PROVOCATION AND MANDATORY LIFE IMPRISONMENT

It came home to me that the provocation defence had fallen into disrepute when a student in a criminal law class other than mine approached me, dismayed at the rumour that I still supported the provocation defence. My own students may also be dismayed, but they know that I always link defences with dispositions. There are plenty of problems with the provocation defence, but it is often better than mandatory life imprisonment.

The provocation defence obviously needs updating. Its reference to acting in the heat of passion, and before there is time for the accused’s passion to cool, sounds more like a bad romance novel than the measured tones of the homicide provisions of our Criminal Code. The Department of Justice is to be congratulated on reviewing the defence. What is troubling, however, is that they also seem not to be linking the defence with the disposition of mandatory life imprisonment.

The simple abolition of the defence of provocation without more would result in sentencing people to life imprisonment even though they killed in extraordinary circumstances highly unlikely to reoccur. Most killers who act in anger because of provocation are not as sympathetic as Robert Latimer was to the jury that recommended leniency. Nevertheless, the Latimer case illustrates the difficulty of imposing mandatory life imprisonment on a person who acts inappropriately in extraordinary circumstances.

If the provocation defence was abolished, something like third degree murder without a mandatory penalty would have to be introduced for murders in extenuating circumstances. Such vague language, however, would do little to alleviate the legitimate concerns of those who want to minimize the danger of sexist and homophobic prejudices influencing the decisions of juries, not to mention judges and prosecutors. In any event, a defence lawyer bound and determined to exploit such prejudices can always argue provocation going to mens rea.

A somewhat less drastic option would be to abolish provocation for all spousal homicides. Although most spousal homicides involve men killing women, some do involve women killing men. Both the Ratushny Self-
Defence Review and the Working Group on Provocation have revealed that women can qualify for the provocation defence and that the deceased's wrongful act or insult may arise in the context of an abusive spousal relation. In the sexual and spousal assault contexts, law reform has attempted to focus on assaults divorced from the larger relational context. Provocation, like self-defence and sentencing, however, remains a vehicle for considering the relational context of violence.

Much of the public outcry about provocation is driven by manslaughter sentences in the range of four to five years. More consideration needs to be given to the fact that our new sentencing law speaks directly against possible prejudices that could discount violence against women or gay men. Section 718.2 clearly instructs judges to increase sentences for offences involving spousal or child abuse, hate based on sex or sexual orientation or an abuse of a position of trust and authority. The answer in many cases may be proper sentencing after a successful provocation defence, not the abolition of the defence.

Proper sentences for manslaughter alone may not be enough and another way to counter sexist and homophobic prejudices would be to specify certain acts that would be deemed in law not to constitute provocation. This would follow the approaches used in both Bills C-49 and C-46. Words that only conveyed that the deceased was leaving the relationship and/or that he or she was or was not sexually attracted to the accused should be deemed not to constitute provocation. It would go too far to conclude that all expression could not constitute provocation. Reasonable people will disagree about whether taunts about past inadequacies and infidelity should be categorically excluded. Such an amendment could be re-enforced with a preamble proclaiming the right of everyone to the equal protection of the criminal law. This is a legitimate principle even if the equality rights of the Charter may not technically apply.

The ordinary person standard should be preserved, but following Justice Wilson's dissent in *Hill*, the accused's characteristics (with the exception of age) should only be considered in determining the context of the insult and not the level of self-control that is expected. The majority in *Thibert* appeared headed in this direction, but like Justice Dickson in *Hill*, somewhat sloppily left room for the accused's gender to be considered when determining the appropriate standard of control. If male stereotypes of aggression and homophobia and female stereotypes of passivity are not to be reproduced in the law, gender must clearly be deemed irrelevant to the level of self-control that society expects.

Replacing the reference to wrongful acts or insults with the narrower notions of wrongful acts would go some way to collapsing the distinction between provocation and self-defence. Provocation is an excuse to be partially pardoned without a whiff of justification or praise. At the same time, there is something to be said about following the trajectory of self-defence by abandoning notions of suddenness or imminence which seem to be based on the problematic paradigm of a bar room brawl.

There is much in the defence of provocation that needs to be reformed.