The Meaning of Equality: Sexual Harassment, Stalking, and Provocation in Canada, Australia, and the United States

Caroline A Forell
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INTRODUCTION

Sexual harassment, stalking, and the criminal defense of provocation are three areas of law where the majority of injured parties are women and the majority of perpetrators are men. In this paper I examine how, in Canada, Australia, and the United States, two visions of gender equality, formal and substantive, have influenced the development of these areas. Formal equality is found when likes are treated alike. When men and women are compared, formal equality usually means that women's conduct is measured against a male norm. In contrast, substantive equality recognizes differences based on dominance and power and seeks to accommodate the different needs of subordinated groups such as women.

Feminist legal scholars, lawyers, and jurists have heavily influenced the evolution of the legal doctrines of sexual harassment and stalking in all three countries. It is therefore not surprising that sexual harassment and stalking are two areas

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1. Provocation, sexual harassment, and stalking are all areas where constitutional doctrines of equal protection played little or no part in the development of the law. Instead, I examine whether the statutes and case law in these areas are gender-biased and how much formal or substantive gender equality exists.


3. Justice Claire L’Heureux-Dubé puts it this way: “[E]quality isn’t just about being treated the same, and it isn’t a mathematical equation waiting to be solved. Rather, it is about equal human dignity, and full membership in society.” Claire L’Heureux-Dubé, A Conversation About Equality, 29 DENVER J. INT’L. L. & POL’Y 65, 69 (2000).
where substantive gender equality prevails. In contrast, the
provocation defense, once only available to men, has been
expanded to include women who kill under similar
circumstances, rather than abolished. Because women rarely kill
“in the heat of passion” but represent the vast majority of
victims of such killings, the provocation defense demonstrates
the injustice that purely formal equality can sometimes create.

The laws of Canada, Australia, and the United States have
their origins in the British common law. Unlike England,
however, all three countries have constitutions creating federal
systems that divide government between the centralized national
government and states or provinces. Law-making by a variety of
different jurisdictions therefore occurs within each country.

There are important differences among the three countries.
All three nations’ highest appellate courts have jurisdiction to
review sexual harassment cases based on federal statutes.
However, unlike the Canadian Supreme Court and Australian
High Court, the United States Supreme Court lacks jurisdiction
to review homicide cases concerning provocation, the crime of
stalking, or stalking protective orders unless a constitutional or
federal question is presented. As a result, the highest federal
courts of Australia and Canada are much more likely to review
provocation and stalking cases.

Unlike the Australian or American Constitutions, Canada’s
1982 Charter of Rights and Freedoms explicitly provides for sex
equality free from government discrimination. This gender
equality provision has been interpreted to mean substantive
equality based on equal human dignity and full membership in
society. Furthermore, the Canadian Supreme Court currently
has four women including its Chief Justice, while the U.S.

4. “[E]quality writing accepts that substantive equality is the operative
   model in Canadian law.” Diana Majury, The Charter, Equality Rights, and
5. Section 15 states: “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.” Part I of the Constitution Act, 1982, being Schedule B to the
6. Chief Justice Beverly McLachlin, Justice Rosalie Abella, Justice Louise
   Charron, and Justice Marie Deschamps.
Supreme Court has only one woman, and the current Australian High Court has none. Women on the bench have often been staunch proponents of gender equality, and therefore their presence can make a difference in how equality analysis applies to gender discrimination. Based on Canada’s interpretation of the meaning of equality and the stronger representation of women on its highest court, one would expect it to lead the way in providing substantive equality in its treatment of provocation, stalking, and sexual harassment. However, this has not been the case.

I. SEXUAL HARASSMENT IN THE WORKPLACE

Sexual harassment and stalking are recent legal concepts, emerging in the past 25 and 15 years, respectively. Workplace sexual harassment is an area where substantive equality has firmly taken hold. Catharine MacKinnon’s path-breaking 1979 book, Sexual Harassment of Working Women, framed sexual harassment as a form of sex discrimination by men who used power and sex to dominate women. All three countries have embraced her analysis.

8. See Rachel Davis & George Williams, A Century of Appointments But Only One Woman: Gender and the Bench of the High Court of Australia, 28 ALTERNATIVE L.J. 54 (2003).
9. Women Justices have played major roles in cases that favor women’s rights. For example, Justice Sandra Day O’Connor was highly influential in preserving the right to abortion in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). Both Justice O’Connor’s majority opinion and Justice Ginsburg’s concurring opinion in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), advanced women’s interests in the area of sexual harassment. Justice Ginsburg’s majority opinion in United States v. Virginia, 518 U.S. 515 (1996), blurred the line between intermediate scrutiny for gender and strict scrutiny for race in a classic formal gender equality decision which required an all-male state military school to admit women. See also Majury, supra note 4, at 321-23, regarding female judges making a difference in Canadian equality analysis.
10. California enacted the first stalking statute in 1990. See Forell & Matthews, supra note 2, at 126.
12. MacKinnon notes that “sexual harassment is less an issue of right and wrong than an issue of power.” Id. at 173.
13. See, e.g., Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminates’ on the basis of sex.”);
While sexual harassment, like most legal claims, provides formal equality in the sense that it is available to men and women, the claim allows for substantial contextualization, which helps assure substantive equality. Thus, the gender of the perpetrator and injured party are often considered in determining the severity of the conduct. For example, in the United States Supreme Court same-sex decision *Oncale v. Sundowner Offshore Services, Inc.*, Justice Scalia stated:

> We have emphasized . . . that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back in the office.

However, if the football player was female and a male coach smacked her on the buttocks as she headed onto the field, this might be viewed differently from smacking the buttocks of a male player. In other words, gender matters when it comes to sexual harassment.

Recently, other related forms of harassment based on sex have become the foci of assuring substantive equality: sexist but non-sexual harassment and harassment based on sexual

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Human Rights Act, R.S.C., ch. H-6, § 14(2) (1985) ("sexual harassment shall ... be deemed to be harassment on a prohibited ground of discrimination"); Sex Discrimination Act, 1984, § 28A (Austl.) (defining sexual harassment as making "an unwelcome sexual advance, or an unwelcome request for sexual favours" or "engag[ing] in other unwelcome conduct of a sexual nature in relation to the person harassed.").

15. *Id.* at 81 (internal citation omitted).
16. The most obvious example is the use by some of the U.S. Circuit Courts of Appeals of the “reasonable woman” standard in determining whether the perpetrator's conduct created a hostile and abusive workplace under Title VII. *See, e.g.*, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
orientation.  


21. The Canadian Human Rights Act § 14(2) provides that “sexual harassment shall . . . be deemed to be harassment on a prohibited ground of discrimination.”


23. Specifically, 42 U.S.C. § 2000e-2(a)(1), which makes it illegal for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”
discrimination to include sexual harassment. Similarly, most state employment discrimination statutes do not expressly refer to sexual harassment but, like the federal statute, have been interpreted to include sexual harassment as a form of sex discrimination.

Ironically, American jurisdictions’ failure to expressly provide for sexual harassment in their statutes may have made it easier for courts to include anti-woman sexist, but non-sexual, conduct as a form of sexual harassment because they are not faced with the legislature’s specific use of the word “sexual.” In contrast, both the Canadian and Australian federal discrimination statutes expressly refer to “sexual” harassment. Thus, the Australian Human Rights and Equal Opportunity Commission describes the test for sexual harassment under the federal act as having three essential elements, including that “it must be of a sexual nature.” Nevertheless, it appears that in both Canada and Australia, non-sexual sex-based hostility has been treated as either sexual harassment or simply as sex discrimination.

While the word “sexual” in their statutes creates some uncertainty about whether Australia and Canada provide claims
when anti-woman harassment is not sexual, their express coverage of sexual orientation harassment has made it clear that workplace harassment of lesbians and gay men gives rise to a civil rights claim. In contrast, while the United States Supreme Court’s decision in Oncale v. Sundowner Offshore Services, Inc. held that Title VII covers same-sex sexual harassment, a discrimination claim specifically based on sexual orientation remains unavailable under federal law. A number of lower federal courts, however, have allowed a claim that is essentially the same as sexual orientation discrimination under the Price Waterhouse v. Hopkins sex stereotyping form of sex discrimination. It now seems likely that a gay man or lesbian who is treated with anti-homosexual animus in the workplace may recover under Title VII so long as the claim is carefully framed as either Oncale same-sex discrimination or Price Waterhouse sex stereotype discrimination, instead of sexual

32. 490 U.S. 228 (1989).
In Price Waterhouse, for example, the Court held that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” And that principle applies whether the plaintiff is a man or woman. As the First Circuit noted, “just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.” Centola, 183 F. Supp. 2d at 409 (internal citations omitted).
orientation discrimination. Thus, today substantive equality is for the most part available in all three countries for sexual harassment, sexist harassment, and harassment based on sexual orientation.

II. STALKING

The stalking statutes enacted in all three countries in the early to mid-1990s originated and have been applied based on the needs of women. According to a well-regarded U.S. federal government survey of 8000 women and 8000 men in 1998, four out of five stalking victims are female and 94% of their stalkers are male.34 Thus, the crime of stalking and civil stalking protective orders have benefited many more women than men.35

Furthermore, my research indicates that there are scenarios where a stalking protective order will be awarded to a woman against a man, while a similarly situated man would most likely be denied an order against a woman.36 For example, in the Oregon case Bryant v. Walker, a female department store clerk obtained a stalking order against a male customer who had repeatedly followed and leered at her in the store over a number of years.37 The Court of Appeals affirmed the award of the stalking order, finding that it was appropriate to factor in the victim’s gender in determining that her alarm was reasonable.38 It is highly unlikely that a male clerk would have sought or successfully obtained a stalking order if a female customer had repeatedly leered and followed him. This lack of symmetry in legal treatment recognizes that women’s experiences and

35. Id. at 5-6. The survey also found that 42% of women were stalked by acquaintances or strangers rather than intimates or former intimates. Id. at 6.
38. Id. at 151.
perceptions of what constitutes stalking differ from men’s and
deserve protection even though men most likely would neither
seek nor be granted a remedy under similar circumstances.
Thus, stalking law is an example of substantive instead of formal
equality: it allows different treatment based on gender in order
to assure meaningful equality for a historically subordinated
group.

Even though all three countries have provided substantive
equality for women by enacting stalking statutes, their
approaches differ. Canada’s criminal stalking statute is federal,³⁹
while Australian and American stalking statutes vary from state
to state.⁴⁰ By not requiring that victims prove either subjective
or objective fear from stalking,⁴¹ a number of Australian
jurisdictions appear to have the least demanding requirements
for obtaining a stalking conviction.⁴² Canada’s statute falls
somewhere in the middle in its requiring that the victim prove
both objective and subjective “fear for their safety” and
requiring a minimum of recklessness on the part of the stalker.⁴³
Finally, American stalking statutes are the most demanding,
often requiring intent to harass or specific threats.⁴⁴ The more
stringent American requirements are a result, at least in part, of
concerns about the First Amendment and analogous state free
speech provisions. Thus, in the United States, stalking that

⁴⁰. See, e.g., OR. REV. STAT. § 163.732 (2003); Crimes Act, 1958, § 21A
(Victoria).
⁴¹. See, e.g., Crimes Act, 1900, § 562AB (New South Wales), which reads:
(1) A person who stalks or intimidates another person with
the intention of causing the other person to fear personal injury is liable to
imprisonment for 5 years, or to a fine of 50 penalty units, or both. . . .
(3) For the purposes of this section, a person intends to cause fear of
personal injury if he or she knows that the conduct is likely to cause
fear in the other person.
(4) For purposes of this section, the prosecution is not required to
prove that the person alleged to have been stalked or intimidated
actually feared personal injury.

See also Criminal Law Consolidation Act of 1935, § 19AA (South Aust.).
⁴². At least one other Australian jurisdiction only requires subjective fear
and provides that intent to cause only mental instead of physical harm is
sufficient. See Crimes Act, 1958, § 21A(3) (Victoria).
⁴⁴. Jennifer L. Bradfield, Note, Anti-Stalking Laws: Do They Adequately
solely or mainly involves words or images must be sufficiently threatening to merit punishing speech.\textsuperscript{45} Most American statutes also require that the victim’s fear or alarm be reasonable.\textsuperscript{46}

While the crime of stalking is an important remedy, victims much more frequently rely on civil protective orders when they are available. Once such an order is obtained, the stalker risks criminal prosecution if he disobeys it. States and provinces within each country vary widely concerning who can obtain stalking protective orders. This results in discrimination among stalking victims from different states and provinces as to whether they can obtain a civil restraining order remedy.

Failure to provide a protective order remedy for certain groups of stalking victims creates inequality among women who are stalked. Some jurisdictions limit protective orders to spouses or current intimates against spouses and current intimates.\textsuperscript{47} Many also provide protective orders for former spouses and former intimates.\textsuperscript{48} However, stalking by strangers and acquaintances is frequently not covered. Jurisdictions which specifically provide stalking protective orders for all victims of stalking assure that all women benefit from substantive equality.\textsuperscript{49}

Canada’s embrace of substantive equality under the Canadian Charter would seem to make it more likely that its stalking protective order legislation would be all-encompassing. And, in fact, under the national criminal code, a “peace bond” can be obtained against any person proved to be a stalker,

\begin{thebibliography}{99}
\bibitem{46} \textsc{Forell & Matthews, supra} note 2, at 130.
\bibitem{47} See, \textit{e.g.}, Criminal Code \textsc{§} 189 (Northern Territory, Austl.). \textit{See generally} Bradfield, \textit{supra} note 44, at 236-39 (discussing civil protective orders).
\bibitem{48} See, \textit{e.g.}, Domestic Violence Protection Act, 2000 (Ontario), \textit{available at} http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/00d33_e.htm; Criminal Code Act Compilation Act 1913, Ch. XXXIIIB (Christmas Island, Austl.). \textit{See generally} Bradfield, \textit{supra} note 44, at 236. Persons stalked by former spouses or intimates constitute one of the largest groups of stalking victims. Tjaden & Thoennes, \textit{supra} note 34, at 6.
\bibitem{49} See, \textit{e.g.}, \textsc{Or. Rev. Stat.} \textsc{§} 30.866(1); \textsc{Or. Rev. Stat.} \textsc{§}163.738(2)(a)(B); Domestic Violence and Stalking Act, ch. 14 (1998) (Manitoba); Crimes Act, 1958, \textsc{§} 21A (Victoria).
\end{thebibliography}
regardless of the kind of relationship he has to the victim, in all Canadian provinces and territories.\textsuperscript{50} A peace bond is a form of protective order that, although not created with stalking in mind, works quite well in this context. The order can last up to a year, is renewable, and is issued by a judge, magistrate, or justice of the peace.\textsuperscript{51} Its major drawbacks are the relatively small criminal penalty and the fact that it can take several weeks to obtain the order. Nevertheless, it is often the preferred or only option when the stalker is a non-spousal former intimate, an acquaintance, or a stranger.\textsuperscript{52} The availability of a peace bond throughout the entire nation sets Canada apart from the United States and Australia, where the availability of protective orders in non-spousal situations depends on state law, which varies widely. Thus, unlike Australia and the United States, Canada provides an important remedy for all victims of stalking, a remedy that benefits mostly women.

III. PROVOCATION

The provocation defense has very different origins and purposes than laws regarding stalking and sexual harassment. Long before any of the three countries achieved independence from England, provocation began as a common law defense available only to men defending their honor.\textsuperscript{53} It remains the most male-biased of the three areas of law. While sexual harassment and stalking laws are modern remedies for predominantly female injured parties, a successful provocation defense reduces the severity of the punishment for certain convicted killers, most of whom are male.

Provocation is a partial defense that male and female killers of intimates and former intimates frequently assert. Rather than acquittal, provocation reduces murder to manslaughter, typically


\textsuperscript{51} \textit{Id.}


resulting in a substantially shorter sentence. Domestic homicide most commonly involves men killing women; in all three countries, women represent at least three-quarters of domestic homicide victims. In all three nations, men commit domestic homicides for different reasons than do women. Men most often kill out of jealousy and rage—in the “heat of passion”—when women exercise their sexual and physical autonomy. Women most often kill their batterers out of fear and despair.

“Heat of passion” has replaced honor as the most common basis for provocation. Over time, the boundaries of heat of passion have expanded so that today any form of infidelity or attempting to leave an intimate relationship may suffice to allow the provocation defense. Feminists argue that men who kill their intimates or former intimates in the heat of passion out of possessiveness, rage, or hurt pride should not be able to succeed in asserting the provocation defense; they should be found guilty of murder, not manslaughter.

Even though the vast majority of people who kill their partners or former partners in the heat of passion are male, formal equality exists because the rare woman who kills out of


55. Morgan, supra note 54, at 256-57.

56. Id.


rage and jealousy can also use the defense.\textsuperscript{59} Thus, provocation law now theoretically\textsuperscript{60} provides formal gender equality. However, it is formal equality based on a male norm.\textsuperscript{61}

Provocation rules work differently for men who commit domestic homicide in each of the three countries. However, based on both the level of explicit constitutional protection of women and percentage of women on the bench, the outcomes are counter-intuitive. Australia provides the most pro-woman treatment of provocation of all three countries, while Canada’s statute\textsuperscript{62} and Supreme Court decisions\textsuperscript{63} remain solicitous to men who kill their intimates out of jealousy or rage. Finally, the rules in the United States are divided into two groups: traditional provocation and the Model Penal Code’s extreme emotional disturbance test.\textsuperscript{64} Both are substantially less pro-woman than are Australia’s rules, with the Model Penal Code’s rule,\textsuperscript{65} first issued in 1962, allowing for the most male-bias of all rules.\textsuperscript{66}

Australia has taken the lead in modifying or abolishing provocation. Its provocation case law, while applying seemingly traditional rules, has frequently denied use of the defense to men who commit domestic homicide in the heat of passion.\textsuperscript{67}

\textsuperscript{59} CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 26 (2003). \textit{See also Morgan, supra} note 54, at 256 (“I found no reported Australian cases where women were provoked into killing men who left them or who ‘confessed adultery.’”). Similarly, when provocation is allowed for domestic homicides based on fear and past domestic abuse by the deceased, it is available to both male and female killers, even though those who actually assert it in this context are overwhelmingly female.

\textsuperscript{60} I say “theoretically” because there is evidence that juries are less sympathetic to women than to men who kill intimates out of rage and jealousy. \textit{See} Lee, \textit{supra} note 59, at 52.

\textsuperscript{61} \textit{See generally} FORELL & MATTHEWS, \textit{supra} note 2, at 157-61.


\textsuperscript{65} MODEL PENAL CODE § 210.3(1)(b) (1962) (“a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. 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.”).

\textsuperscript{66} \textit{See} Lee, \textit{supra} note 59, at 35-39.

\textsuperscript{67} \textit{See, e.g.,} Stingel v. The Queen (1990) 171 C.L.R. 312 (Austl.); Hart v.
Furthermore, it is the only country where two jurisdictions (Tasmania\textsuperscript{68} and Victoria\textsuperscript{69}) have completely abolished the defense. Thus, Australia provides the greatest amount of substantive gender equality in domestic homicide cases.

Changing social norms have led to widespread criticism in all three countries of the availability of provocation to men who commit domestic homicides out of rage and jealousy.\textsuperscript{70} It is therefore interesting to consider what has led to the dramatic difference in treatment of the defense in Australia compared to the United States and Canada. Most likely, the major reason for some Australian states taking the lead on abolishing the defense is the different sentencing rules in these Australian states. Canada, all American states, and some Australian states have mandatory minimum sentences for murder while some Australian states do not. This means that in Tasmania and Victoria, which do not have mandatory minimum sentences for murder, trial judges can take the circumstances of the killing into account in deciding what sentence a murderer (who previously would have had the defense of provocation available) should receive. Thus, trial judges can choose to give substantial jail sentences to people who murder out of jealousy and possessiveness, while giving people who murder their batterers out of fear for themselves or their children little or no jail time. The ability of trial judges to tailor the sentences was mentioned as a factor in Tasmania’s decision to abolish the defense\textsuperscript{71} and is a key justification given by the Victorian Law Reform Commission in its report recommending that provocation be


\textsuperscript{70} See, e.g., Morgan, supra note 54; Bradfield, supra note 68; Lee, supra note 59; Nourse, supra note 57; Gary T. Trotter, Anger, Provocation, and the Intent to Murder, 47 MCGILL L.J. 669 (2002); Edward M. Hyland, R. v. Thibert: Are Any Ordinary People Left?, 28 OTTAWA L. REV. 145 (1997).

abolished.72

It remains to be seen whether the abolition of provocation is the most effective means of providing substantive equality for women. Will judges in fact sentence murderers who committed domestic homicide out of rage and jealousy to longer sentences than they currently receive when convicted of manslaughter? If not, then little has been accomplished while creating a risk of greater punishment for battered women who kill. Battered women frequently rely on provocation as a basis for being found guilty of manslaughter instead of murder, even though often the more appropriate outcome is for them to be acquitted based on self-defense.73 Until social norms as manifested by prosecutorial charges, jury verdicts, and judicial sentencing recognize that battered women who kill out of fear are killing in self-defense, there is a need for some means of recognizing that their conduct is much less egregious than that of people who kill out of rage and jealousy. Abolition of provocation leaves this to prosecutors and judges without any input from the jury. Whether this is the best substantive equality has to offer will have to await empirical studies of how abolition of provocation impacts men and women who previously relied on provocation.

CONCLUSION

Substantive gender equality is clearly manifested in laws on stalking and sexual harassment in Canada, Australia, and the United States. Thus, the needs of female victims of stalking and sexual harassment are factored into the rules applied for these two claims. Provocation law, in contrast, continues to be mainly, but not entirely, 74 based on male-biased formal equality under


73. See, e.g., Rebecca Bradfield, The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System (unpublished Ph.D. thesis, University of Tasmania, 2002), 145, 194 (in all 22 cases in Bradfield’s survey where a battered woman claimed provocation at trial, she was successful, but in only 9 of 21 cases was a self-defense claim successful).

74. In all three countries, provocation is now allowed to be argued when the bases for a domestic homicide are fear and despair. See, e.g., Van den Hoek v.
which both men and women can claim provocation when they kill out of jealousy and rage. Australia is the one country where concern for providing substantive equality has led to the abolition of the provocation defense in one state and a plan to abolish it in another. Determining whether elimination of the provocation defense entirely is the best way to provide substantive gender equality will require an examination of the outcomes in domestic homicide cases in Tasmania and Victoria, compared to the rest of the jurisdictions in Australia, Canada, and the United States, where mandatory minimum sentences for murder continue to assure that some form of the provocation defense will remain available.

Overall, the stalking, sexual harassment, and even the provocation rules in all three countries provide evidence of the law’s willingness to factor in women’s needs. Progress towards gender equality is indeed being made.

The Queen (1986) 161 C.L.R. 158, 168 (Austl.). See generally Forell, supra note 64, at 618 n.116. This expansion in what can be considered provocation takes into account the emotions that women are more likely to act on.