WOMEN'S LEGAL EDUCATION AND ACTION FUND

A Feminist Perspective on Provocation in Criminal Law: Further Steps Towards the Implementation of Equality Rights in Criminal Law
(Background Paper and Consultation Report)

prepared for LEAF by
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December 1999

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Executive Summary: The LEAF national consultation on the defence of provocation, held in July 1999, examined the defence within the context of equality principles with particular attention to the actual impact of the present law and the proposed changes on members of diversely situated groups in Canadian society. The consultation determined that egalitarian principles and objectives require a comprehensive legislative reform package encompassing the abolition of the defence of provocation, the expansion of the statutory grounds on which the defensive or protective use of force is recognized to be justified to ensure that the defence reflects substantive Charter values, the abolition of mandatory minimum sentences for murder, the enactment of judicial sentencing guidelines for murder and manslaughter cases to ensure that sentencing discretion is exercised in accordance with criteria established with reference to Charter values, and, accordingly, consistent with that objective, the inclusion in those guidelines of the principle that a sentence should be increased where the offender was motivated by a desire to exercise control over the victim or the victim's conduct, or by hatred, bias, or prejudice based on sex, ethnicity, religion, colour, national origin, language, mental or physical ability, sexual orientation, social or political beliefs, cultural practices, or analogous characteristics.

The specific recommendations adopted by consensus at the consultation on the defence of provocation were:

(1) that the defence of provocation be abolished;

(2) that no additional substantive partial defences be enacted that provide for mitigation of sentence by reduction of a conviction from murder to manslaughter where commission of the offence was motivated by human emotions such as compassion, fear, or despair;

(3) that the defence of self-defence be simplified and the interests that justify the defensive use of force be expanded to include protection of personal security, including but not limited to coercion by physical force or threats of physical force, on the ground that such an expansion is required to achieve substantive equal liberty and security for all, irrespective of gender, race, ethnicity, sexual orientation, religion, etc., as guaranteed by sections 7 and 15 of the Charter, and is thus required to achieve an interpretation and application of the law of self-defence that is consistent with Charter values;

(4) that legislated guidelines be enacted for murder and manslaughter cases to ensure that sentencing discretion is exercised in accordance with criteria established with reference to Charter values, and, accordingly, consistent with that objective, that those guidelines include the principle that a sentence should be increased where

the offender was motivated by a desire to exercise control over the victim or the victim's conduct or by hate, bias, or prejudice based on any of the aggravating factors specified, or analogous to those specified, in Section 718.2(a)(i) of the *Criminal Code*, that is, race, sex, national or ethnic origin, language, colour, religion, age, mental or physical ability, sexual orientation, political and social beliefs, or cultural practices, and, on the coming into effect of these guidelines, that the present mandatory minimum sentences for murder be abolished; and,

(5) that women across Canada engage in a comprehensive examination and evaluation of the nature and purpose of criminal conviction and punishment, and of the assumptions and beliefs on which current sentencing and correctional practices are based, with a view to the development of a fundamental reconceptualization of: a) the framework within which the criminal law power of the state operates; b) the objectives of the criminal law; and, c) as need be, the methods used by the state to attain those objectives; and that the federal government provide funding for this project.

Introduction: Objectives of the Consultation Process

The consultation on provocation conducted by LEAF in the Summer 1999 was initiated by the Violence Sub-Committee of the National Legal Committee of the Women's Legal Education and Action Fund with the financial support of the Court Challenges Program. The central focus of the consultation was the law of the defence of provocation. The purpose of the consultation was to ensure that the policies developed by LEAF on provocation, self-defence, and sentencing, viewed as equality rights issues, are informed by the experience and the considered views of a diverse group of women with expertise in this area. In further support of this objective some members of the National Legal Committee and the Violence Sub-Committee also participated in the national consultation on this subject sponsored by the Canadian Association of Elizabeth Fry Societies and held in Ottawa on July 9 and 10, 1999.

The discussions at the July 29, 1999, LEAF sponsored consultation in Toronto are reflected in this Consultation Report and will form part of the basis for any policies ultimately adopted by the National Legal Committee of LEAF on the law of provocation and self-defence and related sentencing issues. The consultation discussions will also serve to inform decisions made by the National Legal Committee about case development and case selection in cases where the issues to be litigated involve provocation, self-defence, or mandatory sentences.

The impetus to undertake consultations on these issues at this particular time was provided by law reform initiatives taken by the Federal Department of Justice (Canada). In 1998 the Department issued a Consultation Paper entitled "Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property" accompanied by a general call for comments. In July 1999 the Department advised that draft legislation to enact changes to the Criminal Code, amending or abolishing the defence of provocation and amending the law of self-defence, would be introduced in Parliament in the Fall 1999 or soon thereafter. The National Legal Committee of LEAF will endeavor to submit comments and recommendations on legislative reform of the defence of provocation to the Federal Department of Justice (Canada) as soon as reasonably possible, and will comment on the draft legislation when it is ultimately introduced in Parliament. In both instances the submissions made to the Federal Department of Justice (Canada) on behalf of LEAF will be based on the July 1999 CAEFS consultation, on this Report about the July 1999 LEAF consultation, and on subsequent research by, and discussions among, members of the National Legal Committee.

The first section of this document was originally prepared as a discussion paper to provide background information and outline some of the key issues for the purpose of the LEAF consultation held July 29, 1999. The purpose of the discussion paper was to stimulate reflection and provoke discussion among participants at the consultation. The contents of the discussion paper portion of the document do not indicate, and should not be taken to indicate, that LEAF had already formulated a policy position prior to the consultation or that LEAF necessarily endorsed or endorses all or some of the provisional views expressed in that background discussion. Nonetheless it is reproduced here because it provided part of the framework within which the consultation took place and is therefore presumed and referred to in the Report on the consultation.

Section 1: The Background Discussion Paper.

Re-examining the Theoretical Framework: Feminist Analysis of Violence and Inequality.

The use of violence, physical force and other forms of power, to coerce, to intimidate, and to control women, is common in Canadian society. Violence and threats of violence are widely employed to maintain, to affirm, and to reinforce both the fact and the perceived legitimacy of social and legal inequalities based on gender. The elimination of violence and omnipresent threats of violence against women in Canada is therefore essential for the establishment and full development in Canada of legal, cultural, and social arrangements and conditions consistent with principles of sex and gender equality.

Equality principles and feminist equality theory oppose abuse of power in all inter-personal relationships of any type. In recent years Canadian jurisprudence dealing with the use and abuse of power has undergone significant development as the judiciary has began to re-examine and delineate the contours of domination and exploitation within the framework of the

constitutional guarantees in the Charter and under the influence of developments in international human rights law. But what is and is not commonly understood by Canadians to constitute an "abuse" of power remains largely a cultural question. And it is undeniable that the use of power, including physical force, to coerce, control, and intimidate other persons is not an uncommon phenomenon in Canada. Indeed coercive conduct of a variety of types enjoys a significant measure of cultural approval and acceptance by Canadians. The exercise of power to control and direct "subordinates" is seen by Canadians to be fully appropriate in "normal" inter-personal relationships between persons of unequal power under conditions of social and economic inequality. "Coercion", as long as it remains within "legitimate" albeit elastic and largely unregulated bounds, is thus culturally and socially approved and enjoys immunity from legal and non-legal sanctions.

Consequently, when women in Canada seek recognition for the proposition that claims of authority over women based on their sex are illegitimate and that the exercise of power on such a basis is an abuse of power, they are challenging both the legitimacy of gender hierarchy and the propriety of practices that are commonly used by Canadians to maintain a wide variety of hierarchical social relationships that involve domination and subordination. To propose the elimination of the use of violence against women is thus to move in opposition to deeply entrenched assumptions---that social hierarchy based on sex is legitimate, and that the exercise of power to maintain and reinforce existing forms of social hierarchy is legitimate.

Under these conditions feminist law reform initiatives must be resolutely consistent with fundamental equality principles. Compromise on essential issues tends only to reinforce entrenched attitudes grounded on misogyny and sexism; the law, in its content, interpretation, application, and effects, is a public tool or instrumentality with significant potential to influence culture and shape social attitudes for better or worse. Feminist initiatives in law reform should therefore avoid mere reform and instead seek to transform the criminal law into an instrument that will be responsive and effective in its denunciation, condemnation, and prevention of violence against women, and socially constructive in designing and structuring the penal consequences for individuals and the community which flow from conviction. Specific reform proposals should be considered in the context of such a broad and transformative vision of criminal law. This discussion of the law of provocation, and related matters such as the law of self-defence and sentencing, therefore seeks to articulate the issues within the context of such a vision.

Provocation and Self-Defence as Equality Rights Issues.

The defences of provocation and self-defence directly engage the substantive life, liberty, personal security, and equality rights protected by Sections 7, 15, and 28 of the Charter of Rights and Freedoms. The constitutional guarantees under Sections 15 and 28 of the Charter of equality before and under the law and equal protection and benefit of the law, without discrimination on the basis of sex, must be interpreted to encompass the substantively equal right not to be deprived of life, liberty, or personal security other than in accordance with fundamental justice.

Accordingly women may not, on the basis of their sex, be denied equality before and under the law or equal protection and benefit of the law in relation to their lives, their liberty, or the security of their persons. Discrimination on the basis of the other personal characteristics enumerated in Section 15, such as race, national or ethnic origin, colour, religion, age, or disability, or analogous characteristics, is likewise prohibited.

The lives, liberty, and personal security of women are directly affected by the law of the defences of provocation and self-defence whenever a woman accused in a murder case invokes these defences in her own defence and whenever a woman is killed by an accused (male or female) who subsequently invokes either of these defences as a defence to murder. Insofar as the law of the defences of provocation and self-defence, and interpretation and application of that law, are shaped by patriarchal values and assumptions based on the social experience of males, women accused who invoke these defences may often be denied equal benefit and protection of the law. The same must be said of the women whose deaths are partially attributed to their own "provocative" words or conduct. Those are the direct effects.

The indirect but arguably even more significant and widespread effect of the influence of patriarchal values, and of assumptions based on the social experience of males, on the interpretation and application of the law of provocation and self-defence is to extend a general legal sanction to violence against women and to thereby powerfully reinforce and affirm cultural beliefs and practices that are patriarchal rather than egalitarian. Insofar as this occurs it affects the lives, liberty, and personal security of all women in Canada. Persons who are identifiable as members of other socially subordinate and marginalized or racialized groups are similarly affected.

A woman who is effectively denied the equal right to use force to protect herself, and those for whom she is responsible, when she believes it to be necessary to do so, is neither free, nor equal, nor secure. A women who lives in a social environment that puts her at risk of being blamed for "causing" another person to fly into a homicidal rage and kill her is likewise denied full enjoyment of her rights and liberties. Women who live with the knowledge that it is a simple fact that full exercise of their liberties, of their right to determine for themselves, freely and voluntarily, how, where, with whom, and under what conditions they shall live and work, and to express their opinions, observations, and preferences, freely and honestly, may place their lives, liberty, and personal security at risk, are more vulnerable to coercion and intimidation by persons who are in a position to affect those interests. Insofar as the present law of the defences of provocation and self-defence abandons women to deal as best they can with patriarchal violence and multiple forms of related gender-based intimidation and coercion, and yet assesses culpability in accordance with patriarchal values and a gendered social perspective when women use physical force to protect themselves against that violence, the law denies women full benefit and enjoyment of their right to substantive equality in society twice-over---a version of the classic double-bind in which you are damned if you do and damned if you don't. This state of affairs violates Sections 7, 15, and 28 of the Charter, and must be changed.

The exercise of discretionary decision-making powers by prosecutors, by judges at sentencing, and by parole boards, in cases of violence both by and against women are further sources of substantive inequality for women whose lives, liberties, and personal security are compromised by violence and threats of violence. The liberty interests of a woman who uses violence to protect herself or other persons for whom she is responsible may be adversely affected as a consequence of gender bias at any or all of these decision-making points in the criminal justice process as well as in the interpretation and application of the defences of provocation and self-defence in the trial itself. Although reliable comparative empirical information about the cumulative effect of gender bias in these decisions is difficult to obtain, it is probable that the effect is significant. Measures to subject these decisions to more effective regulation by the rule of law should be adopted. Tentative proposals to achieve this objective are discussed below.

The decisions by police, by prosecutors, by judges at sentencing, and by parole boards, that determine whether the state will intervene to detain, control, or supervise a violent assailant, and if so, how, and for what period of time, also have significant impact on the liberty and security interests of women who are subjected to violence and threats of violence. Failure by these decision-makers to appreciate that the impact of violence and threats of violence on women is both unacceptable and grave, combined with the absence of adequate community alternatives for women and their dependents, only compounds the despair and desperation with which many women in Canada live. Here again is the cruelty of the double bind perpetuated by the continued failure of Canadian society to take adequate steps to deal with violence against women in its many forms.

Before outlining options for reform of the law of the defence of provocation and exploring the implications of equality rights for those reforms in greater detail, it is useful to review the current state of the law related to the interpretation and application of the defence and its operation within the law of homicide.

<u>Provocation as a Defence and as a Mitigating Factor in Sentencing: Summary of Current Law.</u>

Provocation is a statutory defence (see Section 232)[1] with a long common law history. It is a "partial" defence, thus called because it does not result in full acquittal but merely the reduction of the conviction from murder to manslaughter. Only if and when all the elements of murder are proven beyond a reasonable doubt does the availability of the so-called "defence" of provocation, as such, become a live issue. Evidence that may be used to establish provocation for the purpose of reducing a conviction for murder to a conviction for manslaughter may also be used to raise reasonable doubt about one or more aspects of <u>mens rea</u> required for conviction of murder. Thus an accused may be convicted of the lesser offence of manslaughter either by

[1]See Appendix I, below, for the text of the sections from the <u>Criminal Code</u> and the <u>Charter of Rights and Freedoms</u> referred to in this discussion paper.

application of Section 232 or, on the basis of the same evidence, as a consequence of reasonable doubt on one or more elements of the mens rea required for conviction on a charge of murder.

In either case evidence of provocation may be considered as a mitigating factor in sentencing. In Stone (S.C.C., 1999) the unanimous opinion of the Court was that the operative effect of Section 232 lies precisely in the fact that it permits the trial judge to consider provocation in sentencing. By contrast murder convictions require the imposition of a mandatory life sentences with no less than 10 years to parole eligibility for second degree murder and no less than 25 years to parole eligibility for first degree murder. Provocation cannot be taken into account when imposing sentence for murder to *reduce* the mandatory minimum period to be served in prison prior to eligibility for parole. By contrast. provocation could conceivably be one of the factors considered by the parole board, when a convicted offender is otherwise eligible for parole, or by the jury in conjunction with a 15 year review conducted under the "faint hope" provisions in section 745.6 of the Criminal Code.

The case law shows that the statutory criteria specified in Section 232 as conditions of applicability of the defence of provocation are strictly interpreted. The "wrongful" act or insult must be one that would be sufficient to deprive an ordinary person of "the power of self-control," and the homicidal response of the accused must be "in the heat of passion" caused by the insult or act and must be taken "on the sudden" before his (or her) passion has time "to cool." There are thus two thresholds---one objective, one subjective. Persons whose response under provocation does not fit within this template cannot benefit from the defence of provocation as it is presently defined.

The Code provides that the questions posed by the statutory criteria in Section 232 are questions of fact. The trial judge nonetheless exercises the usual judicial control over availability of the defence in law. The issue of provocation therefore goes to the trier of fact only if and after the trial judge determines that there is sufficient evidence of provocation as defined in the statutory provision to make the defence a live issue in law; there must be what is referred to as an "air of reality" to the accused's claim. Error by the trial judge on this issue is an error of law and constitutes grounds for appeal.

In those cases in which the trial judge determines that the defence is available in law. the trier of fact (judge or jury) must first apply the objective test to determine whether the act or insult was "provocative" within the meaning of Section 232. and then must determine (applying a subjective test) whether the homicidal response of the individual accused was in the "heat of passion", caused by the provocative act or insult, and "on the sudden." without deliberation.

Until 1986 under Canadian criminal law the trier of fact was prohibited from considering the accused's characteristics or circumstances when determining what would or would not be a grave insult to the ordinary person. Hill (1986. S.C.C.---6/3) changed the law on this point somewhat, although the majority still declined to require that the trier of fact particularize the objective "ordinary person" test to that of a person of the same age, sex, race. etc. as the accused.

In 1986 the court remained prepared to rely on the "good sense" of the jury to incorporate those factors, such as "race", that might affect the gravity of the insult. Unfortunately no specific directions on the point were mandated. At the same time the court stated that in all cases the jury was to assume that the accused was an individual with a normal temperament and capacity of self-control, and that the accused was not exceptionally excitable, pugnacious or intoxicated.

Ten years later in Thibert (1996, S.C.C.) the Court mandated particularization of the objective test in the following terms:

> In summary then the wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person, of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control.

Note that this approach takes the human significance or meaning of events into account and adopts the lead developed by the provincial appeal courts in acknowledging that a triggering incident "may well be coloured and given meaning only by a consideration of events which preceded it. Indeed, one could image a case in which a given gesture, in itself innocuous, could not be perceived as insulting unless the jury was aware of previous events. They disclose the nature, depth and quality of the insult." (Laycraft, J.A., in Daniels, (N.W.T.C.A., 1983).

This reflects the same general line of legal development seen in the law of self-defence in the cases of Lavallee (1990, S.C.C.), Petel (1994, S.C.C.), and Malott (1998, S.C.C.), in which objective tests relevant to the availability of self-defence are particularized to take into account the accused's history, experience, circumstances, and perceptions. Canadian law now recognizes that an accused's past experience colours and shapes his or her interpretation of the significance of events in the present. In concurring reasons in Malott (1998), L'Heureux-Dubé cautions, however, against permitting the acknowledgment of particular patterns of past experience (such as evidence of the so-called 'battered women's syndrome') to function as new stereotypes and interfere with proper interpretation of the evidence in individual cases.[2]

Section 232(3)(b) provides as a matter of law that no act which a person has a legal right to do can be deemed to constitute provocation for the purposes of application of the Section 232. Some judges may now be giving more effect to this provision in the Code than formerly, especially in cases involving allegedly provocative but lawful conduct by women. (See, for example, Young (N.S.C.A., 1993), leave to appeal to the S.C.C. refused; see also the remarks of Major, J., writing in dissent in Thibert, 1996, S.C.C.).

Mistakes of fact may be relevant in applying Section 232. Mistakes of fact that an ordinary person in the same circumstances might have made may be considered in applying the

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[2]Malott (S.C.C., 1998) at paragraphs 39-43.

objective test to determine whether the act or insult, as perceived, was sufficiently provocative to cause the ordinary person to lose self-control. In Petel (1994, S.C.C.) the Court emphasized that such mistakes must be reasonable.

One effect of the requirement that mistakes of fact be reasonable is to render the defence of provocation potentially unavailable to accused who are cognitively impaired or emotionally volatile and who, as a consequence of that impairment, make mistakes of fact which are deemed "unreasonable" (i.e., not inferences an "ordinary person" would make). Nonetheless, despite the impairment, such an individual may well at the same time not found be on a balance of probabilities to be not criminally responsible due to mental disorder under Section 16. In such a case the effect of the burden of proof under Section 16 is conviction of the accused for murder in violation of the presumption of innocence protected under Section 11(d) of the Charter, while the unreasonableness of the mistake precludes access to the defence of provocation and the mitigation of punishment under Section 232. This outcome arguably constitutes a denial of liberty other than in accordance with principles of fundamental justice and denies the accused the equal benefit and protection of the law on the prohibited ground of mental disability in violation of Sections 7 and 15 of the Charter, respectively.

One solution to this and related problems that arise in conjunction with mental disorder, mental disability, and the defence of provocation (including those noted below related to restrictions on availability of the defence of automatism following the recent decision by the S.C.C. in Stone), lies in the proposal made by Wilson, J., writing in dissent in Chaulk (1990, S.C.C.), that whenever the accused adduces sufficient evidence to make sanity a "live issue", the Crown should be required to demonstrate the sanity of the accused beyond a reasonable doubt. This alteration in the burden of proof would reduce the number of individuals who are convicted of a criminal offence, including murder, in the absence of proof beyond a reasonable doubt that they have the mental capacity for criminal responsibility. In appropriate cases civil commitment proceedings could be brought. In other cases placement in a structured and well supervised community living setting would be a fully adequate response.

An alternative solution to the situation of the person who is cognitively impaired, discussed, critiqued, (and rejected) below under options for reform of the defence of provocation, would be to abandon the objective "ordinary person" test now used to limit access to the defence of provocation and to assess each case on a subjective basis only. Under that approach mistakes of fact would not be required to be reasonable. In any event, as an increasing number of accused appear to be diagnosed as subject to fetal alcohol syndrome, and, as such, may in many cases lack the capacity presumed at criminal law, fundamental justice demands a fresh approach to these cases. The general approach taken in the handling of criminal cases involving accused who are cognitively impaired should therefore be re-examined. The same must be said for cases involving accused who are sane within the meaning of section 16 but whose emotional response to provocative circumstances is markedly more rapid or extreme than that of the "ordinary" person.

There are strong similarities between the defence of provocation and what is known as the defence of "psychological blow" automatism. The defence of automatism operates by raising a reasonable doubt that the accused acted as a voluntary agent. Reasonable doubt that the accused acted as a voluntary agent requires acquittal, subject to any statutory bars to reliance on the defence. The cause of the automatic state is of crucial importance, however, in determining what, if any, form of the automatism defence is available as a matter of law. If automatism is found to be caused by a mental disorder the accused may be found to be exempt from criminal responsibility as a consequence of mental disorder (to be established on a balance of probabilities) but will then be subject to the assessment, detention, and review provisions under Part XXI of the Code. (And see discussion of these and related issues in the recent decisions by the S.C.C. in Stone and in Winko; for an overview of these decisions see the Lawyers' Weekly, June 4 and 11, 1999).

An accused who relies on a defence of automatism is only entitled to a full acquittal (as opposed to a verdict of not criminally responsible on the basis of mental disorder) in those cases in which the "cause" of the automatic state is a non-pathological medical condition (i.e., one not involving evidence of mental disorder as such), involuntary intoxication or impairment (as in the unanticipated side-effect of a medicine or anaesthetic), a physical blow (where the effect of the blow is measured by a subjective test, i.e., the question is simply whether this blow may have caused an automatic state in this accused), or an extraordinary psychological blow (measured first by an objective test to determine whether it is "extraordinary" and then by the usual subjective test to establish that it may indeed have produced an automatic state in the accused.

The two stage test applied to assess "extraordinary" psychological blows for the purpose of determining whether the defence of sane-automatism is available is directly analogous to the test required by statute to determine when murder in response to "provocation" is to be reduced to manslaughter for the purposes of conviction and sentence. In both cases an "objective" test is used to ensure that the only accused persons who benefit from the provision are those who "lose control" in circumstances in which the "ordinary"/ "normal" person might have been similarly affected. Which characteristics and prior experiences of the accused should and should not be considered under Section 232 in the provocation cases has, as was seen above, been long debated. Analogous issues are considered when assessing whether or not a psychological blow is "extraordinary."

In cases in which a defence of automatism or provocation, or both, is raised by the accused, the trial judge, as the arbiter of questions of law, determines whether, on the evidence before the court, the defences are available in law. This determination functions as a sorting device to determine which accused persons will benefit from the defences of provocation and "sane" automatism and which will not. The judiciary openly acknowledges that policy considerations, including the need to protect the public when there is uncertainty about the likelihood of further violence by the accused, play a major role in decisions about the availability of these two defences in cases involving inter-personal violence.

The similarities between the two defences, provocation (strictly speaking not a "defence" leading to a right of acquittal, as such, but rather a basis for reduction of the gravity of the charge on which a conviction is entered and for mitigation of sentence) and psychological blow automatism, render them subject to similar criticisms on both evidentiary and social/ political grounds. The following cases starkly exemplify some of the key legal and socio-political issues in this debate.

R. v. Jackson, [1996] 48 C.R.(4th) 357 (Alta.C.A.); and
R. v. Stone [1997] 6 C.R.(5th) 367 (B.C.C.A.) and (S.C.C., 1999).

As noted above, the reasons for judgment by the British Columbia Court of Appeal and the Supreme Court of Canada in Stone outline the steps to be taken where a trial judge must determine whether the evidence may support defences of mental disorder, "sane" automatism, or provocation.

The social history and criminal record in Jackson suggest that the failure of the criminal justice system in preventing domestic violence is attributable in part to the inability or failure of judges to recognize a pattern of violence for what it is....before a woman dies. Both cases raise major questions about the approaches taken by trial judges to the difficult task of the prediction/ prevention of future violence by accused in response to similar situational "triggers". Steps should be taken to improve the training and assessment support services available to trial judges who handle cases involving inter-personal violence.[3] An increased use of automatic pre-conviction detention in assault cases would protect many women from avoidable violence and give them an opportunity to make necessary changes in living arrangements, access support services, etc., etc.[4]

Common criticisms of the defence of provocation.

Common criticisms of the defence of provocation include the following :

(1) that the defence devalues the lives of persons whose words or conduct are deemed sufficiently "provocative" to provide a basis for mitigation of punishment for what would otherwise be a conviction for murder, and thereby prejudices the liberty interests of other persons who, in the absence of the application of a legal quasi-sanction or partial excuse

[3]See Robert J. Kane and George Sigel, "Violence Prediction: Revisited", [illegible] *Journal of Criminal and Civil Commitment* 63-79.

[4]This point was made by more than one participant at the recent CAEFS consultation. A related hypothesis is that increased routine use of short term preventive detention on the occasion of the very first incidence of domestic violence together with the use of other non-penal interventions might be effective to stop the use of violence before it becomes habitual.

to homicidal violence, also might be inclined to engage in similarly "provocative" speech or conduct;

(2) that the continued existence and use of the legal defence sanctions and legitimizes the use of violence as a means to assert and maintain control over other persons, including women, children, and others who are socially subordinate or dependent on the assailant;

(3) that the defence is a significant source of discrimination in a diverse society in that the defence may often not be deemed available in law to individuals who are genuinely provoked into a "loss of the power of self-control" but whose life experiences are not shared or readily understood by decision-makers in the criminal justice system;

(4) that by recognizing actions which are motivated by anger, but not those which are motivated by other strong emotions such as despair and compassion, as a legal basis for mitigation of punishment, the defence demonstrates a lack of appropriate compassion for many accused persons insofar as it ignores the significance of the influence of human emotional responses to life circumstances as "causes" of their criminal conduct; and,

(5) that insofar as the defence of provocation invokes a rationale of "excuse", rather than "justification", and requires the accused to acknowledge temporary loss of capacity in the form of "loss of the power of self-control", it pathologizes the accused and thereby places the accused at an enhanced risk of assessment in the future as "disabled", "sick", "crazy", or simply "dangerous", and, in cases where the accused is identified as a member of a socially subordinated, marginalized or racialized group, may also reenforce negative stereotypes of that group.[5]

Arguments for retention of the defence of provocation.

The arguments for retention of the defence of provocation in some form include:

(1) reluctance to abolish the defence of provocation if it could, even if only in rare

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[5]In a worse case scenario, adverse action on the part of the parole board prejudiced by evidence "provocation" and "loss of the power of self-control" could potentially result in incarceration for a manslaughter conviction that is far longer than would have resulted from a conviction for second degree murder. And see as well below, in the discussion of self-defence and gender equality, the parallel issues related to the potentially pathologizing impact of reliance on the "battered woman's syndrome", especially where it is viewed as an abnormal psychological state as opposed to a set of assumptions and beliefs developed by rational inference from a woman's experience of extended subjugation to physical and psychological violence.

cases, afford some benefit to women who are charged with murder but cannot raise the defence of self-defence because of the circumstances in which the murder was committed; and,

(2) the view that accused who commit murder in a fit of rage caused in part by a pattern of systemic discrimination might benefit from the defence of provocation and, moreover, perhaps should be permitted to benefit from such a defence on affirmative action grounds.

These arguments are examined in greater detail below. Recent years have seen growing general support in many jurisdictions, however, for complete abolition of the defence of provocation on the ground that in civil society ordinary people do not kill other people in response to provocation or insults. Murphy, J. writing the minority judgment in Moffa v. R. (1976-77, Australian H.C.) stated: "It degrades our standards of civilization to construct a model of a reasonable or ordinary man and then to impute to him the characteristic that under provocation (which does not call for defence of himself or others), he would kill the person responsible for the provocation." Indeed. The defence is also widely seen to imply that the alleged provocateur is partially responsible as a matter of law for the aggression that caused his or her own death, to thereby condone the use of violence against those whose words or conduct are perceived to be outrageous and enraging, and to thereby in turn nurture cultural/social beliefs and attitudes that encourage assailants to lose (or arguably simply fail to exercise) the power of self-control. Twenty plus years later these and other similar views are widely held. Against this general overview of the current state of the law of the defence of provocation and the criticisms most commonly lodged against the defence, this discussion now turns to an examination of the principal options for reform of the law with an emphasis on scrutiny of the implications of those options for the advancement of women's substantive equality rights.

Abolition or Reform of the Defence of Provocation?: The Principal Options and Arguments.

At the outset of this discussion of options for reform of the defence of provocation it is essential to underscore that practical effect of the defence of provocation for persons accused of homicide has been to mitigate the penal consequences of a conviction for murder whether those be the death penalty, as was the case when the defence was developed under English law, or, as at present in Canada, a minimum sentence of life with the postponement of parole eligibility for at least ten years in the case of second degree murder, and twenty-five years in the case of first degree murder. Although provocation might appear to have limited, if any, application to first degree murder, insofar as acting on "the sudden" appears inconsistent with "planning and deliberation", the courts have held that this question turns entirely on the evidence in the individual case. On occasion a "planned and deliberate" murder is found to have been "provoked".

However, second degree murder cases constitute the vast majority of the murder cases in which availability of the defence of provocation following conviction for murder is a live issue. Absent a ruling that the defence of provocation is available in law and a finding by the trier of fact that the ordinary person test in Section 232 was satisfied and that the accused acted under provocation as defined in Section 232, a conviction for second degree murder requires that the trial judge to impose a life sentence with a mandatory minimum period of 10 years incarceration prior to eligibility for parole. The exercise of judicial discretion may result in a *longer* period of incarceration prior to eligibility for parole in such a case, but not a *shorter* period.[6] Once released from prison, persons subject to a life sentence remain under parole supervision for life, (unless they receive a pardon).

The principal options for reform of the defence of provocation are five-fold:

(1) eliminate the ordinary person (objective) test presently used to restrict access to the defence of provocation and use an unqualified subjective test, thereby ensuring that everyone in Canada, across the full range of cognitive abilities and diverse social and cultural experience, enjoys the equal benefit of the defence if and when they are liable to conviction for a murder that is found as a matter of fact to have been committed in a fit of anger or rage provoked by the words or conduct of the person they murdered;

(2) expand the grounds for mitigation of punishment to recognize a broad range of motives and related emotional states, in addition to anger, as lawful "compassionate" grounds for the reduction of a murder conviction to manslaughter, to permit the mitigation of sentence in other categories of cases, analogous to provocation, where emotion is a major factor in commission of the offence and no defence to conviction, as such, is available.

(3) prohibit use of the defence of provocation by accused whose murder of an individual or individuals is motivated in whole or part by hatred, prejudice, or bias based on one or more of the factors specified in Section 718.2(a)(i) of the Criminal Code, enacted in 1995, as aggravating factors in sentencing: race, sex, national or ethnic origin, language, colour, religion, age, mental or physical disability, sex orientation, etc.;

[6] Summary re sentencing in murder cases over-all:---The mandatory sentencing provisions applicable in second degree murder cases are, of course, the very provisions which are at issue in the Latimer case, on appeal to the S.C.C. In this discussion it should be remembered that although a successful defence of self-defence results in acquittal, in a case involving *excessive* force in self-defence causing death, the defence fails and a conviction for murder results with no mitigation of penal consequences. As always, if there is evidence of planning and deliberation the conviction is for first degree murder---unless as in the Latimer case, the prosecution does not persevere in pursuit of conviction on the most serious charge the evidence would appear to support.

(4) limit the availability of the defence of provocation to persons who are provoked into a state of anger in which they "lose the power of self-control", in response to words or conduct which they experience as wrongful, hateful, or insulting, and which are based on their membership in one or more groups that are widely subject to discrimination and prejudice in Canada; and,

(5) abolish the defence of provocation.

Options 1, 2, 3, and 4 are mutually compatible and therefore any one or more of these options could be adopted in any combination. Option 5 stands alone. Abolition of the defence of provocation is incompatible with Options 1, 2, 3, and 4, all of which contemplate maintaining, if not expanding, the defence of provocation as a mechanism to permit the exercise of judicial discretion in sentencing individuals convicted of murder in cases involving provocation.

Reform of the defence of provocation, whether by abolition, expansion, or restriction, is, however, in no way inconsistent with intervention by statutory amendment to re-address sentencing in murder cases generally, including those in which anger or other emotional states, caused by the circumstances in which the murder was committed, may have been a factor. Sentencing guidelines can be used to constrain the exercise of judicial discretion within prescribed limits and to provide a partial or complete alternative to the mandatory minimum sentences presently required in murder cases.[7] The exercise of discretionary decision-making powers by both prosecutors and parole boards can also be constrained by the promulgation of more detailed regulatory guidelines and requirements subject to judicial review.[8]

It is therefore abundantly clear that issues of justice in sentencing need not be addressed solely through reform of the substantive law of the defences alone. Liability to be convicted of a criminal offence is not necessarily, and need not be, fully determinative of the penal consequences to be imposed following that conviction. The sentencing process can and ordinarily does permit consideration of factors in addition to those that are relevant in determining whether the accused is liable to be convicted. It is helpful to bear this in mind as we consider the options for reform of the substantive law of the defence of provocation.

<u>Option 1.---Repeal Section 232(2) and thereby eliminate the ordinary person (objective) test presently used to restrict access to the defence of provocation</u>.

Pursuant to Section 232(2) of the <u>Criminal Code</u>, the defence of provocation is not available to an accused who loses the power of self-control under provocation that is not deemed sufficient to provoke loss of the "power of self-control" in the fictional "ordinary person". The

[7]See discussion below.

[8]See discussion below.

use of objective tests to determine the moral culpability and relative turpitude of criminal accused has long been seen to be a dubious method, because it tends to give preferred treatment to persons whose background and life experience most closely corresponds to that which members of the judiciary assume is "normal", "ordinary", or "mainstream", precisely because it is more or less like their own. In the absence of a legitimate policy objective or goal that can only be achieved by the minimum standards or criteria that are typically established by an objective test, reliance on objective tests now invites strong criticism on the ground that it disregards social diversity and individual difference. In the case of the defence of provocation, the elimination of the ordinary person test would ensure that everyone in Canada, including individuals representative of the entire range of social and cultural experience found in contemporary Canadian society, as well as those individuals whose cognitive abilities are limited, would enjoy equal benefit of the defence if and when they are liable to conviction for a murder committed in a fit of anger or rage provoked by the words or conduct of the person they murder.

This reform would ensure that only subjective tests, not objective tests, would be applied to assess the bona fides of the claim in each case. The questions to be answered would all relate to the individual accused---was the accused provoked? did the provocation cause the accused to lose the "power of self-control? did the accused act in the "heat of passion"? This shift to a solely subjective focus would acknowledge the full impact of social and cultural diversity in shaping the significance of human experience and emotional response and should ensure that all the facts relevant to the remaining statutory criteria are given full consideration in each individual case. The argument in support of this approach is that equality principles require that everyone in Canada, inclusive of the full range of ability and diversity of social and cultural experience, must enjoy the equal benefit of the defence if and when they are liable to conviction for a murder committed in a fit of anger or rage provoked by the words or conduct of the person they kill. As long as we continue to have a defence of provocation in mitigation of punishment for murder, it cannot be the case that some cases of provoked homicidal rage are more worthy of compassion than others.

This proposal is arguably flawed in at least two respects. First it fails to acknowledge that the Supreme Court of Canada has now mandated particularization of the objective test, as seen in Thibert (1996, S.C.C.), for example, as explained above in the review of the current state of the law. This development in the interpretation of the defence of provocation arguably addresses the equality issues that arise from diversity of social experience and cultural background. The residual difficulty with the "ordinary person" test in this regard lies in the need it creates in many cases for evidence, often including expert evidence, to assist the jury in appreciating the human significance of the wrongful act or insult to an individual who shares the social experience and cultural background of the accused, and in the related leaps of empathy and imagination that this approach requires of the trial judge and the jury.

The second flaw in the proposal arises from policy considerations. The "ordinary person" test functions to deny access to the defence of provocation to accused who lack a normal capacity for self-control, or who are exceptionally excitable, pugnacious or intoxicated. Capacity for self-

control, like capacity generally in the criminal law, is presumed, as a matter of public policy, and on the ground of the principle of equality of all persons before and under the law, to be a characteristic of all individuals. All persons are presumed to be equal in law, to have a capacity for self-control and to have an equal responsibility to respect the rights of other persons. Complete abandonment of the objective test, which serves as a means to require everyone to exercise a minimum degree of self-control over his or her aggressive impulses motivated by anger, would be wholly inconsistent with the presumption that all individuals have the capacity of self-control and are required to exercise that capacity as necessary to ensure that their conduct does not violate the rights of others

The proposal would also be inconsistent with the refusal of the Canadian judiciary to recognize a defence of "irresistible impulse" and with the exercise of judicial control to ensure that the interpretation of the legal definition of "mental disorder" in the application of Section 16 is guided by public policy objectives, including protection of the public from unpredictable recurrent violent behaviour. Following Stone (1999, S.C.C.) it may be argued that when an individual kills and subsequently alleges either that they "lost the power of self-control" or that the motivation for the conduct was righteous anger at the wrongful and insulting words or conduct of the victim, one of the first questions that should and will ordinarily be asked in either case is whether the assailant was suffering from a "mental disorder" within the meaning of Section 16. Absent a finding that the accused was not criminally responsible due to mental disorder, it *might* now be argued (even though Stone's conviction was not altered by the S.C.C.) that the case should proceed without any further reference to claims of incapacity or loss of capacity, although that approach is most consistent with de facto abolition of the defence of provocation on the ground that loss of the power of self-control is subsumed under the defence of automatism, whether "sane" or "insane". Residual Charter problems in relation to the requirement of proof on a balance of probabilities that the accused was not criminally responsible could be addressed by adoption of Wilson, J.'s proposal in Chaulk as outlined above.[9]

Option 2.---Recognize additional compassionate grounds for mitigation of punishment in murder cases.

The proposal under this option is to recognize a broader range of motives and related emotional states as lawful "compassionate" grounds for the substitution of a conviction for manslaughter in murder cases, and to thereby permit the mitigation of sentence in murder cases where no other defence is available. Possible additional grounds include fear or despair and compassion or empathy.

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[9]See also Brenda Baker, "Provocation as a Defence for Abused Women Who Kill", (1998) 11 *Canadian Journal of Law and Jurisprudence* 193-211, and Tim Quigley, "Battered Women and the Defence of Provocation", (1991) 55 *Saskatchewan Law Review* 223, for alternate approaches to some of the issues raised above in the discussion of Option 1.

a) Compassion or Empathy---The cases of Latimer and Rodriguiz.

These issues have been the recent subject of wide discussion and debate in relation to the Latimer and Rodriguiz cases. General public opinion is varied and divided. The specific focus in the present discussion, however, is on the implications of any potential change in the law for the equality rights of women. What we must consider is whether the proposal to expand the compassionate grounds for reduction of a conviction for murder to manslaughter would ultimately enhance or diminish the autonomy and substantive equality of women, whether they are the person killed or the person who kills.

Members of the community of persons who have disabilities are quite clear that the proposed expansion of the "compassionate" grounds for mitigation of punishment for murder would place the lives of many people with disabilities at grave risk and would devalue the lives of all members of that community. Many members of other communities or groups which are subject to one or more forms of prejudice or bias, and whose experience has taught them that "compassion" can be an all too convenient mask for discrimination and oppression, share those concerns.

On the other hand there are the voices of women who tell stories about the unmet needs of those who are sick and in pain and the desperation of care-takers who kill because they cannot help and yet refuse to abandon the person for whom they, and often they alone for all practical purposes, are responsible. There are many such stories, often involving murder of the dependent followed by the suicide or attempted suicide of the desperate exhausted care-giver. Are those who kill, often quite deliberately and in accordance with a plan, under circumstances in which they genuinely believe that there is no viable alternative (because no adequate and appropriate social resources are available to them) and that in the whole of the circumstances killing is therefore a "lesser evil" than not killing, appropriately punished as murders without mitigation of sentence?

If what women really want is authentic autonomy and meaningful choice in fundamental matters affecting the quality of their own lives and the lives of persons for whom they are responsible, will that broad objective be advanced or subverted by use of compassionate grounds to convict on the lesser charge of manslaughter and thereby achieve mitigation of sentence for women who are convicted of murdering persons for whom they were care-takers? There is a strong argument to be made that this "solution" is disingenuous and fundamentally unjust insofar as it fails to acknowledge collective societal responsibility for structuring the conditions within which such choices are made and instead deflects responsibility onto individuals. No one, whether care-giver or dependent, should be abandoned to despair in circumstances that could be alleviated by the pro-active provision of more effective social and medical services and a widespread use of and respect for advance medical directives. The lives of dependent, ill, or disabled persons should not be placed at enhanced risk as they clearly would be by an expansion of partial defences to murder to include killings motivated by compassion and empathy. And care-givers should have the resources they need, not the dubious benefit of being convicted of

manslaughter rather than murder. That is too little, too late, and constitutes a clear example of collective social hypocrisy. Let us not pretend to excuse our lack of political will by yammering about how compassionate we feel towards those who are motivated by empathy to kill and those who are killed. If compassion has any place at all in these cases it is at sentencing following conviction for first or second degree murder. Any other approach will, without question, put the lives of disabled or dependent persons at enhanced risk and divert collective attention away from the task of ensuring that the substantive equality rights of disabled and dependent persons and their care-givers, many of whom are women[10], are actually met in a timely and adequate manner.

b) Fear or Despair---Cases where "self-defence" is unavailable.

Many women are of the opinion that the law of self-defence is generally interpreted and applied in Canada in a manner that denies women equal protection and benefit of the law and reenforces gender inequality. In addition, the statutory provisions on the defence of self-defence in the Criminal Code are cumbersome to interpret and apply, and have arguably become less coherent and intelligible, and less rather than more of a deterrent to inter-personal violence, as a result of recent judicial decisions.

Self-defence is best understood as a subcategory of necessity. The defence is based on the principle that each person has a right to take those steps which are necessary to protect his or her life and physical integrity as long as the force used is not disproportionate to the threat. Traditionally the principal conceptual rationale for self-defence has therefore been that of "justification" (by contrast to the "excuse" rationale adopted in Perka for the defence of necessity). (See also the dissent by McLachlin, J., in McIntosh (1995, S.C.C.) for discussion of the distinction between justifiable and excusable homicide.)

The Criminal Code provides a comprehensive statutory framework that reduces the basic common law principles applicable to self defence to codified form. Section 34(1) is used where the person relying on the defence is not the aggressor, has not provoked the assault, and does not use force intended to cause death or grievous bodily harm. The accused is not subject to a duty to retreat under Section 34(1). Section 34(2) is available where the accused is the initial aggressor or provocateur, applies where the accused causes death or grievous bodily harm, and does not require the accused to retreat, even if he or she is the initial aggressor---as to the latter issue, see McIntosh (1995, S.C.C.). Prior to the decision in McIntosh, Section 35, which includes a duty to retreat (unlike Section 34), was the section governing cases in which the

[10]Reductions in support services for dependent persons often fall most heavily on women---wives, mothers, sisters. The effect of increased care-taking functions on the lives of these women can be dramatic and substantial as they find themselves with no choice but to abandon employment, association with friends, recreation and other leisure activities, and resign themselves to life with little or no income, social isolation, and the tedium of paper-work and patient care. The decision to cut medical and social services for disabled and dependent persons in the community arguably constitutes discrimination on the basis of sex because affected care-givers who absorb the impact of the program cuts are predominately women.

accused was the initial aggressor. After McIntosh, Section 35 will probably only be invoked, if at all, by accuseds who were the initial aggressor or provocateur but who thereafter attempted to retreat and did not cause death or grievous bodily harm. It is noteworthy that subsequent to the ruling by the Supreme Court of Canada in McIntosh, which relieved aggressors of the duty to retreat as a precondition of the availability of self defence under Section 34(2), provincial appellate courts appear to continue to attach significance to evidence that an accused attempted to retreat on the ground that it is relevant to determining whether the use of force that caused the death or grievous bodily harm was reasonably necessary. Thus, despite the absence of a statutory "duty" to retreat, evidence of some effort to retreat may be of crucial importance for successful use of the defence by an accused.

Section 37 appears to be intended to provide a defence to those who use force preventively, to protect themselves or other persons for whom they are responsible from assault, and who do not cause death or grievous bodily harm.

In Lavallee (1990, S.C.C.) the Court abandoned the requirement that the threat defended against be "imminent" and held that the reasonableness of the accused's action must be evaluated from the perspective of the accused, taking into account the perceptions, history, and life-experience of the accused. This approach was subsequently confirmed in Petel (1994, S.C.C.) in which the court identified three elements of self-defence (under Section 34(2)): (1) the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm; and (3) a reasonable belief that it is not possible to preserve oneself from harm other than by the use of force. The tests are hybrids between subjective and objective factors. The individual accused must actually believe that all three elements are present and have "reasonable" grounds for these beliefs. Nonetheless the "reasonableness" of the grounds invoked is to be evaluated (as established in Lavallee) from the perspective of a person situated as the accused was in terms of perceptions, experience, etc. In Petel the court also confirms that the accused may make "reasonable" mistakes of fact in assessing any of the elements of the situation. This implies that the reasonableness of the action taken must be evaluated on the basis of the facts as the accused may well have believed them to be in the heat of the moment. However the mistakes of an intoxicated or impaired accused are assessed as if he or she was sober at the time. [Query: should this limitation apply to an accused who, though impaired, *neither* provoked the assault *nor* initiated the violence and mistakenly believes him or herself to be using no more force than is necessary?]

In Faid (1983) the Supreme Court of Canada established that self-defence was not a "partial defence." In other words, self-defence is available as a justification only to an accused who uses no more force than necessary. If "excessive" force is used, self-defence ceases to be relevant to the disposition of the case and analysis proceeds with reference to gravity of harm caused and mens rea or fault as in an ordinary assault or homicide case.

Nonetheless, following Cadwallader, it has long been generally recognized that an accused, who is typically acting quickly, in fear, and under stress, is not required to "measure with nicety" the force required for self-defence. In Cadwallader, as in the more recent cases of

Lavallee and Petel, the suggestion is that the context and the entire situation of the individual accused must be taken fully into account in determining just how carefully the force used in self-defence must be controlled.

The general rule on excessive force is found in Section 26 which affirms that everyone who is authorized by law to use force is criminally responsible for any excess of force. This provision is of general application and is therefore relevant, inter alia, to defence of the person, defence of property, as well as the use of official force in enforcement of the law (see Sections 25 and 27), in suppression of riots (see Section 32), etc.

Where a trespasser uses no actual positive force against persons in possession of the property and does not threaten the personal security of those persons, no force may be used other than that required to remove the trespasser. If the trespasser uses force against persons, then the appropriate paradigm for analysis is self-defence, subject to all the usual constraints of the law of self-defence. This distinction is based on the underlying requirement of proportionality of harms and the distinction between persons and property.

So much for a review of the law of self-defence. It should be clear that before and since the land-mark decision in Lavallee (discussed also above in the review of the current law of provocation),[11] significant steps have been taken by members of the judiciary in Canada to address issues of gender equality and social and cultural diversity. Our concern in the present context is to determine what the remaining obstacles to successful use of self-defence by female accused are and how significant they are.

First, of course, there is the matter of unnecessary complexity in the wording of the statutory provision itself. One remedy to that problem is to reduce the defence to simpler terms. For example the definition might read:

> A person is not guilty of an offence based on the use of force against another person where the conduct is undertaken for the purpose of defending or protecting the life, physical well-being, psychological security and well-being, or the liberty, of either the accused or a third person, against the application of unlawful force, including confinement or detention, or denial of the necessities of life, where the accused, based on the knowledge and understanding he or she has of the whole of the circumstances, reasonably believes the force used to be necessary to avoid the harm.

Clearly that definition expands the interests that trigger the right of self-defence. The added interests could be selectively edited to limit the right to the defence of life and the prevention of

[11] The influence of Lavallee (SCC, 1990) has been considerable both in and outside Canada; its significance is not only in relation to self-defence and the rules on admission of expert evidence, but also in relation to contextualization in the legal interpretation of human choices and behaviour; in this latter respect the decision has had major jurisprudential significance internationally.

serious bodily harm. To do so, however, would limit the scope of the right of self-protection afforded by the law of self-defence to more or less what it is at present, and thereby defeat the claims of women, and others, to take such action as is necessary to protect physical integrity, psychological security, and meaningful autonomy. With such limitations self-defence would not assist an accused who killed to prevent sexual assault or to escape coerced servitude and victimization.

The other thing that this definition does is to retain a justification rationale. This definition does not invoke a rationale of "excuse" as a basis for either a "partial defence" (as in provocation) or acquittal on the ground of compassion. The present of law of self-defence, as noted above, already permits a margin of latitude for errors of perception and judgment based on human frailty and the stress of the circumstances, and the expectation is that this thread in interpretation of self-defence would continue. The other and more compelling consideration is based on a combination of political principle and pragmatism. The equality rights of subordinated individuals and social groups, are more effectively advanced, in both theory and practice, by criminal defences based on a "justification" rationale, properly structured and progressively interpreted, than they ever can be using an "excuse" rationale.

The only accused who needs an "excuse" is the accused who lacks "real rights" (i.e., one to whom no "justification" is available.) Given this, why opt for the less effective rationale if the more effective one can be developed? On reflection it should be clear that an "excuse" is only effective as a ground for compassionate relief (in this context the dubious benefit of a manslaughter conviction) to the extent that it is based on compelling facts and circumstances. Yet the reason it is merely an "excuse" and not a "justification" is precisely because those facts and circumstances are not *sufficiently* compelling to warrant an outright acquittal. Hence, if the view is that there are "murder" cases in which even a manslaughter conviction would be unjust, the solution lies in changing the facts and circumstances that are appreciated as giving rise to a defence of self-defence leading to a full acquittal, *not* in expanding the compassionate grounds for substitution of a manslaughter conviction.

Experience with widespread misunderstanding and misapplication of the "battered women's syndrome" lends further support to the argument that adoption of an excuse rationale in criminal defences is regressive in that its effect is to undermine the advancement of equality rights. There is a significant strand in contemporary professional and public thought in Canada about BWS and use of self-defence in the context of homicide that reproduces old gender stereotypes. These stereotype driven approaches to BWS suggest that only "crazy"/"dangerous" women kill ("normal" women being those who are submissive and compliant in the face of male/institutional authority even when it is abused), that BWS is inevitably stigmatizing, that if we had a defence of diminished capacity it would be used instead of BWS, and that a successful BWS defence is one that just skirts but avoids the edge of the defence of "insanity", etc. Such statements do nothing to eliminate gender bias in the criminal law process against women accused of homicide. They all involve an approach to self-defence that involves labeling the defence as a defence of "justification" but nonetheless analyzing the accused's conduct as if it is at best a quasi-"excuse". This approach presents the accused as "sick"/"psychically damaged"/

"abnormal" etc., even though, viewed objectively, in some cases the self-defensive action may arguably be a fully justifiable response to male violence. (This is all too familiar to women who are often labeled at best "uppiety", and at worst pathologically aggressive when they assert the right to equal treatment as measured by public, i.e., middle-class, white male, norms.) Any analytic focus on the *justifiability* of the homicide on the grounds of *necessity* (which in the majority of cases would focus attention, <u>inter alia</u>, on past failures of the police and the courts to intervene to prevent violence perpetuated by the deceased and the variety of systemic factors, such as racism and sexism, that may have contributed as societal "causes" of both the violence and the failure to intervene effectively to protect the accused against the violence) is thus diffused.

The literature also demonstrates wide-spread recognition that BWS: (1) is prone to misunderstanding and misuse; (2) invites a legal approach to the interpretation of homicide that denies women the right to equal protection and benefit of the law as rational persons who took reasonably necessary steps in the face of conduct which they reasonably perceived (given what they knew and had experienced) to be life-threatening or unavoidable and threatening to the survival of their psychological personhood and humanity; (3) diverts attention from male violence and conceals the causal significance of inadequate institutional responses to prior requests by the accused for legal assistance in protecting herself or her children/other dependents from harm by the deceased or from the increased risk of grave harm known to be associated with attempts to leave a violent relationship or situation; (4) is of limited value to accused whose personal characteristics do not fall within a BWS "profile" but who could nonetheless mount a justification defence were they permitted to do so---i.e., other than as used within a very narrow range of cases, BWS fails to provide equal protection of the law to all accused women who act with justification but whose cultural and social profiles may render a BWS defence quite inappropriate; and, (5) tends to needlessly and inappropriately stigmatize women who kill in self-defence under circumstances where no other options are reasonably available to them.

It is clear that, in the aggregate over many cases, a consistently applied "justification" based approach to application of the law of self-defence to women who kill their abusers would have a social, legal, and political significance and impact that would be markedly different from the impact of widespread reliance on self defence analyzed as an "excuse". A justification rationale asserts the right of an accused to take reasonable steps to protect his or her life. A contextualized justification analysis requires that the situation in which the accused acted be viewed from the perspective of the accused's experience and knowledge. When a case using a justification based approach to the analysis of self-defence concludes with the acquittal of the accused, the accused emerges from the process as an individual whose equal agency as a autonomous person with rights as well as responsibilities has been affirmed.

Since 1990 (when <u>Lavallee</u> was decided) there has been a general re-examination in Canada of self-defence in response to abuse and this has been accompanied by a rapid expansion of understanding in Canada of the severity and social impact of violence in Canadian society. General public awareness of links between conduct of individuals and systemic institutional factors and political decisions for which there is collective public responsibility appears to be

developing. A feminist approach to analysis of abuse now locates abuse squarely within the broad spectrum of conduct that uses violence and coercion (of a variety of types) for the purpose of maintaining personal control and protecting patriarchy (i.e., used here as a short form for a myriad of beliefs and social arrangements and expectations that are supportive of male dominance within a social, legal and political hierarchy, a hierarchy that is often racist and homophobic).

Given these social and attitudinal developments, as well as the political goals identified above related to the advancement of equality rights, the general approach proposed here for use of the defence of self-defence in assault and homicide cases is as follows:

-Define the goal as being to affirm that accused's choice to use force was rational and fully justified in the circumstances as she/he (reasonably) perceived them to be.[12]

-Ground analysis of the case on detailed particulars of accused's experience, knowledge, situation.

-Include all the factors related to the culture of this accused's community / family group that arguably shaped her/his perception of the choices available.

-Develop an exhaustive social history.

-Use experts for purpose of collecting / assembling social history information and get it before the court (hoping to thus avoid pre-emptive exclusionary rulings by the judge on grounds of assumed lack of relevance) as part of the files/information on which one or more experts (which may include medical experts used to eliminate organic or psychiatric causal factors) base their opinions; here the defence may be able to make highly effective strategic use of state experts (and see Nodland).[13]

-Use Lavallee and Petel, not re BWS *per se*, but to support contextual analysis and the admission of expert evidence as required to assist the trier of fact to interpret the significance of social history, culture, etc., etc., in shaping the understanding the accused

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[12] Note discussions by D. Kahan and M.C. Nussbaum, "Two Conceptions of Emotion in Criminal Law", (1996) 96 *Columbia Law Review* 269 and Alexander Reilly, "The Heart of the Matter: Emotion in Criminal Defences," (1997-1998) 29 *Ottawa Law Review* 117-151, about the implications of the relation between cognition and emotion for theoretical approaches to defences in criminal law. An examination of emotional responses and choices as grounded on an agent's beliefs about the world should be useful in developing an understanding of accused as autonomous agents as an alternative to pathology as an analytic model for the female accused; and see below, Option 4, for discussion of the implications of a political understanding of oppression for strategic resistance and survival by marginalized or racialized groups.

[13] Nodland, Irvin B., "Defending battered women: everything she says may be used against them," (1992) 68 *North Dakota Law Review* 131-44.

had of the situation, including the significance of the choices, if any, available to her/him to end or avoid the violence/coercive control.

-Require an interpretation of the Code provisions on self-defence (and of the law of evidence) consistent with Sections 7, 15, 27, and 28 of the Charter.

-In those cases (hopefully rare but that is an empirical question) in which the facts are appropriate be prepared to argue on the basis of common law and the equality provisions of the Charter that self-defence is also available to justify homicide or assault where the harm avoided is not physical death but life under conditions of coercive control and abuse by the deceased that place the health, safety, or sanity of the accused or persons for whom she/he is responsible at unavoidable risk. (And see security of the person as protected by Section 7 of the Charter, and as discussed in the case law at common law, and the writing of Elizabeth Schneider and Evan Stark about coercive control and the survivor of abuse as an *agent* who makes choices in pursuit of a range of interests, including his or her personal survival.)[14]

The law of self-defence arguably now permits the latitude required to take the circumstances and perceptions of an accused fully into account when assessing liability to conviction. These recent developments which particularize the objective test address some of the concerns about gender bias in the law of self-defence. What remains to be done is to simplify the terms in which the statutory defence is defined and to expand the interests that may be defended by force.

c) When Killing is Murder.

When "murder" is the label that fits the crime the term "murder" should be used. The term functions to attribute responsibility and to signal denunciation of the conduct. Sentencing is a different issue and should be analyzed independently from the issue of liability to conviction. This particular discussion has rejected the proposal to recognize a broader range of motives and related emotional states, such as fear, despair, and empathy, in addition to anger, as lawful "compassionate" grounds for substitution of a conviction for manslaughter in murder cases to allow mitigation of sentence where no other defence is available. Detailed examination of the probable consequences of such proposals demonstrated that the effect would be to undermine rather than advance substantive equality for women and others, both as accused and victims.

Traditionally motive has not been deemed to be relevant to the issue of liability to conviction as such. Nonetheless, fear and despair, compassion and empathy, are matters that may be properly considered in sentencing. At present under Canadian law it is the mandatory minimum sentences for first and second degree murder which severely limit the extent to which motive (or any other) factor is permitted to affect sentencing decisions in murder cases. (Even if

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[14] Schneider, Elizabeth M., "Resistance to Equality," (1996) 57 *University of Pittsburgh Law Review* 477-524; Stark, Evan, "Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control," (1995) 58 *Albany Law Review* 973-1026.

such factors are taken into account as reason to impose the minimum sentence provided by law, it must be recognized that the sentencing judge has no control over subsequent decisions to deny parole even though denial of parole can have the effect of significantly extending an accused's incarceration. This is exemplified by those inmates in the Self-Defence Review who remained incarcerated long after their parole eligibility date.) If, as appears to be the case, the present law with respect to mandatory minimum sentences in murder cases is unduly rigid and the minimum sentences unusually high by international standards[15], it is arguably more appropriate to *change that law* rather than to attempt *to avoid its consequences* by expanding reliance on the substitution of a manslaughter conviction as a means to achieve justice in sentencing. Options for possible reform of mandatory minimum sentences for murder are discussed under a separate heading below.

Option 3.---Prohibit use of the defence of provocation by accuseds who are motivated by hatred, prejudice, or bias based on any of the personal characteristics specified in Section 718.2(a)(i) of the Criminal Code.

This proposal would prohibit use of the defence of provocation by any accused whose murder of an individual or individuals is motivated in whole or part by hatred, prejudice, or bias based on one or more of the factors specified in Section 718.2(a)(i) of the Criminal Code: race, sex, national or ethnic origin, language, colour, religion, age, mental or physical disability, sex orientation, etc..

Moreover it should be noted that insofar as the homicidal rage in a provocation case is the result of hatred, prejudice, or bias based on race, sex, national or ethnic origin, language, colour, religion, age, mental or physical disability, sexual orientation or any other similar factor, Section 718.2(a)(i) (enacted in 1995) applies to require consideration of motivation as an *aggravating* factor in sentencing. The provocation defence in its current form is fundamentally inconsistent with the policy which this sentencing provision reflects. At minimum consistency would appear to require that the provocative impact of the "wrongful act" or "insult" on the accused not be based on or amplified by the accused's attitude toward any of the above enumerated characteristics of the victim. Cases decided under Section 718.2(a)(i) have held that hate based offences are more abhorrent, invite imitation, and attack the social fabric. For similar reasons rage fueled by hatred or bias should attract more condemnation, not less, where an accused fails to exercise the power of self-control and acts out his or her rage. These observations also support abolition of the defence of provocation.

Option 4.---Limit availability of the defence of provocation to persons enraged by words or conduct which provoke by reference to the accused's membership in a group that is subject to a pattern of widespread or historical discrimination, prejudice, or bias.

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[15] For a table comparing the sentencing and release practices of Canada with those of fifteen other countries, see Appendix II, below.

This proposal would limit the availability of the defence of provocation to persons who are provoked into a state of anger or rage in which they "lose the power of self-control" in direct response to wrongful, hateful, or insulting words or conduct directed against them which they perceive to be based on or motivated by their membership in one or more groups which have historically been the object of hatred and discriminatory treatment or are widely subject to discrimination and prejudice in Canada.

This option for reform was raised at the CAEFS consultation in Ottawa, but time did not permit full discussion at that consultation of the reservations some participants had about whether the "rage" experienced by members of marginalized and racialized groups in response to the treatment of group members actually does motivate violence and what the broad political and cultural implications and consequences would be for marginalized and racialized communities if the defence were retained in this form.

The common negative or destructive response of members of groups who are subject to systemic discrimination often appears to be to internalize their anger (as seen in symptoms such as hypertension and patterns of substance abuse and other self-destructive behaviour) or to direct that anger towards other members of the group to which they belong or towards dependent family members (or the family dog, or even inanimate targets, such as the wood-pile, or the "dirty" wood-work or kitchen floor). As observed above with respect to women, fear of reprisal, and a pattern of learned behaviour that habituates deference and subservience, generally serve to inhibit socially subordinated persons from acting on the rage that they may feel in response to discrimination. It should be recognized, as well, that the survival and ultimate liberation of marginalized and oppressed groups often lies in their ability to understand their circumstances and the motivations of their immediate oppressors in political terms and to thereby depersonalize the abuse to which they are subjected. The marginalized teenager who can laugh at "what some fool said or did" and then write a song or tell a story based on the experience is far more apt to die at home of old age then as a youth in a jail cell with a shiv in the back. This approach supports the development of rich sub-cultures and over time transforms public consciousness. It does not require and is indeed gravely under-mined by the killing of bigots in out-bursts of rage and by the corrosive, self-destructive assumptions and beliefs that underlie such rage.[16]

Accordingly it may be argued that insofar as enraged violence by the oppressed is self-destructive, and, moreover, inevitably strengthens social bigotry and invites pro-active repression, retention of the defence of provocation in a form that makes it available solely to marginalized individuals who kill because they are enraged by a pattern of discrimination and persecution is actually not in the interest of oppressed individuals or groups. Those few cases in which the accused actually *loses* the power of self-control in response to hateful insults, etc., can be dealt with as automatism cases. In such cases classification of the cause of loss of capacity as an extra-ordinary psychological blow or mental disorder, would determine whether a defence of

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[16]As an adjunct to the reconstruction of political/social culture, the legal system itself might be used to model a non-violent discourse based response to bigotry that combined denunciation with deconstruction of the simple ignorance that underlies bigotry.

sane automatism and a full acquittal is available. It might be thought that the probability that the defence of sane automatism would be found to be available as a matter of law and credible as a matter of fact in such cases would be likely to increase in proportion to the degree to which hatred and bigotry have been successfully marginalized in the community such that these encounters are rare and therefore "extra-ordinary" both in that sense and in the sense of that which is "shocking". In fact that is unlikely; bigotry when it is rare may well be seen as less not more threatening. It is more likely that successful uses of a defence of sane automatism will continue to be unusual. The defence of temporary insanity will probably be utilized instead, as necessary.

Option 5.---Abolish the Defence of Provocation.

Support for abolition of the defence of provocation is wide-spread. Many theorists argue that, in practice, the provocation defence operates to provide men with a licence to kill women at a cost of minimal loss of liberty and thereby devalues the lives of women.[17] This argument also applies to cases involving accused who kill members of marginalized or socially subordinate groups.[18] These effects appear to be strongest in the most hierarchical communities.[19] The defence of provocation when combined with significant social inequality and the community and judicial attitudes that commonly accompany and sustain social inequality may actually encourage both more acts of violence and more brutal violence.

Statistics[20] show that the provocation defence is most often raised in Canada by men who have killed a female in a domestic context. Women who kill males in a domestic setting usually do so in response to a pattern of abuse and often cannot satisfy the statutory criteria specified under Section 232. The provocative human significance of the final triggering event as perceived and experienced by a female accused may not be understood and appreciated by a male trial judge. Increasingly however, as noted above, particularization of the ordinary person test permits this particular hurdle to application of the defence to be over-come....as long as the emotional response is still anger. However the requirement that the response be "sudden" and "in the heat

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[17] See Andrée Côté, "Violence Conjugale, Excuses Patriarcales et Défense de Provocation." (1996) 29 *Criminologie* 89-113; and "The Defence of Provocation and Domestic Femicide." LL.M. Thesis, University of Montreal,1994.

[18] See Sheila Galloway & Joanne St. Lewis, "Reforming the Defence of Provocation," (article-unpublished) 1994, 48 pp.

[19] See Galloway & St. Lewis, op. cit., at 35, on the enhanced threat posed by the defence of provocation for women in highly patriarchal communities.

[20] See Maria Crawford and Rosemary Gartner, *Woman Killing: Intimate Femicide in Ontario, 1974-1990*, Toronto, Women We Honour Action Committee, 1992; and Maria Crawford and Rosemary Gartner, and Myra Dawson, *Intimate Femicide in Ontario, 1991-1994*, Toronto, Women We Honour Action Committee, 1997.

of passion" are modeled on the response pattern of the leading North American stereotype of the patriarchal male. [Here it should be recognized that socialization/ enculturalization (i.e., gender) plays a more significant role here than sex; a male socialized to regard the expression of anger as childish (as opined to me by a student raised in the Inuit culture) would be unlikely to respond to an insult with enraged machismo.] In addition, in many cases a female accused's fear and feelings of intimidation caused by the size, strength, and past violent conduct of the male provocateur, combined with learned subservience and socialization, may serve to inhibit and delay the violent expression of anger by a female towards a male provocateur. This difference in response between males and females makes the defence of provocation as it is presently framed more readily applicable to male conduct.

An analogous issue related to gender arises in the self-defence cases, but the reasons for relaxation of the "immediacy" requirement seen in that context will not necessarily benefit a female accused who alleges she was "provoked". A women whose socialization inhibits the use of force, and who may therefore appear to have demonstrated "restraint" in the face of extreme provocation, may find it more difficult, not less difficult, to claim subsequently that she did not make a deliberate choice to use violence but ultimately simply lost her capacity to exercise self-control. Indeed insofar as inhibition is a factor where the circumstances are provocative it will tend to suggest that all human beings, *including both women and men*, have a greater capacity for self-control than Section 232 in its present form *requires them to exercise*. And this, from a policy perspective likely brings us to the nub of the matter. The defence of provocation arguably rewards *avoidable* violence by excusing individuals who fail to exercise the degree of self-control of which they are capable. Canadian criminal law has moved generally in recent years towards the imposition of culpability under analogous circumstances. This perspective points to abolition of the defence on the grounds that it is inconsistent with contemporary Canadian criminal law policy. That policy requires that all individuals exercise a higher level of care, respect, and deference for the life, liberty, and personal security of other persons than was generally expected at the time the defence of provocation was developed.

Sentencing in Murder and Manslaughter Cases.

Sentencing is about penal consequences. This topic therefore points squarely at the need for discussion in the feminist community in Canada about the aims of "punishment" and the means of "rehabilitation". That discussion has yet to occur. There does appear to be some difference in opinion, much of which could probably be resolved through research, analysis, and discussion. Some of the questions to be addressed include such matters as: What is and what should be the purpose of a criminal conviction? What is and what should be the purpose of "punishment" and "social control"? What other social and legal actions and mechanisms are required to support the attainment of these purposes in individual cases and to reduce general reliance on the criminal law (state coercion) to achieve them? To what extent can and should reliance on incarceration be reduced? What are the implications of de-incarceration for federal / provincial cost-sharing and programming? Assumptions about the propriety of particular

responses to these and related questions will shape any discussion about sentencing in murder and manslaughter cases.

At this stage in the discussion it can be taken as established that sentencing in a murder case is only one of a number of opportunities to influence the severity of the penal consequences that attach to the commission of culpable homicide. And it will become immediately apparent that many of the same issues discussed in conjunction with the substantive law of the defences of provocation and self-defence are potentially relevant to sentencing as well.

The periods of incarceration required under Canadian law for murder are far longer than under the laws of many other jurisdictions at present.[21] This results from political compromises made at the time the death penalty was abolished in Canada. Since then the Charter has come into force. But in Luxton (1990, SCC) the court held that the mandatory minimum sentence for first degree murder does not infringe Sections 7, 9, or 12 of the Charter. Nonetheless, mandatory minimum sentences are widely seen to involve serious human rights issues.

A broad range of alternatives to the rigidity of the present system of mandatory minimum sentences for murder are available including:

Option 1. Reduce mandatory minimum sentences for first and second degree murder.

Option 2. With or without a reduction in mandatory minimums, create limited exceptions to permit sentencing discretion by trial judges subject to statutory guidelines where a conviction of either murder or manslaughter has been entered against the accused

(*a*) and either the accused, or the person killed by the accused, is a women;

And/or (b) and the circumstances of the offence involved an attempt by either the accused or the person killed to protect the life, personal autonomy, or personal security of herself or persons for whom she is responsible in face of coercive-oppressive control or abuse.

Option 3. Abolish mandatory minimum sentences for first and second degree murder;

Option 4. Abolish mandatory minimum sentences for first and second degree murder and enact statutory guidelines to constrain the exercise of judicial discretion in sentencing in (a) all murder *and* manslaughter cases; or (b) in the cases specified in Option 2(a) and (b).

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[21] See Appendix II, "Life Sentences for First Degree Murder (Canada) and International Equivalents: Eligibility for Release and Average Time Served," Corrections Directorate, Ministry of the Solicitor General, March 4, 1999.

Option 5. Reduce mandatory minimum sentences for first and second degree murder. and enact statutory guidelines to constrain the exercise of judicial discretion in sentencing in (a) all murder *and* manslaughter cases; or (b) in the cases specified in Option 2(a) and (b).

At the CAEFS consultation there was substantial support for the abolition of mandatory minimum sentences *as long as* abolition is combined with the enactment of sentencing guidelines to constrain judicial discretion in sentencing. Abolition alone was widely viewed as prejudicial to the lives and personal security of women who are subject to violence, particularly male violence. These concerns were also strongly expressed on behalf of women who are also persons with disabilities or members of marginalized or racialized groups. The general apprehension on behalf of people who lack power in Canadian society is that the unconstrained exercise by judges of discretion in sentencing will perpetuate and enhance existing inequalities and place women who are subject to violence at increased risk. If the guidelines approach is adopted, many of the issues discussed above in relation to the substantive law of the defences will need to be re-visited for the purpose of generating the criteria to be incorporated in the guidelines.

In this connection consideration should be given to the possible use of conditional sentences in selected murder cases. The legislation providing for conditional sentences is an initiative with the potential to reduce reliance on incarceration in Canada. The use of conditional sentences in murder cases would require legislative amendment to remove / qualify the prohibition in Section 742.1 against the use of conditional sentences where a minimum term of imprisonment is required or where the sentence is more than two years.[22] If conditional sentences were used in selected murder and manslaughter cases, what, if any, conditions should be mandatory? Should guidelines address this issue? The very suggestion that conditional sentences may be appropriate in some murder and manslaughter cases poses an obvious challenge to widely held assumptions about punishment in murder cases. This underscores yet once again the need for fundamental re-examination within the feminist community of the nature and purpose of "punishment" and state coercion.

Controls on Exercise of Discretion by Prosecutors, Parole Boards, and Review Boards.

As noted above, prosecutors and parole boards exercise significant discretionary power to shape the practical effect of conviction. Analogous issues arise where an individual is subject to detention following a finding of lack of criminal responsibility under Section 16 of the Criminal Code. Whether an accused has effective representation by funded counsel at these stages is a significant factor.

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[22] And see Carol Fleishhacker, LLM. Thesis, 1999, University of Saskatchewan, for a discussion of empirical studies that provide evidence to support re-evaluation of the common assumption that sentences served in the community are not experienced by offenders as "punishment" or are seen by offenders as a less onerous form of punishment.

Consideration should be given to regulation of the policy criterion used by prosecutors in charging and plea bargaining as a means to eliminate the potential for abuse of the prosecutorial power to obtain guilty pleas from women who are often understandably intimidated by the risk of conviction on a charge with a mandatory minimum. Elimination of plea bargaining (both charge and sentence bargaining) in cases where the accused is a woman could be proposed as a form of affirmative action required to redress a structural/ systemic power imbalance that disadvantages women.

Lack of access to effective funded legal representation remains an issue for many inmates in correctional facilities across the country. Conditional release decisions as well as numerous matters related to prison conditions, health case, transfers, visits, communication, education, etc., all of which collectively contribute to the quality of life of an inmate, are often adversely affected where an inmate has no means to enforce his or her rights.

Accordingly, in conjunction with the questions about the implications of women's equality rights for the handling of murder and manslaughter cases, it cannot be forgotten that a life sentence for manslaughter, even with a comparatively short term certain to parole eligibility, places the inmate's potential conditional liberty at the discretion of the parole board. Parole board decisions are of comparatively low visibility but have a significance impact on the actual duration of incarceration. The matter of gender equality before the parole board in cases involving inter-personal violence therefore warrants close scrutiny if we are to have a comprehensive grasp of the full impact of the conviction of a woman for murder or manslaughter.

Section 2: The Consultation Report and Recommendations.

The LEAF Consultation: Participants and Format.

The LEAF consultation was held in Toronto on July 29, 1999. It was organized as a one day meeting and attended by about sixteen women selected to ensure a broad range of life experience and expertise as well as social, cultural, and racial diversity among the participants in the discussion.

The first half of the consultation focused on the effects of the present law of provocation (in its procedural, evidentiary, as well as substantive aspects) and the projected effects of various proposed reforms of the law on diverse identifiable segments of Canadian society. The central objective in this discussion was to ensure that evaluation of options for reform did not limit itself to a black letter "theoretical" legal perspective in which the actual impact of the law on members of affected communities was ignored. The second half of the consultation focused on specific options for reform. Discussion focused on the five options for reform of the law of provocation set out in the Background Discussion Paper above, at pages 14-15, and encompassed the closely related issue of mandatory sentences, alternatives to which are outlined above at pages 30-31. The discussions were confidential. This report is therefore structured as a report on the five

recommendations generated in the LEAF consultation itself, together with the rationale for those recommendations.

__Executive Summary__: **The LEAF national consultation on the defence of provocation, held in July 1999, examined the defence within the context of equality principles with particular attention to the actual impact of the present law and the proposed changes on members of diversely situated groups in Canadian society. The consultation determined that egalitarian principles and objectives require a comprehensive legislative reform package encompassing the abolition of the defence of provocation, the expansion of the statutory grounds on which the defensive or protective use of force is recognized to be justified to ensure that the defence reflects substantive Charter values, the abolition of mandatory minimum sentences for murder, the enactment of judicial sentencing guidelines for murder and manslaughter cases to ensure that sentencing discretion is exercised in accordance with criteria established with reference to Charter values, and, accordingly, consistent with that objective, the inclusion in those guidelines of the principle that a sentence should be increased where the offender was motivated by a desire to exercise control over the victim or the victim's conduct, or by hatred, bias, or prejudice based on sex, ethnicity, religion, colour, national origin, language, mental or physical ability, sexual orientation, social or political beliefs, cultural practices, or analogous characteristics.**

The specific recommendations adopted by consensus at the consultation on the defence of provocation, together with the rationale for the adoption of each, are detailed below.

__Recommendation 1__: **That the defence of provocation be abolished.**

Violence and threats of violence are inimical to the fundamental values of a society that seeks to nurture egalitarianism. The social and cultural effect of the legal defence of provocation is to condone and thereby legitimate the use of violence and threats of violence against those who are different, deviant, or disruptive, and less physically and socially powerful. The defence of provocation therefore arguably violates sections 7, 15, 27, and 28 of the __Charter__ by denying equal benefit and protection of the law for the substantive life, liberty, and personal security interests of all persons in Canada. In its interpretation and application the defence also has discriminatory effects which systematically disadvantage the less socially powerful members of society, which includes all women, as accused persons. In adopting the __Charter__ Canada has affirmatively espoused egalitarian legal principles and invested those principles with constitutional status. The defence of provocation therefore no longer has any place in the substantive law of criminal defences in Canada and should be abolished.

The defence devalues the lives of persons whose mere words or conduct are deemed sufficiently "provocative", wrongful, and insulting to provide a basis to mitigate punishment for what would otherwise be a murder conviction. The effect of the defence is to prejudice the liberty interests of all persons who, but for the threat of a legal quasi-sanction or partial excuse

for homicidal violence, might be inclined to engage more freely or more frequently in similarly "provocative" speech or conduct. In this way the defence sanctions and legitimizes the use of violence and threats of violence as a means to assert and maintain control over other persons. It is therefore not surprising that the defence is most often invoked in cases where the alleged provocateur was a woman, a child, someone who was socially subordinate to or dependent on the assailant, or who, whether subordinate or not, challenged the status or authority of the accused. The so-called "homosexual panic" defence exemplifies such a use of the mere fact of another person's social-sexual identity as an excuse for homicidal violence.

By implying that the alleged provocateur is partially responsible as a matter of law for the aggression that caused his or her own death, the use of violence against those whose words or conduct are perceived to be outrageous and enraging is condoned. In the aggregate, cases in which the defence of provocation is successfully invoked inevitably nurture authoritarian and hierarchical cultural/social beliefs and attitudes that encourage assailants to lose (or arguably to simply fail to exercise) the power of self-control. The brunt of the resultant violence falls most often on those who deviate or are seen to deviate from dominant norms. Thus the defence of provocation in effect licences violence and threats of violence as individualized private social control mechanisms.

The defence is also a significant source of discrimination against accused persons in that the defence may often not be deemed to be available in law to some individuals who are nonetheless extremely angry about the conduct of others. Accused whose life experiences and circumstances are not shared or readily understood by decision-makers in the criminal justice system may attach a significance to aggravating conduct that is equally opaque to and unappreciated by the decision-makers. Moreover, insofar as the defence of provocation invokes a rationale of "excuse", rather than "justification", and therefore requires the accused to acknowledge temporary loss of capacity in the form of "loss of the power of self-control", it tends to invite the application of a pathological model to the accused. Accused are thereby placed at enhanced risk of assessment in the future as "disordered", "sick", "crazy", or simply "dangerous", and may inappropriately internalize these labels with serious negative effects for self-image and personal decision-making. In addition, in cases where the accused is identified as a member of a socially subordinated, marginalized or racialized group, use of a defence that partially excuses violence on the basis of "loss of the power of self-control" may reenforce negative stereotypes of and prejudice against that group held by persons who are members of the group, as well as by "outsiders". The effect is to reenforce rather than reduce social inequalities and perceptions of social difference.

The proposition that accused who commit murder in a fit of rage (in response, for example, to systemic discrimination or abuse of power in a hierarchical relationship) might benefit from the defence of provocation and, moreover, perhaps should be permitted to benefit from such a defence on affirmative action grounds, does not sustain scrutiny. The evidence suggests that such cases are rare and that the behaviour, when it does occur, is not only self-destructive for the accused, but also harmful to the interests of the equality seeking group to which the accused belongs and to social understanding and solidarity for the reasons noted

above. Arguments purportedly based on equality principles should not be used to condone and encourage homicidal rage.

Defences relying on mental disorder will continue to be available in appropriate cases, including cases in which the accused is cognitively impaired or disabled either temporarily or permanently. In cases not involving mental disorder as defined under section 16, systemic discrimination can be taken into account in sentencing, as discussed below under Recommendation #4. If, in addition, section 16 of the Criminal Code is amended along the lines proposed by Madame Justice Wilson writing in dissent in Chaulk, accused will no longer be liable to conviction despite a reasonable doubt about capacity for criminal responsibility. This approach will permit the imposition of conditions on release in appropriate cases, while precluding a finding of "criminal responsibility" in the absence of proof of capacity according to a criminal standard. The effect would be to remedy the violation of section 7 of the Charter entailed at present by the requirement of proof on a balance of probabilities of mental disorder under section 16.

Recommendation 2: That no other substantive partial defences be enacted to provide for mitigation of sentence by reduction of a conviction from murder to manslaughter where commission of the offence was motivated by human emotions such as compassion, fear, or despair.

In recognizing actions which are motivated by anger but not those which are motivated by other potentially compelling emotions such as despair, fear, empathy, or compassion, as legal grounds for mitigation of punishment, the criminal law may be said at present to demonstrate a lack of appropriate compassion for many accused persons insofar as it ignores the significance of the influence of authentic human emotional responses to life circumstances as "causes" of their criminal conduct. Compelling claims for sentencing treatment equivalent to that afforded provoked accused certainly can be made by desperate care-givers and battered women who have been convicted of murder. Why should mitigation of sentence be accorded many of those who kill in a fit of homicidal rage but not those who are motivated to kill by fear, despair, or compassion?

The response to this question is multi-faceted. First, as seen in Recommendation #1, it must be concluded that emotional motivation alone, whether the emotion be anger, fear, despair, compassion, or empathy, can never provide an explanation for violence that constitutes more than an excuse. This has long been recognized at criminal law which has traditionally never treated the motive for an offence as relevant to conviction other than insofar as it may provide circumstantial evidence of intent. Excuses for human choices are not justifications and cannot be permitted to function as grounds for acquittal if we are to establish a society in which respect for the rights of others has priority over the unconstrained expression of each individual's personal desires. Accordingly it must be concluded that not only should the defence of provocation be abolished, as recommended above, but for the same reasons no further defences should be enacted that are structured in a manner analogous to provocation and grounded on recognition of

compelling human emotion as an "irresistible" force which overwhelms human capacity to exercise control over choice.

Nonetheless, as was proposed in the case of claims of provocation, those few individuals who make a credible claim that they actually were unable to exercise control over their actions as a consequence of their emotional response to the circumstances and whose capacity for criminal responsibility is cast in reasonable doubt by the evidence should be dealt with by a verdict of "not criminally responsible" under section 16 rather than by conviction. In addition, accused who act to defend themselves or others under circumstances in which they reasonably perceive the use of force to be necessary will be acquitted in accordance with traditional principles governing necessity, and pursuant to Recommendation #3 below which contemplates a simplification and broadening of the defence of self-defence. These two changes should ensure that many of the accused who are now convicted of murder or manslaughter will have an appropriate legal defence available to them that may result in acquittal. The beneficiaries of these changes should include many women and members of racialized and marginalized groups for whom self-defence, as presently defined in law, is now often not available or is restricted because of the difficulty the trier of fact has in appreciating the accused's perception of the circumstances. These matters are discussed in greater detail below in conjunction with Recommendation #3.

Compassion for the residual group of accused persons, who have neither a defence based on self-defence nor mental disorder, or who do but are nevertheless convicted of murder or manslaughter, can be expressed in appropriate cases through the sentencing process as proposed below under Recommendation #4. The sentencing guidelines, to be legislated, will permit distinctions based on Charter values to be made between those cases in which mitigation of sentence on the grounds of compassion in recognition of the accused's emotional response to the circumstances in which the offence was committed is, and is not, permissible as a matter of law. It is proposed that the guidelines incorporate a principle requiring that the sentence be increased in any murder or manslaughter case in which hatred, bias, or prejudice, based on the personal characteristics or Charter protected conduct or beliefs of the victim, was a motivating factor for commission of the offence. This measure is intended to protect the lives, the liberty, and the personal security of less powerful members of Canadian society from being discounted or devalued in the exercise of sentencing discretion.

Recommendation 3: That the defence of self-defence be simplified and the interests that justify the defensive use of force be expanded to include protection of personal security, including but not limited to coercion by physical force or threats of physical force, on the ground that such an expansion is required to achieve substantive equal liberty and security for all, irrespective of gender, race, ethnicity, sexual orientation, religion, etc., as guaranteed by sections 7 and 15 of the Charter, and is thus required to achieve an interpretation and application of the law of self-defence that is consistent with Charter values.

Participants in the consultations were of the opinion that women accused of murder may often not obtain equal benefit of the defence of self-defence. This may occur in a number of ways. Women who do not understand the law of self defence may not realize that it may apply to them and may assume themselves to be "guilty" as charged. This assumption, compounded by the self-accusatory tendency of many women who have killed in an act of desperate last resort, inevitably colours communications with legal counsel, who may themselves not appreciate the significance of the woman's circumstances sufficiently to make the appropriate connections between the present law of self-defence and the facts of the case. This group of women should enjoy the benefit of the defence as it is presently defined but often may not because of failure to identify relevant facts and apply the law properly.

A second group of women are not protected from conviction for murder by the law of self-defence because the defence limits the purposes that justify the use of force to protection of one's own life and the avoidance of serious bodily harm to oneself and the defence of persons under one's protection from assault. The justification under section 37 has been interpreted to encompass circumstances where lethal force is used to protect another person, such as a child, from assault or its repetition. But it may not provide a defence to murder where the harm avoided by the defensive use of force is physical harm that is not "grievous", or is not characterized as "grievous" by counsel or the judge, and the use of lethal force is deemed to be a disproportionate response. Nor does the defence apply where the harm defended against is psychological harm, however severe, or the coercive use and abuse of one or more forms of power to strip the accused of autonomy in one or more of the fundamental aspects of her life.

The general assumption has been that women and other persons who find themselves subject to psychological abuse and coercive control are able to withdraw from oppressive relationships without the use of force. However the numerous cases in which women who leave or attempt to leave an oppressive relationship have been killed by their abusive partners precisely because they left show this assumption to be incorrect. Yet under the present law of self-defence women who kill their husband or partner because they have concluded that there is no other safe means of escape from a controlling, oppressive relationship have no defence to a charge of murder. This is a gap in the law which must be remedied because the effect of the gap is to abandon women and other dependent persons to lives of abject subordination in violation of fundamental principles of human rights. Public resources to assist these individuals are generally wholly inadequate to assure their safety as they attempt to assert their right to live independently, free from controlling partners. This is widely recognized. As a consequence some women conclude that unless they are prepared to go underground there simply is no safe means of escape. A few do just that: others stay, and of this latter group some eventually kill and typically find themselves without a defence to murder. Self defence is defined too narrowly to be applicable. The defence of provocation[23], even in those rare cases in which it may be found to be

[23] In Recommendation #1 abolition of the defence of provocation is proposed. Provocation is sometimes seen as an alternative defence where self-defence is not available in law to an accused, but in actuality the provocation defence offers accused very limited and highly uncertain benefits at an extremely high cost to the accused.

appropriate to the particular circumstances of the individual case, is of highly dubious benefit because it entails a life sentence with ultimate release from incarceration at the discretion of the parole board.

At international law we recognize that peoples living under conditions of political and legal subjugation have the right of self-determination and the right to use force to assert that right. Why then should we not recognize an obligation to afford persons living in conditions of subjugation in Canada either appropriate state protection against those forms of subjugation and oppression that violate individual human rights at international law or an analogous right to use force when necessary to assert their right to live as autonomous persons free from subjugation? If the hesitation is based on the perception that it may be difficult to distinguish between those cases in which the use of lethal force was reasonably necessary to avoid the harm and those in which it was not, that difficulty is always present in self defence cases.

The crucial change would lie in giving effect to the recognition of personal autonomy, of the right of the individual to be free from coerced compliance with the unlawful dictates of another person, as a fundamental interest which individuals are entitled to defend to the same extent and by the same means, when necessary, as they are entitled to use in defence of their lives and to protect themselves against grievous bodily harm. Such an expansion of the right of self-defence is arguably required to implement the protections for substantive liberty and personal security guaranteed under sections 7, 15, and 28 of the Charter, and is consistent with the proposition that under non-hierarchical social and legal arrangements in a state governed by laws structured to give effect to egalitarian principles, the state must enact criminal laws that actually do protect the equal right of all persons to equal personal autonomy free from criminal interference.

Even those women to whom the defence of self-defence is available in law at present, and who might obtain a full acquittal at trial, may often not actually benefit from the protection afforded them by the defence because the apparent certainty offered by a charge and plea bargain frequently appears more attractive than taking the risk of being convicted of murder if a plea of self defence is not successful. It is rare for a woman to be willing to risk conviction of first or second degree murder if a charge of second degree murder or manslaughter can be obtained in return for a guilty plea. Many women are easily intimidated or otherwise persuaded to accept responsibility for a lesser offence. Others are primarily concerned to limit the period of time to which they will be subject to incarceration because their primary objective is to maintain ties with children and other family members. Yet some of those women would have received a full acquittal had the case gone to trial. In addition, many women who accept such a bargain are given a life sentence and therefore, despite the specification at sentencing of a minimal term of parole eligibility, are eligible for conditional release from incarceration only at the discretion of the parole board. The Self-Defence Review included more than one case in which a woman remained incarcerated long after her parole eligibility date. These issues all have a significant impact on the practical consequences of conviction.

Recommendation 4: That legislated guidelines be enacted for murder and manslaughter cases to ensure that sentencing discretion is exercised in accordance with criteria established with reference to Charter values, and, accordingly, consistent with that objective, that those guidelines include the principle that a sentence should be increased where the offender was motivated by a desire to exercise control over the victim or the victim's conduct or by hate, bias, or prejudice based on any of the aggravating factors specified, or analogous to those specified, in Section 718.2(a)(i) of the *Criminal Code*, that is, race, sex, national or ethnic origin, language, colour, religion, age, mental or physical ability, sexual orientation, political and social beliefs, or cultural practices, and, on the coming into effect of these guidelines, that the present mandatory minimum sentences for murder be abolished.

This recommendation reflects two strongly held views: (1) that the mandatory minimum sentences for murder are inappropriately inflexible and severe in many cases and should be abolished; and, (2) that in the absence of mandatory minimum sentences, legislated guidelines are needed to ensure that judicial sentencing discretion in murder and manslaughter cases will be exercised in accordance with and in furtherance of Charter values. Participants at the consultation took the position that the two aspects of Recommendation 4 which correspond to these strongly held views were not severable. In other words, until appropriate legislated guidelines are in place, mandatory minimum sentences for murder should not be abolished.

The wide-spread and firmly expressed concern was that the discriminatory attitudes towards women, and others who are identified as members of distinct groups on the basis of race, sex, national or ethnic origin, language, colour, religion, age, mental or physical ability, sexual orientation, political and social beliefs, or cultural practices, which express themselves in violence against members of these groups, will also affect sentencing in murder and manslaughter cases. If the lives and well-being of all persons in Canada are to enjoy equal protection by law then guidelines must be established to ensure that the exercise of sentencing discretion is not discriminatory. In the absence of such guidelines it is likely that sentences will continue to be influenced by the perceived "social value" of the victim and the perpetrator, and that penalties for homicidal violence directed at women, racialized minorities, lesbians, gays, persons who are disabled, etc., will often signal that the lives of such persons are not equal in value to the lives of more powerful members of society.

In view of these concerns it is proposed that the legislated guidelines require that the sentence for murder and manslaughter be increased in all cases in which there is evidence that the offence was motivated by a desire to exercise control over the victim or the victim's conduct, or by hate, bias, or prejudice based on any of the aggravating factors specified, or analogous to those specified, in Section 718.2(a)(i) of the *Criminal Code*, that is, race, sex, national or ethnic origin, language, colour, religion, age, mental or physical ability, sexual orientation, political and social beliefs, or cultural practices. This will ensure that the abolition of mandatory minimum sentences for murder is not inappropriately interpreted as an invitation/licence to kill the less powerful members of society. Departure from the guidelines would be permitted in appropriate

cases. Reasons would be required to explain the departure from the guidelines and the propriety of the sentence would be a question of law, subject to review on appeal.

In reviewing this Report a number of members of the National Legal Committee who had participated in the Leaf Consultation observed that they perceived the general expectation at the Consultation to have been that the guidelines will also provide that where the accused kills in response provoking acts or insults based on the accused's social, racial, or ethnic identity or group membership, the provocative circumstances are to be considered a mitigating factor in sentencing.

<u>**Recommendation 5**</u>: **That women across Canada engage in a comprehensive examination and evaluation of the nature and purpose of criminal conviction and punishment, and of the assumptions and beliefs on which current sentencing and correctional practices are based, with a view to the development of a fundamental reconceptualization of: a) the framework within which the criminal law power of the state operates; b) the objectives of the criminal law; and, c) as need be, the methods used by the state to attain those objectives; and that the federal government fund this project.**

Throughout the discussions at the CAEFS and LEAF consultations the view was repeatedly asserted, in the context of discussion of issue after issue, that women need to engage in a nation-wide discussion among diversely situated individuals and groups situated at the community and grass-roots level about the assumptions, objectives, and methods that shape criminal justice practices and policies in Canada, to provide a basis for decision-making in matters of criminal justice and corrections that is in accord with egalitarian principles and appropriately reflects <u>Charter</u> values. The past experience of many consultation participants with processes of social and legal change has demonstrated to them that discourse on fundamental issues at the community and grass-roots level where people know the effects of the law first hand is of immeasurable value in framing new and effective approaches to issues in criminal justice. Participants were strongly of the view that questions such as those related to the objectives of the criminal law, penal philosophy, the methods used in corrections, and the many issues related to sentencing and mandatory minimum sentences, should be extensively discussed at the local level and by a diverse range of groups. Comprehensive research, analysis, and consultation is essential if there is to be broad agreement around some of the directions for change raised by or implicit in one or more of the recommendations proposed here. The federal government is urged to allocate funds for such a project.

Appendix I.

Selected excerpts from the **Charter of Rights and Freedoms, 1982**.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. 30/31 Eliz. 2-11 Sch. B:7 (U.K.).

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. 30/31 Eliz. 2-11 Sch. B:15 (U.K.).

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. 30/31 Eliz. 2-11 Sch. B:27 (U.K.)

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. 30/31 Eliz. 2-11 Sch. B:28 (U.K.)

Excerpts from the **Criminal Code**: as amended to June 28, 1999---substantive provisions relevant to provocation, self-defence, murder, manslaughter, and sentencing.

Use of force to prevent commission of offence

27. Every one is justified in using as much force as is reasonably necessary
    (a) to prevent the commission of an offence
        (i) for which, if it were committed, the person who committed it might be arrested without warrant, and
        (ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or
    (b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).

Preventing breach of peace

30. Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him into the custody of a peace officer, if he uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace.

Defence of Person

Self-defence against unprovoked assault

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

Extent of justification

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Self-defence in case of aggression

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if
(a) he uses the force
(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and
(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;
(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

Provocation

36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

Preventing assault

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

Extent of justification

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

Defence of Property

Defence of personal property

38. (1) Every one who is in peaceable possession of personal property, and every one lawfully assisting him, is justified
(a) in preventing a trespasser from taking it, or
(b) in taking it from a trespasser who has taken it, if he does not strike or cause bodily harm to the trespasser.

Assault by trespasser

(2) Where a person who is in peaceable possession of personal property lays hands on it, a trespasser who persists in attempting to keep it or take it from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation.

Defence with claim of right

39. (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

Defence without claim of right

(2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.

Defence of dwelling

40. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.

Defence of house or real property

41. (1) Every one who is in peaceable possession of a dwelling- house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

Assault by trespasser

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.

Assertion of right to house or real property

42. (1) Every one is justified in peaceably entering a dwelling- house or real property by day to take possession of it if he, or a person under whose authority he acts, is lawfully entitled to possession of it.

Assault in case of lawful entry

(2) Where a person

(a) not having peaceable possession of a dwelling-house or real property under a claim of right, or

(b) not acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right, assaults a person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be without justification or provocation.

Trespasser provoking assault

(3) Where a person

(a) having peaceable possession of a dwelling-house or real property under a claim of right, or

(b) acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right, assaults any person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be provoked by the person who is entering.

-For the definition of culpable homicide as murder, see s. 229.

-On classification of murder committed in the course of certain specified offences, including sexual assaults, kidnapping, and forcible confinement, as first degree murder, irrespective of whether the murder is planned and deliberate, see s. 231.

Murder reduced to Manslaughter

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

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

(3) For the purposes of this section, the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything 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) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

Punishment for Murder

235. (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment.

Manslaughter.

236. Every person who commits manslaughter is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

On sentence and eligibility for parole see, inter alia: s. 745 on sentences of life imprisonment and eligibility for parole; and ss. 742 - 742.7 on conditional sentences.

Appendix II.

Life Sentences for First Degree Murder (Canada) and International Equivalents Eligibility for Release and Average Time Served

Country	Sentence Reviewed/Parole Eligibility	Average Incarcerated Time Served
Canada	25 Years - "Faint Hope" Sec. 745.6 CCC allows offenders to apply for sentence review at	23.4 years*
Australia	Parole Eligibility at 13 years	14 3/4 years
Austria	Parole Eligibility at 15 years	20 years
Belgium	Life sentence for murder (Voluntary Homicide). In reality, a 30 year maximum with first judicial review at 1/3rd of sentence, hence 10 years for first time offenders. For recividistic murderers this parole ineligibility is moved to 14 years. Belgium has a parole board but under new legislation starting 99/01/01 lifers conditional release now decided by judges in the court system but the proceedings take the form of a parole board hearing.	Belgium statistics of average time Incarcerated do not include pre-trial detention. Estimated average length of pre-trial detention = 1.5 years. Convicted murderers serve an average of 4048 days in custody = 11.2 years. 1.5 years + 11.2 years = 12.7 years.
Denmark	No parole ineligibility period	13.5 years
England	Mandatory life sentences reviewed after 10 years Home Secretary reviews life sentences.	14.4 years
Finland	No Parole System - 'Fixed practice' of pardoning by President of the Republic at 10 - 12 years	10 -12 years for one victim, 2 or more victims 15 years
France	30 years maximum for "homicide voluntaire" which corresponds to first degree murder. Parole Eligibility at 15 years.	15.5 years
Ireland	First sentence review at 7 years	21 years
Japan	Parole Eligibility at 10 years (7 years if offender under 20 years of age).	21.5 years
New Zealand	Parole eligibility at 10 years	11 years
Norway	No life sentences - maximum penalty for murder is 21 years (this includes multiple murders). Parole eligibility at half sentences. (Range: 2.5 years to 10.5 years)	12.5 years
Scotland	Life sentence for murder - First review at 7 years. Offender goes before a civilian parole board.	11.2 years
Sweden	Life sentence - Offender can ask for review after 4 years. Prison and Probation Services make the decision	12 years
Switzerland	Life sentence for murder - automatically reviewed by judge after 15 years.	All get some form of conditional release at 15 years
United States	1) Life without parole: (Exit due to death, Governor's Commutations, Compassionate Release) 2) Life with possibility of parole	29 years 18.5 years
Average	**9.5 Years**	**14.3 Years**

Based upon 1994 United Nations date - these countries have been contacted to update these figures.
Prepared by: Corrections Directorate, Ministry of the Solicitor General 1999/03/04
*Note from JHSC:The Kaplan-Meler survival analysis was used to calculate the average length of time that 1st degree murderers will spend in prison. While the median time is 28.4 years, more than half will, on average spend 30.6 years in prison.