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**PROVOCATION EXCUSE:
USING INTERNATIONAL LAWS AND NORMS
TO GIVE PERSPECTIVE IN THE DOMESTIC SPHERE**

By Erin Iungerich*

Introduction

“It effectively provides a defence for lashing out in anger, not just any anger, but violent, homicidal rage. It rewards lack of self-control by enabling an intentional killing to be categorised as something other than murder.”¹ Those were the words of New Zealand’s Justice Minister Simon Power on why he introduced a bill to abolish the provocation excuse in his country. The bill passed in New Zealand’s Parliament by a vote of 116 to five.² When it was announced the five opposing members would vote against the bill, members supporting the bill shouted “shame” at those opposing.³

The visceral reaction of politicians came against the backdrop of a University employee claiming he was provoked into stabbing his ex-girlfriend 216 times.⁴ The experience of New Zealand is not unique, however. The case of *People v. Merel*⁵ provides a reason to dislike the use of the provocation partial excuse in general, and homo- and transphobic applications of the excuse in particular.

Jose Antonio Merel and Michael William Magidson were charged in the death of Gwen Araujo, a transgender woman. Both Merel and Magidson had sexual relations with Araujo. There were discussions about Araujo’s gender between the defendants and their friends. The court notes

* J.D. Candidate, Sandra Day O’Connor College of Law. I would like to thank my proofreader, sounding board, therapist, and best friend Debi Kealey for her invaluable help while I was researching and writing this article. I would also like to thank Professors Carissa Hessick, Judy Stinson, and Zachary Kramer for their most welcome advice and counsel.

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¹ Crimes (Provocation Repeal) Amendment Bill, [2009] 656 NZPD 5646 (N.Z.) [hereinafter *Provocation Repeal*] (Statement of Hon. Simon Power) *available at* http://www.parliament.nz/en-nz/pb/debates/debates/49HansD_20090818_00001219/crimes-provocation-repeal-amendment-bill—first-reading.

² *Provocation Defence Abolished*, THE NEW ZEALAND HERALD (NOV. 27, 2009), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10611973.

³ *Id.*

⁴ *Id.*

⁵ *People v. Merel*, A113056, 2009 WL 1314822 (Cal. Ct. App. May 12, 2009).

that in one discussion, the defendants talked about “men who dressed as woman [sic] and ‘l[ed] men into sex.’”⁶ At one point, Magidson attempted to feel Araujo’s genitals and breasts, and Araujo pushed his hand away⁷ (one might wonder if at that point Araujo would have been justifiably enraged at the unwanted sexual advance of Magidson to meet the provocation excuse standard, but this article will not discuss that point). Finally, after a night of drinking, Merel, Magidson, and their friends decided to confront Araujo.⁸ At one point, Merel was alleged to say, “I swear if it’s a man, I’m going to fucking kill him.”⁹ The fact Araujo was referred to as “it” indicates something about the mindset of her attackers. After forcing Araujo to submit to an invasive inspection, and discovering Araujo was a transgender female with genetic male genitalia, Merel purportedly began crying and said, “I can’t be fuckin’ gay.”¹⁰ The defendants went on to beat Araujo with a can, a frying pan, a fist, a knee, tied her up with rope, wrapped her in a blanket, beat her with a shovel, and then buried her in a hole.¹¹ The defendants were allowed to make an argument of provocation to the jury.¹²

I relate the story of Gwen Araujo to give the discussion of provocation defense some perspective. As Joshua Dressler notes in his well-thought out article, “[i]n the ordinary provocation case, for example, when the provoker spits in another’s face, uses insulting racial epithets, wrongs the individual by assaulting him, or commits some harm to a loved one, the provoker sends a disparaging message . . . or commits a seeming injustice.”¹³ While we may understand a defendant becoming enraged at a perceived insult, seeming injustice, or unwanted advance, we must keep in mind the kinds of brutal acts perpetrated by defendants who wish to use the provocation defense. In return for Gwen Araujo’s perceived wrong, which was apparently not disclosing her genital status to the defendants, she was brutally beaten, then dumped in a hole.

The question is not whether such situations as the Araujo case can enrage; the provocation excuse exists because they can. Rather, this article will not explore whether such situations should enrage; that is a social question beyond my scope. What question this article will explore

⁶ *Id.* at *2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *3.

¹¹ *Id.* at *3-*5

¹² *Id.* at *9.

¹³ Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on A Difficult Subject*, 86 Minn. L. Rev. 959, 972 (2002).

and attempt to answer is whether a jury should be able to mitigate a crime through the provocation excuse.

Part I will give a very brief overview of the current state of provocation law in the United States. Part II will examine international norms and treaties, along with solutions in other common law countries, to the provocation excuse problem. Part III will look at proposed solutions in the domestic legal system. Part IV will put forward using international norms and treaties to formulate a role for juries in provocation mitigation. I will discuss the provocation excuse as a whole, with reference to specific problems of homosexual and trans panic, and violence against women as ways to understand the flaws in provocation theory. My proposal is that the United States' legal system take into account international human rights ideas which could be used to help juries frame their deliberation on whether to mitigate a murder charge based on provocation. I suggest juries be instructed they may consider provocation in a murder trial, but if, and only if, the jury finds doing so would not violate the victim's human dignity or right to security of person, and respects the victim's right to private life.

I. Description of the Current Provocation Defense

A. American Common Law

A typical common law statute regarding the distinction between murder and manslaughter can be found in 18 U.S.C. § 1112: “(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: voluntary – Upon a sudden quarrel or heat of passion.”¹⁴ The presence of heat of passion is viewed as removing the malice requirement for murder.¹⁵ Common law provocation uses a “reasonable man” standard to determine whether a sudden quarrel or heat of passion caused sufficient provocation to eliminate the malice consideration for murder.¹⁶ The common law has further narrowed provocation defense beyond the reasonable man standard. Typically, courts will limit sufficient provocation to certain scenarios, including unjustified physical attack, mutual combat, certain extreme threats, adultery, or assault of a close relative.¹⁷ Further, there must have been no time between the provocation and the killing for a reasonable person to have “cooled off.”¹⁸

¹⁴ 18 U.S.C. § 1112 (2013).

¹⁵ PAUL H. ROBINSON, CRIMINAL LAW DEFENSES §102 (2012).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

B. Model Penal Code

The Model Penal Code lays out a provocation rule which represents a departure from traditional common law rules of sudden quarrel or heat of passion.¹⁹ Instead, the MPC uses a standard of “extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”²⁰ The MPC further modifies the common law rule by stating, “The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.”²¹ There are four important effects of the MPC’s broader language: 1) the victim does not have to be the source of the disturbance; 2) the common law tradition of limited circumstances is removed; 3) the jury does not use a reasonable person standard to determine whether there is adequate provocation, instead examining the facts from the point of view of someone in the defendant’s situation; and 4) “the adequacy of the provoking conditions is to be determined not according to the circumstances as they are, but as the defendant believes them to be.”²² In the explanatory note to the MPC manslaughter rule, the authors state, “The traditional requirement of a sudden heat of passion based on adequate provocation is broadened by the Model Code, though the new version still retains both objective and subjective components.”²³

C. Example of Statutory Exception in the United States

The state of Maryland retains much of the common law qualifications for murder and manslaughter, with absence of “malice aforethought” reducing murder to manslaughter.²⁴ Also, Maryland uses a “heat of passion” standard for reducing murder to manslaughter, with the additional common law reasonable man standard and no cooling off period.²⁵

However, Maryland makes one important statutory exception to their general provocation defense. In 1997, Maryland passed a change to their manslaughter statute, eliminating adultery as adequate provocation. As the statute currently reads, “The discovery of one's spouse engaged in sexual intercourse with another does not constitute legally adequate

¹⁹ See generally MODEL PENAL CODE § 210.3 (2013)

²⁰ *Id.*

²¹ *Id.*

²² ROBINSON, *supra* note 15.

²³ MODEL PENAL CODE, Pt. II, Art. 210 editor’s note (2013).

²⁴ Parker v. State, 7 Md. App. 167, 199, 254 A.2d 381, 398 (1969).

²⁵ McKay v. State, 90 Md. App. 204, 212, 600 A.2d 904, 908 (1992).

provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery.”²⁶

D. Salient Provocation Cases in the United States

One of the most-discussed cases involving the provocation excuse is *People v. Casassa*, a New York case involving a defendant who claimed romantic rejection by the victim provoked the defendant into killing her.²⁷ The defendant had broken into the victim’s apartment building to listen to her conversations at home.²⁸ Eventually, the defendant broke into the victim’s apartment with gifts, which were subsequently rejected by the victim.²⁹ The defendant then “stabbed [the victim] several times in the throat, dragged her body into the bathroom and submerged it in a bathtub full of water to ‘make sure she was dead.’”³⁰ After being detained at the victim’s apartment, the defendant confessed to the crime, giving police details about the murder.³¹ At trial, the defendant raised the provocation excuse under New York’s criminal statutes, which followed the Model Penal Code (“MPC”) “extreme emotional disturbance” standard, requiring a “reasonable explanation or excuse.”³²

In its analysis of the case, the Court of Appeals of New York explored the provocation excuse as put forth in the MPC, and New York law. Finding the only substantial difference between the New York statute and the MPC was that New York placed the burden of proof on the defendant the court went on to examine the objective and subjective components of the excuse. The court found the first branch of the excuse, acting under the influence of extreme emotional disturbance, was a subjective test; the determination is merely whether the defendant was, in fact, extremely emotionally disturbed.³³ The second branch of the excuse was described as an objective test: whether there was a “reasonable explanation or excuse.”³⁴ However, according to the court, the test is in fact an entirely subjective one.³⁵ The court uses a test which examines the internal view of the situation that the defendant had at the time of the

²⁶ MD. CODE ANN., CRIM. LAW § 2-207 (West 2013).

²⁷ *People v. Casassa*, 404 N.E.2d 1310, 1312 (1980).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1314.

³³ *Id.* at 1316.

³⁴ *Id.*

³⁵ *Id.*

killing, regardless of whether that view reflected reality.³⁶ The court sums up its view on the provocation excuse in the MPC and New York law: “what the Legislature intended in enacting the statute was to allow the finder of fact the discretionary power to mitigate the penalty when presented with a situation which, under the circumstances, appears to them to have caused an understandable weakness in one of their fellows.”³⁷

The best-known case involving homosexual panic as a defense is probably the Matthew Shepard case which took place in Laramie, Wyoming.³⁸ Matthew Shepard was a 21 year-old student who left a bar in Laramie with two other young men, and was subsequently beaten with a .357 magnum handgun, tied to a fence, and left for dead.³⁹ One of the men accused of the crime was Aaron J. McKinney.⁴⁰ McKinney’s attorney told jurors the reason McKinney killed Shepard was that he entered an “emotional rage” after Shepard made sexual advances toward McKinney.⁴¹ Less than a week later, the trial judge disallowed the use of a “gay panic” excuse, stating the excuse amounted to attempt to show temporary insanity or diminished capacity.⁴² The judge was quoted as saying “[e]ven if relevant . . . the evidence will mislead and confuse the jury.”⁴³ Interestingly, Wyoming has a fairly typical common law manslaughter statute, which states “A person is guilty of manslaughter if he unlawfully kills any human being without malice, expressed or implied, . . . (i) Voluntarily, upon a sudden heat of passion.”⁴⁴ The Wyoming Supreme Court has also found “A homicide is manslaughter if the defendant at the time of the killing was incapable of cool reflection as a result of provocation sufficient to produce such a state of mind in a person of ordinary temper.”⁴⁵

The facts of *People v. Merel* have already been related in the introduction to this article.⁴⁶ The defendant in *Merel*, unlike the defendant tried for Matthew Shepard’s murder, was allowed to use provocation as an

³⁶ *Id.*

³⁷ *Id.* at 1317.

³⁸ Michael Janofsky, *A Defense to Avoid Execution*, NEW YORK TIMES (Oct. 26, 1999), available at <http://www.nytimes.com/1999/10/26/us/a-defense-to-avoid-execution.html>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Michael Janofsky, *Judge Rejects ‘Gay Panic’ As Defense in Murder Case*, NEW YORK TIMES (NOV. 2, 1999), <http://www.nytimes.com/1999/11/02/us/judge-rejects-gay-panic-as-defense-in-murder-case.html?ref=aaronjamesmckinney>.

⁴³ *Id.*

⁴⁴ Wyo. Stat. Ann. § 6-2-105 (West, Westlaw through 2013 General Session).

⁴⁵ *Searles v. State*, 589 P.2d 386, 389 (Wyo. 1979).

⁴⁶ See *Merel*, *supra* note 5.

argument for the jury.⁴⁷ Similarly to Wyoming, California's definition of manslaughter includes mitigation of homicide through lack of malice and "upon a sudden quarrel or heat of passion."⁴⁸ As in the New York statute, the burden of proving mitigating factors falls on the defendant.⁴⁹ In instructions to the jury, the trial judge advise the jury a "reasonable man" standard should be applied to the provocation defense: "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man."⁵⁰ The instructions also included the requirement that "the exciting cause must be such as would naturally tend to arouse the passion of the ordinarily reasonable man."⁵¹

II. Foreign and Transnational Solutions

A. New Zealand

As mentioned in the introduction, New Zealand abolished its provocation partial excuse laws in 2009.⁵² Before taking up debate on the Bill, the New Zealand Law Commission published an in-depth report on the status of the excuse, and its recommendations based on flaws of and reasons to retain the excuse.⁵³ I include the Commission's findings because of its influence over the parliamentary debate.

The report contains a brief discussion of the history of the excuse as a "retaliatory justification" for four specific affronts, "a gross insult; seeing a friend attacked; seeing an Englishman unlawfully deprived of liberty; and catching someone in the act of adultery with the defendant's wife."⁵⁴

After its historical analysis particular to New Zealand, the Commission set out its argument for abolition of the partial excuse. The report points to four fundamental flaws in the provocation concept:

1. The excuse does not fulfill its stated purpose of recognizing human frailty, because it does not take into account diminished capacity

⁴⁷ *Id.*

⁴⁸ Cal. Penal Code § 192 (West, Westlaw through Ch. 3 of 2013 Reg.Sess.).

⁴⁹ Cal. Penal Code § 189.5 (West, Westlaw through Ch. 3 of 2013 Reg.Sess.).

⁵⁰ *Merel*, *supra* note 5.

⁵¹ *Id.*

⁵² *Provocation Repeal*, *supra* note 1.

⁵³ *See generally*, NEW ZEALAND LAW COMMISSION, REPORT 98: THE PARTIAL DEFENCE OF PROVOCATION (2007).

⁵⁴ *Id.* at 19.

2. It “bifurcate[es]” what the jury must consider by at once taking into account the defendant’s perceptions of the gravity of a provocation, but an objective standard for self-control
3. “[I]t assumes that there is in fact such a phenomenon as a loss of self-control”
4. It assumes an ordinary person would react to a grave provocation with uncontrolled homicidal violence⁵⁵

The first flaw set out by the Commission is perhaps its weakest argument in favor of abolishing the partial excuse. Legislation must not cure all possible ills in order to be valid. A partial excuse for provocation does not necessarily need to solve the related, but separate, issue of diminished capacity for decision-making in order to be an effective legal tool.

The Commission put forward an intriguing argument when it examined loss of self-control in real-world settings. It states in its report “[i]t is not at all clear that there is in fact such a phenomenon as a loss of self-control.”⁵⁶ The Commission argues even if loss of self-control does exist, “it is an abomination that a judge, defence counsel, or members of a jury can seriously contend that an ordinary person . . . might lose control and kill Only the most extraordinary person could kill in such circumstances.”⁵⁷ This argument makes at least intuitive sense. After all, billions of people around the world are insulted every day; millions perhaps are grievously offended. And yet, how many of these grievously offended people are actually driven into such a rage that they assault the other person, to say nothing of kill the other person in a homicidal rage?

The report goes on to note, as others have (two of whom will be discussed later)⁵⁸, that the excuse favors the interests of heterosexual men.⁵⁹ The report makes note of the disparate impact on women and homosexual men, as well as the male-centric theory behind the excuse that it can be used “in situations where [men] deem their masculinity to be fundamentally threatened.”⁶⁰ The Commission does point out, however, there is an argument to be made that the law should recognize “a degree of culpability short of murder,”⁶¹ and that a majority of common law

⁵⁵ *Id.* at 42.

⁵⁶ *Id.* at 45.

⁵⁷ *Id.* at 46.

⁵⁸ *See infra* Part III.B.

⁵⁹ *Id.* at 48-49.

⁶⁰ *Id.* at 49.

⁶¹ *Id.* at 51.

countries still have a provocation defense.⁶² Two of those common law countries will be discussed below.

In its discussion of whether the judge or jury should decide the question of provocation, the Commission includes two compelling arguments: First, that if 12 members of the community decide the defendant is guilty of a charge not as severe as murder, the community as a whole is more likely to accept a reduced sentence.⁶³ Second, that if faced with the prospect of only being able to decide between guilt for murder and an acquittal, jurors who believe there is a partial excuse will choose to acquit rather than find the defendant guilty.⁶⁴ The second argument more compelling than the first. It is not apparent that the community as a whole will accept a jury's verdict; in fact, several examples of a community's puzzlement with jury verdicts spring to mind (one of the most apparent might be the public reaction after the Rodney King trial). However, jury nullification is a particular thorny issue. It may make some sense to give a jury more options than guilt or acquittal, because in the case of provocation, acquittal seems especially perverse to the demands of justice.

In its parliamentary debate on the topic, the Minister of Justice, Simon Power, specifically referred to the Commission's report, emphasizing its importance in the legislative process.⁶⁵ Mr. Power made several important policy arguments in his speech to Parliament. Practically speaking, jurors may find it difficult to understand the instructions given to them which should frame their deliberation. In relating to Parliament input from a judge, the judge advised Mr. Power "'most have seen the glazed look in the jurors' eyes' following instructions from the bench in this regard."⁶⁶ This is as important a point to remember as jury nullification. If a jury does not understand what it is to deliberate, a just outcome is more a matter of luck than of careful examination of the facts.

On the broader message of the provocation excuse to the public, Mr. Power emphasized two key points: First, the message of ordered society should be that people should not resort to violence as an outlet for anger; second, victims and their families should be as important a consideration as the reasonableness of the defendant. He proposes that "it is inappropriate and undesirable that anger be singled out as an overriding mitigating factor that could be seen to justify conviction for manslaughter

⁶² *Id.*

⁶³ *Id.* at 52.

⁶⁴ *Id.*

⁶⁵ *Provocation Repeal*, *supra* note 1.

⁶⁶ *Id.*

rather than murder.”⁶⁷ While it may be inaccurate to say that only anger is grounds for reduction from murder to manslaughter, his point is certainly well taken that it has been used as a defense in particularly egregious cases. Also, it is apparent from the amount of public research and debate on the topic in multiple countries, the legal community and occasionally the public at large sees the use of anger as an excuse to be, at least in some circumstances, problematic at best.⁶⁸

As I stated in the introduction, I believe it critically important to keep in mind the level of violence done to victims, and the underlying justifications for that violence when assessing the provocation excuse. As Mr. Powell stated to Parliament: “This partial defence enables the accused to besmirch the character of his or her victim. Needless to say, the victim cannot defend his or her legacy. Repeal of the partial defence would make factors such as the alleged sexual behaviour of the victim less relevant at the trial.”⁶⁹ While there are certainly reasons besides provocation to introduce such evidence about the victim, the provocation excuse makes the victim an easy target. The characteristics of the victim are likely to become an essential part of the defense, because the defendant has a motive to make the victim’s behavior as shocking as possible to meet the requirement that a reasonable person in the defendant’s situation would have become enraged. Therefore, large amounts of court time and publicity can be devoted to attacks on someone who has been violently killed.

While Mr. Powell focused on policy reasons why the excuse should be abolished, his colleagues Lianne Dalziel and Charles Chauvel discussed two other reasons why juries should not be faced with the prospect of evaluating the provocation defense. Mr. Chauvel and Ms. Dalziel both discussed the fact that the victim is not able to testify at trial; that the jury invariably hears only one side of the victim’s actions leading up to his or her death. As Mr. Chauvel compellingly stated, “All that the jury ever hears is the killer’s account of the victim’s last moments, and inevitably the account is coloured; it is designed to paint the victim as somehow morally inappropriate, and deserving, even, of what eventually happened to him or her.”⁷⁰ It is important to remember any jury can be swayed by receiving only one side of the story. In New Zealand, Parliament decided

⁶⁷ *Id.*

⁶⁸ *See, e.g.*, NEW ZEALAND LAW COMMISSION, REPORT 98: THE PARTIAL DEFENCE OF PROVOCATION 18 (2007); LENNY ROTH & LYNDESEY BLAYDEN, N.S.W. PARLIAMENTARY RESEARCH SERVICE, PROVOCATION AND SELF-DEFENCE IN INTIMATE PARTNER AND SEXUAL ADVANCE HOMICIDES: BRIEFING PAPER NO. 5/2012 ii (2012).

⁶⁹ *Provocation Repeal, supra* note 1.

⁷⁰ *Id.* (Statement of Hon. Charles Chauvel).

to repeal the provocation excuse at least in part because it was impossible for the jury to understand the victim as a whole person. Ms. Dalziel gave another, broader, reason for juries to be removed from decisions about provocation: “it is an invitation to jurors to dress up their prejudices as law.”⁷¹ The allegation is especially disturbing because, if true, a jury should not be trusted to make decisions about provocation excuses, because they have a predisposition to denounce the victim by excusing the killer. This may be the reason underlying New Zealand’s decision to repeal the provocation defense. In light of their experience with highly public trials, the government of New Zealand decided that, along with solid public policy arguments, jurors simply could not be trusted to make just decisions because of deeply imbedded prejudices.

B. United Kingdom

Unlike New Zealand, the United Kingdom repealed their common law provocation defense, but replaced it with a statutory regime leaving in place the loss of control concept.⁷² Under the U.K.’s Act, a defendant cannot be convicted of murder if he (or, rarely, she) suffered from a loss of self-control that had a “qualifying trigger,” and that a reasonable person “in the circumstances” of the defendant *might* have acted in a similar way.⁷³ Additionally, the loss of self-control does not have to be sudden.⁷⁴ A qualifying trigger includes something “done or said (or both)” which “caused [defendant] to have a justifiable sense of being seriously wronged.”⁷⁵ The legislation also stipulated when examining whether a qualifying trigger is present, “the fact that a thing done or said constituted sexual infidelity is to be disregarded.”⁷⁶

But then the courts severely limited the statutory exclusion for sexual infidelity as a qualifying trigger. The Court of Appeal for England and Wales considered the exception, and found that it was not as simple as it appears on its face. The court’s reasoning walked through the common law notion that “sexual infidelity has the potential to create a highly emotional situation” and that it can “produce a completely unpredictable, and sometimes violent response.”⁷⁷ The court asked whether intentional

⁷¹ *Id.* (Statement of Hon. Lianne Dalziel).

⁷² Coroners and Justice Act, 2009, c. 25, Part 2, Chapter 1 (Eng., Wales, N. Ir.).

⁷³ *Id.* at § 54.

⁷⁴ *Id.*

⁷⁵ *Id.* at § 55.

⁷⁶ *Id.* at § 55.

⁷⁷ *R v. Clinton and R v. Parker and R v. Evans*, (2012), Court of App of Eng. and Wales (U.K.).

taunts from an unfaithful partner should be ignored,⁷⁸ and then went on to examine legislative history. The history was used to help answer the court's question, but also presents an underlying assumption of the theory of provocation: "for a man to be able to say that he killed his wife as a result of sexual infidelity . . . if other factors come into play, the court will of course have an opportunity to consider them."⁷⁹ For the court, the statement showed that it may examine sexual infidelity unless infidelity were presented as the exclusive qualifying trigger.⁸⁰ It also shows the legislature's assumption that men will use the excuse when they have killed women.

C. *United Nations*

One of the fundamental flaws with how the provocation defense has been used in some cases is the defendant attempts to strip part of the humanity from the victim; by attempting to get the jury to go along with the defendant's outrage at the cheating spouse, the gay man approaching another man in a bar, the transgender woman who takes off her clothes without first issuing a warning about her genitals, the defendant attempts to paint the victim as something "other," a person more worthy of disgust, or at least disapproval, rather than sympathy and respect. International law is uniquely positioned to give a jury a broad perspective on the importance of viewing everyone as fully human and fully worthy of a respected place in society. International law does not speak directly to the validity of the provocation excuse. It does, however, speak directly to the value of the victims the provocation defense has been used to condemn, and therefore to the need to change how the excuse is used in courts.

The basis for international law within the United Nations system, and a basic starting point for perspective on examining a domestic legal doctrine, is the "recognition of the inherent dignity . . . of all members of the human family."⁸¹ The international human rights system also has provisions that "everyone has the right . . . to security of person."⁸² While these sweeping ideals may not speak directly to the validity of a provocation defense, they can give a jury a framework for deliberation. Juries should be reminded in criminal cases where the victim's actions are being impeached that along with defendants' rights, the victim also has basic human rights which can only be violated in the most extreme

⁷⁸ *Id.*

⁷⁹ *Id.* (Quoting Hon. Claire Ward, MP).

⁸⁰ *Id.*

⁸¹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES.217(III), at preamble (Dec., 10, 1948) [hereinafter *UDHR*].

⁸² *Id.* at Art. 3.

situations. While not established as law in the United States, this framework of thinking about all people as an equally valuable part of the “human family” helps ensure a jury views the victim as a fully worthy human being. The victim should be viewed as a person with rights, regardless of his or her consensual sexual activity, sexual orientation, or gender identity.

An additional United Nations document which can be used to frame judicial examination or jury debate in provocation situations is the Convention Against Torture (CAT).⁸³ In some cases where the defense has put forward the provocation excuse, there has been a series of violent acts before the victim died.⁸⁴ Under the CAT, “‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he . . . has committed or is suspected of having committed.”⁸⁵ As a California court pointed out, the CAT definition of torture only applies to acts which can be attributed to officials, and is only binding in the United States on those acting under color of law.⁸⁶ However, the CAT definition does give additional depth to statutes in the United States. California’s statute, for example, defines torture as inflicting great bodily injury “with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.”⁸⁷ The international norm exemplified by the CAT makes clear torture can be mental as well as physical. A judge or jury should keep in mind that the victim may have suffered tremendous psychological distress prior to death, and that fact should have bearing on the viability of a provocation defense. It should be an incredibly difficult burden to convince a judge or jury that a defendant was provoked into torturing a victim.

D. Europe

The European Convention on Human Rights (ECHR) has language which is more concise than the U.N. Convention Against Torture. The ECHR simply states “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁸⁸ The European Court of Human Rights firmly established the norm against torture, saying “[a]rticle 3 of

⁸³ Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 [hereinafter *CAT*].

⁸⁴ See *Merel*, *supra* note 5.

⁸⁵ *CAT*, *supra* note 83, at Art. 1.

⁸⁶ *People v. Martinez*, 125 Cal. App. 4th 1035, 1046, 23 Cal. Rptr. 3d 508, 516 (2005).

⁸⁷ Cal. Penal Code § 206 (West, Westlaw current through Ch. 3 of 2013 Reg.Sess.).

⁸⁸ European Convention on Human Rights art. 3, Sept. 3, 1953 (Council of Europe).

the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behavior."⁸⁹ Here is an international court recognizing the importance of protecting all victims, regardless of who they are or what they have done, from inhuman or degrading treatment. The Court goes on to give a definition of "degrading" as "arous[ing] in the victim feelings of fear, anguish, and inferiority capable of humiliating and debasing them."⁹⁰

Along with torture, the European Convention on Human Rights contains the idea of respect for private life.⁹¹ It may at first seem difficult to relate respect for private life to a provocation defense situation like that in *Shepard* or *Merel*. However, the European Court of Human Rights has made the following statement about what private life entails: "the concept of private life includes a person's physical and psychological integrity . . . [States] are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals."⁹² In the European human rights system, states are mandated to protect victims against physical and psychological assault by defendants, including private citizens. The respect for private life along with strong provisions against torturous conduct provides citizens with a bulwark against treatment like that received by Matthew Shepard and Gwen Araujo before their deaths.

III. The Current Debate in the United States

[W]hen courts permit a jury instruction for voluntary manslaughter in these instances, the defendants' response receives legitimization regardless of whether they ultimately receive a reduced sentence. The mere provision of the jury instructions indicates that the judge believes that the defendant's sentence could be mitigated under the law in light of the unwanted advance.⁹³

A. *Creating Exceptions within the Doctrine*

⁸⁹ Application no. 12694/04, *Lacatus and Others v. Romania*, 2012 E.C.H.R.

⁹⁰ *Id.*

⁹¹ European Convention on Human Rights art. 8, Sept. 3, 1953 (Council of Europe).

⁹² Application no. 29525/10, *Remetin v. Croatia*, 2012 E.C.H.R.

⁹³ Kavita B. Ramakrishnan, *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, 26 Berkeley J. Gender L. & Just. 291, 316-17 (2011).

Maryland statute, § 2-207, explicitly states spousal adultery is not a mitigating factor in a murder case.⁹⁴ The statutory exception is almost exactly like the solution developed in the United Kingdom.⁹⁵ In Britain, the statutory exclusion was then strictly limited through court interpretation.⁹⁶ The Supreme Court has said on many occasions that a penal statute will be construed strictly.⁹⁷ Additionally, there is a tradition of construing statutes which overturn the common law narrowly.⁹⁸

It is entirely possible a Maryland court would make the same exception the Court of Appeals did in Britain. Somewhat mitigating the possibility of a British-style interpretation is the fact that Maryland courts have required no cooling off period, unlike the statute in Britain.⁹⁹ Also, a Maryland court recognized that “there are many slings and arrows of outrageous fortune that people either must tolerate or find an alternative way, other than homicide, to redress.”¹⁰⁰ While it is possible in Maryland that the statute would not be so strictly construed as to make its provisions as limited as in Britain, the statute does not make provision for cases like *Shepard* or *Merel*, nor does it provide a guarantee that the intent of the legislature will be followed in every case.

In his article *Homophobia in Manslaughter: the Homosexual Advance as Insufficient Provocation*, Robert Mison makes the argument judges as a matter of law should prohibit the use of the provocation defense in “gay panic” cases.¹⁰¹ For Mison, the provocation defense in such cases focuses on the victim’s behavior, rather than the actions of the defendant.¹⁰² Allowing the provocation defense against homosexual victims acts to create a group of citizens denied full protection of the law because of homophobia.¹⁰³ Because of such entrenched homophobia on the part of both judge and jury, and to avoid cases of blaming the victim,¹⁰⁴ the problem of misuse of gay panic provocation defense is best solved by eliminating the possibility of the defense being used in such cases.

⁹⁴ MD. CODE ANN., CRIM. LAW § 2-207 (West 2013).

⁹⁵ See Ramakrishnan, *supra* note 93, at 303-12.

⁹⁶ See *id.* at 313-18.

⁹⁷ See, e.g., *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 90 (1820).

⁹⁸ See, e.g., *Staples v. United States*, 511 U.S. 600, 605 (1994); *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797).

⁹⁹ *Bartram v. State*, 364 A.2d 1119 (Md. Ct. Spec. App. 1976).

¹⁰⁰ *Dennis v. State*, 661 A.2d 175 (Md. Ct. Spec. App. 1995).

¹⁰¹ Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance As Insufficient Provocation*, 80 CAL. L. REV. 133, 176-77 (1992).

¹⁰² *Id.* at 147.

¹⁰³ See *id.* at 156, 163.

¹⁰⁴ *Id.* at 170-71.

Mison has been criticized for focusing on only the homosexual advance issue to carve out a special exception for only one group.¹⁰⁵ Presumably such an argument would extend to Maryland's statutory exception as well. While I agree that an idea solution would cover the entire provocation excuse realm, I disagree that a proposed solution necessarily has to cover all provocation ground. Focusing on single issues, whether it be homosexual advance or spousal infidelity, can both focus attention and develop solutions tailored to those particular circumstances, without throwing out an entire legal theory. However, there may be an issue with passing such exceptions as part of a legislative regime, given that very few states have a statute like Maryland's.¹⁰⁶

B. Modification of the Existing Excuse Doctrine

Christina Pei-Lin Chen and Joshua Dressler have both argued for a modification of the provocation defense rather than an exception-based approach. In her well-researched and well-thought-out note, Chen states feminist critique has shown through impact analysis that the provocation defense in non-violent advance cases is extremely gender- and heterosexual-biased, being used almost exclusively by heterosexual men who kill.¹⁰⁷ Women use the defense rarely, since they rarely kill, and when they do, they typically claim to have acted in self-defense.¹⁰⁸ Also, since male heterosexuals do not make advances toward homosexual men, Chen states "male heterosexuals become an insulated class accruing all the benefits attached with no burdens."¹⁰⁹ Transgender victims are left out of Chen's analysis, since she states a critical factor in the use of the defense is the defendant's perception of the victim's gender at the time of the advance.¹¹⁰

In contrast to Mison, Chen's proposal is to expand the provocation defense to include killing out of fear, and should only be used in cases where the victim could have invoked the same defense.¹¹¹ By using a two-pronged approach, Chen seeks to eliminate the disparate impact on female

¹⁰⁵ Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on A Difficult Subject*, 86 MINN. L. REV. 959, 961 (2002).

¹⁰⁶ Kimberly Wilmot-Weidman, *After A 3-year Fight, Murder Is Finally Murder in Maryland*, CHI. TRIB. (Nov. 23, 1997), http://articles.chicagotribune.com/1997-11-23/features/9711230114_1_spousal-maryland-law-deadly-rage.

¹⁰⁷ Christina Pei-Lin Chen, Note, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 224 (2000).

¹⁰⁸ *Id.* at 225-26.

¹⁰⁹ *Id.* at 224.

¹¹⁰ *Id.* at 235.

¹¹¹ *Id.* at 233.

and homosexual victims of heterosexual male rage.¹¹² The solution is creative, and would preserve what some see as a valid excuse for killing. The one drawback of the proposal is that it focuses on an expanded use of a problematic excuse, rather than focusing on the rights and value of the victim in a particular instance.

Finally, Joshua Dressler addresses the question of how the excuse can be modified to produce better results. For Dressler, the provocation excuse is a legal recognition that sometimes ordinary people can become so provoked as to kill another.¹¹³ For Dressler, it is important to remember that the provocation must be so severe that “an ordinary person in the actor’s circumstances, even an ordinarily law-abiding person of reasonable temperament, might become sufficiently upset by the provocation to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently.”¹¹⁴ Dressler further states that the provocation excuse itself is not biased in favor of one group; rather “[t]he provocation defense is about human imperfection and, more specifically, impaired capacity for self-control.”¹¹⁵

There are problems with Dressler’s argument addressed by the New Zealand law commission, and by Chen’s note. First, there is not conclusive evidence that there is such thing as loss of self-control, and second, if there is, it only occurs in the most extraordinary circumstances.¹¹⁶ In everyday life, ordinary people frequently become angry, and possibly even enraged, but do not enter into a homicidal fit. Second, as Chen’s article notes, while the language of the excuse may not in itself be biased toward one group, its effect certainly is.¹¹⁷ Finally, if the excuse is about recognizing human imperfection, then the imperfection of the victim should be recognized as well. Is a woman who engages in a sexual relationship with a man who is not her husband more imperfect than the husband who kills her? The provocation excuse, if it is about human imperfection, allows the jury to treat imperfect actions by the victim differently than certainly imperfect actions by the defendant.

Dressler argues that the role of the jury is important enough to be retained in provocation cases. Twelve citizens, as members of a community, should be allowed to make the decision on whether a situation reasonably drove a defendant to kill.¹¹⁸ Dressler would limit removing a

¹¹² *Id.* at 231

¹¹³ Dressler, *supra* note 100, at 972-73.

¹¹⁴ *Id.* at 974.

¹¹⁵ *Id.* at 978-79.

¹¹⁶ *See supra* Part I.A.

¹¹⁷ Chen, *supra* note 102, at 217, 224.

¹¹⁸ Dressler, *supra* note 21, at 980-81.

jury from the decision making process only in cases such as “assassins, terrorists, and violence-justifying racists.”¹¹⁹ This solution ignores the vast majority of cases where the disparate impact of the excuse is felt. Certainly, it ignores the vast majority of cases in total. Dressler’s exception seems to be not really an exception at all. The jury system as it stands, which would be substantially left intact by Dressler’s solution, leads to unacceptable results. It is by changing how the jury system operates vis-à-vis the provocation excuse that we can achieve more just results.

IV. Framing the Jury Debate Using Transnational Norms

A. Why Transnational Norms Should Matter

Almost none of the international norms described in Part II are binding on the U.S., and those that do are not applied to private, rather than state action. Even in countries like the United Kingdom, which comes under the European human rights system, the provocation defense is still alive and well.¹²⁰ So why should those norms impact the debate regarding the provocation excuse in the United States? International norms help frame the debate for both judge and jury, and emphasize human rights based on the idea of the human family. International human rights law contains standards which are non-derogable.¹²¹ They both embrace and go beyond equal treatment to the central idea of dignity. They hold the state and individuals to human rights standards, giving citizens positive rights and the ability to demand protections from the justice system, not just freedom from state interference.¹²² International norms do not replace local law, they augment and work in conjunction with local laws to ensure a just result. Additionally, transnational court decisions can give context and elaboration on judicial or jury review of fundamental rights.

B. Why a Jury Should Hear the Provocation Excuse

To give an idea of what a jury is faced with when beginning to deliberate on provocation defense, here is the partially incomplete quote of the instruction read to the jury in *Merel* from the appellate court decision:

¹¹⁹ *Id.* at 997.

¹²⁰ *See supra*, Part II.D.

¹²¹ *See CAT, supra* note 83; *UDHR, supra* note 81.

¹²² *Compare CAT, supra* note 83 and *UDHR, supra* note 81 with Cal. Penal Code § 206.

To reduce unlawful killing from murder to manslaughter upon the grounds of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion. The heat of passion which will reduce ... a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in [the] same circumstances. A Defendant is not permitted to set up his own standard of conduct to justify or excuse himself because his passions were aroused, unless the circumstances in which the Defendant was placed and [the] facts that confronted him were such as would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable period of time.

The question to be answered is whether or not at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause an ordinarily reasonable person of average disposition to [act] rashly, and without deliberation and reflection, and from passion rather than from judgment.

If there was a provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if a sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder as I defined it, the mere fact of a slight or remote provocation will not reduce the offense to manslaughter.¹²³

This partially incomplete jury instruction is 292 words long. A typical juror would have guilty making sense of the entire quote, not to mention evaluating every part of it based on the facts of the case. Jury instructions must change for practical purposes alone.

The long tradition of the provocation defense is not enough to cling to it when strong public policy of non-violence, non-discrimination, and justice for victims and families is at stake. There is a real danger as

¹²³ *Merel, supra* note 5, at.*9. See also CALJIC No. 8.42.

Robert Mison¹²⁴ and the New Zealand legislature¹²⁵ point out of judges and jurors bringing their prejudices to bear against a victim, especially if those prejudices are an ingrained part of social norms. If we are to keep our reliance on juries playing such a critical role in administering justice, some method must be found to mitigate their prejudice. Transnational norms can assist with the jury process, and work along with local laws to ensure a just result. An example of cooperation between international and state norms was given in the discussion of torture.¹²⁶ The court can rely on its state statute for technical definitions, while allowing international norms a place in framing the jury debate, and judicial deliberation.

C. Proposed Jury Instruction Using Transnational Norms

I propose a simple jury instruction incorporating local and transnational ideas. Instructions would be given to the jury that they may find a defendant not guilty of murder, but guilty of the lesser charge of manslaughter if, and only if, such a finding would not violate the victim's dignity, and sufficiently respects the victim's right to security of person and respect for private life as part of the human family. Courts should at their discretion give a brief background on dignity, security of person, and respect for private life as those terms are understood within the state, and within the international human rights framework. This would allow the community to be part of the justice process. Also, it would give juries additional guidance which may help make them aware of subconscious prejudice. Through the action of all twelve jurors, such an instruction could also frame deliberation in the jury room, potentially dealing with the issue of jury nullification of murder charges. Finally, such an instruction would take into account the rights of victims and their families.

To avoid wholly unjust verdicts, I would propose the following change to the current provocation defense: a judge should make a determination whether—under local law, in conjunction with globally recognized standards—the victim was tortured before death, including being subjected to inhuman or degrading treatment or punishment. Such a judgment would be regardless of the victim's behavior. This would move the determination of torture from jury to judge, and from part of sentencing to a factor in determination of guilt. A defendant who tortured a victim would be completely barred from using the provocation defense. Such a rule would eliminate the danger of a jury's complete disregard for a victim's rights based on prejudice.

¹²⁴ See Mison, *supra* note 101, at 170-71.

¹²⁵ See *supra*, Part II.A.

¹²⁶ See *supra*, Part II.C.

Conclusion

Integrating international norms with state standards is certainly not without problems. First, it does not guarantee a just result in a provocation defense case. Determined juries would still be able to excuse behavior which would seem unjust in some cases. Also, such a close integration of international and state norms may require a substantially different political climate that is currently prevalent in the United States. Often, there is a misperception that international law is used to undermine national authority. Such a view would need to be fundamentally changed before the political will to implement international standards could be realized. Finally, the solution is only a partial one. Ultimately, I would prefer to see a New Zealand-style solution of complete elimination of the provocation defense, with recognition that there is no such thing as a reasonable fit of homicidal rage. However, I agree that as social norms currently stand, such a solution may not be practically feasible. Until such time as killing a person because of their sexual expression, sexual preference, or gender identity becomes universally condemned, I believe an instruction admonishing the jury to keep in mind standards of the human family is our best option.