The Defence of Provocation: An Acrimonious Divorce from Reality

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Introduction

Provocation is the quintessential 'crime of passion' defence. It consists of subjective elements: did the accused lose control and kill under provocation? — and objective elements: could an ordinary person also have been provoked into losing control? Once evidence of provocation has been raised, the prosecution needs to disprove provocation beyond reasonable doubt.[1] If the defence is successful, it reduces a murder charge to a manslaughter conviction. As countless commentaries have established, it is one of the more complex doctrines in the criminal law. Many critics see the concepts of 'loss of control' and 'an ordinary person' as spurious. Cogent arguments continue to be presented that in reality the provocation defence is a gender-biased anachronism, the inconsistencies in its application plaguing credibility. The literature in disciplines besides law (sociology, psychology and criminology) contains a wealth of findings on intimate partner violence (lethal and non-lethal) that reveal a clear gender asymmetry. Men are violent and kill: out of jealousy, to maintain control (or in response to losing it), or to defend their affronted honour. They are proprietary. It is not surprising that these same men who kill their intimate partners might raise the defence of provocation: that they were provoked by their partner's insults or infidelities or threats to leave. In contrast (and regardless of what defence might ultimately be raised), the comparatively few women who kill intimate partners do so mostly as a final act of desperation and self protection (or child protection) against a violent male — radically different circumstances.

This article will analyse a selection of that non-legal literature. It will also consider recent cases from Victoria in particular, as well as from NSW, in which the provocation defence was raised[2] — mostly in intimate partner killings, mostly by proprietary men.

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1 For the position at common law, see e.g. *Masciantonio* at 67. See also *Crimes Act* 1900 (NSW) s23(4).

2 The provocation defence formerly operated in Victoria under common law principles, whereas in NSW s23 of the *Crimes Act* dictates its content. Although a deeper comparative analysis is not necessary for the limited purposes of this article, in simple terms the defence was not especially dissimilar: see *Stingel* at 320. In theory the defence was more difficult to raise successfully in Victoria, given that NSW had removed the common law constraint as to time: under s23, the provocative conduct may have occurred immediately before the killing or at any previous time. Other subtle differences in the application of the defence are beyond the scope of this paper. Victoria has now abolished the provocation defence.

These cases demonstrate the inconsistent results obtained by raising the defence.[3] Sometimes it is successful and the proprietary male receives a markedly reduced sentence for manslaughter. The verdict itself and the sentiments expressed suggest that the reality of proprietary male violence is being ignored. At other times the defence fails and his murderous violence is eloquently condemned. For the purposes of this paper, it is this very inconsistency that is significant. The article will also examine studies that demonstrate that the average person is prone to tolerate violence inspired by jealousy, which goes some way to explaining why it is that the defence sometimes succeeds.

The Flawed Defence

Why privilege 'loss of control'? Why does lethal retaliatory anger in response to an insult warrant the Law's sympathy? Briefly, the partial defence of provocation historically arose to express tolerance for human frailty, at a time when men bore arms and retaliated to affronts to their honour (Horder 1992; Singer 1986). But whilst the historical foundations are fascinating, their relevance for justifying the defence today is questionable. Drawing on the work of psychologists, one set of commentators has asserted the fallacy of the notion of loss of control:

> Angry impulses do not so overwhelm us to the point that we become enslaved by them. We are endowed with a high level of choice concerning how we act, even in relation to the most provocative forms of conduct. Those who lash out when confronted with a distasteful experience do not respond in this manner because of an absence of a meaningful choice. They do so because they *elect* to do so. ... [T]he desire to ensure that a loved one does not die in pain (resulting in an act of mercy killing) might be just as powerful as the anger stemming from a confession of adultery. The latter should enjoy no special privilege in the law. ... [Loss of control requiring that the accused was] 'so subject to passion as to make [them] not master of [their] mind' [is] more akin to a state of automatism than one with the requisite *mens rea* for murder (Neal & Bagaric 2003:247–248).[4]

When men raise the provocation defence, it is invariably in circumstances where they allege they have been insulted, mocked, humiliated, or spurned. In intimate partner killings, the real 'loss of control' is that the men have lost control of their women.[5] To have that control challenged is an affront to their honour. It is regularly in circumstances where the allegation cannot be verified, because the only witness to the alleged provocative incident is, conveniently, dead (Morgan 1997). It could be argued that it is similarly convenient that the provocation defence insists that the jury must consider the evidence most favourable to the accused; that it permits the potential for his invention to be regarded as 'fact'.

And ordinariness: could an ordinary person respond with lethal violence to an insult? As I have previously argued (Coss 2005:134), this is not supported by the facts. Ordinary people do not so respond. In Australia each year on average 77 intimate partner homicides occur; and on average, men are perpetrators in about 60 of them (Mouzos & Rushforth

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3 The author endeavoured to read all cases from Victoria and NSW over the last 8 or so years (that were accessible to the public electronically) in which the defence was raised and had an impact that was not insignificant. As the goal of this paper is to highlight inconsistency, cases were selected for discussion (or noting) almost solely on that basis. From Victoria, 13 cases were chosen, and 11 from NSW — although in a couple of instances a single case might have generated four separate entries (trial, appeal etc) warranting comment.

4 See also Reilly 1997:325–326; Howe 2002:58.

5 See also Victorian Law Reform Commission (2004:2.28): 'Rather than a loss of self-control, the use of anger and violence by men against women is often instrumental — a deliberate and conscious process — intended to gain compliance and control. Those who inflict violence, including in the context of a relationship of sexual intimacy, it was argued, generally make a decision to act or not to act.'

2003:2). In most cases there are insults, threats of or actual separations, suspicions of or confessions of unfaithfulness — all affronts to male honour. It would appear that approximately 50 men kill their intimate partners each year in these classic circumstances. But how many intimate partner breakdowns occur each year? We know from the Australian Bureau of Statistics that there are between 50,000 and 55,000 divorces recorded each year.[6] Anecdotal evidence suggests that the number of de facto breakdowns is likely to be considerably higher than that. It would be impossible to determine the numbers of breakdowns of intimate couples (boyfriend and girlfriend, or same sex). But it is conceivable that the combined figure of all these groupings is likely to swell the total out to 200,000 or more. And in Australia each year, in 100% of those breakdowns, insults and hurtful remarks would be exchanged. But this figure does not include the massive numbers of intimate relationships that do not break down but in which hurtful remarks are exchanged — numbers in the millions. And yet only 50 men kill their intimate partners each year when affronted by insults, separations or confessions. Men who kill when affronted by their intimate partners are truly *extra*ordinary. It is problematic that the provocation defence's existence confirms that the criminal law believes such men warrant sympathy, and thus a significant reduction in sentence.

The ordinary person test of the provocation defence in Australia is a slight variation of the two-tiered test originally propounded by the House of Lords in *Camplin*. The High Court has pronounced on more than one occasion (*Stingel*; *Masciantonio*; *Green*): the accused's characteristics are to be attributed to the ordinary person to help understand the gravity of the provocation but, other than the age of the accused, in assessing the powers of self-control the ordinary person is otherwise devoid of the accused's personal characteristics. In the NSW case of *Mankotia* 2 (at [18]- [19]), Smart AJ had this to say:

> In practice the gravity of provocation/self-control distinction has proved hard to explain to a jury in terms which are intelligible to them. In *Rongonui* ... Tipping J ... said that it required 'mental gymnastics'. Thomas J ... said (at [205]) that most trial Judges had seen: 'the glazed look in the jurors' eyes' [when instructing them on the two-tiered test].
>
> I would go a little further. Many trial Judges in this State give juries both verbal and written directions on provocation. Juries struggle with the distinction and find it hard to grasp.

It is ironic that the test is intelligible to High Court judges but apparently incomprehensible to the 'ordinary person'.

For the reasons already articulated, it could be argued that the objective test of provocation, like the subjective test, is indefensible.

'You're Mine, or You're Dead'

I will now identify what might be seen as the key finding from the literature on intimate partner violence. A distinctive feature of intimate partner homicides by males is proprietariness — feelings of ownership, exclusivity and jealousy. Foremost amongst researchers discerning its central role are Wilson and Daly.

> Sexual proprietariness has been consistently identified as the predominant ostensible motivational factor in studies of nonlethal wife-beating ... and the same motive is also predominant, but to an even greater degree, in case studies of uxoricide [wife killing] (Wilson & Daly 1998b:299).[7]

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6 See ABS 2005. There were 52747 divorces in 2004, 53145 in 2003, and a high of 55330 in 2001.

7 Studies have confirmed that women in de facto relationships are at far greater risk of becoming murder victims than married women, see eg Brownridge 2004.

Threat of or actual separation, suspicion of or confession of infidelity, and failure to maintain control have been identified as key determinants of violence and killing by a jealous and possessive male.[8] As Johnson and Hotton found in their Canadian study:[9] 'Men are more often motivated by jealousy, especially in estranged and other intimate partner relationships, when commitment to the relationship is challenged or seen as tenuous' (2003:80).

With that in mind, it will be useful to investigate two recent cases in which proprietary males pleaded provocation after killing their spouse: *Ramage*, and *Butay*. James Ramage was a wealthy businessman, and amongst his prized possessions was his beautiful wife Julie. She finally left him after years of coping with the intimidation of a manipulative man, and fear arising from initial violence in the marriage. He lured her to the former matrimonial home, and then bashed and strangled her to death. He alleged that she sneered at the renovations he had arranged, and confessed that sex with him repulsed her. By that stage he knew that she had found a new partner. He claimed he simply lost control and killed her. His subsequent concealment of the crime was meticulous. Her death was labelled 'honour killing in the suburbs' in the media (Kissane 2004:4). The jury accepted the provocation defence, convicting Ramage only of manslaughter, and he was sentenced to 11 years imprisonment. From the perspective of Julie's family, friends, and keen observers, it was Julie Ramage who had been on trial — her marital unhappiness, her striving for independence, her new romantic attachment, all held up to ridicule in a dramatic illustration of victim-blaming (Cleary 2004:20). The trial process re-created her as 'duplicitous, pleasureseeking' (Kissane 2004:4) by asking: how could Julie have had an affair if she was really afraid of James?[10] And it re-created her as a 'hormone-driven flibbertigibbet' (Kissane 2004:4) by implying: didn't the fact that she had tampons in her handbag when she was killed make it more than likely that she had tetchily abused Ramage, as he alleged? But the history of violence, and the awareness of family and friends of Julie's fear of Ramage, was never really allowed to surface, due in part to Victoria's restrictive evidence laws.

In his sentencing remarks, Osborn J had this to say (at [35]–[36]):

> [Y]ou were at the time of the fatal confrontation in a state of extreme obsessive anxiety and desperately seeking to reassert control over the relationship with your wife. It was in this context that the jury were entitled to conclude it was reasonably possible you were provoked to lose self-control [and also to conclude that an ordinary person could have lost control].

The phrase 'desperately seeking to reassert control' stands out. Why does a manipulative, controlling, proprietary male who kills when challenged warrant some sympathy, some excuse?

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8 Amongst a rich body of work, see Wilson, Daly & Daniele 1995; Wilson, Johnson & Daly 1995; Wilson & Daly 1996; Wilson & Daly 1998b. Some commentators have questioned the evolutionary psychology conclusions of Wilson and Daly (including that males are *sexually* jealous whereas females are *emotionally* jealous): see Goldenberg et al 2003; Sabini & Green 2004. And some have questioned the notion of the *supremacy* of jealousy in predicting violence, although its importance has been acknowledged: see Barnett, Martinez & Bluestein 1995. But this in no way lessens the impact of the overall findings, and the findings of so many others, about the vital role of possessiveness and jealousy in male violence.

9 In keeping with these findings is the reality that young women are at far greater risk of being murdered by their partners, that the risk declines somewhat once women pass reproductive age, but that the risk is high when there is significant age disparity between the partners. Besides the Wilson & Daly works, see especially Shackelford, Buss & Weekes-Shackelford 2003; Shackelford & Mouzos 2005.

10 It is the sort of question frequently posed by victim-blaming participants in the criminal courts: see Ferraro (2003:121): '[T]he invocation of a woman's sexual infidelity usually raises doubts about the veracity of her claims of being battered'.

The judge went on to say (at [38]):

> I am satisfied (a) that the attack was carried out with murderous intent; (b) that it was brutal and required a continuing assault to achieve its end; and (c) ... the gravity with which you were confronted was objectively far from extreme. It was rather of a character which many members of the community must confront during the course of the breakdown of a relationship.

That being the case, with 'reality' at least partly acknowledged, how is it possible that a reasonable jury, properly instructed, could believe an ordinary person might have lost control in these circumstances? It is difficult to fathom.

In the following remarks (at [40], [42]), it is clear that the judge had misgivings about Ramage's innate manipulative nature, especially when ensconced in an intimate relationship.

> [T]he history of your relationship with your wife ... [involves] episodes of violence and elements of continuing intimidation and dominance over her for many years. ... I must record some underlying concern as to your capacity to function in a non-violent manner within a marital relationship should you re-establish one. I say this because it is apparent that your offence was the product of core aspects of your personality and it seems to me that these will not easily change.

Near judgment's end (at [53]), Osborn J's condemnation of violence is apparent:

> The Court cannot allow the law to be seen to condone deliberate domestic killings whether or not they are to be characterised as murder or manslaughter. Such killings strike at the foundations of society. In the case of manslaughter such killings will deserve particular condemnation in cases where the killing was done with murderous intent and savage brutality and where, although the jury has accepted the reasonable possibility of provocation, it is apparent that such provocation was not objectively extreme.

Although the sentiments despising violence are entirely valid, the reality is that James Ramage was found not guilty of murder. That was so because he claimed that his estranged wife said sex with him was repulsive. The Law in effect says that his vicious killing of his wife, provoked by such an affront, is an ordinary retaliation, that it warrants some sympathy. It certainly reduces his sentence from perhaps 20 years[11] to 11 years (although 11 years was above the more common 6 to 8 years). I have previously described *Ramage*, in terms others may find overly theatrical, as an obscenity (Coss 2005). Even with the passage of time I see no reason to soften that denunciation.[12]

In the second case under consideration, *Butay*, Ruth Butay was 'highly regarded' by all who knew her and was described as 'caring, considerate, courteous, respectful, well-spoken'. She had attempted to make it clear to her husband Jesus that their marriage was finished. She had separated from him, and wanted an amicable break-up. He alleged that he had begged her to keep the marriage alive, but that she had rejected him by confessing that she was having an affair. Flatman J (at [8]) recited some of the abuse that Butay alleged his wife flung at him:

> You said your wife told you that [X] was her lover and that he was much better, 'meatier' than you. She said that you were a 'dickhead' and that you had better 'cut off your dick'.

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11 Here are some examples of head sentences in Victorian cases of affronted murderous males: *Tuncay* (18 years), *Conway* (19 years), *Yasso* (20 years), *Kumar* (20 years), *Parsons* (life imprisonment).

12 As Taylor (1986:1696) reflected 20 years ago, '[t]he law of provocation endorses men's ownership of women's sexuality by expressly sanctioning violent reactions by [men] to their [woman's sexual freedom]'. For the latest condemnation of *Ramage*, see Cleary 2005.

> She said she 'can now fuck around because she won't get pregnant'. She also pushed you in the face. She was laughing and yelling. [Butay felt he was] 'drowning'.

Ruth Butay was battered to death with a large hammer:

> There were severe lacerating injuries to the back of the head, with fragmentation fractures of the underlying skull and extrusion of brain tissue. ... The injuries were consistent with being caused by a half kilo hammer ... She was struck savagely at least five times and was vulnerable and defenceless during the attack ... lying face down on the floor (at [11], [12]).

As the judge summed up (at [22], [33]), '[t]he truth was your wife had determined to leave you and you were not prepared to accept ... that [your] wife had the right to make her own choice'.

The jury in Victoria found Butay guilty of manslaughter on the grounds of provocation, and the trial judge, after labelling it (at [34]) 'a crime of great gravity', sentenced him to 8 years imprisonment. Of course the judge, having left the issue of provocation for the jury's consideration, was bound to accept that verdict, although one senses dissatisfaction (at [25]–[26]):

> [Y]our wife's family have found the trial an ordeal ... From their perspective, just as Ruth was unable to defend herself from your violent and savage attack with the hammer, equally she was unable to defend herself from your allegations as to her use of provocative and abusive words ... I would emphasise to Ruth Butay's family and friends [that] the jury verdict means no more than a finding that the jury could not exclude, beyond reasonable doubt, the possibility of those words being said.

Apparently the jury believed that nothing could be more insulting to a man who cannot accept that he is losing his possession than to be told he is sexually inadequate as well. As one commentator said of a similar case: 'The image of a female antagonist who dished it out verbally enables him to be positioned as a battered man, a man battered by a woman's words, and in danger of losing his masculinity' (Tyson 1999:80).

It would be difficult to imagine clearer representations of what sociologists term proprietariness than the cases of *Ramage* and *Butay*. Both men had lost control — not of themselves but of their wives. In both cases the law partially excused their lethal violence, their acts of terror against their intimate partner.

In the non-legal literature, intimate partner violence (IPV) has attracted an abundant array of graphic labels unlikely to be found in the law reports, including: 'systematic patriarchal terrorism' (McMurray et al 2000:90), 'the pandemic violence of men against their intimate partners' (Sev'er, Dawson & Johnson 2004:568), and 'the widespread prevalence of terrorism within families' (Ferraro 2003:127). When male violence results in a woman's death, whether within an intimate relationship or otherwise, it is frequently termed femicide. Femicide is widely understood as 'the misogynous killing of women by men' (Radford 1992:1), although one commentator prefers the broader definition of 'death-in-life' or 'living death', where a woman lives in an intimate relationship under the incessant threat of being murdered (Shalhoub-Kevorkian 2003:581, 591). When Julie Ramage repeatedly told her family and friends that she feared her husband James, it was tragically prophetic.

Asymmetrical Killings

As discussed, the literature isolates proprietariness as a key identifier of male intimate partner violence. It is important to expand upon that concept. A fundamental and complementary research finding is that there are crucial differences between male violence

and female violence (when it occurs), that they are truly asymmetrical. As Dobash and Dobash (2004:343, 344) noted:

> [W]omen's violence differs from that perpetrated by men in terms of nature, frequency, intention, intensity, physical injury and emotional impact. ... [The violence used by women had occurred mostly] in the context of 'self-defence' or 'self-protection' ... [W]omen did not use intimidating or coercive forms of controlling behaviour ... Men who were the recipients of women's violence usually reported that it was inconsequential, did not negatively affect their sense of well-being and safety ... [The findings] indicate that the problem of intimate partner violence is primarily one of men's violence to women partners and not the obverse.[13]

The Dobashs then posed and answered a question some commentators think worthy of raising:

> [W]hat is to be done about the very small number of women who may *initiate* severe, persistent, repeat physical and sexual violence against a male partner in a context of no violence from the man? We have yet to see any evidence that would enable us to consider this issue (Dobash & Dobash 2004:346).

Like so many researchers into IPV, the Dobashs pleaded for the implementation of policies aimed at eradicating male violence against their female partners; certainly not to cut funding to strategies aimed at ameliorating the lives of female survivors.[14] Certainly not to entertain legal rulings (e.g. successful pleas of provocation) that reduce a term of imprisonment from a potential 20 years or so (for a murder conviction) to about 6 or 8 years (for a manslaughter conviction). Such reduction might well be viewed by some critics as partially excusing, and thus risking perpetuating, male violence.

A plethora of studies (Wallace 1986; Polk 1994: Mouzos 2000)[15] has authenticated the existence of the asymmetry with respect to intimate partner homicide, distinguishing the stark contrasts between the circumstances under which men kill and under which women kill. Purely in statistical terms, in Australia there are on average 77 intimate partner homicides each year, and males kill female partners in over three-quarters of them (Mouzos & Rushforth 2003:2). These ratios are largely replicated in Britain (Aldridge & Brown 2003; Dobash et al 2004), Canada (Johnson & Hotton 2003; Wilson, Johnson & Daly 1995) and the United States, although a higher (Wilson & Daly 1992)[16] but diminishing (Dugan, Nagin & Rosenfeld 1999) percentage of women kill their intimate partners in the US.

Looking beyond mere statistics, Polk has confirmed on more than one occasion:

> The killing by men of their women partners occurs without prior violence on the part of the victim. When women kill their male partners, on the other hand, in a large proportion of the cases it is precisely the prior violence of the male that sets the stage for the lethal violence that follows (1997:153).[17]

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13 Their research findings have discredited earlier claims, perhaps championed by father's rights groups, that men and women were equally violent in intimate relationships. See also Dobash et al 1992. See generally Harne 2005.

14 See Carll (2003:1609) where she laments funding cuts to battered women's shelters under the Bush Administration in the United States.

15 For a thorough analysis of these and other studies, see Morgan 2002. See also Mouzos & Rushforth 2003. All these findings, and those of their own commissioned survey, are discussed in Victorian Law Reform Commission 2004.

16 For an explanation of the high ratio of female perpetrators, especially amongst the African-American population, see Gauthier & Bankston 2004.

17 See also Polk 1994; Smith, Moracco & Butts 1998

Far from men acting out of uncontrollable passion when killing their sexual intimates, Polk (1997) has clearly identified that careful thinking and planning are key features in the vast majority of these homicides. International researchers (amongst them Wilson and Daly 1992), are in agreement on the fundamental differences:[18] stalking and killing post-separation; murder-suicides; killing the whole family;[19] lethal retaliation to infidelity; killing after years of inflicting verbal and physical violence — these are almost exclusively committed by male spouses, virtually never by female spouses. Women kill their spouses under very different circumstances.

> Unlike men, women kill male partners after years of suffering physical violence, after they have exhausted all available sources of assistance, when they feel trapped, and because they fear for their own lives (Wilson & Daly 1992:206).[20]

So we have an unambiguous delineation of their non-commensurability (Serran & Firestone 2004).[21]

Key indicators of lethal male violence — prior violence by him, separation by her (and stalking by him), his sense of honour affronted — all feature in discussions about proprietariness. The concepts invariably overlap, but it is helpful to attempt a focus on each of them.

Prior Violence

Evidence of prior violence, whether to their intimate partner or to others, is not surprisingly a key predictor of femicide. Campbell (1992:102) encapsulated the findings of major studies, stressing that 'woman battering routinely precedes femicide ... everywhere in the world'.[22] The most recent study examining intimate partner murderers in Britain has expanded on this evidence, challenging the notion favoured by defence lawyers that an act of femicide is a moment of passion committed by an otherwise ordinary man. As the researchers verified:

> [Intimate partner] murder would not appear to be associated with the one-off event of high emotion in which the man just 'snaps' and acts *out of character* by using violence against his woman partner. Instead, they are more likely to be events in which the man acts *in*

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18 And to this 'list' could be added several other features peculiar to men killing intimate partners. There may be acts of sadism — occurrences in a disturbing number of homicides by males, but never by females: see e.g. Campbell 1992:103; Baker, Gregware & Cassidy 1999:179. And there may be acts of acute sexual violence — frequently perpetrated by men but never by women. Although sexual violence usually ranks behind physical violence in terms of frequency and severity, one study found that in Spain it rated on a par: see Medina-Ariza & Barberet 2003.

19 See Wilson, Daly & Daniele 1995, where the authors had acknowledged that familicide was an almost exclusively male domain. It was a shock to read of the alleged familicide (in Maitland NSW) committed by the wife and mother of her family, using a shotgun: see McMahon 2005:1. There are exceptions to every rule.

20 See also Rathus (1993:92): 'There is a vast difference between a woman, who has been the subject of abuse for years, finally reacting by taking the life of her abuser and a man who has perpetrated violence consistently, going too far one day and using lethal force. For the women, their attack may often be the first time they have seriously retaliated and it is done to prevent further abuse. For the men the attack is merely the final act of violence in a pattern which they have controlled.'

21 If we move outside intimate relationships, the differences if anything widen. Sadism and acute sexual violence again feature prominently: see Dutton, Boyanowsky & Bond 2005. Serial killing (especially when coupled with sexual violence) and mass murder are an exclusively male dynamic: see eg Bland 1992:233–252.

22 See also McFarlane, Campbell & Watson 2002:54; Smith, Moracco & Butts 1998:402, 415, Campbell et al 2003:1095.

> *character* by continuing to use violence against the woman whom he has previously abused (Dobash et al 2004:597–598).[23]

With that in mind, it is prudent to consider the Victorian case of *Kumar*. Raj Mani had secured protection orders against Munesh Kumar after his violence and threats to kill her. She had moved interstate, and then refused him entry to her home when he unexpectedly arrived. Kumar alleged that she abused him and insulted his parents. He broke into her apartment, and proceeded to destroy her, stabbing her a dozen times with a knife and then hacking her another dozen times with a meat clever. The outcome in *Kumar*, a murder conviction, was satisfactory, a majority of the Court of Appeal supporting the trial judge's refusal to leave provocation to the jury. But Eames JA dissented, finding sufficient evidence of provocation to warrant it being presented to a jury. It could be argued that Kumar, a jealous, violent, proprietary male, was the least deserving of the Law's compassion. But Eames JA asserted (at [113]) that these sorts of sentiments should play no part in the Law's application of the defence.

> The question in this case — whether an ordinary 20-year-old might be so inflamed by the conduct alleged in this case as to lose self-control and kill — might well raise concerns that if a jury were to hold a reasonable doubt, and acquit the accused of murder, then it was adopting a standard of subjugation of women by violent men which was antithetical to a civilised society. Some of the reasons of the learned trial judge might be thought to reflect such concerns. That, in my opinion, would not be a valid basis for refusing to leave the defence to the jury where there were items of provocation which might be viewed in a different light by a jury.

The provocation defence, by its very existence, already adopts a standard which potentially subjugates women. It is of concern if a senior judge, for the sake of legal correctness, could embrace a position that acknowledges and then disregards that subjugation.

In contrast, it was refreshing to read O'Bryan AJA's forthright judgment in *Kumar* (at [176]):

> I regard provocation as anachronistic in the law of murder since the abolition of capital punishment and would support its abolition as a so called defence by Parliament . . . I have experienced, as I believe have other judges who have presided over murder trials, unjustified jury verdicts which could only be explained in terms of provocation.[24]

Separation

It has been conclusively established that the most dangerous time for a woman in an intimate relationship is separation — either when a decision has been made to separate, at the point of separation, or immediately after. That was so for Julie Ramage, Raj Mani, Ruth Butay and others.

> In several countries, from one third to one half of all women killed by partners had left or were trying to leave at the time of the murder. Early stages of estrangement, particularly the first 3 months, are exceptionally risky (Dobash et al 2004:582).[25]

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23 The only apparent limitation of the study was that it focused solely on those convicted of murder, not murder *and* manslaughter. Some could argue that that narrowing of focus may undermine the force of the conclusions.

24 See also Neal & Bagaric 2003.248–250.

25 See also their conclusion (at 597) that in their nationwide study of femicide victims, '1 in 3 women had separated from their partners and about 1 in 20 were trying to leave the relationship'. See an earlier study of Easteal 1993.

Some commentators have even gone so far as to stress the mandatory requirement that women contemplating leaving a violent partner be counselled as to how to go about it in such a way as to minimise their chances of being murdered (Campbell et al 2003:1095). Separation has thus been identified as a key predictor of homicide (Johnson & Hotton 2003:59, 68; Dawson & Gartner 1998:382).

These findings add further credence to Mahoney's writings on the notion of 'separation assault', which is defined as:

> the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return ... It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship (Mahoney 1991:65–66).[26]

The image clearly created is one of a controlling,[27] manipulative and possessive man. Successive studies have reported higher risks of more serious and more frequent violence (Johnson & Hotton 2003) post-separation, including sexual violence (DeKeseredy, Rogness & Schwartz 2004), with psychological abuse at peak levels (Logan & Walker 2004:1480). And a key controlling behaviour, which ranks high on the predictors of femicide by their intimate partners, is stalking.

> Following and spying on the woman, threatening messages on the victim's car and threats to harm the children were associated with a two, four, and nine times, respectively, greater likelihood of attempted/actual femicide ... It is important that 49% of the attempted or actual homicide victims who were *not* physically abused *were* stalked, results suggesting how important it is to recognize the serious risk of deadly harm presented by stalking behaviours alone (McFarlane, Campbell & Watson 2002:66).[28]

Munesh Kumar, like so many other murderous males, had stalked his victim.

Turning briefly to the woman's perspective, although a successful separation may dramatically reduce the risk of lethal violence being perpetrated against her or by her (as self-protection), there are so many factors impinging not just on a woman's ability to leave a violent partner, but on her 'ability to maintain separation' (Logan & Walker 2004:1478).[29] Certainly many women from minority cultures find themselves in a Catch-22 situation, frantically needing escape from violence, but fearful not just of the retaliation of the violent partner (Jordan 2004:1413), but also fearful of those who may be in a position to help. This latter fear may be due to a variety of factors, some of which may stem from long exposure to oppression and discrimination as a minority person.

> [W]hen men dominate family, political, economic, and other social institutions both in number and in power, the policies and practices of these institutions are likely to embody, reproduce, and legitimate male domination over women (Yodanis 2004:657).

And she may be tied inextricably to the cultural group threatening reprisals should she attempt to abandon her family (Kasturirangan, Krishnan & Riger 2004; Shalhoub-Kevorkian 2003). Feelings of isolation[30] and hopelessness, and fear of death, may be

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26 Mahoney's thesis has been extensively discussed. See e.g. Dawson 2003:691–692, 704; Morgan 2002:37–39.

27 'Women who separated from their abusive partners after cohabitation experienced increased risk of femicide, particularly when the abuser was highly controlling': see Campbell et al 2003:1092.

28 See also Hilton & Harris 2005; Campbell et al 2003.

29 See generally Fugate et al 2005. See also Barata & Senn 2003; Waldrop & Resick 2004. For an Australian perspective on barriers and responses, see e.g. Kaye, Stubbs & Tolmie 2003; Katzen 2000.

30 Amongst femicide victims, studies have also confirmed that women from rural areas are at far greater risk than those in urban settings. See e.g. Logan et al 2003; Gallup-Black 2005; Lee & Stevenson 2006.

overwhelming. Killing a violent partner may be perceived to be the only solution (*Denney*)[31] — once again, a far cry from the reasons a violent proprietary male kills.

Honour

The related concept of 'male honour' is seen by many commentators as of paramount importance. The patriarchal notion centres on:

> (a) the control of female behavior ... (b) male feelings of shame when that control is lost ... (c) ... the individual man acts alone; he is both judge and executioner, responding to feelings of wounded pride and violated identity (Baker, Gregware & Cassidy 1999:166, 179).[32]

Notions of exclusivity go hand in hand with male honour; punishment for perceived transgression is vital. The 'If I can't have you, no one can' mentality is very much to the fore. Of course 'honour killings' — renamed patriarchal killings by one set of commentators who resented the oxymoron evident in the familiar term (Sev'er & Yurdakul 2001:994 n1)[33] — occur world-wide, and are not linked to any one culture.[34] But from time to time an accused person kills his spouse or girlfriend, and then seeks to rely on his 'cultural values' as an excuse. That then threatens to give legal credence to the patriarchal violence, thereby adding racism to the sexism imposed on female victims.

> Sexism and racism are not mutually exclusive; rather, the intersectionality of their multiple identities complicates minority women's experiences of violence (Kasturirangan, Krishnan & Riger 2004:320).

Judicial attitudes

Proprietariness has already been identified as the key determinant of lethal male violence. Factors such as his prior violence, his stalking, and his sense of honour affronted, recur. It is important to investigate recent cases in which these concepts are all too evident in the accused persons so that we can determine how judges perceive the explosions of male violence. Is proprietariness (and indeed asymmetry) recognised? Does it attract condemnation, or sympathy? Inconsistency needs to be noted (if it exists), both in sentiments expressed and in outcomes. Three key cases — *Yasso*, *Khan* and *Conway* — provide intriguing resonances, especially after a detailed consideration of their facts. *Khan* too offers an absorbing contrast to both *King* and *Mankotia*.

In *Yasso*, Eman Hermiz was stabbed to death by her estranged husband Mazin Yasso. Fearing for her life after he persistently threatened her, she had taken out intervention orders, but he continued to breach them and stalk her. Armed with a kitchen knife, he accosted her behind a suburban shopping mall. He believed that she was having an affair. He trapped her against a wall, and she screamed. He alleged that he demanded that she hand over her mobile phone (to prevent her alerting the police), and that she refused and then spat

31 In *Denney* the wife killed her husband after years of violent and degrading abuse, and the jury accepted the defence of provocation. The trial judge, Coldrey J, handed down a suspended sentence.

32 The authors were actually contrasting honour killings in what they termed 'traditionalist' societies with those perpetrated in western societies. See also Sev'er & Yurdakul 2001; Shalhoub-Kevorkian 2003. And see Vandello & Cohen (2003:998) for a precise definition of honour.

33 They quote (at 976) the Muslim Women's League who see honour killing as 'a problem of domination, power and hatred of women'.

34 See e.g. report of United Nations Development Fund for Women (UNIFEM): <www.unifem.org/gender_issues/violence_against_women/facts_figures.php?page=3>, accessed 20 February 2006; and see Amnesty International 2004.

at him. She screamed for help as Yasso commenced stabbing her. Various distant witnesses saw the confrontation, heard his yelling and her screaming, and watched the stabbing. A number cried out to him to stop. He looked up at them then continued to drive the knife in. No one could verify the alleged spitting. The injuries detailed by Coldrey J (*Yasso* 1 at [53]) were shocking:

> there were 12 stab wounds to the area of the neck and chest, some of which had entered the chest cavity damaging the left lung and heart. One stab wound had penetrated the breast bone. This would have required severe force. [There were also] eight defensive type wounds to the deceased's upper limbs.

At trial, cultural witnesses alleged that the act of spitting by a wife to a husband was a grievous affront for an Iraqi born Chaldean Christian male. In short the defence was asking the court to give credence to a savage honour killing. Although long championed by some, the 'ethnicity argument' in provocation has been roundly condemned, Howe (2002:46) labelling them 'profoundly racialised excuses for men to murder women'. She is not alone in identifying sound bases for ignoring the values of certain ethnic/cultural groups:

> It is morally wrong that men should believe and act in a way that demeans women to the status of something akin to property ... Logical consistency would mean that some men would be permitted to have more than one wife, female circumcision would be permitted and some women would be compelled always to have sex with their partners (Neal & Bagaric 2003:251–252).

Coldrey J refused to leave provocation for the jury for the following (one might argue compelling) reasons (*Yasso* 2 at [31]–[33]):

> Cultural values inevitably change over time. In our modern society persons frequently leave relationships and form new ones. Whilst this behaviour may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it. What is abnormal is the reaction to this conduct in those small percentage of instances where the former partner (almost inevitably a male) loses self control and perpetuates fatal violence with an intention to kill or to cause serious bodily injury. In my view, this will rarely, if ever, be a response which might be induced in an ordinary person in the 21st century.

He could have cited as authority the sociological references already mentioned here. Convicted of murder, Yasso was sentenced to 20 years imprisonment.

On appeal, the Court of Appeal overturned the verdict and ordered a re-trial, specifically on the ground that provocation should have been left to the jury. Charles JA found there was a great deal of evidence favourable to the accused concerning the effect of the separation and the supposed affair, given his cultural background, and that this became crucial if the jury accepted the alleged spitting incident (*Yasso* 3 at [29]–[30]). The judge (at [51]) rebuffed Coldrey J for suggesting that a presumption existed against leaving provocation for the jury in relationship breakdown killings, and for suggesting that Yasso's ethnicity was not relevant in assessing the gravity of the provocation. Batt JA, though troubled, agreed that a re-trial was warranted. It seems clear that the majority was not apprised of the facts of how many intimate relationships break down each year, and how many men kill their intimate partners each year. Vincent JA, dissenting, insisted that Yasso's defence collapsed on the ordinary person test (at [66]):

> no reasonable jury could have failed to be satisfied beyond reasonable doubt that the applicant's reaction to the victim's conduct fell below — indeed fell a long, long way below — the minimum limits of the range of powers of self-control that must be attributed to the ordinary person.[35]

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35 Vincent JA was quoting Brooking JA in *Parsons* at [15].

At his re-trial, Yasso did have his defence of provocation considered by the jury, but they rejected it and he was convicted of murder — again. Hollingworth J, echoing the words of Coldrey J at the first trial, made her feelings about the spitting allegation clear (*Yasso* 4 at [48]–[50]).

> First, there was considerable evidence before the court of the traumatic physical consequences that awaited any Iraqi wife who spat at her husband. Eman Hermiz would have been well aware of these possible consequences. Secondly, it is beyond credence that this small woman, just 152 centimetres tall and weighing 47 kilos, faced with a large angry male wielding a knife, and in a remote location away from any possible assistance, would spit at you. Finally, given the fear which you say your wife exhibited at the time, it may be doubted whether she could have produced any spittle from what is likely to have been a dry mouth.

Yasso was once again sentenced to 20 years imprisonment.

It could be argued that what is missing from this episode is a judge bluntly stating: 'Even if she had spat at you, that does not give you a licence to kill her, cultural beliefs or not. Such attitudes will not be embraced by the Law in this country.' Certainly Coldrey J came close to doing so in the first trial. Ultimately the jury rejected provocation, either on its subjective test, finding that he simply was not provoked and did not lose control, or else on its objective test, rationalising that an ordinary person could not have so reacted. That the defence was rejected is heartening. But two appeal court judges had very different views on the matter, identifying the latitude of the provocation defence. A defence which has the potential to partially excuse a Yasso, the epitome of a homicidal proprietary male, has no credence.

In *Khan*, a husband murdered his cuckold upon finding his wife in the act of adultery — historically the classic provocation circumstance. As Lord Chief Justice Holt said so notoriously 300 years ago: 'jealousy is the rage of a man, and adultery is the highest invasion of property'.[36] It can be argued that little has changed. Gulam Mohammad Khan was suspicious of an affair between his wife and their friend Mohammed Abbas. He arrived home unexpectedly early from the mosque, waited in hiding, and heard and spied them having sex. He went into the kitchen, took a knife, returned to the bedroom and stabbed Abbas to death. But he didn't merely kill Abbas, he sought to obliterate him.

> Appalling injuries were inflicted upon the deceased during the attack. The injuries were so gross that they were close to disembowelling the deceased. There were a total of sixty-seven knife wounds ... a number of wounds into the abdomen were inflicted after the heart of the deceased had stopped beating (Allen J in *GM Khan* at 554–555).

The provocation defence is meant to rest on 'loss of control'. But the facts in *Khan* suggested something else.

> [I]t cannot be overlooked that the respondent came home from the Mosque because he suspected that his wife was having an adulterous association with the deceased. He waited for an hour in an adjoining bedroom to see what would happen. He must have known full well what was likely to happen [because he had overheard the planned assignation] . .[H]e did have time within which to steel his self control, as he should have, but failed to do so (at 557).

The only logical conclusion to be reached is that Khan did not lose control (in the provocation sense); he simply avenged his honour, having lost control of his wife. It could

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36 *Mawgridge* (1707) Kel 119; 84 ER 1107 at Kel 137; 84 ER 1115. Holt LCJ was discussing *Maddy's Case* (1672) 1 Vent 159; 86 ER 108.

be argued that because the jury found otherwise is another example of a defence without credibility.

After acknowledging the strict Muslim beliefs of the accused, Allen J had this to say (at 557–558):

> Adulterous abuse of hospitality can be highly provocative for the irreligious as well as for the religious. Cultural pressures are manifold. For many men adultery committed with his wife is an intolerable insult to his manhood and an act of gross betrayal. Violent reaction to adultery is no new phenomenon. It has existed as long as men have been men and doubtless it will continue for as long as men are men.

It seems that jealousy is the rage of man and adultery the highest invasion of property, still. The judge did say in the next breath that 'no cause for provocation justifies the taking of human life', but it can be argued that that is a standard script which simply states that an accused will not be acquitted for the killing, that he must be punished. But the jury ensured that Khan's killing would be partially excused because of what they must have perceived was extreme provocation. The trial judge sentenced Khan to 5 years imprisonment for this crime of unbridled male vengeance. And yet the Court of Criminal Appeal, after admitting the sentence was 'excessively lenient', merely increased it by another year.

Khan makes for a noteworthy contrast with *King*. As already discussed, studies authenticate that the circumstances in which men kill and in which women kill in intimate relationships are truly asymmetrical. One could argue that it would be reprehensible if the Law somehow pretended that they were equal. In *King*,[37] the accused, Pearl King, stabbed her husband to death with a single knife wound after being subjected to many years of drunken physical and verbal abuse, including on the day of the killing. The provocation, as in *Khan*, was described as great, and she was sentenced, as in *Khan*, to 6 years imprisonment. A single stab wound, compared to 67 stab wounds. Years of abuse, compared to an act of adultery. Given what is known of the asymmetry, these two cases, at least on face value, seem extraordinary.

It is also worth contrasting *Khan* with *Mankotia*. In *Khan*, the accused's strict Muslim background was deemed significant (at least at sentencing), but not all cases in NSW treat ethnicity with what could be described as the same empathetic inverse racism.[38] In *Mankotia*, where the accused stabbed his girlfriend 42 times when she said their relationship had ended, the defence sought to 'explain' his response by looking to his ethnic background from a small village in India. Mercifully this attempt to excuse male violence (by creating a deadly cocktail, adding racism to the sexism already suffered by the female deceased) was rejected at trial (*Mankotia* 1), on appeal (*Mankotia* 2), and in the application for special leave to appeal to the High Court (*Mankotia* 3). This time the Law refused to give any credence to this 'excuse' for a patriarchal (honour) killing.

Turning then to the third significant case, *Conway*, Lisa Richardson was stabbed to death by her ex-fiance Midas Conway at her place of employment. The relationship deteriorated when Conway was sent to prison for drug offences. Eventually she informed him that she had met someone else, and that the engagement was over. When he was released from prison he refused to accept that the relationship had ended. He visited her a couple of times

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37 This case is in dramatic contrast to *Denney*, where the battered wife received a suspended sentence for killing her abusive husband.

38 In *Tuigamala*, Wood CJ at CL noted (at [26]) that the accused's Samoan upbringing 'was only likely to accustom him to violence as a means of response. That is, however, of limited significance since those who take up life in this country are expected to adjust to its norms or otherwise to accept the consequences.'

at her work, on the final occasion concealing a kitchen knife in his jeans. He claimed he wanted to know exactly where he stood, and that if she refused him, he would kill himself. He alleged that she told him again that the relationship had no future, and he informed her that he would kill himself. He claimed that he pulled out the knife and tried to stab himself, but that she laughed at him and said, 'If you want to kill yourself, what do I care?' He grabbed Lisa, who cried out, and a shop assistant managed to disarm him, but he seized another knife and stabbed her repeatedly. As Teague J said at trial, Conway's 'attack on her was sustained and ferocious' (*Conway* 2 at [4]), and it had occurred a mere nine days after being released from prison.

The trial judge refused to leave provocation to the jury, explaining that the ordinary person test required a lethal retaliation to something 'beyond laughter and words of a scornful, derisive or taunting kind' (*Conway* 1 at [7]). And he quoted with approval the statement of Lord Hoffman in *Smith (Morgan)* (at 169) — 'male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide' — a sentiment also quoted with approval by at least one other Victorian judge, Charles JA in *Leonboyer* at [147], curiously the same judge who had ruled in favour of Yasso on appeal. Found guilty of murder, Conway was sentenced to 19 years imprisonment.

On appeal, the Court of Appeal again ruled that provocation should have been left to the jury. Callaway JA opined (*Conway* 3 at [7]):

> [T]his was not, or was not just, a case of possessiveness and jealousy [because] on the view of the evidence most favourable to the applicant, she mocked the grief of a man who was then holding a knife, in her presence, with the intention of killing a human being, namely himself. A more dangerous taunt could hardly be imagined. In my opinion, a reasonable jury might have failed to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense. It was certainly not 'distant from the realities of human experience'.

And Eames JA (at [18]) castigated the trial judge (although using words of the utmost respect) by emphasising the stress caused to all parties by being obliged to order a re-trial.

A woman tries to exercise her independence and make a choice about her future, and is brutally murdered. The Law is prepared to contemplate excusing her murderer because he alleged that she provoked him by laughing at him, and because an ordinary person might well retaliate in similar fashion to like provocation. It is arguable that the reality of male violence and possessiveness, and the commonplace of relationship break down, is being completely disregarded.

Fortunately the jury at his re-trial rejected Conway's defence of provocation and he was convicted of murder, and again sentenced to 19 years imprisonment. Bell J focused on reality (*Conway* 4 at [7]–[8]):

> The essential fact that emerged from the evidence ... is that you brutally stabbed [her] to death because she had rejected your affections ... You murdered [her] in a state of possessive male rage. Your view was that if you could not have her, no-one else would. You took from [her] the most important of her human rights, the right to personal security, the right to life itself.

Once again the judge could have cited from a myriad of sociological references. The judge quoted with approval from the first trial where that judge had derisively rejected Conway's claims of what heralded the killing: his wanting to kill himself, her callous laughter. None of the evidence supported his claims. It seems extraordinary that Conway's 'defence' succeeded for so long. Conway had simply lost control of his fiance.

Already we have witnessed a significant degree of inconsistency, not only in terms of ultimate outcomes in provocation pleas in intimate partner killings, but in terms of judicial utterances. Many judges seem well-versed in the sociological literature, even if they do not cite it, ready to condemn displays of jealous male violence. Others seem almost oblivious to its reality. Compared to the mixed messages of *Yasso*, *Khan* and *Conway*, cases like *Parsons*, *Tuncay* and *Leonard* are absolutely clear in their disparagement of male retaliatory violence — revealing that inconsistency continues to flourish.

In *Parsons*, the accused was enraged at the prospect of losing to his estranged de facto in the Family Court, so he tackled her outside during an adjournment, unsheathed the 'stay-sharp' knife he had brought with him, and stabbed her 48 times, with numerous stabbings going 'through the throat and coming out the other side'. He claimed she provoked him. The trail judge refused to accept the defence, as did the Court of Appeal. As Brooking JA stated (at [15]):

> To hold that provocation arose in this case would be to encourage savagery at the expense of civilised behaviour. Many litigants, especially in the Family Court, are anxious, angry, disappointed. There is nothing out of the ordinary about the present case except the applicant's reaction.

This is a clear denunciation of male violence, but far removed from the appeal court sentiments in cases like *Yasso* and *Conway*.

Similarly in *Tuncay*, the accused claimed he was provoked to kill when his devout Islamic wife said she would leave him if his drinking did not stop. He claimed he had threatened to commit suicide, and that she had responded by admitting that would make things easier. The claim echoes the supposed scornful laugh in *Conway*. The trial judge said (at 31) that Tuncay had inflicted:

> dreadful injuries, probably the worst I have seen inflicted by a man upon his wife. The homicidal attack was directed at someone who had not attacked him physically and was considerably smaller in stature and weight. I consider you must have attacked her from behind using four heavy objects to batter and smash open her skull.

He was convicted of murder at trial, although provocation had been left for the jury, something which the Court of Appeal decreed need not have happened. As Hedigan AJA reasoned (at 30):

> The violent response to [the wife's] statement (surely in its substance a not uncommon one, that a wife would leave an unhappy family situation unless change was made ...) could never be characterised as the action of an ordinary person

It is a clear acknowledgement of the reality of intimate relationships, and of male violence. It is difficult in the extreme to reconcile these sentiments with what was said on appeal in *Yasso* and in *Conway*.

In the NSW case of *Leonard*, the jury rejected the provocation defence after the accused shot his de facto wife at point blank range when she drunkenly threatened to return to prostitution. Sully J (at [15]) denounced the violence:

> It is the paramount purpose of the rule of law in any truly civilised society to protect unflinchingly the sanctity of human life. In such a society it is the paramount duty of the Courts to give, unflinchingly, full and public effect to that purpose. That purpose and duty are especially important in such a society as our own, where mutual marital fidelity has been largely supplanted by extra-marital liaisons of various kinds, many of which, as the daily experience of the Court makes plain, are all too apt to break down in circumstances of great bitterness. That entails, in its turn, that there cannot, and must not, be allowed to develop in society any perception that it is in any way permissible for an aggrieved party to such a

> breakdown to lash out in self-absorbed frustration to the extent of killing, — or, indeed, of inflicting any other bodily harm upon, — either the other party to the breakdown, or any third party, who is thought to be involved in, or responsible for, the breakdown.

This proclamation is quite a contrast to the sympathetic utterances in the earlier NSW decision of *Khan*.

Other judges in Victoria have expressed condemnation of male violence in not dissimilar terms to Sully J, and to Coldrey J in *Yasso*. Vincent J arguably started that trend in 2000 in *Teeken* (at [13]):

> A sentencing judge must ... reflect the repudiation of the community of the resort to violence to resolve personal issues. This is of particular significance in situations where a relationship break down is involved. There has, after all, been a whole system of law and an entire court structure put in place in our society for the precise purpose of dealing with such problems. Regrettably, judges in the criminal division of this court are regularly confronted with perpetrators, almost always male, who, unable to come to terms with relationship break down or rejection, give vent to their anger and frustration, often in circumstances of some loss of self control, and commit the irrevocable act of taking the life of another, frequently their former partners.

He made similar comments in *Abebe* (at [11]) and in *Farfalla* (at [20]). Others have followed suit.[39]

Notwithstanding such statements, it is the outcomes in these cases that are, arguably, cause for more than mere concern. In *Teeken* the jury found provocation for the elderly accused after he lost his temper with his estranged wife's new partner, grabbed a rifle, and shot him at point-blank range: a five year sentence for an explosion of anger from a proprietary male. In *Abebe*, the accused successfully raised provocation for stabbing the deceased in the chest after his estranged wife confirmed that the latter was her boyfriend, and the deceased had looked 'arrogant and condescending': a sentence of 8 years for another display of possessive male violence, where his ethnicity was seen as important to clinching the provocation defence. And in *Farfalla* the deceased had allegedly laughed at the accused's sexual inadequacies, which stirred the jury into finding he was provoked into killing her.[40] Farfalla was sentenced to 9 years imprisonment for this retaliatory killing in response to the alleged insult to his honour.

Even when the right messages are conveyed — a condemnation of male violence — the wrong outcomes sometimes result — a successful provocation defence. And even when the right outcomes are achieved — conviction for murder — statements are too frequently uttered during the process that can only be labelled problematic.

Lethal retaliations to insults to male honour, even in non-intimate relationship cases, do not always attract condemnation. It can be argued that the provocation defence, in these circumstances as well, has the potential to invite juries to arrive at some bizarre findings, and *Dimond* is a conspicuous example. A young man, Jayde Dimond, was walking bare-chested when he had his T-shirt and prized cap pinched by a group of young men. He ran several blocks and returned with a carving knife and stabbed one of the men. Badgery-Parker AJ had this to say (at [20], [41]):

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39 See e.g. Flatman J in *Butay* at [32]; Coldrey J in *Goodrum* at [21].

40 One is reminded of the famous House of Lords decision in *Bedder*, the case seen as the catalyst for the passing of s3 of the *Homicide Act* in 1957, which dramatically broadened the scope and application of the provocation defence in England. Bedder had stabbed a prostitute to death after she laughed at his impotence. The then narrow reading of the objective test denied him a provocation defence.

> To my mind, there is no doubt at all that the provocative conduct, attributing to it such gravity as the offender may himself have attributed to it, was such as could have caused an ordinary person in the position of the accused to lose control to the extent of forming a murderous intent. ...
>
> [T]he teasing, mocking, taunting, humiliating words and actions ... which might in some circumstances have been regarded as trivial and merely childish ... were such as may have been perceived by this particular offender on that particular night at that particular place as quite extreme.

The logical conclusion is that the ordinary person test is devoid of credibility; a personal affront becomes the focus, and lethal male violence is virtually established as the norm. Dimond's murderous act attracted a sentence of just 6 years imprisonment — a surprising outcome indeed.[41]

The case of *Dib* is a sobering contrast. Moustapha Dib's plea of guilty to provocation manslaughter was rejected by Hulme J. Dib had witnessed his brother being punched during an altercation between separate groups of youths. He grabbed a knife and stabbed the deceased in the back and chest. Having described the altercation as 'boyish fisticuffs', the judge continued (at [94]):

> I do not believe that loss of control so as to form an intention to kill or do grievous bodily harm to [V] is or might be the reaction of an ordinary person in the accused's position to what occurred ... Levels of self-control of violence are not yet so low.

This condemnation of a male's resort to lethal violence echoes Viscount Simon's famous dicta in *Holmes* (at 601) that 'as society advances, it ought to call for a higher measure of self-control in all cases'. The pity is that such sentiments are not more universally expressed. More usual is the defence being left to the jury in circumstances where a male has lost his temper, grabbed a knife, and stabbed the life from his tormentor, and the jury accepts that defence — instigating a dramatically reduced sentence, from perhaps 20 years to one of 6, 7 or 8 years imprisonment.[42]

Trying to Understand the Cases

Why do juries find provocation when it is clear from the evidence (and the judge's comments on sentencing) that there was no 'loss of control'? Why do juries find provocation when it is clear that an ordinary person could not have responded similarly? In short, why is the reality of male retaliatory anger frequently not recognised in criminal courts?

One could argue that ignorance is the key. Just as juries (and judges) were said to be ignorant of the lives of battered women, and so required 'experts' to inform them of that reality (Stubbs & Tolmie 1999), so experts on intimate partner violence might assist in bringing enlightenment into criminal courts. Perhaps expert testimony aiming to refute the notion of 'loss of control' might help; experts could reaffirm that the retaliatory violence was merely as a response to losing control over their women. And no doubt it would benefit

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41 Why then was Lynette Vandersee (in *Vandersee*) sentenced to 8 years imprisonment? She killed her sleeping husband with the blunt end of a tomahawk after years of humiliation, intimidation, and psychological as well as sexual abuse (plus significant emotional abuse directed at her daughters). And why was the final straw of provocation, the husband cutting a large chunk of her hair off, described as 'medium'? Might she have fared better had he stolen her prized cap? Is this the Law pretending that male killings, and female killings, are commensurable? See also *Denney*; and *King*.

42 Amongst too many recent examples, see *Cardoso*; *See*; *Battur*; *Bullock*.

if empirical evidence was introduced to demonstrate that millions of relationships (broken or not) involve insults and hurts, and how few men resort to killing, thus disproving the basis of the 'ordinary person' test.

A starting point to the conundrum could be to look at the attitudes of ordinary people who may be empanelled as jurors. If there is ignorance, then it is likely that there are stereotypical attitudes and prejudices. One study of university student perspectives uncovered something disturbing:

> Male students were more likely than female students to attribute blame to victims of domestic violence, and male students who used violence in their dating relationships were more likely to attribute blame in domestic violence incidents to the victim (Bryant & Spencer 2003:374).

In contrast, students in that study who had themselves experienced violence tended to impugn the perpetrator or society, suggesting there is nothing like experience. Surveys have been carried out in Australia seeking community attitudes to domestic violence and youth attitudes to sexual coercion (Graycar & Morgan 2002:306–308). Notwithstanding improvements (between 1987 and 1995) in the numbers rejecting violence as unacceptable, still 18% believed male violence was justified in certain circumstances. Interestingly, notions of provocation were less willingly tolerated (only 8% feeling it justified violence). But these percentages remain disturbingly high. One Australian study into the attitudes of separated men found that nearly 50% of them thought violence was justified sometimes, with 40% blaming 'her provocation' for a resort to violence (McMurray et al 2000) — disquieting figures indeed.

It seems clear that ordinary people may see 'love' and possessive jealousy as inescapably intertwined.

> Interview data from 1,000 Canadian high school students revealed that more than half of them believed romantic jealousy, which they identified as one of the most significant causes of violence, is actually a sign of love (McMurray et al 2000:101).

We have already seen that jealousy and possessiveness are key determinants of femicides. Even more startling is a recent US study of university students' attitudes, which

> empirically demonstrate that there is something different about perceptions of jealousy-related violence compared to other sorts of violence. The association of jealousy with romantic love seems to change the meaning of the violent act ... A violent act that people would judge harshly and that would indicate a lack of love in one case is seen in a far more charitable light if it was prompted by a jealousy-provoking incident (Puente & Cohen 2003:457, 458).

Another more recent study has compared university students' attitudes from traditionalist honour cultures with attitudes from non-honour cultures (Vandello & Cohen 2003). Although some may understandably find the categorisation problematic, the researchers relied on the work of others to identify honour cultures as, typically, Mediterranean, Middle Eastern, Latin and South American, and deep-south (Anglo) American. Those participants from honour cultures were more inclined to condone violence by a jealous husband/fiance, more sympathetic towards the female victim who wanted to stay with the violent husband/fiance, and more intolerant of the female victim who wanted to leave the relationship. Apparently, no great gender differences were displayed in the responses of the participants.[43]

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43 But one commentator has warned of 'the devastating impact masculinist hegemony has on some women's capacity to register misogyny': see Howe 2004:56.

Each of those studies confirmed that when asked a direct question about violence, almost all respondents condemned it unconditionally. But by using more subtle forms of probing to elicit more heart-felt responses, the studies showed that tolerance of jealousy-inspired violence is, insidiously, all too common.

That indulgence is exactly what is evidenced in a number of the cases discussed earlier. James Ramage was desperate to reassert control, was jealous of his wife's new partner, and was insulted to be told by his wife that sex with him repulsed her. It could be argued that the jury must have been very tolerant of his brutally lethal response, impressed by his claims that he loved her. Gulam Mohammad Khan found his wife in the act of adultery — and that jury too must have been very tolerant of the unrestrained stabbing of her lover inspired by Khan's jealousy. In truth, tolerance of jealousy-inspired violence is a sickening invitation to violent men: 'Yes Your Honour, I did slaughter her, but I really really loved her.'

Sympathy for the accused leads inexorably to attributing blame to the victim. Victim blaming is frequently detected by commentators examining discourse in criminal trials, and Crocker's extensive Ontario study of wife assault cases over a 30 year period provided ample evidence (Crocker 2005). That was so notwithstanding there was a general satisfaction with the way judges responded to intimate partner violence, judges who reviled and severely punished the perpetrators. Different judges described violence by a man against his spouse as 'intolerable', a 'scourge', and 'terrorization'. Condemnation was not uncommon:

> The kind of violence against vulnerable women by former spouses and boyfriends is intolerable in a civilized society, and it must be met with strong sentences of imprisonment to deter the accused and others and to express society's denunciation of such conduct (Crocker 2005:212, quoting *Doodnauth*).

Too frequently though language was employed which played on age-old stereotypes, with the good woman, the deserving victim, the feminine, much to the fore — questioning why a certain battered woman didn't leave, criticising a certain battered woman for being abusive to her batterer in court, or describing a certain wife batterer as a good father and family man. This corroborates Nicolson's earlier hypothesis on the power of language to influence trial outcomes (Nicolson 1995),[44] to say nothing of sending messages to the broader community. This confirms, as other studies have found, that attitudes about a 'real victim' pervade not merely cases of sexual assault (Du Mont, Miller & Myhr 2003)[45] but of course intimate partner violence as well. Again we see evidence of the obsession with chastity, femininity, the good obedient woman not stepping out of the constraint man has imposed upon her. Perhaps the courtroom may really be 'a place of performance' (Threadgold 1997:57) after all. When directions are being given by judges based on their assessment of credibility or reasonableness, their intrinsic attitudes may be powerful triggers.

> When men's lives, values and attitudes are taken as the norm, the experiences of women are often defined as inferior, distorted, or are rendered invisible (Bograd 1990:15).

If we return to the first case examined, *Ramage*, observers believed that it was Julie Ramage on trial, not her murderous husband James. The case painted James Ramage as having been led on by his wife Julie. As one commentator lamented: 'So, first Julie Ramage had provoked her husband by lying ... and then she had provoked him by telling him the truth bluntly before he was ready to hear it' (Kissane 2004:4). And in each of the cases in

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44 And it is not merely the power of language that can influence jurors: see Bell 2004.

45 See generally, Meyers 1997; Howe 1998; Carll 2003.

which the proprietary male has successfully pleaded provocation, it can be argued that it is the long dead victim whose (alleged) insults or infidelity or threat of separation is held up to blame (and ridicule and shame), almost as much as the murderous response of the accused.

A Possible Future

All of the above discussion — not merely the wildly inconsistent legal outcomes and judicial statements, but also the sociological arguments revealing the reality of male violence — make the arguments in favour of abolition of the provocation defence, I would submit, irresistible. Tasmania abolished the defence in 2003 after virtually no discussion (Bradfield 2003). Law reform bodies in NSW (Howe 1999) and in England (Howe 2004) eventually recommended retention of the defence, albeit in modified forms; no legislative action to date has modified the defence in those jurisdictions. In New Zealand, recommendations have been in favour of abolition (Tolmie 2005); again, commentators await a legislative response. Victoria has now abolished provocation,[46] enacting legislation recommended by the Victorian Law Reform Commission (2004). Central to the VLRC's view was the incontrovertible logic: 'While extreme anger may partly *explain* a person's actions, in the Commission's view it does not mean such behaviour should be partly *excused*' (VLRC 2004:Executive Summary, xxi).

The VLRC's moves to abolish provocation were borne of thoroughly considered critiques instigated by Professor Jenny Morgan in her seminal work, *Who Kills Whom and Why: Looking Beyond Legal Categories*. It is to be hoped that other jurisdictions will follow the Victorian lead and consign provocation to the historical archives. I leave an appraisal of the VLRC's invaluable reform proposals — including how battered women who kill are protected by the reforms — to another paper (Coss 2006).

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