism and criminalization of the poor: the abolition of this defence may therefore have a more profound impact on these groups than on others. In addition, NAWL recognizes that some individual women benefit from the provocation defence through plea negotiations that are unreported in the press or otherwise, and that abolition may thus also negatively affect women as a group as well as racialized people who respond to racism and persons with cognitive disabilities who experience harassment.

With these very real concerns in mind, NAWL makes its recommendation for the abolishment of the defence contingent on the simultaneous abolition of the mandatory minimum sentences of imprisonment for murder and offences involving a firearm.

3. Abolishing mandatory minimum sentences of imprisonment, including life sentences for murder [102]

NAWL believes that feminist analysis must be intertwined with humanist principles in order to think critically about mandatory minimum sentences of imprisonment. As Hélène Dumont notes, the introduction of the 1997 gun control laws, including new mandatory sentences of imprisonment, has been rationalized by the need to control violence, implicitly drawing upon

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[102] The term mandatory life sentence, rather than mandatory minimum sentence, is used in this context, because with respect to first and second degree murder the mandatory minimum penalty is also the maximum possible penalty – life. Hence there is no discretion with respect to the penalty to be imposed, only with respect to the minimum period of imprisonment before eligibility for parole. See *Sentencing Reform: A Canadian Approach, the Report of the Canadian Sentencing Commission* (Ottawa: Minister of Supply and Services , 1986) at 178.

feminist campaigns to criminalize male violence.[103] The association between feminist aspirations for women's freedom and security, equal protection, and equal benefit of the law and the imposition of increasingly repressive criminal sanctions is one that NAWL rejects, preferring to embrace instead a feminism that is also based upon a respect for universal human rights and a politic of humanism.

Mandatory minimum sentences of imprisonment have been the subject of extensive critique by academics and practitioners, as well as by every body appointed by the Canadian government to investigate the issue. According to the Canadian Sentencing Commission reporting in 1987, "In the past 35 years, all Canadian commissions that have addressed the role of minimum penalties have recommended that they be abolished."[104]

In reports issued in 1984[105] and 1987[106] the Law Reform Commission of Canada specifically recommended the abolition of the minimum life sentence for second degree murder. The justification for this position was that murder as an offence encompasses a wide "spectrum of reprehensibility,"[107] and that for all other offences, the law's judgment on the heinousness of a particular motivation is expressed in the sentence meted out by the judge. The Commission therefore argued that at least second degree murder should be brought into line with other offences, and that abolishing the mandatory life sentence would also obviate the need for special rules like the defence of provocation.

Similarly, Judge Lynn Ratushny, after conducting the Self-Defence Review with respect to women convicted of homicide who alleged that they acted in self-defence, recommended the abolition of the mandatory life sentence for second degree murder and instead suggested that a jury be empowered to recommend a sentence less than life imprisonment in certain circumstances.[108] While Judge Ratushny's recommendation also extended only to second and not first degree murder, the justifications she provided apply as fully to both forms of murder.[109]

Granted, there has not been a consensus on the abolition of mandatory sentences for first and

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103 H. Dumont, "Désarmons les Canadiens et armons-nous de tolérance: Bannir les armes à feu, bannir les peines minimales dans le contrôle de la criminalité violente, essai sur une contradiction apparante" (1997) 2 Crim. L.Rev. 43 at 50.

104 *Sentencing Reform, supra* note 102 at 178.

105 *Homicide, supra* note 82 at 68-70.

106 *Recodifying Criminal Law, supra* note 83 at 59.

107 *Homicide, supra* note 82 at 69.

108 Her Honour Judge Lynn Ratushny, *Self-Defence Review: Final Report*. Submitted to the Minister of Justice and to the Solicitor General of Canada, 11 July 1997 at 160-63.

109 E. Sheehy, "Reviewing the Self-Defence Review" (2000) 12 C.J.W.L. forthcoming.

second degree murder. The Ouimet Committee and the Canadian Sentencing Commission, among others, exempted murder from their call for the elimination of minimum sentences because they believed that a consideration of the sentence for murder would raise the issue of capital punishment, which was beyond their mandate.[110]

However, NAWL believes that the arguments for the abolition of mandatory minimum sentences of imprisonment apply, as urgently and as strongly, to murder as to any other offence. The abolition arguments are in many ways more compelling when applied to the mandatory life sentence because the sentence is so extreme and so categorical. Mandatory life sentences should be eliminated along with all other mandatory minimum sentences of imprisonment.

Canada's extremely lengthy sentences for murder[111] have been the subject of much concern internationally, as well as within Canada. The recent dramatic increase in the federal prison population,[112] as well as the extensive documentation regarding the extremely high and discriminatory incarceration rates for Aboriginal people in this country[113] and African-Canadians in Ontario[114] may well be related to mandatory minimum sentencing structures.

There is a great deal of criticism of our over-use of incarceration, in terms of both the imposition of incarceration as a sanction and the length of sentences imposed. Restraint is becoming an increasingly important principle in sentencing. But, in conflict with this trend, mandatory life sentences negate the possibility of even the consideration of restraint, instead giving rise to excessive punishment that with certainty will further swell the ever-growing prison population.

The elimination of mandatory minimum sentences of imprisonment is consistent with current thinking on sentencing and with the directions in which Canada has indicated it wants to move in the context of criminal justice, as evidenced by sections 718.2 (d) and (e) of the *Criminal Code* and the attention being given to restorative justice. How can Canada claim to be seriously investigating restorative justice and to be recognizing the need to pay particular attention to the circumstances of specific offenders, while at the same time retaining mandatory minimum prison sentences and in fact adding new mandatory prison sentences in

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110 *Sentencing Reform, supra* note 102 at 9, 261.

111 "Life Sentences for First Degree Murder (Canada) and International Equivalents" [unpublished]. Prepared by Corrections Directorate, Ministry of the Solicitor General, 1999/03/04.

112 Dumont, *supra* note 103 at note 39 cites a federal report that says that this population increased by 22% in 1990-95 and is expected to increase by another 50% in the next ten years if the trend continues.

113 Documented repeatedly but most recently in the Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (Ottawa: Minister of Supply and Services, 1996).

114 Commission on Systemic Racism in the Ontario Criminal Justice System, *Racism Behind Bars* (Toronto: Queens Printer, 1994) [hereinafter, *Racism Behind Bars*]; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queens Printer, 1995) [hereinafter, *Systemic Racism*].

the face of devastating and virtually unanimous critique?

NAWL takes the position, which will be elaborated upon below, that all mandatory minimum sentences of imprisonment must be abolished, including the new mandatory prison sentences for offences involving firearms as well as the mandatory life sentence for murder. NAWL supports abolition of mandatory minimum prison sentences because they are ineffective: they do not achieve deterrence nor do they highlight the seriousness of the offence; they are contrary to principles of fundamental justice and equality; they constitute cruel and unusual punishment, and lead to arbitrary imprisonment; they conflict with the purposes and fundamental principles of sentencing set out in the *Criminal Code*; they undermine public accountability and increase the power of the Crown; they reduce the number of plea bargains and thereby increase the demands on court time; they intensify systemic racism; and they create pressure for an upward increase in the length of sentences of imprisonment. In sum, mandatory prison sentences cannot be justified and should not be tolerated in a free and democratic country.

3.1 Challenging the rationales for mandatory minimum sentences of imprisonment

Based on debates that have taken in place in the House of Commons and Senate, the Canadian Sentencing Commission attributes two primary objectives to the imposition of mandatory prison sentences – achieving greater deterrence and highlighting the seriousness of the offence.[115] While these are legitimate policy objectives, mandatory minimum prison sentences are notoriously ineffective in relation to either of the stated objectives.[116]

The absence of sustainable rationales for mandatory minimum prison sentences gives rise to speculation that the unstated objective of the retention and expansion of mandatory prison sentences is to calm public panic over (unsubstantiated) perceptions of increased crime rates and heightened violence.[117] As Dumont so eloquently argues:

> L'on dit volontiers que la peur est mauvaise conseillère; par conséquent, ce sentiment ne devrait pas être l'instigateur des lois criminelles tellement il perturbe tout examen rational de la réalité. ...
>
> Le législateur n'a pas à exploiter cette demande de plus de punitivité du public en mettant de côté tout un savoir pertinent sur les méfaits sociaux et économiques de la dureté des peines et sur l'incertitude qu'elles soinet de toute façon bien appliquées

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115 *Supra* note 102 at 177.

116 See P. Stenning, " Solutions in search of problems: A critique of the federal government's gun control proposals" (1995) 37 C. J. Criminology 184 at 189.

117 *Ibid.* See also A. Doob, "Sentencing Reform: Where Are We Now?" in J. Roberts and D. Cole, ed. *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 349 at 355: "The impetus was quite explicitly political: the minimum sentences were imposed as part of an extension of firearms control. All firearms would, eventually, have to be registered and in recompense for this minor inconvenience, the 'bad guys" would get harsher penalties. The government of the day hoped, therefore, to be able to counter the claim that they were punishing only the law-abiding with their gun control legislation."

dans l'administration de la justice criminelle.[118]

The government must not base policy on the "law and order" agenda that is being proposed by the right-wing lobby in Canadian politics. Dumont points out that the new mandatory prison sentences draw their support from public fear and ignorance. By permitting public opinion or political trends to determine sentences, we are leaving questions of momentous and constitutional significance to be resolved by undifferentiated and uninformed opinion.[119] Political expediency cannot be allowed to trammel human rights and justice.

3.1.1 Mandatory minimum sentences of imprisonment do not achieve deterrence

According to the Sentencing Commission, general deterrence is a frequently-cited justification raised for minimum penalties.[120] In the absence of any unequivocal evidence of the effectiveness of prison sentences as general deterrents, deterrence has come under heightened scrutiny and criticism as a sentencing principle. With respect to mandatory sentences of imprisonment, the deterrence argument is particularly suspect.

First, the mandatory nature of imprisonment would have to be generally known in order for it to function as a general deterrent, and the studies cited by the Sentencing Commission demonstrate that most members of the public are unaware of the penalties associated with specific offences, including mandatory minimums, as too are prisoners.[121] The recent trial of Robert Latimer, in which the members of the jury returned a murder verdict and thereafter expressed shock and dismay when they learned that the mandatory penalty was to be life imprisonment, illustrates the point as well.

Second, in order for a mandatory prison sentence to retain its deterrent effect, it would be necessary for the general public to be unaware of the partial defence of provocation, which acts to circumvent the mandatory sentence of life imprisonment. It is unlikely that the general public is aware of these mandatory sentences, but for those who are familiar with them it would seem probable that they are also aware of the excuse of provocation, thereby undermining any possible deterrent effect. In fact, the defence of provocation has such a strong resonance with popular misogynist beliefs that it may more than offset any possible deterrent effect.

Finally, as Dumont illustrates, all of the available evidence suggests that deterrence cannot be and is not achieved through mandatory minimum sentences of imprisonment. In fact, she uses Canada's experience with the mandatory minimum in s. 85 of the *Code* to demonstrate the

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118 Dumont, *supra* note 103 at 45, 56.

119 *Ibid.* at 54.

120 *Sentencing Reform, supra* note 102 at 65.

121 *Ibid.* at 90-91, 181.

erratic results of mandatory prison sentences, given that this section is invoked infrequently by prosecutors and has accomplished no discernible deterrent effect.[122]

3.1.2 Mandatory minimum sentences of imprisonment do not highlight the seriousness of the offence

Highlighting the seriousness of the offence is the primary rationale for imposing mandatory life sentences for first and second degree murder, which are recognized as the most serious criminal offences. However, because murder is so clearly and unquestionably understood to be a serious offence, it is not necessary to impose a mandatory life sentence in order to demonstrate extreme censure. The offence itself through its label, "murder," unequivocally reflects the seriousness of the offence. The label of murder is appropriate and adequate as the symbolic, general statement of society's abhorrence of this particular crime.

The appropriate sentence for the specific offence committed is not a symbolic matter and should be determined based on all of the principles and guidelines that have been developed to ensure fairness, justice, and proportionality in sentencing in this country. With the elimination of mandatory sentences of imprisonment, the seriousness of each specific murder would be reflected in the sentence imposed. It is anticipated that, in the absence of a mandatory life sentence, some murder convictions may nonetheless result in the imposition of a life sentence. Such a result would, presumably, come about because it is the appropriate sentence, not because it is the required sentence.

The rationale of highlighting the seriousness of the offence may have some logic for some specific offences,[123] but it does not apply to murder. For example, drinking and driving was at one time considered socially acceptable and was generally not regarded as criminal behaviour and therefore may have needed a clear statement of denunciation. However, it is ironic that for murder, the one offence that does not need to be highlighted as serious because it is universally regarded as the most serious offence possible, the highlighting rationale continues to be used to justify the retention of a mandatory minimum sentence of life imprisonment.

Further, the provocation defence undermines this rationale by promoting the perception that some murders are less serious than others. While some violent reactions may be more understandable, the resulting murder is no less serious. The crime of murder should not be discounted to manslaughter in order to circumvent the mandatory life sentence. The circumstances of a particular murder may warrant a less harsh sentence, but it is a wrong to the victim and to society to indicate that the crime itself is not a murder.

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122 Dumont, *supra* note103 at 64-65.

123 NAWL does not support any form of mandatory minimum sentences for any offences so does not accept the argument that there is a need to highlight the seriousness of those offences recently recognized as serious offences. The point here is simply that these are the offences for which the logic of highlighting works. Highlighting murder as serious is superfluous.

Finally, as Dumont points out, a mandatory minimum sentence of imprisonment sends the message that all such crimes are equally abhorrent. By imposing a minimum sentence for murder, Parliament is insisting that no murder can ever be punished with a shorter sentence.

In the context of the new mandatory minimum prison sentences for offences using a firearm, it is unnecessary to highlight the seriousness of offences involving firearms: even the gun lobby acknowledges the moral culpability of this use of firearms. Furthermore, in a similar vein to murder, it is inappropriate to attach the serious penalty of a mandatory prison sentence to all such uses and to thereby imply that, for example, a killing using a firearm is necessarily more culpable than a frenzied knife attack.

3.2 Abolishing mandatory prison sentences is mandated by *Charter* principles and by basic principles of sentencing

NAWL argues that mandatory minimum prison sentences offend the *Charter* ss. 7, which requires that deprivations of liberty occur in accordance with principles of fundamental justice because they impose a uniform punishment that does not appropriately reflect the offender's moral culpability. NAWL also believes that mandatory prison sentences violate s. 12 of the *Charter*, which prohibits the imposition of cruel and unusual punishment, by ignoring the individual circumstances of the offender and the specific impact of a mandatory sentence, they produce arbitrary and cruel punishments. NAWL argues that mandatory minimum penalties involving incarceration offends s. 9 of the *Charter*, which prohibits "arbitrary detention," because they impose imprisonment arbitrarily, without regard to the specifics of the offence or offender. Finally, NAWL argues that mandatory prison sentences contradict sentencing principles of equity, proportionality, and restraint.

NAWL contends that mandatory prison sentences violate ss. 7 and 12 of the *Charter* in spite of the Supreme Court of Canada's decision in *Luxton*[124] where it upheld the constitutionality of the mandatory sentence for first degree murder. In that case, the Court focused its attention primarily on the question of proportionality, finding that the mandatory life sentence for first degree murder for offenders like Luxton, who kill intentionally in the course of illegally dominating their victims through specified crimes like forcible confinement, demonstrates "a proportionality between the moral turpitude of the offender and the malignity of the offence."[125]

NAWL suggests that *Luxton* must be read narrowly to apply to the offender and offence at issue in that case in terms of the s. 7 challenge. Relying upon Supreme Court jurisprudence on s. 7 of the *Charter*, Dumont argues that the penalty associated with an offence must be capable of accurately reflecting the offender's degree of moral culpability :

> Même si le législateur peut créer une infraction d'homicide qui entraîne la culpabilité de contrevenats pour le même crime alors que l'un a seulement la *mens rea* minimale

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124 *R.* v. *Luxton*, [1990] 2 S.C.R. 711.

125 *Ibid.* at 721.

> requise et l'autre a plus de turpitude morale, la peine, par contre, doit fluctuer en intensité et être différente pour tenir compte de leur degré différent de responsabilité morale.[126]

Not every person who commits murder will share that degree of moral turpitude that renders a life sentence "proportional" to the crime, as is reflected by the existence of the provocation defence. But beyond provocation, a woman who commits kills a third party under threats of immediate death from a violent mate will still be convicted of murder. Is her moral culpability or turpitude in such circumstances proportionate to a life sentence, or indeed to a murder conviction? The same sentence of life is imposed on the person who kills to collect on life insurance as well as the person who kills to escape a violent marriage, regardless of the difference in moral turpitude inherent in these two motivations for murder. Furthermore, the person who assists the suicide of another can also be convicted of murder, as the Supreme Court of Canada insisted in the *Rodriguez* case, and would also be subjected to the mandatory life sentence. NAWL believes that such a person's moral turpitude is not proportionate to a life sentence.

The new laws regarding the imposition of at least four years imprisonment for the use of a weapon in the commission of an offence also raise the possibility that the sentence will not be proportionate to the offender's moral culpability, in violation of s. 7. For example, accidental and spontaneous killings using a gun will receive at least a four year sentence, regardless of the motive or the context of the offence. Thus, if a man had armed his home with a collection of weapons and had used these weapons to threaten his wife, which is not unusual for men who abuse and control their wives, and she one day used one of these weapons against him, she will be liable to the minimum sentence of four years even though the weapons were not hers, and in spite of a history of wife assault.

NAWL also argues that *Luxton* must not be read as indicating that the mandatory life sentence can never constitute cruel and unusual punishment in violation of s. 12. The s. 12 *Charter* inquiry with respect to a given punishment is focused on an assessment of the impact of the punishment on the individual offender, in light of their specific circumstances.[127] Inevitably, the requirement of a mandatory sentence will mean that some offenders will be sentenced to a term that, in the circumstances of his/her case, constitutes cruel and unusual punishment in violation of s. 12 of the *Charter*. To determine in advance that every and any person who commits first or second degree murder will automatically be sentenced to life imprisonment, regardless of anything to do with the particulars of the crime or the particulars of their own life history or circumstances, is inhumane.

NAWL argues that some mandatory prison sentences have a cruel and unusual impact on offenders. Consider the impact of life imprisonment on Aboriginal women whose life sentences result in loss of their children, their identities as mothers, their intimate

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126 Dumont, *supra* note 103 at 60-61.

127 See *R.* v. *Goltz*, [1991] 3 S.C.R. 485.

relationships, and their Aboriginal communities. Indeed, the Saskatchewan Queens Bench was prepared to find that the sentencing an Aboriginal woman to serving a life sentence at the Prison for Women in Kingston offended her *Charter* rights under ss. 7 and 12, as well as her right to equality under s. 15.[128]

Further, several new cases emerging out of challenges to the new mandatory minimum sentences of incarceration for offences involving the use of firearms suggest that the courts may agree with these constitutional arguments in this context as well. In *Bill*,[129] the British Columbia Supreme Court held that a mandatory four year sentence violates s. 12 where the offence is unlawful act manslaughter based on careless use of a weapon. The Ontario Court of Appeal in *McDonald*[130] held that the mandatory four year sentence can meet s. 12's requirements only if the court can take into account pre-sentence custody. More recently, the Supreme Court of Canada has adopted the position of the Ontario Court of Appeal in *McDonald*, holding that pre-trial custody must reduce the length of even a mandatory minimum prison sentence:

> [S]entences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law. It is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case.[131]

NAWL argues as well that mandatory minimum sentences of incarceration violate s. 9 of the *Charter* by arbitrarily imprisoning convicted persons. The point is that the mandatory penalty prevents the judge from the tailoring the sentence to fit the offence and the offender, and requires the imposition of a sentence that may also be "arbitrary" when compared with the culpability of others involved in the offence.

The U.S. experience of mandatory minimum prison sentencing in the area of drug offences provides many examples of the arbitrary impact achieved by mandatory minimum sentencing. One author recounts a case in which a seventeen year old high school student answered the telephone on behalf of her boyfriend and informed the caller as to how he could be contacted to arrange a drug transaction. She was convicted of a drug offence that carried a mandatory seven year sentence, whereas the dealer himself was able to strike a deal with information to

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128 See, e.g. *R.* v. *Daniels*, [1990] 4 C.N.L.R. 51 (Sask. Q.B.).

129 (1998), 13 C.R. (5th) 103 (B.C.S.C.).

130 (1998), 40 O.R. (3d) 641 (C.A.), discussed in A. Manson, "The Reform of Sentencing in Canada" in D. Stuart *et al.*, *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Thomson, 1999) 457 at 484.

131 *R.* v. *Wust*, [2000] S.C.J. No. 19 at para 21.

sell and plead to a lesser offence for which he was sentenced to five years imprisonment.[132] The author suggests that this gendered dynamic resulting from the mandatory scheme may be systemic, because factors like the impact of battering, the experience of pregnancy, or the role of mothering cannot be accounted for under mandatory minimum sentencing:

> Misplaced equality, or attention to only one factor, undermines the goals of consistent sentences for similar crimes and proportional punishment for different crimes. When judges are prevented from considering such factors as an offender's prior record, the extent of the offender's role in [a crime], or the culpability of the offender, new disparities emerge.[133]

Finally, as the above quotation also illustrates, mandatory prison sentences contravene the fundamental sentencing principles of equity, proportionality, and restraint. A mandatory life sentence is predetermined by the charge. It takes away virtually all judicial discretion in the sentencing of the accused and may produce arbitrary imprisonment. Equity, proportionality, and restraint as sentencing principles must be exercised in each individual case; they cannot be accommodated by a predetermined sentence. While NAWL accepts that the offence must be the primary focus in sentencing, it is fundamental to our system of criminal justice that the circumstances of the offender and of the offence also be given consideration in determining the appropriate penalty.

While some may suggest that the courts are free to develop the notion of a "constitutional exemption" such that, using the *Charter* arguments set out above, some individual accused can be excused from a mandatory minimum penalty on the grounds of, for example, extreme hardship, NAWL believes that this is an inadequate response to the problems posed by mandatory minimum prison sentences. This was the approach taken in the *Latimer*[134] case, currently under appeal to the Supreme Court of Canada. Latimer's alleged motive of alleviating his daughter's suffering on account of her severe disabilities coincided with discriminatory beliefs about the worthiness of the lives of those who live with disabilities, such that the court was willing to constitutionally exempt Latimer from the mandatory life sentence for murder. NAWL suggests that individual solutions for the widespread and systemic inequities posed by mandatory minimum sentences will inevitably produce exemptions for those accused whose causes resonate with dominant accounts of "hardship" and culpability and for those who have the resources to litigate this issue.

NAWL therefore believes that the only just solution is to abolish all mandatory minimum prison sentences. Extreme penalties like those imposed by mandatory minimum sentences of

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132 P. Oliss, "Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines" (1995) 63 U. Cinn. L.Rev. 1851 at 1861 See also fn 69: "it may also have a disparate impact along gender lines. ...For example, many women act as mules for their more culpable husbands and boyfriends."

133 *Ibid.* at 1860.

134 [1997] S.J. No. 849 (Q.B.).

imprisonment should be reserved for exceptional, not usual cases. As Dumont puts it: "en démocratie, la législation d'exception peut constituer un affront à la décence publique si elle devient un instrument régulier de répression."[135]

3.3 Mandatory prison sentences undermine accountability and increase the power of the Crown

Accountability requires that, wherever possible, discretion be exercised publicly and openly. By eliminating judicial discretion, mandatory sentences encourage and magnify the repercussions of the private exercise of discretion.[136] The sentencing discretion that should reside in the judge, be exercised in the open court room, and be subject to appellate review, is usurped by Crown Attorneys and police in deciding which charge to lay or which charge to accept a plea to. These momentous decisions are undertaken without any possibility of public scrutiny and with no assurance that basic *Charter* values like equality will be respected. The existence of the mandatory prison sentence greatly enhances the Crown's bargaining position and puts the accused in a very vulnerable position.

The U.S. experience with mandatory minimum sentencing that relies upon imprisonment should warn us of the serious risks that go with increased prosecutorial discretion in the absence of public scrutiny and accountability. According to the Sentencing Commission's report to Congress in 1991, *Special Report to the Congress: Mandatory Minimums in the Federal Criminal Justice System*, "plea bargains are used to circumvent clearly applicable mandatory minimums in more than a third of the cases studied."[137] It also found that mandatory minimum charges are filed "unpredictably": "Overall, the Commission's empirical data indicated, defendants do not receive mandatory minimum sentences in approximately 41 per cent of the cases where they appear to be warranted."[138] The Canadian Sentencing Commission has also noted that many provincial prosecutorial guidelines have developed that permit avoidance of mandatory minimum penalties.[139] Thus the mandatory minimum prison sentences do not produce either more certainty or uniformity in punishment: they simply shift the discretion from the public role of the judge to the private arena controlled by prosecutors.

This expanded area of prosecutorial discretion creates new forms of power and dominance. It provides a weighty leverage for prosecutors to hold over accused persons, and the U.S. legal literature is replete with examples of abusive exercises of this authority. A common abuse is the pursuit of mandatory minimum charges against low level criminal actors –often women

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135 Dumont, *supra* note 103 at 55.

136 *Sentencing Reform, supra* note 102 at 187-88.

137 H. S. Wallace, "Mandatory Minimums and the Betrayal of Sentencing Reform" (1993) 40 Fed. Bar New & J. 158 at 160, quoting the report at ii, 58.

138 *Ibid.* at 161.

139 *Sentencing Reform, supra* note 102 at 65.

and other relatively powerless persons– while charges against more culpable offenders are bargained away or "down" to less serious offences because they have information to exchange for guilty pleas to lesser offences.[140]

In the Canadian context, we already have hard evidence that the mandatory life sentence for murder creates injustices in the prosecutorial and trial processes for battered women on trial. Judge Lynn Ratushny in her Self-Defence Review conducted pursuant to Terms of Reference issued by the Solicitor General and the Minister of Justice, concluded in her final report that certain convicted persons should be exempted from the mandatory sentence for second degree murder in specific circumstances and upon the recommendation of the jury. She identified a category of accused women through her review who were unable to avail themselves of legitimate claims to self-defence and instead accepted to plead guilty to manslaughter so as to avoid trial. These women may well have been acquitted had they been able to persevere to trial, but they were at risk, if self-defence failed for whatever reason, of receiving a mandatory life sentence of imprisonment. Judge Ratushny concluded that "systemic forces" curtailed these women's access to the defence of self-defence and that it was therefore unjust and inappropriate to impose a mandatory life sentence upon this group. Instead, she urged the government to create a new mechanism to allow the jury to recommend to the trial judge that such a person serve a sentence less than life imprisonment if convicted of murder.

Concerns about fairness, justice, and equality in the exercise of behind-the-scenes discretion on first and second degree murder charges and plea bargains cannot be addressed except by bringing the discretion into a public forum: that is, into the sentencing process.

3.4 Mandatory minimum sentences of imprisonment reduce the number of plea bargains overall and increase the demands on court time

In spite of the fact that mandatory minimum prison sentences increase the pressure on accused persons to plead guilty and the finding of an earlier Canadian study that lawyers believed that the old mandatory minimum sentences increased the likelihood of a plea bargain,[141] the more recent U.S. experience suggest otherwise. The uneven impact of prosecutorial discretion appears to result in an overall reduction in the number of cases resolved through plea bargains and in a massive increase in the prison population. One study of several reporting on this phenomenon remarks: "Even defendants who have little doubt of the likelihood that they will be found guilty are more likely to take their chances on a trial when faced with the possibility of a lengthy minimum sentence."[142] Criminal law experts here in Canada voice the same opinion regarding the impact of increased numbers of offences

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140 *Ibid.* at 160; see also Oliss, *supra* note 132 at 1861.

141 *Sentencing Reform*, *supra* note 102 at 180.

142 Federal Courts Study Committee, *Final Report* (2 April 1990) at 134, as quoted in Wallace, *supra* note 137 at 163.

carrying a mandatory minimum sentence of imprisonment.[143]

In light of the fact that even marginal changes in the guilty plea rate produce enormous trial time increases and system costs,[144] NAWL suggests that not only do the new mandatory minimum prison sentences cost more than meets the eye, but they also increase the risk that through delay, accused's fair trial rights will be violated and prosecutions stayed. Thus abolishment of all mandatory minimum sentences of imprisonment, including those for murder, will carry some unexpected positive consequences.

3.5 Mandatory minimum sentences of imprisonment intensify systemic racism

U.S. experience also shows that racial minorities can expect to receive the brunt of mandatory minimum jail sentences: "Whites are less likely to be indicted or convicted at the indicated mandatory minimum level, more likely to plead guilty, and more likely to receive a 'substantial assistance' reduction."[145] Canada already has evidence supporting the proposition that prosecutors' exercise of discretion with respect to level of charges, choice of summary or indictable process, position on bail, and sentencing evince patterns of systemic racism against African-Canadian accused and in favour of white accused.[146] The statistics regarding charging and bargaining practices for Aboriginal accused likewise suggest that the increased significance of prosecutorial decisions regarding charging and bargaining will have a negative impact on the incarceration rates of Aboriginal offenders in Canada, which already constitute a crisis.

Ironically, the new mandatory minimums in the U.S. were partly based on an argument that they would level out sentencing patterns that clearly discriminated against African-American offenders.

3.6 Mandatory minimum prison sentences create pressure for an upward increase in the length of sentences of imprisonment

Dumont convincingly argues that the new mandatory minimum prison sentences for offences using firearms will, inevitably, create a trend toward increased punitiveness overall in sentencing. She argues that judges will, and must, use the principle of proportionality to sentence offenders, even in the context of these new minima. Therefore, she argues, if even an accidental homicide using a gun must be sentenced to at least four years imprisonment, an assault involving intentionally inflicted, multiple knife wounds should be sentenced more severely, even if a sentence of less than four years would have been imposed prior to the new

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143 Manson, *supra* note 130 at 484.

144 *Final Report, supra* note 142 at 137, as quoted in Wallace, *supra* note 137 at 163: "even a 5 percent reduction in guilty pleas means 33 to 50 percent increase in trials."

145 Wallace, *ibid.*

146 *Systemic Racism, supra* note 114 at 143, 145-46, 192, 265-81,

legislation. Dumont concludes that by creating a new mandatory minimum threshold of four years imprisonment for certain offences, the legislation distorts prior sentencing patterns.[147] In the context of murder and the current mandatory life sentence, the period of parole ineligibility is clearly affected by the minimum sentence as well as the specific *Criminal Code* provisions on parole ineligibility for first and second degree murder.

3.7 The defence of provocation undermines the rationale for the minimum sentence of life imprisonment

The existence of the provocation defence undermines any rationale for a mandatory life sentence for murder. The whole point of a mandatory sentence is that it is neither negotiable, nor subject to mitigating factors: it is clear; it is certain; it is inevitable. But, given the partial defence of provocation, it is none of these things. Whatever deterrent and/or symbolic value the mandatory sentence may have, if any, is totally negated by the existence of the defence of provocation.

The defence of provocation is a partial, but woefully inadequate, arbitrary, and unjust response to the serious concerns regarding differing levels of offence seriousness, offender culpability, and the proportionate impact of sentences on different offenders. As the sole and highly circumscribed means to circumvent the harshness of mandatory sentences, provocation is simultaneously under- and over-inclusive.

Provocation constitutes clear acknowledgment that the mandatory life sentence is, in some circumstances, unduly harsh. But the defence severely restricts the circumstances in which undue harshness can be recognized and responded to. This necessarily raises questions relating to whether provocation is the sole relevant mitigating factor or even an appropriate mitigating factor, questions discussed above in relation to provocation.

Once it is admitted that one mitigating factor is relevant in sentencing for murder, there is a heavy onus on government to ensure that this is truly the only relevant mitigating factor. This burden the government cannot meet. This question of relevant and appropriate mitigating factors is a matter that should be left to the sentencing judge to determine on an individual basis in light of all the circumstances and factors presented.

With the elimination of the mandatory sentence for first and second degree murder, a non-discriminatory understanding of provocation would take its rightful place as a factor to be considered, along with other mitigating and aggravating factors, in assessing the appropriate sentence for the specific crime for which this particular accused has been convicted. This is the role that provocation plays with respect to any other offence under the *Criminal Code*; it is the appropriate role with respect to murder as well.

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147 H. Dumont, "De la Loi C-41 à la Loi C-55: la détermination de la peine avec une main de fer dans un gant de velours" in P. Healy and H. Dumont, eds. *Dawn or Dusk in Sentencing* (Montréal: Éditions Thémis, 1997) 83 at 100-01.

NAWL requests that Parliament review its classification scheme for sentencing in relation to mandatory minimum sentences in light of *Charter* guarantees, the empirical evidence relating to mandatory minimum sentences, the fundamental principles of sentencing, and current insights into sentencing reflected in academic and judicial writing. The infusion of equality values into the *Code*'s sentencing framework would be far more effective and appropriate than mandatory minimum sentences as a way of denouncing violence and treating accused persons fairly and with justice.

4. Addressing the potential risks of abolishing mandatory prison sentences

Abolition of the mandatory life sentence will place the sentencing for a first or second degree murder conviction fully within the discretion of the presiding judge. It will also rid the law of the special, more punitive parole rules for first and second degree murder. While NAWL believes that abolition is vastly preferable to the current mandatory life sentence, there are risks that discretion in sentencing and parole will be exercised in ways that reflect biases against disadvantaged groups in our society.

With respect to the implications for sentencing of abolishing the mandatory life sentence of imprisonment, NAWL is extremely concerned about the exercise of discriminatory discretion in sentencing. The racism of our criminal justice system has been clearly and unequivocally documented. One piece of this systemic racism is the disproportionately high sentences received by people of colour and Aboriginal peoples. In addition, male offenders convicted of crimes of violence against women receive disproportionately low sentences when, for example, they succeed with the provocation defence to reduce murder to manslaughter and then use "provocation" as a mitigating factor at sentencing.[148] The provocation discussion in this brief also indicates that homophobia may permeate practices around the prosecution and sentencing of homicides of gay men.

The public response to the *Latimer* case also gives rise to the concern that the abolition of the mandatory life sentence may lead to unduly lenient sentences for those convicted of murdering a disabled person. The prospect of widening judicial discretion is understandably infused with uncertainty and scepticism for those groups who have to date fared so badly at the hands of judicial discretion.

Further, it is clear that unless addressed directly, the underlying patriarchal value system that supported the defence of provocation will re-emerge in new doctrines of criminal (ir)responsibility such as no intent based on "rage" and through the practices of mitigation of sentence.

It would be a terrible irony if the mandatory life sentence were abolished in the name of fairness and justice, only to be replaced by a situation in which group-based bias and injustice were allowed free rein under the mantle of judicial discretion. It is critical that the abolition of the mandatory life sentence be accompanied by the introduction of sentencing guidelines

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148 See *Stone, supra* note 30.

designed to require equity, fairness, and non-discrimination in the exercise of judicial discretion in the context of sentencing.

With respect to parole, while other convicted offenders have their parole eligibility determined by the length of their sentence, persons convicted of murder face much longer, mandatory periods of parole ineligibility: for first degree murder it is twenty-five years, with only a very remote chance under s. 745 of the *Criminal Code* that it will be shortened, after at least fifteen years; for second degree murder it is ten years, with the possibility that, with or without a jury recommendation, it will be raised even higher by the judge to somewhere between ten and twenty five years. In the absence of a mandatory life sentence, parole eligibility for a life sentence would generally be seven years.

The abolition of lengthy mandatory parole ineligibility rules for murder opens up the possibility of parole decisions that display the same problems as sentencing. For example, the research commissioned by the Ontario Commission on Systemic Racism in the Criminal Justice System exposed systemic racism in the provincial parole process in the form of stereotypes and communication barriers for Black prisoners.[149] Michael Mandel's work has identified a bias against property offenders and against poor offenders, and a bias in favour of violent offenders and corporate or white collar offenders.[150] Furthermore, some attention to the special parole risks posed by extremely violent, repeat killers may be needed as well in a new parole regime.

4.1 Egalitarian sentencing principles

In order to avoid the distortion of sentencing discretion by discriminatory biases, NAWL proposes that a new section be added to s. 718 of the *Criminal Code* that instructs judges to apply sentencing principles, and particularly aggravating and mitigating factors, in accordance with the equality mandate contained in s. 15 of the *Charter*. New law is needed to guide the discretion of judges who will, upon the abolition of the mandatory minimum prison sentences, embark upon sentencing for murder for the first time.

Such a reform is not without precedent. The 1992 sentencing reforms contained in Bill C-41 in 1995 set out many general principles that guide sentencing, including, for example, the notion that the sentence should be aggravated if the offence was motivated by racial hatred or bias.

However, it is clear that the sentencing law of 1995 has given rise to numerous difficulties and disparities. First, there has been a marked tendency for judges to use conditional

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149 *Systemic Racism, supra* note 114 at 325.

150 M. Mandel, "Democracy, Class and the National Parole Board" (1984-85) 27 Crim. L.Q. 159.

imprisonment for violence against women and children,[151] but a resistance to using this new sentence for property offenders[152] and for violence by agents of the state such as police officers.[153] NAWL believes that sentencing principles informed by an equality analysis would add consistency and credibility to the judicial resort to this new sentencing option.

Second, the gender neutrality of the new guidelines also has produced what NAWL would call unjust results. For example, the aggravating principles of breach of trust and abuse of a spouse have been used to justify a sentence of incarceration for an Aboriginal woman who killed a man who had several times engaged in serious violence against her.[154] In other words, the gender neutrality of the principles allows distortion of the social reality such that women who kill violent mates are themselves cast as the "abusers" deserving of an aggravated sentence to reflect their "breach of trust." NAWL calls for the insertion of s. 15 principles into the aggravating and mitigating factors so that the broader context of women's inequality will inform a principled view of the facts at issue.

Finally, with the abolition of provocation and the mandatory minimum sentence for murder, NAWL recognizes that the excuse of provocation will creep back into the mitigation of sentence and that our systematic undervaluing of the lives of women, racialized people, and people with disabilities may result in discriminatory sentencing patterns based on the identity of the deceased victim.

To prevent this infusion of bias at the sentencing stage, the sentencing principles must be tempered by equality principles. Relations of domination and subordination, viewed in the larger social, legal, and political context should inform when and how we use our "empathy" to mitigate sentence. One who kills from a position of dominance, who invokes discriminatory beliefs to justify the homicide, or who suggests that a victim's life was somehow less valuable because of their subordinate position, must not be allowed to claim "mitigation."

4.2 Creating a New Parole Regime for Murder

NAWL believes that the abolition of the mandatory life sentence for murder should include abolition of the lengthy mandatory periods of parole ineligibility currently in place in the *Criminal Code*. Murder should, generally, be treated like other offences and parole eligibility should depend upon the length of the sentence actually meted out by the judge.

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151 See, for example, four of the five cases before the British Columbia Court of Appeal on the availability of conditional sentences of imprisonment that involved sexual or indecent assault: *R.* v. *Ursel*, [1997] B.C.J. No. 1853 (C.A.)

152 See *R.* v. *Virdi*, *ibid.*

153 *R.* v. *Deane*, [1998] O.J. No. 3578 (Prov. Div..).

154 *R.* v. *Gladue*, [1999] 1 S.C.R. 688.

In the case of a decision to impose a life sentence, a judge should hear a jury recommendation as to parole eligibility, and should be empowered to lengthen the period of parole ineligibility beyond the seven year norm. In such a case, the burden of proof should be on the prosecutor, the jury should be required to provide reasons for its recommendation, and the judge's decision to raise the period of parole ineligibility beyond seven years must be subject to review for *Charter* violation. Currently, the *Corrections and Conditional Release Act* permits the sentencing judge to require that certain violent offenders serve a longer proportion of their sentence prior to parole eligibility -it can be raised from one third up to one half[155]- but the question remains as to how much higher than one half a judge should be able to raise the period of parole ineligibility for murder.

Another component of a new parole regime for murder would be the amendment of the *Corrections and Conditional Release Act* to mandate the inclusion of an equality guarantee as a component of the disposition of individual parole applications and of broader reviews of parole practices and outcomes. Furthermore, to ensure transparency and accountability of the Parole Board for compliance with the equality guarantees in the *Charter*, parole decisions must be subject to automatic judicial review in the case of potential *Charter* violations. In addition, some thought needs to be given to the creation of a legal structure that would ensure transparency and accountability for discriminatory decisions, processes, and patterns in the context of parole determinations.

4.3 Abolishing the emerging common law defence of rage

NAWL believes that the government must act now to abolish, through amendment to the *Criminal Code*, the common law doctrine of "rage." This doctrine has been used as an alternative to the provocation defence where men cannot meet the legal requirements of the provocation defence. The defence of "rage" thus has posed the potential for violent men to avoid what few constraints there are on the defence of provocation by simply arguing, in the alternative, that they were so overcome by the experience of "rage" that they failed to form the intent to kill.

NAWL argues that framing "rage" in this way essentially re-casts it as a matter of intent as opposed to a motive. In fact, male "rage" in the context of intimate femicide is a product of social relations of women's oppression and men's sense of entitlement to control their female partners. NAWL believes that re-casting men's rage as a no intent defence is even more dangerous to women than the defence of provocation since it suggests that those people in a state of rage do not intend their actions, whereas the defence of provocation acknowledged the intention but excused it on "compassionate" grounds.

The abolition of the defence of provocation would be defeated by common law developments such as rage were the government not to take legislative action to prevent lawyers and judges from relying on such pernicious doctrines as "rage." NAWL suggest that a section of the *Criminal Code* could be drafted that precludes reliance on extreme anger or rage as a defence

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155 S.C. 1992, c. 20, s. 120(1).

to either the physical (*actus reus*) or mental (*mens rea*) aspect of the offence, similar to the wording that prohibits the use of evidence of "extreme intoxication" in s. 33.1 of the *Criminal Code*.

4.4 Implementing other measures to buttress women's equality rights

In addition to abolishing provocation and rage as defences and drafting an equality-driven sentencing principle, there are other important government initiatives that must be undertaken if the government is to fulfill its *Charter* obligations. NAWL recommends that it provide funding for full legal representation, at all levels of the proceedings against an accused, for women who survive male violence against women. The government must also provide full and extensive services for victims of violence against women that are adapted to the needs of diverse communities of women. NAWL recommends that the government provide mandatory training for judges on violence against women, racism, sexism and other past and current, legal and judicial biases. It must also develop effective programs to prevent violence against women. Finally, NAWL recommends that the government support a feminist revision of punishment and incarceration.

5. Reforming the defence of self-defence

NAWL supports the recommendations made by the Canadian Association of Elizabeth Fry Societies with respect to reform of the law of self-defence. These recommendations require, from the federal government, a commitment to funding or doing the research about the use of self-defence in the context of intimate femicide and homicide; pursuit of a consultation process with national women's groups that work on male violence against women; federal leadership in implementing the recommendations from the Self-Defence Review; specific reforms to the substance of the defence of self-defence that will respect and promote women's equality rights, including the rights of racialized women, Aboriginal women, lesbians, and women with disabilities; and procedural reforms that dictate when and how a judge should present self-defence to the jury.