

Review

***Homicide Law Reform, Gender and the Provocation Defence* by Kate Fitz-Gibbon, Palgrave MacMillan, 2014, 315 pp (ISBN 9781137357540)**

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Kate Fitz-Gibbon's monograph *Homicide Law Reform, Gender and the Provocation Defence* (2014) provides a rigorous analysis of the varied ways the partial defence of provocation has been mobilised in England, Wales, New South Wales ('NSW') and Victoria. Using gender as an analytic focal point, Fitz-Gibbon combines case analysis, empirical data and in-depth interviews with legal practitioners and policymakers to consider how provocation has been theorised, legislated, litigated and reformed. This book begins with a pointed question: does a defence that serves to justify men's lethal violence against women have any relevance in a modern criminal justice system? In pursuing a negative answer to this question, Fitz-Gibbon's book draws from criminology, feminist theory, socio-legal studies and criminal law.

The partial defence of provocation has been subject to much scholarly, legal and public debate. In a time where murder carried the sanction of death, provocation was borne as a way to recognise and justify the moments where men killed out of 'righteous anger' because their honour was affronted. Over time, the defence has shifted doctrinal registers: rather than justifying righteously motivated anger, the partial defence now works to mitigate a 'loss of control' as a concession to human frailty. Fitz-Gibbon's work intervenes in this narrative to argue that despite the shifting forms that provocation has taken as a defence, its function has remained largely to legitimate patriarchal violence in the laws governing homicide. Provocation is anachronistic.

In Part I, Fitz-Gibbon outlines three distinctive ways the partial defence of provocation has been mobilised: (i) men who kill in response to adultery; (ii) men who kill in response to a non-violent same-sex sexual advance; and (iii) women who kill following a pattern of abuse. Despite the different factual scenarios in which the defence is raised, a gendered logic flows throughout: men can be partly excused for a sudden killing in response to an affront to their honour, but women struggle to have their affronts to dignity (in the context of ongoing family violence) recognised in a similar way (p 87).

Part II then discusses the disparate debates surrounding reform, retention and abolition of provocation. Fitz-Gibbon notes that while provocation has caused considerable legal angst, there has been no universal experience of reform (p 91). In some jurisdictions, reforms to provocation have been provoked by cases where men have been convicted of manslaughter instead of murder after brutally killing their (ex) partners. In Victoria, James Ramage's successful claim of provocation following torturing and strangling his estranged wife, Julie Ramage, provided the impetus for abolition (pp 117–22). In NSW, proposals to restrict provocation arose following Chamanjot Singh's killing of his wife following her purported disclosure of sexual infidelity (pp 155–60). In England and Wales, however, it was not a single case that precipitated reform, but rather an independent review by the Law Commission.

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Following the Commission's report, the English Government abolished provocation and replaced it with 'loss of a control' — a substantially similar defence that had more narrowly defined 'qualifying triggers' and specific statutory exclusions (pp 133–4) (see, for example, Wake 2013).

Part III concludes by considering the problematic consequences of reform. In Victoria, the new offence of defensive homicide was introduced to capture the experiences of women who killed following a history of domestic abuse. However, Fitz-Gibbon argues that, far from enabling women's narratives, the offence has been primarily used by men to justify violence and denigrate victims (including women) using 'defensive' rather than 'provocative' rhetoric (p 186). Even where provocation has been replaced, like in England, with a partial defence that includes a new qualifying trigger — like fear of violence and excludes provocation borne by sexual infidelity — it continues to obscure the history of female victimisation (p 211). In cases where women kill their abusers, the reliance on provocation or loss of control limits the testing of exculpatory alternatives like self-defence (pp 208–10). Provocation has also raised concerns in sentencing — rather than offence labelling — when it is used to lessen what are sometimes referred to as 'domestic murders' (p 258). Taken together, Fitz-Gibbon cautions against reforms that fail to simplify the laws of homicide and do not interrogate the gendered norms that underlie the operation of such laws.

Homicide Law Reform, Gender and the Provocation Defence provides an important contribution for understanding the divergences between intent and implementation when it comes to provocation. Fitz-Gibbon's incorporation of interviews with lawyers, judges and legislators offers a broader picture about how provocation is mobilised than what the case law may reveal. A decade after the abolition of provocation in Victoria, it is clear that the promise of reform can be eclipsed by the surprises of implementation.

The book's encouraging methodological interdisciplinarity, however, also limits its capacity to interrogate provocation in more doctrinal terms. At times, it is unclear whether conclusions are drawn from the failure of the statutory provisions, judicial interpretations or the mechanics of litigation. If we are to interrogate the failures of provocation more fully in law — especially by recognising the legal and technical processes — we also need to be specific about the places where those failures manifest.

A call for gender justice animates Fitz-Gibbon's book. In particular, her passionate critique of the legal system reveals how both physical and discursive violence is perpetrated against women. For Fitz-Gibbon, abolishing provocation and offering a discursive space for women's narratives to be heard is an answer to remedying these injustices. In contradistinction, other scholars argue that, in order to better deal with gendered violence, provocation should be retained albeit in a more restricted form (see, for example, Loughnan and Crofts 2014; Wake 2015). Irrespective of which position is ultimately taken up, Fitz-Gibbon's book is an incitement for more reflection in law reform. Gender justice cannot be fully achieved by rhetoric or reform. Reflection, relation and critique are essential. In order to continue this dialogue, lawyers, legislators and scholars must interrogate the ways women are excluded by the law at the very points the law is purported to protect them.

References

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