CRITIQUE AND COMMENT

PROVOCATION LAW AND FACTS: DEAD WOMEN TELL NO TALES, TALES ARE TOLD ABOUT THEM

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[When students are taught the doctrine of provocation as a defence to murder, the cases they are required to read almost invariably involve the killing by a man of his wife or de facto partner, who has left him, sometimes (apparently) for a new partner, sometimes (apparently) to 'screw everyone in the street', often (but less apparently) in a context of previous violence by him. The first part of this article addresses how 'the facts' are constructed in these cases and how those constructions might influence 'the law' on provocation, and considers whether some of the 'leading' cases can be reconstructed. The second part of the article focuses closely on the objective test in the provocation doctrine, in particular the role of ethnicity in the reconsideration of that test. Like the provocation doctrine, the article is value-laden. It asks the reader to reconsider the values embodied in the law, and facts, on provocation.]

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I INTRODUCTION

The major focus of this article is the stories told about the women who 'provoked' men into killing them because they left them and/or engaged in a sexual relationship with someone else. The legal tale is that of the provocation defence to murder. The factual tale told is, I argue, highly relevant to the legal story told. The storytellers are many and varied. The dead women can no longer tell the stories of their own lives; others are left to tell the tale. I have not done what the editors of the book *Blood on Whose Hands* did: speak to the relatives and friends of the dead women.[1] I have tried instead to gain some of the context of these women's lives from more traditional legal storytellers — the accused, the appellate judges (and, occasionally, the trial judge), the casebook editors and legal academics. I make no claim to truth for the stories I tell. But I do call into question the otherwise apparently unproblematic 'truth' of the stories of the other taletellers.

I commence with a detailed analysis of one of the 'leading cases' on the doctrine of provocation in Australia, that of *Moffa v The Queen*.[2] This is where the Australian High Court is said to have either endorsed[3] or rejected[4] the House of Lords decision in *Holmes v Director of Public Prosecutions*[5] that 'a confession of adultery *without more* is never sufficient to reduce an offence which would otherwise be murder to manslaughter'.[6] I am intrigued by the fact that legal commentators can tell different legal stories about this case. Did the High Court accept (with an exceptional qualification) the common law in *Holmes* or did it reject it? I suggest that the answer to this question, or at least an answer to why these analyses vary so much, might be found in how you read 'the facts' in *Moffa*. Despite the fact that this decision is at the highest appellate level in Australia, there are many ways to tell the tale of what happened, to present 'the facts', and different ways of presenting 'the facts' might well lead to different (legal) conclusions. Although I engage in speculation on 'the facts', I do so with the assistance of the tale told by the dissenting judge in the High Court.[7]

I go on to consider a variety of different factual readings of cases where men have killed their wives or partners (or their wives' or partners' new lovers) and claimed 'provocation' which, in some cases, has led to a different legal result. In some cases, courts have held that men who create the circumstances that they then claim constitute provocation, cannot avail themselves of the defence. I

1 Women's Coalition Against Family Violence, *Blood on Whose Hands? The Killing of Women and Children in Domestic Homicides* (1994).

2 *Moffa v The Queen* (1977) 138 CLR 601 ('*Moffa*').

3 Peter Gillies, *Criminal Law* (3rd ed, 1993) 362.

4 David Lanham, 'Provocation and the Requirement of Presence' (1989) 13 *Criminal Law Journal* 133, 142.

5 [1946] AC 588 ('*Holmes*').

6 Ibid 600 (emphasis added).

7 *Moffa* (1977) 138 CLR 601, 611–7 (Gibbs J). Murphy J, although he agreed in the result, argued for a fully subjective test for provocation, a position which I reject throughout this article.

argue that many of the traditional provocation cases, even those where the defence succeeded, could (and should) be read as cases of 'self-induced provocation'. 'The facts' just need to be seen differently.

The second part of the article shifts to a more traditional focus on the 'objective test' in the provocation doctrine where I consider the more recent Australian High Court pronouncements in *R v Stingel*[8] and *Masciantonio v The Queen*.[9] Here I argue that the objective test — whether the ordinary person could have been provoked by the alleged provocation — is another way to call into question the apparently unproblematic acceptance of the ordinariness of men killing their wives when they leave them or have a sexual relationship with someone else. This part also considers the role of ethnicity in the construction of the ordinary person. I suggest that some of the discussion could be read as having racist implications and that much of it ignores the role of gender while focussing on race, as if only men have a race. I conclude with a consideration of Jeremy Horder's proposal to abolish the defence of provocation and suggest that his proposal does not go far enough. The paper thus moves away from the more common feminist interest in restrictions on the availability of the defence to women who kill their battering partner.[10] My interest is in the availability of provocation to men, in particular when they kill their female partners or former partners when, it is alleged, the women 'confessed adultery' or made other moves to leave 'the relationship'.

Some 40 per cent of homicides in Australia are 'domestic',[11] variously defined as involving spouses, former spouses, de factos and former de factos, sometimes lovers and former lovers, and the killing of children by their parents or the killing of family members by other family members. Some 30 per cent of killings involve those who have been 'sexual intimates'. And some 75 per cent of spouse killers are not the gender-neutral spouse, but men killing their female partners.[12] Further, many of these men will raise provocation as a defence, albeit

8 (1990) 171 CLR 312 ('*Stingel*').

9 (1995) 183 CLR 58 ('*Masciantonio*').

10 See, eg, Katherine O'Donovan, 'Defences for Battered Women Who Kill' (1991) 18 *Journal of Law and Society* 219; Alison Young, 'Conjugal Homicide and Legal Violence: A Comparative Analysis' (1993) 31 *Osgoode Hall Law Journal* 761; Julia Tolmie, 'Provocation or Self-Defence for Battered Women Who Kill' in Stanley Yeo (ed), *Partial Excuses to Murder* (1992) 61; Stella Tarrant, 'Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws' (1990) 20 *University of Western Australia Law Review* 573.

11 Or, at least, homicides classified as such. These figures do not include deaths caused by workplace hazards or hazardous products: see generally Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991).

12 See, eg, Heather Strang, 'Characteristics of Homicide in Australia, 1990–91' in Heather Strang and Sally-Anne Gerull (eds), *Homicide Patterns, Prevention and Control* (1993) 5; Elizabeth Matka, *Domestic Violence in NSW* (Crime and Justice Bulletin No 12, Bureau of Crime Statistics and Research, New South Wales Attorney-General's Department, 1991); Alison Wallace, *Homicide: The Social Reality* (Research Study No 5, Bureau of Crime Statistics and Research, New South Wales Attorney-General's Department, 1986); Ken Polk and David Ranson, 'Patterns of Homicide in Victoria' in Duncan Chappell, Peter Grabosky and Heather Strang (eds), *Australian Violence: Contemporary Perspectives* (1991) 53.

a partial defence, because their partner has left them and 'confessed adultery'.[13] How are their stories told?

II TELLING TALES

The leading Australian[14] authority in this area is the 1977 decision of the High Court in *Moffa*.[15] The accused had visited Italy for a month and when he returned:

> [H]e found his wife indifferent to him. During a period of more than a month before 21st August she refused sexual intercourse, although she gave the state of her health as the reason for that. She also frequently told him that she had ceased to love him and planned to leave him. This upset him greatly and during this period he frequently pleaded and expostulated with her. On the night of 20th August he talked with her throughout most of the night praying and begging her not to leave. On the following morning he resumed this conversation in the bedroom of their home.[16]

The High Court quotes directly from the accused's account to the trial court:

> She said 'Mick, don't you understand? I don't want to look at you any more. I'm not going to stop with you.'
>
> I said 'Kay, this is no bloody good to do these sort of things. All the people around here will make a very bad name.'
>
> She said 'I don't care about these other people around here.' I then went to caress her.
>
> As I went near her she said, 'Don't come near me — I'll scratch your eyes out.'
>
> She grabbed me and I pushed her away.
>
> She said 'Don't you understand. I don't love you any more, I don't want to look at your face any more. Don't you understand I've been enjoying myself screwing with everybody on the street. You fucking bastard. You understand that all right?'
>
> At this point she took the photographs from her drawer and she said 'If you want to look at me, look at the pictures' and she threw them at me.
>
> She was very angry.

[13] Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Report No 40 (Appendix 6, 1991) 79.

[14] For a discussion and critique of similar UK cases, see Sue Bandalli, 'Provocation — A Cautionary Note' (1995) 22 *Journal of Law and Society* 398. For a New Zealand perspective, see Elizabeth McDonald, 'Provocation, Sexuality and the Actions of "Thoroughly Decent Men"' (1993) 9 *Women's Studies Journal* 126.

[15] (1977) 138 CLR 601.

[16] Ibid 614 (Gibbs J).

When she said these things I became very mad.

I said 'Why have you done this? You promised you would never do it.'

I said 'Kay, why have you done this to me?' and I started to cry.

When I was crying she was laughing at me and she said 'Get out you black bastard.'

She then threw the telephone at me.

I then lost control and I remember going out to the back of the house.

I went outside on the back porch.

I picked up a piece of pipe.

It was bent.

I went back inside the house.

I went back into the room.

I had the pipe in my hand.

She was seated on the bed.

I came in and I said 'Is this what you want? You force me to do it.'

When she saw me she said 'I'm not scared of you, you fucking bastard.'

I then hit her.

I lost control and hit her again.

I didn't grab her by the neck or anything.

I can't remember grabbing her chain.

I can't remember how many times I hit her.

It was more than once.

I picked up the photographs from the floor.

I pulled the door shut but I don't remember locking it.

I got into the car and went to Lenzi's place.

> Somewhere between leaving the house and arriving at Lenzi's I threw the pipe away.
>
> I went to Lenzi's first because I wanted him to look after the children.
>
> After I spoke to Lenzi I went to the police.[17]

Remember, this is what he said she said or did. There were no witnesses which is not, of course, atypical in domestic murder cases.[18] That the accused is telling a story, may be telling a tale, seems to be openly recognised by some of the judges. Stephen J comments, in referring to the story told by Moffa as background to the events on the day of the killing:

> After describing in detail the rather troubled course of his married life, in which he featured as the industrious, generous and forgiving spouse and his wife as his inconstant, ungrateful and spendthrift partner the applicant comes to the events of the morning on which he killed her and the preceding night.[19]

Mason J (as he then was) points out (while still finding that the defence of provocation should have been left to the jury) that 'a case of provocation by words may be more easily invented than a case of provocation by conduct, particularly when the victim was the wife of the accused.'[20]

The trial judge, Mitchell J, clearly had some doubts about Moffa's story. Indeed, one of the grounds of appeal was that she had effectively reversed the burden of proof (it remains on the Crown to negative provocation), in that her continual emphasis in the summing up upon criticism of the accused's statement, and the need for the jury to believe the accused's statement, at least tended to give the impression that the accused bore an onus of in fact establishing those events.[21]

The above is his story. How do we know whether his story is 'true'? A misguided question perhaps.[22] Arguably, it is particularly misguided in the light of

[17] Ibid 614–5.

[18] For comment on this aspect see McDonald, above n 14, 131–2; Adrian Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence — A Victorian Case Study' in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (1994) 225, 232.

[19] *Moffa* (1977) 138 CLR 601, 618.

[20] Ibid 620. Mason J does not explain why, in his view, the potential for invention is particularly acute when the victim is the accused's wife. He may be referring to the point I made earlier: that domestic killings usually occur without witnesses. The recent *Homicide Prosecutions Study* carried out by the Law Reform Commission of Victoria, examining all Victorian homicides prosecuted between 1981 and 1987, showed that 60.2% of women victims were killed in their home, with 44.3% being killed in a home they shared with the accused: see Law Reform Commission of Victoria, *Homicide Prosecutions Study*, above n 13, 38, .

[21] *Moffa* (1977) 138 CLR 601, 610. For example, Mitchell J had said in summing up, 'If, of course, you don't believe she said what he said she said on the last day about screwing everyone in the street, if you don't believe that provoked him into killing her, do you believe that in fact it was because she wanted a divorce, because he says she wanted more money than he was able to give her?' (1977) 138 CLR 601, 610.

[22] Alison Young, in giving us 'a rough summary of "the facts"' of the killing by the UK woman, Sarah Thornton, of her husband, says, '[a] version similar to this appeared in newspaper and television reports, magazine features on women who kill; a television programme about bat-

some recent Australian decisions. For example, in *R v Voukelatos*, the Victorian Court of Criminal Appeal confirmed that:

> [if] the applicant was provoked into killing his wife by conduct on her part which he *believed* to have taken place, the question whether the crime might have been reduced to manslaughter by such provocation should have been left to the jury, *even though the applicant's belief was wholly the product of delusion.*[23]

Appeal courts, when reviewing a trial judge's failure to leave provocation to a jury, or when reviewing a trial judge's direction on provocation, are obliged to take a view of the facts that is most favourable to the accused.[24] This means, of course, that students who only read appellate judgments receive a particular version of 'what happened', often with little, if any, of the factual doubts and possible inconsistencies that would be most obvious in the trial transcript or the trial judge's summing up. And not only do they get a view of the facts 'most favourable to the accused', they of course get a judicial construction of those 'facts'. How did the courts 'say' what Moffa said his wife said? That is, how did the High Court describe her behaviour? For Barwick CJ:

> The totality of the deceased's conduct on that occasion, according to that account [the account extracted above], was that there was *vituperative* and *scornful* rejection of the applicant's connubial advances, a *contemptuous* denial of any continuing affection, a *proclamation of finality* in the termination of their relationship coupled with an expression of pleasure in having had intercourse *promiscuously* with neighbouring men. This statement of enjoyment in that course of conduct might reasonably be thought, particularly if coupled with the manner of her rejection of the applicant, to contain an assertion, *contemptuously* expressed by the deceased, of sexual inadequacy on the part of the applicant.[25]

tered women. However, when the narrative appears in its legal form, subtle mutations, manipulations and metamorphoses occur. This is not to suggest that the above mentioned media accounts of the event, or indeed my version of it, have any purchase on the "Truth" (whatever that might be, and from which the legal account could be claimed to deviate). The "Truth", if such a thing could exist, may be known only to the participants in the event; even then, I would argue that the accounts of victim and assailant would be dramatically different.': Alison Young, 'Caveat Sponsa: Violence and the Body in Law' in Jane Brettle and Sally Rice (eds), *Public Bodies–Private States: New Views on Photography, Representation and Gender* (1994) 136, 137–8. For a particularly innovative analysis of and challenge to the process of fact-finding — or truth-making — in legal decision-making, see Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701.

23 *R v Voukelatos* [1990] VR 1, 4 (Young CJ) (emphasis added) ('*Voukelatos*'). Cf Murphy J (although he recommended abolition of the defence in its entirety) suggesting that the trial judge can take any mitigatory circumstances into account in sentencing: [1990] VR 1, 19–20. Hampel J dissented, stating that despite the 'attractiveness as a logical development' of the majority's decision, the law on provocation had not just been governed by logic. 'Social considerations and changing conditions and attitudes have been at least as significant' and some 'artificial barriers' were required: [1990] VR 1, 26. (In this particular case, the court did decide that the defence should not have been left to the jury, as there was no suggestion that the applicant had 'in fact' been provoked by his delusional beliefs.)

24 See, eg, *Holmes* [1946] AC 588, 597.

25 *Moffa* (1977) 138 CLR 601, 606 (emphasis added).

This I call the adjectival reading of the case.[26] The non-adjectival reading (or, more accurately, the less adjectival reading) of the case is in the judgment of Gibbs J who said, 'the deceased repeated what she had previously been saying, that she did not love her husband and intended to leave him; she admitted that she had promiscuously committed adultery, and she uttered some vulgar abuse.'[27]

Which reading stays in *your* mind? That she was leaving or 'the proclamation of finality'? The 'vulgar abuse' or the 'contemptuously expressed' sexual inadequacy, 'vituperation' and 'scorn'? But the appellate judges are, of course, describing the same story that Moffa told about what he said she said, it's just that the 'facts' are somehow different.[28] And which 'facts' appear in the headnote?

> On the morning of the killing, she had rejected his advances in a scornful and abusive way; she had contemptuously denied his continuing affections and said that their marriage had ended; and she had boasted of promiscuous sexual conduct with men in the neighbourhood.[29]

Although I have drawn attention to the headnote, in fact most students will not read the headnote because they read the case in a casebook. What are the facts of this case as they appear in the casebook widely used in Victorian law schools?[30] The non-adjectival judgment, the judgment of the dissenting judge, the only judge who said provocation should not be left to the jury, is omitted from the casebook. So students receive yet another version of the facts. Not only do we have Mrs Moffa's words and actions presented by her husband who killed her, in addition to the leading adjectival judgment of Barwick CJ, we do not have the non-adjectival judgment of the dissenting judge at all.[31]

While I am, of course, showing some skepticism towards 'the facts', it is worth pointing out a couple of other 'facts' that are lost to the students in these factual presentations. You will remember that one of the things Mr Moffa said Mrs Moffa did was to throw at him nude photos of herself. When I read the case in the casebook, I had the impression that these photos were taken by the 'men of the neighbourhood', that is, physical 'evidence' to him (and us, I suppose) of her 'promiscuity'. Indeed Stephen J, whose judgment does appear in the casebook, says 'she threw at him photographs of herself which the jury might have understood to have been taken, unknown to the applicant, by another man,

[26] Mason J said he had 'no need to examine in any detail the precise effect of her remarks or indeed to characterise them by an adjectival description': *Moffa* (1977) 138 CLR 601, 622.

[27] Ibid 617.

[28] See also Kim Lane Scheppele, 'Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth' (1992) 37 *New York Law School Law Review* 123.

[29] *Moffa* (1977) 138 CLR 601, 601.

[30] Louis Waller and C R Williams, *Brett, Waller and Williams Criminal Law: Text and Cases* (8th ed, 1997) 216.

[31] Interestingly, the leading casebook used in New South Wales, David Brown, David Farrier, David Neal and David Weisbrot, *Criminal Laws* (2nd ed, 1996) (colloquially known as the 'Four Davids'), does include the dissenting judgment of Gibbs J in its extract of *Moffa*, and indeed leads off with it.

and to be obscene'.[32] Gibbs J, and none of the other judges, explains that most of these photos had in fact been taken by the accused.[33] Gibbs J's judgment, I remind you, is excluded from the students' reading. He is also the only judge who makes clear the connection between the deceased's illness and her refusal of intercourse. The South Australian Supreme Court's appeal judgment makes this even clearer: 'she was suffering vaginal bleeding and thought she had cancer, though she subsequently found out she did not.'[34]

To return to the *law* on provocation. The basic test in common law jurisdictions in Australia is, broadly, whether the accused was provoked by the actions of the victim to lose his (or her) self-control and whether an ordinary person could have also lost self-control and acted in the way the accused did. If both these aspects of the test are found to be satisfied (or, more accurately, if the Crown fails to negative them), the offence is reduced from murder to manslaughter. These are ultimately questions for the jury. However, a trial judge should withdraw the issue from the jury if there is no evidence that the accused was so provoked or 'if the evidence could not reasonably support the conclusion that the provocation was of such a character as could have deprived a reasonable [or ordinary] person of the power of self-control to such an extent as to lead him to do what the accused did.'[35] It will come as no surprise that the High Court in *Moffa* concluded that provocation should have been left to the jury. What is the relevance of the various factual readings, the various tales, to this conclusion?

One possible reading of the adjectival judgment, the one that presents her words and actions in the most egregious light, is that it is in fact more sympathetic to the issue of violence against women: it is only when women's 'confessions of adultery' are really 'outrageous' that the provocation defence is available. But this, of course, ignores that the judges, both majority and dissenting, are talking about the same facts. With or without adjectives, it remains the case that what he said she said and did was that she did not love him any longer, was engaging in sexual activity with a number of other men, showed him photographs of her in the nude taken by him, called him a 'black bastard' (he was of Italian origin) and threw a telephone at him (it did not hit him).[36] And what the adjectives do is both attempt to justify the result — that provocation was available — and, more importantly, make it more likely that the court will conclude that provocation should have been left to the jury. It is not in my view merely coincidental that the non-adjectival description of 'the facts' comes from the dissenting judge, for when her alleged behaviour is stripped of its intensifiers, she did not do or say very much.

It will be recalled that Barwick CJ (he of the adjectives) said that:

[32] *Moffa* (1977) 138 CLR 601, 618.

[33] Ibid 615. The full bench of the South Australian Supreme Court in their consideration of *R v Moffa* (1976) 13 SASR 284, 287 stated that the appellant eventually admitted having taken the photos himself, presumably concluding that all had been taken by him.

[34] *Moffa* (1976) 13 SASR 284, 286.

[35] *Moffa* (1977) 138 CLR 601, 613 (Gibbs J).

[36] Once again, this latter 'fact' appears in Gibbs J's judgment: ibid 616.

> This statement of enjoyment in that course of conduct might reasonably be thought, particularly if coupled with the manner of her rejection of the applicant, to contain an *assertion, contemptuously expressed by the deceased*, of sexual inadequacy on the part of the applicant.[37]

After stating that the jury was entitled to look at the 'situation in its entirety, including the implied taunt of the applicant's incapacity sexually to satisfy the deceased as she had found other men could',[38] Barwick CJ concluded:

> [I]t was open to them to conclude that an ordinary man, placed as was the applicant, would so far lose his self-control as to form an intention at least to do grievous bodily harm to his wife.[39]

Gibbs J, the dissentient, concluded:

> Accepting the view of the facts most favourable to the applicant, the words and acts of the deceased were not such as could have caused a reasonable man to act as the applicant did.[40]

A whole 'cottage industry'[41] of commentary on this case, and contradictory commentary, has since emerged. Graeme Coss asserts that '[i]t is clear since *Moffa's case* that confessions of adultery may amount to provocation.'[42] However, Gillies states that the *Holmes*[43] position on confessions of adultery has been endorsed by Australian courts including the High Court in *Moffa*:

> subject to the qualification that where such a confession is communicated per medium of, and accompanied by other words of exceptionally provocative character, then such verbal conduct may qualify as provocation.[44]

The *Holmes* case referred to is the decision of the House of Lords which held that:

> [A] confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter, and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime.[45]

37 Ibid 606 (emphasis added).

38 Ibid.

39 Ibid. Barwick CJ did suggest that 'a court may be inclined to think a jury should not' conclude that an ordinary man would behave in this way: (1977) 138 CLR 601, 607. However, as I suggested above, while it is of interest to suggest what a jury could or would decide, this does not detract from the fact that the *law* is that an ordinary man could or might (justifiably) behave in this way. Furthermore, given that the Crown had said they would not insist on a retrial if the High Court found that the trial judge's direction on provocation was wrong, the High Court in fact substituted a verdict of manslaughter and sent Moffa back to the State court for sentence.

40 Ibid 617.

41 See, eg, Frances Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis' (1984) 63 *Texas Law Review* 387, but in a very different context.

42 Graeme Coss, *The Laws of Australia: Homicide* (1993) 167.

43 [1946] AC 588.

44 Gillies, above n 3, 362.

45 *Holmes* [1946] AC 588, 600.

This is, of course, the quintessential appellate court judgment: does it not invite speculation on 'the more' or the 'exceptionally extreme' that may or may not have occurred in *Moffa*?

And now a third interpretation of *Moffa* by David Lanham, who states that 'the majority decision in *Moffa* ... frees Australian common law of the restraints imposed, in relation to confessions of adultery ... by *Holmes v DPP*'.[46]

Who knows what 'the law' is? At least some of what 'the law' is seems to be determined by the author's reading of 'the facts'. Coss' reading, in a handbook for practitioners, dependent on writing in a propositional style, removes *all* facts and gets to the 'bare bones': a confession of adultery is 'enough', a confession of adultery with no context, adjectival or otherwise. The second commentator, Gillies, is apparently worried about his own conclusion (hence the 'per medium of' and other distancing language). When he describes *Moffa, all* adjectives are gone: 'words communicating a confession of adultery and accompanied by verbal insults' (and, as it happened in this case, an alleged minor assault) could qualify, if of a 'violently provocative' character or 'exceptional' character.[47] But where *is* this violent or exceptional provocation?

Perhaps the widest reading of the facts comes from Lanham, the third commentator, the one who describes the freeing of Australian law from the restrictions of the English common law. He states:

> It seems perfectly clear that the adultery and other sexual misconduct implicit in the fact that someone had taken photographs of the victim in a state of nakedness was an important, and possibly the most important, aspect of the provocation.[48]

Remember that (most or all of) the photos were taken by the accused. If these, with the (therefore implied) adultery, were the most important aspects of the provocation, there is nothing much left.

I have belaboured the analysis of this case. I have done so because it has been central to the increasingly relaxed attitude in provocation cases in relation to cases of 'confessions of adultery' and because it so clearly illustrates the interconnection between law and facts.[49] It also demonstrates that 'facts' are not just sitting out there with only one story to tell.

III TELLING ANOTHER STORY: 'SEPARATION' VS 'SEX'

I now want to apply Martha Mahoney's insights into men's attempts at 'power and control' which are evident in *Moffa* and related cases.[50] Mahoney has urged us to shift our focus from the battering incident, the battered woman, to the

[46] Lanham, above n 4, 142.

[47] Gillies, above n 3, 363 (citing both the majority and minority judges).

[48] Lanham, above n 4, 142.

[49] See generally Kim Lane Scheppele, 'Facing Facts in Legal Interpretation' (1990) 30 *Representations* 42.

[50] Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1.

attempts at power and control manifested in battering. Mahoney has identified something she calls separation assault:

> *Separation assault* is the attack on the woman's body and volition in which the partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the women for ending the relationship. It often takes place over time.[51]

In many of the reported so-called 'mere words' or 'confessions of adultery' homicide cases, what is also happening is that the victim has announced her intention to leave or has, indeed, already left. Perhaps these cases are more usefully seen as failed attempts at control cases rather than as 'about adultery'. Mahoney points out:

> If only the final, deadly assault is cognizable, the nature of the assault as an attack on separation, rather than on woman's sexual provocation, may remain disguised.[52]

She describes one well-known American provocation case, *People v Berry*,[53] as containing a 'hidden separation assault'. The court there decided that a long delay between the alleged provocative conduct (sexual taunts involving his partner's relationship with another man) could be time for the 'blood to boil' rather than cool,[54] thereby allowing that he was provoked when he killed her. However, Mahoney notes that 'he did not kill her when she taunted him, but when she left him':[55]

> The court might have viewed the case differently had the assault on separation been as cognizable as his response to her alleged sexual taunts: it is difficult to

[51] Ibid 65–6 (emphasis in original).

[52] Ibid 79.

[53] 18 Cal 3d 509 (1976).

[54] It is often thought that the traditional suddenness requirement made the defence less available to women who killed their violent partners. New South Wales removed the suddenness requirement in 1982 (Crimes Act 1900 (NSW) s 23(3)(b)) in partial response to the New South Wales Task Force on Domestic Violence, *Report* (1981). However, time leading 'the blood to boil' rather than 'cool' certainly seems to have been recognised in the more traditional scenario in *Parker v The Queen* (1964) 111 CLR 665, where Parker killed the man for whom his wife left him. As Fisse notes, Parker 'had had a long time, a period of weeks to adapt to the developing situation if he could not alter it, and in particular had waited another twenty minutes or so after V [the murder victim Kelly] and his wife had departed before setting off after them in the car, during which time he could have recovered some equilibrium' and these delays 'were not regarded as destroying the case of provocation': Brent Fisse, *Howard's Criminal Law* (5th ed, 1990) 95.

[55] Mahoney, above n 50, 78–9. In this case the court heard the evidence of a psychiatrist that the wife was '"suicidal" and that her conduct "led the defendant to choke her on two occasions until she achieved her unconscious desire and was strangled"': Nancy Erickson with the assistance of Nadine Taub, 'Final Report: "Sex Bias in the Teaching of Criminal Law"' (1990) 42 *Rutgers Law Review* 309, 411. As Erickson comments, '[i]t is difficult to understand how the psychiatrist could have been permitted to testify that the wife was suicidal and unconsciously wished her husband to kill her. Although the edited version of the case omits this fact, the psychiatrist was appointed by the court to examine the defendant' and had never met, let alone treated or examined, the dead woman.: 411–2 (emphasis added).

> find 'heat-of-passion' in a repeatedly attempted assault carried out over a period of time.[56]

I cannot know whether the situation in *Moffa* was like this; however, one of the judges in the majority does say that 'there were several separations and reconciliations' between Moffa and his wife.[57] And there were statements over a month before the fatal assault that Mrs Moffa planned to leave and no longer loved her husband. When this context is emphasised, her other 'abuse' (assuming it happened at all) could perhaps be seen as her attempt to get him to realise finally that the relationship was over.

However, what can be said with more confidence is that Barwick CJ's judgment emphasises the *sexual* aspects of the alleged actions and taunts. Remember that he is the judge who drew particular attention to the 'implied taunt' or 'assertion' that Moffa was sexually inadequate, contained in what Moffa said his wife said (that she was engaging promiscuously in sex with neighbouring men, together with her rejection of him). By de-emphasising the sexual aspects of her words and actions, Gibbs J effectively places more emphasis on her intention to leave. And Gibbs J of course found that a reasonable or ordinary man could not have been provoked by what was (allegedly) said or done.

The other judges in the majority fit somewhere on a continuum between these two positions, or arguably outside it altogether. One fails to articulate his version of the facts (Mason J); another tells little of the story but argues for his own legal reform: a fully subjective test for provocation (Murphy J). However, I think that there is a tendency in the reported cases for those judges who do not think provocation should have been left to the jury in these confessions of adultery/murderous assault on separation cases to emphasise 'the separation' rather than 'the sex'.

For example, in *R v Tsigos*, where a man killed his wife from whom he had been separated in the past but with whom he had reconciled, Moffitt J describes the facts, on the version most favourable to the accused, in the following way:

> Upon the appellant's version a jury could take the view that he had been subject to distressing and annoying conduct by his wife and Moody, but he had forgiven her and taken her back; that on the day of the killing she had belittled him in comparisons with Moody; that she told him her return was not out of affection for him but as a step in getting the custody of his child from him, that her passion for Moody still existed, that she planned to leave him for Moody and take the child and live with Moody in some kind of adulterous relationship.[58]

[56] Mahoney, above n 50, 79.

[57] *Moffa* (1977) 138 CLR 601, 623 (Murphy J).

[58] *R v Tsigos* [1964] NSWLR 1607, 1633 ('*Tsigos*'). In light of Barwick CJ's later decision in *Moffa*, it is interesting to note his comments on the application for special leave to appeal in *Tsigos* (which was refused). He stated during argument, 'let me suppose for the moment that what she said satisfied the statute — when she said she preferred another man to him, and so on: is there any material upon which the next step could be taken, namely, that an ordinary reasonable man could be said for that reason, as it were, to be justified in shooting his wife and killing her? What happens to the standards in the community if you conclude that? And that is a

Moffitt J observed:

> Unfortunately, in our present community, marriages are frequently broken by adultery on the part of one spouse and a marriage otherwise broken often results in new associations at times accompanied by adulterous conduct and in the break-up of such marriages there are revelations of adultery and threats of separation and threats of future illicit relationships and there are accompanying arguments and the belittling of one spouse by the other.[59]

He concluded:

> Taken at the highest the argument, recriminations and threats of the appellant's wife, alleged by the appellant, were no more than such a domestic break-up of the type which, if it cannot be adjusted by some compromise or separation, can be expected to lead an ordinary person to the courts dealing with family relationships and may also lead such a person to frustration and anger but not to the loss of self-control to such a degree as to take up a deadly weapon and kill the other spouse.[60]

Moffitt J decided that there was no need for provocation to have been left to the jury. I suggest that one of the reasons for this was Moffitt J's emphasis on 'the separation' rather than 'the sex'.

IV YET ANOTHER STORY: 'SELF-INDUCED' PROVOCATION

A series of cases has constructed this type of scenario in a different way again, and in a way which denies the availability of the defence to men who have killed their partners or rivals. For example, in the case of *R v Allwood*,[61] Allwood and his de facto wife (Myles) had separated. Ms Myles had commenced a relationship with a man, Donnelly, who had been boarding with her and Allwood. She left Allwood and, after a period of living with Donnelly, moved with her daughter to live with her mother. Allwood tried to speak to his daughter and was denied this contact by Myles. Myles also rejected a proposal of marriage from him. Allwood then wrote to her in threatening terms. He later visited with a loaded rifle and shot and killed his former de facto and then attempted to kill himself. Prior to the killing, Allwood had asked Myles why she had left him; she replied 'Oh, to have sex'. She was then asked how many times she and Donnelly had had sex and she replied four times. Allwood called her a 'lying bitch' and she laughed 'mockingly' and said '[p]rove it'.[62] A letter he had written on the day of the shooting said: 'I am personally guilty of this crime being in sane mind. All women should take notice of this letter never take a man's family

necessary step ... not merely that you have got provocation, but what would lead a reasonable man to retaliate and that the retaliation is commensurate. It is a large proposition to say that, however hurtful and, if you like, insulting and likely to cause distress the words of the wife': cited in *R v Vassiliev* (1968) 3 NSWLR 155, 163.

59 *Tsigos* [1964] NSWLR 1607, 1634.

60 Ibid.

61 (1975) 18 A Crim R 120 ('*Allwood*').

62 Ibid 122.

away from him he works hard to get it and maintain it'[*sic*].[63] The trial judge refused to allow provocation to go to the jury. On appeal, the Victorian Court of Criminal Appeal agreed with the trial judge, relying on *Edwards v The Queen*,[64] to hold that if the words amounted to provocation, the provocation was 'self-induced':

> The applicant sought out the deceased. He was set upon a confrontation. Not only was he determined to speak with her but he selected the subject-matter and controlled the course of the conversation. He knew the answers that could be expected from her. He wished merely to goad her into giving them — no doubt to give emphasis to what he believed was justification for his imminent suicide. Knowing that she had left him for Donnelly he must have been aware that sexual relations had occurred between them, not only, of course, after they commenced to live together, but also probably at about the time of, or shortly before, their departure from the applicant's home. If then to hear her later admit those relations was provocative, it could not be provocation in law, seeing that it was the applicant who forced her to make those admissions. Even if it was open to the jury to consider that the applicant could have construed the words as an imputation of the applicant's sexual inferiority to Donnelly, the applicant cannot be heard to claim that the words had provoked him. His own earlier hope, vulgarly expressed by letter, that she was now getting the gratification she may have craved demonstrated that if the deceased's words carried the imputation contended for they could not have possessed any element of surprise and fell into the category of words that the applicant was forcing the deceased to utter. ... Only if the hostile reaction goes beyond the reasonably predictable can provocation that is itself provoked be fit for consideration by a jury.[65]

In *R v Radford*,[66] Radford killed his ex-wife's new lesbian partner. Radford and his wife had married in 1971, separated in 1983 and divorced in 1984. He made various attempts to get her to return to him. He had asked her to go to a hotel with him on New Year's Eve 1984. When she refused, he followed her to her partner's home. 'He seized the wife while she was putting her car in the garage. She screamed and he let her go and began to leave the premises.'[67]

> The appellant believed that his marriage had been broken up by the deceased and the lesbian relationship which she had developed with Mrs Radford. He was obsessed by his wife and his desire for her to return to him. He went to the

[63] Ibid 123.

[64] [1973] AC 648 ('*Edwards*'). In *Edwards*, the accused said that he had followed his victim from Perth to Hong Kong where he was intending to blackmail him. When the accused demanded money, the victim attacked him with a knife and the accused then, in response and 'in a white-hot passion' stabbed the victim 27 times. He was convicted of murder, the trial judge having withdrawn the issue of provocation from the jury. On appeal, the Privy Council held that: 'On principle ... a blackmailer cannot rely on the predictable results of his own blackmailing conduct as constituting provocation sufficient to reduce his killing of the victim from murder to manslaughter, and the predictable results may include a considerable degree of hostile reaction by the person sought to be blackmailed, for instance vituperative words and even some hostile action such as blows with a fist ... but if the hostile reaction by the person sought to be blackmailed goes to extreme lengths it might constitute sufficient provocation even for the blackmailer': [1973] AC 648, 658.

[65] *Allwood* (1975) 18 A Crim R 120, 133.

[66] (1985) 42 SASR 266 ('*Radford*').

[67] Ibid 267.

> deceased's house in a bizarre and futile final attempt to get his wife, as he saw it, away from the deceased and back to him. Having failed in his attempt, he was leaving the premises when the deceased came out of the house screaming at the appellant, wielding a cricket bat and shouting: 'You leave my friend alone. You leave my friend alone.'[68]

He then went to his car, took a rifle from it, and killed his ex-wife's partner. The trial judge refused to leave provocation to the jury. On appeal, a majority of the judges decided that provocation should have been left to the jury. King CJ stated:

> It seems to me that on the most favourable version and interpretation of the facts open to the jury, the appellant, having gone to the house emotionally committed to a final attempt to salvage his marriage and his happiness and having failed in his attempt, was confronted by the woman upon whose influence and conduct he blamed the destruction of his marriage and of all that made his life worthwhile, and subjected by her to physical threat with a cricket bat, to screaming and to an infuriating taunt which asserted the deceased's possession of the friendship of the wife to the exclusion of the appellant. I think that it was open to a jury to take the view that a person of ordinary self-control in the position of the appellant might have lost his self-control in such circumstances to such an extent as to kill, or at least to have felt a reasonable doubt about it.[69]

Interestingly, Bollen J[70] dissented, though with little elaboration of his reasons:

> I do not think that the conduct of the deceased could have caused either a person of ordinary self-control or the appellant who had left the immediate presence of the deceased to get his rifle, return and shoot the deceased.[71]

Most relevant for the discussion here is the decision of Johnston J who, like King CJ, decided that provocation should have been left to the jury. He does, however, suggest that 'it would be necessary, or at least open'[72] to the trial judge on a retrial to adopt the approach in *Edwards*:

> The appellant, on his own account, had gone to the premises of the deceased to kidnap his former wife. He entered on to the premises, forced open the door of the garage into which his former wife had just driven her car, and grabbed hold of her. He was dressed in some sort of uniform. The deceased was the friend of the former wife and the owner of the premises. The affection between the deceased and the former wife was, according to the defence, the cause of the marital break-up. Given the actions of the appellant, it may well be the situation that in the application of the rules relating to provocation, the appellant cannot rely on the *predictable* results of his actions on that occasion but only on those results of his actions in so far as they exceeded (if they did) the predictable results of his own actions. The only element of possible unpredictability that I

[68] Ibid 269.

[69] Ibid 269–70. Note that the 'infuriating taunt' in this case has to be the once repeated '[y]ou leave my friend alone'.

[70] Bollen J is the judge who in more recent times became notorious for his comment that it was acceptable for a man to subject his wife to 'rougher than usual handling' in order to 'persuade' her to have sexual intercourse: *Question of Law Reserved on Acquittal Pursuant to Section 351(1A) Criminal Law Consolidation Act (No 1 of 1993)* (1993) 59 SASR 214.

[71] *Radford* (1985) 42 SASR 266, 278.

[72] Ibid 280.

> can see is the use by the deceased of the words 'you leave my friend alone' and then only if those words were said with emphasis on the word 'you' and more particularly upon the word 'my'.[73]

Ian Leader-Elliott argues that 'enraged men who engineer a confrontation, lose all self-control and kill their wives, lovers or rivals after separation, are likely candidates for the ranks of those who are, morally speaking, murderers'.[74] He cites *Allwood* and Johnston J's judgment in *Radford* in support of this proposition.[75] The 'facts' in these cases are not very different to 'the facts' in *Moffa*, they have just been read or told in a different, and I would argue, more progressive way. Surely an accused does not only 'engineer a confrontation' if his wife has already left him?

What appears to me to be happening in *Allwood* and *Radford* is that the courts have expanded the time frame of the alleged provocative incident, much as Mahoney argued they should do to make 'separation assault' legally cognisable. In so doing, rather than making the provocation more understandable,[76] they make the brutality of the assault more visible. In other words, *Allwood* and *Radford* develop a new doctrinal sub-category of self-induced provocation, following a decision made in a very different factual context (*Edwards*), and 'self-induced' provocation does not excuse (or justify). But this legal sub-category, at least in the scenarios I am discussing, can be seen as merely a different description of similar facts. Could not the facts in *Moffa* be read in the same way, and thus treated legally in the same way?

And surely the Victorian case of *R v Gardner*[77] should be subject to such an analysis. Gardner killed both his former partner (Marino) and a man (Shears) who was sleeping in the bedroom next to the bedroom Marino usually occupied. Shears had been invited to the house to give Marino some protection from Gardner. The trial judge had instructed the jury that provocation was available for the death of Marino but not of Shears; Gardner was convicted of man-

[73] Ibid.

[74] Ian Leader-Elliott, 'Sex, Race and Provocation: In Defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 85.

[75] Ibid. Leader-Elliott also cites *Stingel* (1990) 171 CLR 312 and *Bush v The Queen* (1993) 43 FCR 549. Bush was convicted of the murder of his wife's new partner and the attempted murder of his wife. The trial judge had put provocation to the jury but it was rejected, presumably because they found there was some pre-meditation in the accused's behaviour. For a discussion of *Stingel*, and the role of the objective test in provocation, see below Part VI.

[76] See, for two contrasting examples where the court expanded the relevant time frame and thereby made the provocation more understandable, *Parker v The Queen* (1964) 111 CLR 665 (see above n 54) and *The Queen v R* (1981) 28 SASR 321 where King CJ said provocation should have been left to the jury where a woman killed her husband some time after she found out that he had been sexually abusing her daughter(s) for many years. Interestingly, when this case went back for retrial, the Crown rejected Ms R's offer to plead guilty to manslaughter (as they had in the first instance). However, after the jury returned to the court room in R's re-trial and asked the judge how the law would allow them to find R not guilty of both murder and manslaughter, the prosecution tried to reinvoke R's earlier offer to plead guilty to manslaughter. R refused to repeat her original offer and the jury acquitted her completely. See also Bebe Loff, 'Provocation and Domestic Murder: The Axe Murder Case' (1982) 7 *Legal Service Bulletin* 52.

[77] *R v Gardner* (1989) 42 A Crim R 279 ('*Gardner*').

slaughter in relation to Marino's death and murder in relation to Shears. The Victorian Court of Criminal Appeal decided that provocation was available for both killings, notwithstanding the fact that Marino was living in fear of Gardner who had threatened to kill her up to 12 months before the killing,[78] and that Gardner had told others of his threat to kill and had talked with them about a variety of methods he could use. On the night of the killings, Gardner alleged that Marino had:

> taunted him, using abusive language which indicated that she and Shears had enjoyed frequent sexual intercourse during the night and denigrating the applicant's sexual capacity. The applicant said that he became wild, angry and upset and could not control himself. He said that he struck Marino a blow with his hand and proceeded to the second bedroom where he believed Shears was sleeping. He said that he picked up a small statue of an elephant in the hallway and that upon entering the bedroom observed Shears in bed. The upper torso of Shears was naked. The applicant said that he thought Shears was getting up and 'I was shitting myself'. He said that he could not control himself and struck Shears a blow with the elephant before returning to the front bedroom.[79]

O'Bryan J concluded (with Gray and Beach JJ concurring):

> The circumstances that Marino's provocative words implicated Shears in a sexual orgy and Shears' proximity to Marino's bedroom, clearly were matters the jury were entitled to take into account, in my opinion, in considering the defence of provocation in relation to the killing of Shears. There was a sufficient nexus between Marino's provocative words and the death of Shears by the proximity of Shears in a bed nearby.[80]

Some may disagree that in *Moffa,* Mr Moffa 'engineered a confrontation', though in my view that is a reading of the tale that is available on the facts as we have them. In *Gardner*, there can be no doubt that the accused did so. Gardner's threats had been continuous, he (probably) arrived with the weapon with which he killed Shears,[81] he broke into the house that had been firmly bolted against him. And yet still a court was prepared to find not only that Marino had provoked Gardner — and again, we have only his evidence as to what she said on that night — but also that this provocation implicated Shears who was in a separate bedroom.

[78] For example, on New Year's Eve 1987 '[t]he applicant apparently produced a knife at a private function and threatened to cut Marino's throat and burn the house. The following morning the applicant left the house at Morwell [that he and Marino had purchased] and Marino reported to the police that the applicant had stolen some of her clothing and personal items. Marino expressed fears to the police that the applicant might return to the house and injure her': (1989) 42 A Crim R 279, 281. See also below n 81.

[79] Ibid 282.

[80] Ibid 284.

[81] The court stated: 'There was evidence from which the jury could infer that the applicant brought with him from Springvale [a Melbourne suburb about one hour's drive from Morwell] a black hammer baseball bat which belonged to the son of the female companion with whom he resided at Springvale. The bat disappeared on 6 January [the day before the killings] and has not been seen since. A pathologist expressed the opinion that a massive wound to the head of Shears could have been caused by such a bat': ibid 281. See also Howe's clever retelling of 'the facts' in this case: Howe, above n 18, 233–4.

The cases I have concentrated on in my analysis are appellate cases and when the decision results in a direction for a re-trial of the accused I do not have access to the ultimate jury decision in the cases. But we do know that the jury in *Gardner* at the initial trial found that 'provocation' by Marino had not been negatived by the Crown and found Gardner guilty only of manslaughter in relation to her death.

What I have been suggesting in the foregoing analyses is that there is no one inevitable reading of 'the facts' in these cases. The facts can be described in a variety of ways. As Kim Lane Scheppele says, to suggest that there is only one version of 'the truth':

> assumes no problem with understanding how accounts as socially situated cultural products relate to evidence of the world. But particular 'true' stories and particular descriptive statements are often selected from among a set of arguably accurate versions of reality — it is just that other descriptions in the set give very different impressions about what is going on. The vexing question is not just whether the descriptions are accurate in some way, though it is crucially important to screen out lies, but rather, how it is that some particular description instead of some other description comes to be forwarded as the authoritative version of events.[82]

Unless, say, the partner's separation rather than her sexual taunts are emphasised, and/or explicit emphasis is given to the way in which the accused provoked the provocation, and/or a wide focus on the whole context of the relationship is encouraged (so that, for example, previous violence by the accused is relevant to the alleged provocative scenario), we should not be surprised to discover that juries find that the Crown has not negatived provocation in these cases.[83] Scheppele suggests that the ways in which one reading of the facts becomes authoritative 'raises questions of power and ideology, of the "situatedness" of the descriptions that pass for truth, and of the social agendas they support'.[84] It is difficult for me to argue that 'my' version of the facts is more authoritative than, say, Barwick CJ's version of the facts in *Moffa*. But why is his version more authoritative than mine or Gibbs J's version?

V GENDER BIAS?

It will be apparent that I hold the view that the provocation defence is imbued with gender bias. A recent Law Reform Commission of Victoria report did at least raise the question of whether the provocation doctrine was gender biased. On the basis of an empirical study of all homicide prosecutions in the state between 1981 and 1987, the Commission concluded it was not. This was, apparently, because men were more likely to raise the defence when they kill a man not a woman, and it was more likely to be rejected where a man killed a

[82] Lane Scheppele, 'Just the Facts, Ma'am', above n 28, 164.

[83] See also Women's Coalition Against Family Violence, *Blood on Whose Hands*, above n 1; Patricia Easteal, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (1993).

[84] Lane Scheppele, 'Just the Facts, Ma'am', above n 28, 164.

woman (36 per cent) than if a man killed a man (12 per cent).[85] And, when women raised provocation they were more likely to be successful (in the study, all eight women who raised provocation in a domestic context were successful).[86] But as Adrian Howe has pointed out, 30 men did raise provocation in a domestic context and only eight women, and, more importantly, the study failed to address the circumstances that were alleged to amount to provocation in each category.[87] Howe's criticism was echoed by the New South Wales Law Reform Commission in its discussion paper on provocation:

> [I]t is ... important to be aware of what lies behind these figures. The general pattern that emerges from the cases is that men use the provocation defence when they kill their partners or ex-partners in a jealous rage and that women use it ... where they have been the victims of long term domestic abuse. The data treat these situations as commensurate — something which itself should be examined for gender bias.[88]

I found no reported Australian cases where women were provoked into killing men who left them or who 'confessed adultery'. This pattern of male violence is confirmed by empirical research. Polk and Ranson studied all homicides in Victoria between 1985–6 using coroners' files. A major theme identified in homicides involving intimates was 'homicide in situations of sexual intimacy where the violence represented an ultimate attempt by the male to control the life of his female sexual partner'.[89] Within this category, 'a major variation involved male partners reacting to the woman's attempt to move away from his control'.[90] Homicides involving sexual intimates accounted for 31 per cent of all the homicides, and where sexual intimacy was involved, 76 per cent of the offenders were men and 78 per cent of the victims were women. And in five of the six cases where women killed men, there was a history of violence by the man against the woman.[91] '[T]here was not a single instance where a woman killed her male partner out of jealousy',[92] although there were two cases where women

[85] Law Reform Commission of Victoria, *Homicide Prosecutions Study*, above n 13, 77, Table 55.
[86] Ibid.
[87] Howe, above n 18, 228–9.
[88] New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper No 31 (1993) [3.98]. For an analysis in the English context, indicating similar gendered patterns of murder and the use of the provocation defence, see Jeremy Horder, *Provocation and Responsibility* (1992). He states at 187: 'Superficial reflection on these bare statistics might lead one to suppose that it is easier for women than for men to 'get off' with manslaughter on the grounds of provocation when charged with murder. If one bears in mind, though, the very large percentage of women facing a murder charge in domestic homicide cases who have themselves been battered, something rarely true of men facing such a charge, it might be thought rather surprising that the proportion of women who are convicted only of manslaughter is not much higher, compared with their male counterparts.'
[89] Kenneth Polk, 'Homicide: Women as Offenders' in Patricia Easteal and Sandra McKillop (eds), *Women and the Law* (1993) 149, 151 citing Polk and Ranson, above n 12.
[90] Ibid.
[91] Polk and Ranson, above n 12, 69–82.
[92] Polk, above n 89, 152.

killed women (a sexual rival or a sexual partner) out of jealousy.[93] Similarly, most reported cases of women claiming provocation involve years of abuse of either them or their children. That is, the cases of women killing their partners and men killing their partners are not symmetrical, although the women who kill and the women who are killed share the same history, a history of violence.[94]

VI MORE RECENT STORIES

The Australian High Court has spoken more recently on provocation in the case of *Stingel*.[95] Here a 19-year-old man found his former girlfriend (apparently) having sexual intercourse with her new boyfriend and killed him, the victim having told Stingel to 'piss off you cunt'.[96] He was obsessed with the young woman and had been constantly following and harassing her and she had obtained a restraining order against him. The High Court decided that provocation should *not* have been left to the jury:

> [I]t is difficult to conceive that any ordinary nineteen-year-old would be even surprised to be told in strong and abusive terms to go away when he intruded ... upon the privacy of the deceased and A as they voluntarily engaged in sexual activity late at night in a darkened car. Be that as it may, no jury, acting reasonably could fail to be satisfied beyond reasonable doubt that the conduct of the deceased, including the insulting remark and the sexual activities in which he and A were allegedly engaging was not of such a nature as to be sufficient to deprive any hypothetical ordinary nineteen year old of the power of self-control to the extent that he would go to his own car, obtain a butcher's knife and fatally stab the deceased with it. ... [N]o jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary nineteen-year-old.[97]

Is this a sign of hope? The court says nothing about marital or long-term de facto relationships so it may be that it indicates nothing about its future attitude to a case involving more established and non-teen relationships.[98] The decision

[93] Ibid; Polk and Ranson, above n 12, 76–8. Polk carried out a follow-up study on coroners' files in 1987–90 and found that 'at least three of the killings [by women] were provoked by threats on the part of the male to leave the relationship. ... When all of the cases from both phases of the research are added together, however, the earlier pattern whereby most often women who kill their sexual partners are responding to precipitating masculine violence would still hold as the predominant one. This observation is only slightly diluted by the replication cases': ibid 159–60. See also Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994).

[94] See also Wallace, above n 12, 97.

[95] (1990) 171 CLR 312. See also *R v Masciantonio* (1995) 183 CLR 58 which is discussed in Part VIII.

[96] I say 'apparently' because as the young woman was still alive, she gave evidence and denied that that was what they were doing. However the High Court, as is well-accepted, considered the evidence on a view of the facts most favourable to the accused.

[97] *Stingel* (1990) 171 CLR 312, 336–7.

[98] For a much earlier English decision making this sort of distinction, see *R v Palmer* [1913] 2 KB 29, where the court decided that confessions of adultery by a *de jure* wife, and possibly a de facto wife, could amount to provocation, but not by a woman to whom the accused was only engaged. For a case suggesting that adultery by a de facto wife is not sufficient provocation, see

was made in a context of an increasing tendency to take into account every characteristic of the accused in assessing how an ordinary person would (more accurately, could) behave in provocative circumstances. The High Court in *Stingel* followed the lead of the Supreme Court of Canada's Wilson J in *R v Hill*[99] in clearly dividing the objective test in provocation into two parts.[100] The court decided that all (or, at least, many of) the accused's personal characteristics could be taken into account in assessing the gravity of the provocation,[101] but none (except age) in assessing the level of self-control expected of a person provoked.[102] In particular, they followed Wilson J's lead in deciding that sex was not a relevant characteristic allowed to affect the assessment of self-control of the ordinary person. They stated:

> No doubt there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterised as ordinary. The *lowest* level of self-control which falls within those limits or that range is required of all members of the community.[103]

The first part of this paragraph suggests that their approach is one which we might characterise as an 'add women and stir' approach. That is, whilst the court does not say this, it would appear that women's 'self-control' in the context of

R v Greening [1913] 3 KB 846, 849: 'It is a gross offence against a husband that his wife should commit adultery, but there is no such offence against a man if a woman is not his wife, although he may be living with her, chooses to commit such an act. In the latter case the man has no such right to control the woman as a husband has to control his wife. A husband may legally complain if his wife frequents a house of ill fame. A man has no such right in the case of a woman not his wife. The two cases are entirely different'. For a suggestion that New Zealand courts continue to differentiate between sex with wives and casual sex, see McDonald, above n 14, 133.

99 [1986] 1 SCR 313.

100 And, prior to that, the articulation by Ashworth of that distinction: see A Ashworth, 'The Doctrine of Provocation' (1976) 35 *Cambridge Law Journal* 292. Leader-Elliott suggests that '[a]ll indications are that the court [in *Stingel*] intended no more than a restatement, with refinements, of a doctrinal commonplace which had been accepted for nearly two decades. Ashworth's influential discussion of 1976 distinguished characteristics of the defendant which went to the gravity of the provocation from "individual peculiarities bearing on the accused's level of self-control"': Leader-Elliott, 'In Defence of *Stingel*', above n 74, 75.

101 This is explored in some detail in Leader-Elliott, 'In Defence of *Stingel*', above n 74; see below n 111.

102 *Stingel* (1990) 171 CLR 312, 327: 'While personal characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult, the ultimate question posed by the threshold objective test ... relates to the possible effect of the wrongful act or insult, so understood and assessed, upon the power of self-control of a truly hypothetical 'ordinary person'. Subject to a qualification in relation to age ... the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused.'

103 Ibid 329 (emphasis added).

domestic murder is higher than men's,[104] essentialism notwithstanding. And, if we added women and stirred, we would in fact get an average higher level of self-control expected of the ordinary person (man).[105] This (adding and stirring) is not a strategy that is generally attractive, but one which might recommend itself when one is forced to clutch at straws. But is this possible under the Court's formulation? I do not think so. It may be that while saying we cannot set up separate standards for women and men, they do in fact do so, for, as is clear in the second part of the quoted paragraph, the ordinary person only has to comply with the lower limits set for ordinary people, a standard I speculate is set by ordinary men.[106]

Stanley Yeo has supported the High Court on this point in arguing that there should not be separate standards for women and men, as this could arguably disadvantage some women.[107] Leader-Elliott illustrates Yeo's point by referring to 'separation killings'. He recognises that such killings by women of their former partner or rival are extremely rare, as I have noted above. However, he continues:

> If a woman kills her partner as a consequence of jealous possessiveness following breakdown of their relationship, a comparison of her reactions with those of an ordinary *woman* might result in denial of the defence of provocation because it is rare for women to kill in these circumstances. When men kill from jealousy their actions are far less likely to fall outside the range of behaviour which we recognise as the conduct of ordinary men driven to extremes.[108]

This analysis, like that in *Holmes,*[109] surely smacks of equality with a vengeance, that is the granting of formal equality to women where they do not want it or need it, when their situation is not in fact on all fours with that of

[104] This proposition is based on the gendered incidence of spousal homicide; however, it is reinforced by a consideration of the circumstances in which men and women kill their partners. For a speculation to similar effect, see Stanley Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3, 10.

[105] A (perhaps more restrictive) version of this approach was suggested by Hilary Allen, 'One Law for All Reasonable Persons?' (1988) 16 *International Journal of the Sociology of Law* 419, 430: 'jury members might be instructed ... to exclude as unreasonable any response that would not be considered reasonable in both [sexes].' Leader-Elliott suggests that such an approach 'would be hard on men ... for they would be required to meet a higher standard of self-control' and he goes on to suggest that this might, arguably, 'violate the equality principle': Leader-Elliott, 'In Defence of *Stingel*', above n 74, 92.

[106] Cf Yeo, 'Power of Self-Control', above n 104, 10.

[107] Ibid.

[108] Leader-Elliott, 'In Defence of *Stingel*', above n 74, 91–2. He goes on to say that '[i]t cannot be right, however, to allow men an advantage on the ground that they are less controlled and more likely to resort to criminal violence than women': above n 74, 92. It seems that he is here adopting the *Stingel* distinction, between the gravity of provocation and the self-control of men and women: a partner leaving is just as grave a provocation for both women and men, but men are not less self-controlled. As indicated, I am not at all sure that the High Court does not in fact allow for a larger lack of self-control in men. And see, in particular, the comments on the Law Reform Commission of Victoria's analysis of gender bias in Part V.

[109] In *Holmes* [1946] AC 588, 600 it was accepted for the first time that women who find their husbands in adultery and kill them or their partners can also avail themselves of the defence of provocation.

men.[110] Arguably, this is a little unfair to Leader-Elliot, for unlike the House of Lords in *Holmes*, he does recognise that it is rare for women to kill in these circumstances. Indeed, the point he is making depends on recognising this rarity. For me, however, the more interesting question is whether it is justifiable (or excusable) for men *or* women to kill in these circumstances?

And it is precisely because the objective test in the provocation doctrine allows this sort of question to be raised, that I, like Leader-Elliott, support the continuation of such a test within the law on provocation.[111] As Grant, Chunn and Boyle put it: '[e]ven though the ordinary person test can be tilted in practice toward the needs of misogynists and racists, it at least has the potential to set a standard which could be used to reject the argument from such persons'.[112]

It is interesting to note in this context the most recent statements from the Supreme Court of Canada on the doctrine of provocation, this time in the context of a man killing his wife's new partner. The majority of the Court stated: 'Obviously, events leading up to the break-up of the marriage can never warrant taking the life of another. Affairs cannot justify murder.'[113] This appears to be a strong and clear statement about the unacceptability of (at least murderous) violence in the context of extra-marital affairs or separations. However, the majority went on to say:

> Any recognition of human frailties must take into account that these very situations may lead to insults that could give rise to provocation ... Reality and the past experience of the ages recognize that this sort of situation may lead to acts of provocation.[114]

[110] Laurie Taylor makes a similar point: Laurie Taylor, 'Comments: Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense' (1986) 33 *University California at Los Angeles Law Review* 1679, 1697.

[111] My analysis is not centrally concerned with the thorny legal question of the distinction between gravity and self-control. In my view, the distinction assists in clarifying the role of values in the objective test, but whether men are forgiven for killing women who leave them because the provocation is particularly 'grave' or because their 'self-control' is thrown into doubt is of lesser importance. Grant, Chunn and Boyle state that '[i]t is not a big step from asking what is grave provocation to men as men to, *in effect*, demanding a lower standard of self-control from men': Isabel Grant, Dorothy Chunn and Christine Boyle, *The Law of Homicide* (1994) [6.13]–[6.16]. The distinction is discussed in some detail by Leader-Elliott. He gives us a convincing argument that the assessment of the gravity of the provocation must also be done in the context of the ordinary person test, or with some 'objective' assessment: see Leader-Elliott, 'In Defence of *Stingel*', above n 74, 79, where he discusses the example of the person who is hypersensitive to minor insults. He observes that '[i]f we allow D's peculiarity to determine the gravity — the propulsive force — of the provocation, we shall be driven to concede that the self-control of a normal person could not have withstood provocation of that degree of gravity'. Leader-Elliot argues, and I agree, that what the court is suggesting in *Stingel* is that some but not all of the characteristics of the accused can be factored into an assessment of the gravity of the provocation and that '[t]he objective test requires the ordinary person to figure in determination of the gravity of provocation as well as in determination of the self-control issue': Leader-Elliott, 'In Defence of *Stingel*', above n 74, 79.

[112] Grant, Chunn and Boyle, above n 111, [6.20].

[113] *R v Thibert* (1996) 104 CCC (3d) 1, 11 ('*Thibert*').

[114] Ibid 11–12.

In this case, as noted above, a man had killed his wife's new partner. His wife had 'planned to leave him'[115] once before but he had talked her into returning.

> He hoped to accomplish the same result when his wife left him for the deceased on this second occasion. At the time of the shooting he was distraught and had been without sleep for some 34 hours. When he turned into the parking-lot of his wife's employer he still wished to talk to her in private. Later, when the deceased held his wife by her shoulders in a proprietary and possessive manner and moved her back and forth in front of him while he taunted the accused to shoot him, a situation was created in which the accused could have believed that the deceased was mocking him and preventing him from having the private conversation with his wife which was so vitally important to him ... Taking into account the past history between the deceased and the accused, a jury could find the actions of the deceased to be taunting and insulting. It might be found that, under the same circumstances, an ordinary person who was a married man, faced with the breakup of his marriage, would have been provoked by the actions of the deceased so as to cause him to lose his power of self-control.[116]

In deciding that provocation should have been left to the jury, though expressing some doubt as to whether the jury would find provocation in this context, the majority seems to reaffirm that taunts accompanying a break-up of a marriage remain sufficient provocation. In the words of Major J (Iacobucci J concurring):

> In that connection, Cory J [the author of the majority's reasons] states that events leading to the breakup of a relationship are not factors going to provocation but I wonder whether the effect of his reasons is such that these factors have been taken into account in the context of provocation. My colleague emphasizes that the accused still wished to see his wife alone after the end of the relationship. However, in my view, she had made it clear on a number of occasions that she did not wish to be alone with him. This was a choice that Joan Thibert was free to make. The accused had no right or entitlement to speak with his wife in private. The fact that the accused believed that the deceased was preventing him from doing so is not, with respect, a fact that ought to be taken into account when considering the defence of provocation.[117]

The majority had previously stated that:

> [T]he objective element should be taken as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence.[118]

The minority judgment weights 'the balance' somewhat differently, and in a way which I think recognises the claims of the dead woman as well as the accused, in deciding that provocation should not have been left to the jury: 'At

[115] Ibid 12.
[116] Ibid.
[117] Ibid 22.
[118] Ibid 6.

law, no one has either an emotional or proprietary interest in a spouse that would justify the loss of self-control that the appellant exhibited.'[119]

VII WHO *IS* THE 'ORDINARY MAN'?

The suggestion that the provocation defence is ungendered is, as we have seen, still quite prevalent. When the New South Wales provocation law was amended to more properly take account of the circumstances in which women kill their male partners (to remove the suddenness requirement, and the proportionality requirement), Geoffrey Walker stated:

> The notion that the punishment should fit the crime is a worthy legal ideal. But if it is not to conflict with the principle of equality before the law, it must be triggered by defined classes of facts which experience has shown to be correlated to human powers of self control, besides being consistent with the moral principles that underlie the law of homicide. Sweeping deductions from packaged ideologies are not enough.[120]

Now it is obvious that for Walker, human means male, for it is overwhelmingly male frailty that is provoked by separation or sexual threat.

One of the 'defined class[es] of facts which experience has shown'[121] to lead to loss of self-control and to be 'consistent with moral principles' was the discovery by a man of his wife in bed with another man.[122] In *R v Maddy*:[123]

> The Court conceived that killing one Nabor, taken in the act of adultery with the defendant's wife in his house, was but man-slaughter [*sic*], here being sufficient provocation.[124]

The case is also reported as *Manning*:[125]

> John Manning was indicted in Surrey for murder, for the killing of a man. And upon not guilty pleaded, the jury at the Assizes find that the said Manning found the person killed committing adultery with his wife in the very act, and flung a jointed stool at him, and with the same killed him; and resolved by the whole Court, that this was but manslaughter; and Manning had his clergy at the Bar, and was burned in the hand; and the court directed the executioner to burn him gently, because there could be no greater provocation than this.[126]

119 Ibid 22 (Major J, Iaccobucci J concurring).
120 Geoffrey Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988) 217.
121 Ibid.
122 Ibid.
123 (1671) 2 Keb 829; 84 ER 524.
124 Ibid.
125 (1671) T Raym 212; 83 ER 112.
126 Ibid. In a comment on these early cases, Horder, above n 88, 24, fn 8 states, '[i]nterestingly, at this time the cuckold almost invariably killed the male adulterer and not his adulterous wife. Doubtless, this reflected the view that at that time the wives were men's property, not capable of rational moral decision-making, and thus not to be fully blamed for having been seduced'. Grant, Chunn and Boyle, above n 111, [6.14], fn 59, speculate that '[i]t is unlikely, given patterns of homicide and the historical composition of the bench that, for instance, killing a consumer of pornography in a rage would seem "ordinary". If our social and legal history had made us familiar with the idea that women can lose control when confronted with pornography and women judges had had to grapple with the culpability issue, then killing a pornographer

Horder has suggested that in the seventeenth century, killing in these circumstances was not conceived as being 'out-of-control', but rather as using controlled anger in response to an affront to a man's 'sense of honour':[127]

> Men of honour were expected to retaliate in the face of an affront ... [T]he retaliation would, as it were, 'cancel out the affront', and would demonstrate that the person affronted was not cowardly, and that he did not 'lack spirit', to use Aristotle's term. The need to avenge an affront was thought to be one of the most important 'laws' of honour.[128]

It was not until the eighteenth and nineteenth centuries that the notion of anger as 'unreason' (rather than what Horder calls 'anger as outrage')[129] achieved prominence:

> The image created is one according to which, following provocation, the passions and the desires associated with them, such as the desire for retaliatory suffering, temporarily *eclipse* the power of reason to control them, and hold sway within the soul unbridled or 'ungoverned'.[130]

How does the man who is provoked into killing when his wife leaves him compare with the ideal 'Man of Reason'[131] of the eighteenth and nineteenth centuries? His (hetero)sexuality is described evocatively by Naffine,[132] (a heterosexuality which, she maintains, still informs the modern law of rape). The cultural form she draws out, through an analysis of eighteenth and nineteenth century poetry and philosophy, is of a possessive male who, in his possession of a woman, risks none of his subjectivity:

> He remains a free, unitary and whole subject ... Man retains his essence of being as a unified thinking subject whose capacity to reason defines him, who is fundamentally unaffected by the sensual acts of the body, while the woman surrenders both her body and being to him.[133]

For this mythical but consistently appearing man:

> [T]here is no loss of sovereignty when he has sex with a woman. In the act of heterosexual intercourse, he remains a free, unitary subject. While she surrenders utterly, he remains utterly himself; she gives herself up to him and he takes

might be seen as the paradigm provocation case rather than that of a husband killing his unfaithful wife, or there would be lots of case law on provocative heterosexual advances, rather than homosexual advances.'

127 Horder, above n 88, 25.

128 Ibid 26–7. Horder argues that the reason provocation was only a partial defence, rather than leading to a complete acquittal, was because although a person had acted as a man of honour, he had still overreacted. However, he had not grossly overreacted and was therefore entitled to a partial defence: ibid 51–7.

129 Ibid 50; ch 4.

130 Ibid 74. The 'Rise of the Loss of Self-Control' is descibed in a chapter of that name: ibid ch 5.

131 See generally Genevieve Lloyd, *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (2nd ed, 1993).

132 Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 *Modern Law Review* 10.

133 Ibid 13.

> her and possesses her. Though he has had sex with another, the boundaries of his identity have not been breached.[134]

The man who kills his sexual partner when she is leaving has failed to remain an isolated monad. He has not remained a 'free, unitary subject'; the 'boundaries of his identity' have 'been breached'. He is revealed as no longer the autonomous subject but as a being connected to another, as so connected that his jealousy of her can lead to him killing her. However, if we were to condemn him to the realm of murderers, we would blatantly reveal one more fissure in this idealised image. If we forgive, at least partially, we control the damage done to the mythic man. This is particularly the case if we forgive in a way that says he was 'out of control', lacking self-control, the control of the self of the man of reason; thereby the rational ideal remains at least somewhat intact.[135] But should it?[136]

VIII MANY DIFFERENT PEOPLE ARE MEN: THE ROLE OF ETHNICITY

It is through the debate on ethnicity and how it should affect the ordinary man/person that the role of values in the doctrine of provocation has most obviously been played out. However, this debate has usually not recognised that the man who kills has both a race and a gender, as does the woman he kills.[137] Although the debate about ethnicity has been about values, it has tended to mask a more fundamental debate about the values of ordinary men, regardless of ethnicity, and the value of ordinary women of all ethnicities.

Stanley Yeo,[138] whose critique was adopted by McHugh J in *Masciantonio,*[139] has mounted perhaps the strongest attack on the decision in *Stingel*, and advo-

134 Ibid 30–1.

135 To quote Horder once again, who here examines the writings of Foster, Hawkins, East and Russell: 'Great anger is accordingly thought to consist in "overpowering" or "ungovernable" passion, the power of reason having been temporarily "suspended" or removed from its "office"': Horder, above n 88, 77. At the same time, women and in particular 'women's bodies are constituted as the archetypal site of irrationality. The female body, as constructed in legal discourse, is seen to have failed the test of subordinating desire to reason, and emotionality to rationality': Carol Smart, 'Postscript for the 1990s, or "Still Angry After All These Years"' in Carol Smart (ed), *Law, Crime and Sexuality: Essays in Feminism* (1995) 221, 227.

136 For a discussion of the privileging of rage in provocation, as opposed to, say, pity, despair or compassion, see Grant, Chunn and Boyle, above n 111, [6.1]–[6.28] and especially [6.3].

137 See, eg, Padma Raman, *'Many-Headed Hydra': Minority Women and the Intersections of Gender, Race and Class in Law and Critical Theory* (LLM thesis, University of Melbourne, 1996).

138 Yeo, 'Power of Self-Control', above n 104. Note that this article also discusses the High Court decision in *R v Falconer* (1990) 171 CLR 30, a case involving a woman killing her husband, from whom she was separated. He had abused her for many years and just prior to the killing she found out that he had sexually abused their daughters. Legally, the case concerns the defence of automatism. However, see now Stanley Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation' (1996) 18 *Sydney Law Review* 304.

139 (1995) 183 CLR 58, 70–80. The remainder of the Court re-endorsed its position in *Stingel*. In this case, Masciantonio, a man of Italian origin, had stabbed and killed his son-in-law whom he knew had physically assaulted his daughter (and other members of the family). The incident in which the deceased was killed apparently took place in two stages: the trial judge (in an approach endorsed by the Victorian Court of Criminal Appeal) had allowed provocation to go to

cated that the ethnicity of the accused should be taken into account when assessing the self-control of the ordinary person and not just the gravity of the provocation (where relevant).[140] He argued:

> First, as regards the justification [for the provocation defence] based on 'compassion to human infirmity', it could be argued that the law should account for the comparative lack of exposure on the part of the migrant to the various socialising institutions of the host country, such as the family and school, when compared to one who has been raised since early childhood in that country.[141]

Drawing on the notion of youthfulness as a developmental stage, used by Wilson J in *Hill* to justify the acceptance of youthfulness as an exception to the 'neutral' level of self-control expected of the ordinary person,[142] Yeo argued:

> When applying the objective test in provocation, the migrant should be viewed as being in a development stage en route to achieving full socialisation in the ways, values and expectations of her or his host community.[143]

Furthermore, ethnicity is just as 'ordinary' as youth which was accepted by the High Court as an aspect of the level of self-control of the ordinary person:[144]

> [I]f by 'ordinary' is meant being normal, unexceptional and generally acceptable, it could be argued that each and every one of the cultures which make up our heterogeneous community satisfies this quality of ordinariness. This contention may be more clearly evidenced if we spoke in terms of the power of self-control influenced by one's ethnic background ... [W]hile one ethnic group may have a lower threshold of self-control than another in the same community, that lower level would still be regarded as 'ordinary' if it fell within the limits or range which was acceptable to the community as a whole.

the jury for the first part of the incident but not for the second. Interestingly, the majority of the High Court decided that the incident could not be so separated and that the accused should have had the benefit of an instruction on provocation for the whole of the events of that afternoon. McHugh J said the two parts were separate and provocation should not have been left to the jury if the deceased was killed in the second part of the attack as no jury could have a reasonable doubt that an ordinary person could be so provoked.

140 Yeo has now resiled from this position (see Yeo, 'Sex, Ethnicity', above n 138) though its currency continues, not least because of its adoption by McHugh J in *Masciantonio*. Yeo now agrees that his formulation has potential for racism, noting in particular Leader-Elliott's views on this matter. Yeo has now suggested that rather than seeing capacity for self-control as an undifferentiated notion, consideration should be given to 'the form of behaviour or response pattern of an ordinary person while deprived of self-control': Yeo, 'Sex, Ethnicity', above n 138, 305. He argues that different ethnic groups (and men and women) may well have different response patterns in response to provocation. He argues that focussing on the possibility that different groups have different response patterns to (the same?) provocation does not 'assert that a particular race has a lower capacity for self-control than other races. Rather, ethnicity instructs the jury on the type of reaction which may be expected of an ordinary person belonging to the particular ethnic community': Yeo, 'Sex, Ethnicity', above n 138, 305. He also argues that evidence on response patterns should be more forthcoming than evidence of the capacity for self-control: Yeo, 'Sex, Ethnicity', above n 138, 319.

141 Yeo, 'Power of Self-Control', above n 104, 11.

142 Ibid 12, citing *R v Hill* [1986] 1 SCR 313, 350.

143 Yeo, 'Power of Self-Control', above n 104, 12.

144 *Stingel* (1990) 171 CLR 312, 331. See the suggestion by Leader-Elliott that the High Court's concession to youth is in reality a 'consequence of the high valuation we place on the capacity for aggression in youth ... It is more likely that we shall find the reason for the concession in the acceptance and acculturation of youthful aggression than in suppositions about relative degrees of incapacity for self-control': Leader-Elliott, 'In Defence of *Stingel*', above n 74, 88.

> Under this scheme, there could be individuals whose pugnacious and excitable temperaments might be so pronounced as to be deemed extraordinary by each and every ethnic group in the community. Such unusual and unacceptable levels of self-control would then certainly not be attributed to the ordinary person. In this way, the societal protection rationale underlying the objective test remains intact.[145]

Yeo ends his critique by calling on the principle of multiculturalism and for a different understanding of equality:

> [T]o insist that all these different ethnic groups conform to the one standard of behaviour set by the group having the greatest number (or holding the political reins of power) would create gross inequality. Equality among various ethnic groups is achieved only when each group recognises the others' right to be different and when the majority does not penalise the minority groups for being different.[146]

Yeo's critique was taken up by McHugh J in his dissent in *Masciantonio.* McHugh J affirms that the, '"ordinary person" standard would become meaningless if it incorporated the personal characteristics or attributes of the accused on both the issue of provocation and the issue of self-control.'[147] However, he goes on to argue that the ordinary person standard would *not* become meaningless:

> [I]f it incorporated the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue. Without incorporating those characteristics, the law of provocation is likely to result in discrimination and injustice. In a multicultural society such as Australia, the notion of an ordinary person is pure fiction. Worse still, its invocation in cases heard by juries of predominantly Anglo-Saxon-Celtic origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar ...
>
> I have concluded that, unless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law. Real equality before the law cannot exist when ethnic minorities or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.
>
> If it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would answer that that must be the natural consequence of true equality before the law in a multicultural society when the criterion of criminal liability is made to depend upon objective standards of personhood.[148]

[145] Yeo, 'Power of Self-Control', above n 104, 11–12.
[146] Ibid 12.
[147] *Masciantonio* (1995) 183 CLR 58, 73.
[148] Ibid 73–4.

Both critiques of the High Court's decision in *Stingel* seem to rest on an essentialised view of race or ethnicity, that is, the notion that there is one authentic experience of an ethnic identity for each ethnic group.[149] It assumes too that we can know this ethnic identity or, at least, someone who can give expert evidence has the requisite knowledge, and, furthermore, that powers of self-control do vary as between different ethnic groups. I think all of these propositions are contestable and, at the very least, require some evidence for them. It could also be argued that while ostensibly directed in an anti-racist way they could be used to further racist arguments.[150]

A *Whose Experience of Ethnicity?*

To assume that there is one relevant ethnic experience within each group leaves out of account that members of any ethnic group, as well as having an ethnicity, also have a class status, a sexual orientation, a particular physical ability, and, of course, given the emphasis in this article, a sex. Such a listing of aspects of identity is not meant to suggest that these characteristics can be separated out in a simplistic way. Rather, it is to emphasise that any useful description of the culture of an ethnic group will need to encompass the experience of all of its members, not just some.

To illustrate the problems in this task, I will examine just one example, the Victorian case of *R v Dincer*.[151] In this case, a young 16-year-old Turkish woman, Zerrin Dincer, had left home with her boyfriend with whom she had been having a sexual relationship. Her moving out had been opposed by her parents, 'but they finally either gave in or gave an unenthusiastic approval'.[152] However, the following day 'there were some second thoughts'[153] and they tried to trace her. Mr and Mrs Dincer found her at her boyfriend's parents' house. Then 'there was a confrontation between the accused man [Mr Dincer] and the girl in the presence of the young man in the young man's bedroom, in the course of which the girl was fatally stabbed'.[154] In his ruling on whether provocation should be left to the jury, Lush J noted:

> There is evidence that such a man expects to be the undisputed head of his house and that he expects his daughters to live in fairly close confinement in the home circle and to avoid contacts with young men other than those of the family's selection. There is evidence that the loss of virginity in a daughter is a matter of shame and disgrace to their parents which may lead to their social ostracism.[155]

[149] On this point, see Leti Volpp, '(Mis)Identifying Culture: Asian Women and the "Cultural Defense"' (1994) 17 *Harvard Women's Law Journal* 57; Grant, Chunn and Boyle, above n 111, [6.18]. See also Raman, above n 133.

[150] See Yeo, 'Sex, Ethnicity', above n 138, especially 304–5, 316–20.

[151] *R v Dincer* [1983] 1 VR 460 ('*Dincer*'). See also Raman, above n 137, 106–7.

[152] *Dincer* [1983] 1 VR 460, 461.

[153] Ibid.

[154] Ibid.

[155] Ibid.

Lush J decided to leave provocation to the jury and instructed them in the following way:

> [T]he jury must consider an ordinary man who has the same characteristics as the man in the dock. ... [Y]ou have to take into consideration the fact that Dincer is Turkish by birth, the fact that he is Muslim by religion, the fact that he is one whom some of the witnesses were prepared to describe as a traditionalist, the picture painted of him that he was a conservative Muslim, and as part of the consequences of those characteristics that he carries about with him as part of his own personality there are the social practices which are assessed by him as desirable or undesirable, permissible or not permissible, by reference to those essential background aspects of his character.[156]

My concern in this case is that there is no evidence referred to which indicates how (conservative, traditional, Turkish) women might feel in these circumstances. There is one reference to 'parents', but that is the only time there is any mention of 'women' and then only very indirectly.[157] It is also the only time that Mrs Dincer is mentioned, and again, naturally, very indirectly. This is, of course, what one would expect in a criminal trial — she, after all, was not on trial — but it remains the case that her perspective is not necessarily reflected in the court's characterisation of 'culture'. And Zerrin Dincer, the dead daughter, like all the women (and some men who were killed by their new partner's former partner) in the cases I have been discussing, had no chance to tell her own story. What negotiations had occurred with her father or mother? What was her view of 'traditional Turkish culture'? How do feminist Turkish Moslem women describe traditional Turkish Moslem culture? On the basis of the reported ruling and jury direction, I do not know who in fact gave evidence in this case.[158] However, my point is broader: there is no one 'true' characterisation of a culture. It is certainly not the case that any two anthropologists will describe the same culture in the same way.[159] And surely one's own position in that culture, or indeed in another, will affect the experience and description of it.

156 Ibid 466–7.

157 Leti Volpp refers to the use of the 'cultural defence' in two cases involving Asian Americans in the US: '"Cultural defenses" that focus solely on "cultural difference" with no analysis of gender subordination serve to block out gender oppression and gender difference *within* Asian American communities': Volpp, above n 149, 93 (emphasis in original).

158 It is clear that there was more than one witness. Were they 'experts'? Were they neighbours or friends? What was their gender? Who *is* an expert in (traditional, conservative) Turkish Moslem culture? Letti Volpp, in an attempt to develop a position in relation to evidence on culture for criminal defence purposes, suggests that an insider to the culture is a more useful witness than an anthropologist from outside that culture. In the particular context of the two cases she examines in detail, *People v Dong Lu Chen*, (NY Sup Ct, 1988, No 87–7774) (where, in the case of a Chinese American man who had killed his wife, a white anthropologist gave evidence) and *People v Helen Wu*, 286 Cal Rptr 868 (Ct App, 1991) (a case of a Korean American woman who had killed her son, where two transcultural psychologists who were both immigrants to the US gave evidence), I can only endorse her view. However, I have some doubt as to whether it is necessarily generalisable.

159 See, eg, Margaret Mead, *Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation* (1961); Derek Freeman, *Margaret Mead and Samoa: The Making and Unmaking of an Anthropological Myth* (1983); and the play by David Williamson, *The Heretic* (1996), dramatising the dispute between these two anthropologists.

B *The 'Other's' Lack of Self-control*

Similarly, to the extent McHugh J's (and Yeo's earlier) focus is on the need to take account of ethnicity in relation to the self-control of the ordinary person, (rather than the gravity of the provocation),[160] I also have serious doubts. The analyses seem to assume, without more, that the level of self-control of various ethnic groups do differ, and indeed are lower in some ethnic groups than in the dominant group (presumably white Anglo-Celtic Protestant). However, what evidence do we have for this proposition? Do we all assume that 'people from a Mediterranean background' (which people? Italians? Greeks? which Italians? which Greeks?) are more 'hot-blooded' than Anglo-Celts? Do we all assume that 'Asians' (which Asians?) are even more 'dour' than Anglo-Celts? How can we make such assumptions about a culture?[161]

What is more, we may well be making such assumptions where they in fact have no relevance to the alleged provocation that occurred, at least on the gravity question. Take the facts in *Masciantonio*. There a man killed his son-in-law and the context of that killing was as follows: he knew that his son-in-law had assaulted his daughter on a number of occasions; he knew he had assaulted his son on one occasion; he knew that his daughter had financially supported her husband and that he had been pressuring her for more money. Masciantonio also knew that his son-in-law had left his daughter and taken some of her property, and he knew that his son-in-law apparently preferred to sit in a coffee shop than support her on a family occasion. Why is it relevant that the accused in *Masciantonio* was an Italian? In my view it was not, unless we assume that Italian Australians (or perhaps only those born and raised in Italy) are more hot-blooded than Anglo-Celtic men. A father of any ethnicity could, surely, react with aggressive violence to his son-in-law in this factual context. The question really is whether we think this should be put to the jury as 'ordinary'.

The implications of making such generalised assumptions about culture, beyond the direct role in the provocation doctrine, might well feed into racist assumptions in other contexts. If Australians of Italian origin are more 'hot-

[160] It is not absolutely clear to me whether the direction in *Dincer* relates to the gravity of the 'provocation' to an ordinary 'person' of his ethnicity, or the powers of self-control of a traditional, conservative Turkish Moslem ordinary 'person', or both. It seems probable that it is directed towards both. I conclude this on the basis that Lush J refers to 'evidence' on traditional Turkish Moslem values, which could go to both gravity and self-control. However, the direction to the jury in *Dincer* includes the following statement: 'You may be asking yourselves, "How are we to know what an ordinary conservative Turkish Moslem might have done in these circumstances?" There is no answer to that question, Mr Foreman and members of the jury. The law does not allow the calling of evidence to assist the judgment of the jury on a question like that. It is your problem': *Dincer* [1983] 1 VR 460, 468. This suggests that the accused's ethnic identity was relevant to both aspects of the test; however, evidence is apparently only admissible on the gravity question and not on the self-control question.

[161] See also Leader-Elliott, who says that '[g]eneralisations about racial or cultural variations in the capacity for self-control are speculative in the extreme and there are obvious dangers that judicial acceptance of stereotypes will encourage old prejudices or provoke new ones': Leader-Elliott, 'In Defence of *Stingel*', above n 74, 89. And see now Yeo, 'Sex, Ethnicity', above n 138.

blooded' would they make good politicians/lawyers/judges? As Christine Boyle has argued:

> If one is to avoid essentializing race and in effect racialize assumptions about self-control, then one would, I think, say that what gives rise to murderous rage is likely to vary with experience and values.[162]

The defence of provocation has always been about cultural values in the broadest sense. A fillip on the nose is no longer one of the provocations which, without more, invoke the defence. Hence I find Matthew Goode's critique of Johnston J's reasoning in *Radford* and the analysis in *Allwood* rather disingenuous. He says:

> [T]he imposition of a conjectural and 'objective' overlay on the doctrine of provocation is inconsistent with the basis of that doctrine. The point of the defence is a limited concession to human frailty — a recognition that, while homicide committed by reason of loss of self-control is nevertheless a homicide, it is of a different moral order to homicide committed calmly and deliberately. If that is so, what difference should it make that D *ought to have known* that he or she would lose self-control?[163]

It is not just because the accused killed when 'out-of-control' that we have historically allowed a defence of provocation.[164] It is because the behaviour was also seen in some senses as culturally justifiable or excusable, somehow proportionate to the provocation offered.[165] Because the objective test in the provocation doctrine is the one way in which such values come into play,[166] I too support the *Stingel* clarification and reaffirmation of that objective test.

[162] Christine Boyle, 'The Role of Equality in Criminal Law' (1994) 58 *Saskatchewan Law Review* 203, 215.

[163] Matthew Goode, 'On Subjectivity and Objectivity in Denial of Criminal Responsibility: Reflections on Reading *Radford*' (1987) 11 *Criminal Law Journal* 131, 135.

[164] As Horder says, 'It has never been a *sufficient*, as opposed to a necessary, condition of mitigation that defendants satisfy the excusatory element, by proving simply that they killed in anger': Horder, above n 88, 111. I also think the state of being 'out-of-control' is mediated by culture, rather than being a purely unmediated physiological reaction. One brief demonstration of this comes from Horder's study: he comments that in the early development of the doctrine, men who killed in response to sexual jealousy almost invariably killed their wives' lovers rather than their wives. Although this still of course occurs, it is more common now for men to kill their wives. If a man is 'out of control', how has he learnt over the centuries to direct that violence to his (ex) partner rather than her new partner? See also G Sullivan, 'Anger and Excuse: Reassessing Provocation' (1993) 13 *Oxford Journal of Legal Studies* 421, 427, who, in a review article of Horder, asks of '[t]he man who strangles his unfaithful wife ... would [he] ... have acted in a similar fashion if infuriated by the conduct of a person of superior strength?'; Donna Colker, 'Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill' (1992) 2 *Southern California Review of Law and Women's Studies* 71, 100 concludes that, '[t]he people with whom we are angry, the circumstances we define as anger-appropriate, and the way in which anger is expressed are socially constructed phemonena.' See also Alexander Reilly, *The Heart of the Matter: The Role of Emotion in the Criminal Law* (LLM thesis, University of British Columbia, 1996).

[165] An analysis of whether the defence is primarily about justification or excuse is beyond the scope of this article. For discussions of this and its implications for various types of perpetrators and victims, see Grant, Chunn and Boyle, above n 111, [6.9]. See also Finbarr MacAuley, 'Provocation: Partial Justification, Not Partial Excuse' in Stanley Yeo (ed), *Partial Excuses to Murder* (1990).

[166] Or, as the majority in *Thibert* (1996) 104 CCC (3d) 1, 8 put it, '[i]t has been properly recognized [in Canada] that the objective element of the test exists to ensure that the criminal

C *Multiculturalism and Cultural Relativism*

Stanley Yeo's and McHugh J's critiques of *Stingel* raise substantial questions about multiculturalism, equality and cultural relativism. These issues have been presented most graphically by Jeremy Horder through his example of 'Terreblanche'.[167] He sets the following scene:

> Consider the case of a South African defendant brought up in England as a die-hard Afrikaner (let us call him Terreblanche) who fervently believes that coloured people should never speak to a white man on any matter whatsoever unless spoken to first, and that it is the highest form of insult to a white man for coloured people to break this rule of social intercourse. The 'provocation' put in evidence is that the coloured person he passed in the street, let us say, said 'Good morning' to him before Terreblanche had said anything to him.[168]

Terreblanche 'responded with fatal violence'. He compares this scenario later in the book with the facts in *Uddin*.[169] There a Moslem had killed another Moslem who had thrown a pigskin shoe at him. The judge in that case allowed '[e]xpert evidence relating to the religious significance of the shoe-throwing ... to assist the jury in imagining what it would be like to receive such a provocation, perhaps especially from another Moslem.'[170] Horder states:

> The enlightened decision by the judge to allow this evidence to be given evinces the kind of equal concern and respect that ought to be the hallmark of liberal laws in a culturally plural society.[171]

However, Horder goes on to suggest that the '*Camplin* direction',[172] which decided that characteristics like race could be taken into account in assessing the gravity of the provocation, has the potential to lead to racial or religious intolerance. In the case of Terreblanche, 'is the jury to be directed to take his beliefs into account — *qua* characteristics — in judging the gravity of the provocation ...? Would not such a direction be an outrageous compromise of society's commitment to racial tolerance?'[173] Horder concludes:

> It must be made clear that jurors need not invest themselves with the defendant's characteristics where to do so would entail a morally or politically unacceptable compromise of liberal values such as freedom of expression and racial or religious tolerance.[174]

law encourages reasonable and responsible behaviour'. Whether this is in fact the case is discussed above.

167 Horder, above n 88.

168 Ibid 126.

169 *The Times* (London), 14 September 1929, 7, cited in Ashworth, above n 100, 300, fn 41; Horder, above n 88, 143, fn 22.

170 Horder, above n 88, 144.

171 Ibid.

172 *Director of Public Prosecutions v Camplin* [1978] AC 705 *sub nom R v Camplin* [1978] QB 254.

173 Horder, above n 88, 144.

174 Ibid 145. It is clear in Australia after *Stingel* that a juror is not supposed to put her or himself in the shoes of the defendant as this might lead her or him to say she or he could never have killed. She or he is, however, supposed to factor in racial characteristics (where relevant) to the

It is, of course, extremely difficult to define precisely what 'liberal values' are and how, when they conflict, we can decide which one 'wins'. Boyle suggests another way out of the Terreblanche example: Terreblanche's racism is extraordinary, so he ceases to be an ordinary person.[175] I think this forces us to confront our 'wishy-washy' liberal values, and gives us a neat resolution of this particular dilemma. She goes on to suggest a way to give more substance to 'liberal values':

> A theory of equality informed by subordination could provide guidance as to when underlying experiences and attitudes, for which race is an inefficient proxy, could be seen as relevant. This would require an explicit analysis of who wins and who loses from competing configurations of the ordinary person test and of the attitudes promoted as being ordinary.[176]

This appears to be a much more fruitful path of analysis than one which relies on racialised generalisations which may rebound to the detriment of that racial group and which are unlikely to include the perspectives of all the members of that group.

Let us be very clear about this. All assessments of what conduct amounts to provocation are culturally relative.[177] 'Equality' for the accused is vital, but so is 'equality' for the victim. Grant, Chunn and Boyle provide us with an intriguing list of speculative scenarios which place the issue of equality in sharp relief:

> Is the ordinary male enraged by a homosexual advance? Is the ordinary woman tolerant of or enraged by unwanted heterosexual advances, sexual touchings,

ordinary person, in order to understand the context in which the killing occurred. The moral dilemma remains nevertheless the same in both jurisdictions.

175 However, at the same time she cautions us against using race as a proxy for values — why could not an ordinary white person be enraged by racism, she asks?: Boyle, above n 162, 215. Note that Horder seems to make the same point when he alludes to the example of an after dinner speaker who uses the term 'dirty nigger' in his speech knowing that there are people of colour, 'or those who believe(d) in racial equality' in the audience: Horder, above n 88, 140. See also Leader-Elliott, who states that '[p]rovocation is grave only if ordinary people would consider it grave': Leader-Elliott, 'In Defence of *Stingel*', above n 74, 79. He goes on to say that '[t]hough the High Court had nothing explicit to say of this problem [cultural relativism] in *Stingel* or *Masciantonio*, the court's emphasis on the need for *objective* assessment of the gravity of the provocation and its adoption of the rhetoric of equality, is consistent with the view that the provocation defence is bounded by limits of policy, fairness and morality': Leader-Elliott, 'In Defence of *Stingel*', above n 74, 79 (emphasis in original).

176 Boyle, above n 162, 216. Boyle has the advantage of being able to point to the Canadian Charter of Rights and Freedoms to give some substance to 'liberal values', suggesting that a belief in the values the Charter espouses can be assumed to be held by all those in Canada. Notwithstanding the absence of a parallel document in Australia or England, an understanding of inequality as subordination will be of more guidance than mere 'liberal values'. See also Horder, above n 88, 142–3, who writes of 'insults that take the form of "distancing", treating the objects of the provocation as inferiors, less worthy of one's respect and concern ... An accusation, for example, that feminist scholarship is not "proper" scholarship is an insult of this kind, as is, in a different context, Lord Simon's example of the insult "dirty nigger" [in *Camplin*] hurled at a black person by a white person. "Distancing" conduct of this kind, that wrongly treats another as excluded from one's moral, cultural, intellectual, or political community, arguably involves the most deeply wounding threats or challenges to a conception of self-worth.'

177 For a sustained argument that courts are more inclined to see ethnicity as relevant to provocation when the represented ethnic values are consistent with that of the dominant culture, see Raman, above n 137, ch 4.

> misogynist statements, the display of pornography? Is she feminist or anti-feminist? Is the ordinary white person enraged by racist statements? The ordinary person of colour? Is the ordinary Black woman enraged by the idea that she is fit only for domestic work or that she has an insatiable sexual appetite? Does the ordinary male insist on total control of his spouse so that signs of independence are enraging? Is he committed to sex equality or not? Are the commonplace reminders of sexual and racial hierarchies provocation, or instead the not-so-commonplace rebellions against inequality? Would a 'nagging' wife provoke an ordinary person, but not a racist harasser?[178]

This list of scenarios and speculative defendants is not meant to lead us down the path of a fully subjective test in the law of provocation. Rather it reminds us that, in Hampel J's words, '[s]ocial considerations and changing conditions and attitudes'[179] have been part and parcel of the development of the doctrine of provocation from its inception. Therefore, a direction from a judge to a jury that a woman leaving a relationship, perhaps coupled with the odd accusation of sexual enjoyment with a new partner, could provoke an ordinary man is sending a particular message about male culture, and a particular message about the inequality of women.

IX THE FUTURE OF PROVOCATION

The attraction of factoring into an assessment of the gravity of the provocation, race (or attitudes to racist speech) where racist provocation is alleged, or disability (or concern about discrimination against people with a disability) where, say, a reference to 'retards' is said to be provocative, is precisely because it allows us to take account of context. To leave out this context renders incomprehensible what we can, or might, otherwise understand and even empathise with. I have suggested throughout this paper that the provocation doctrine has always been concerned about values. The value that I have tried to put into focus is that of women's autonomy, a value that traditionally has been omitted in provocation law. In my analysis of *Moffa* and of 'self-induced' provocation, I have drawn attention to the ways in which 'the facts' in these cases can be described in alternative ways, ways that recognise women's autonomy and the context of the dead woman's life. In other words, in order to assess the gravity of the provocation to the man, the provoker's alleged taunts and actions should be placed in the context of the dead woman's life as well.

The majority of the Supreme Court of Canada has stated, '[r]eality and the past experience of the ages recognize that this sort of situation [extra-marital affairs and separation] may lead to acts of provocation.'[180] As Scheppele has pointed out, there is no one 'reality'; the very same facts can be reinscribed, even by judges in the same case, so as to see 'the separation' — the exercise of autonomy — rather than just 'the sex'. The remainder of the discussion has concentrated on

[178] Grant, Chunn and Boyle, above n 111, [6.13]–[6.14].
[179] *Voukelatos* [1990] VR 1, 26.
[180] *Thibert* (1996) 104 CCC (3d) 1, 12.

trying to problematise the content of the 'ordinary person' test to argue that no matter what 'the past experience of the ages' teaches us, it should no longer be in any sense ordinary for men to be partially forgiven when they kill their wives who are leaving them, not even when they are alleged to have been taunted about their own sexual inadequacies. Much of the debate about 'the race' of the ordinary person has forgotten that there are both ordinary women, as well as ordinary men, who have an ethnic identity. The objective 'ordinary person' test must be one that directly confronts current social values and takes account of the subordination of women.

One other response to the gendered nature of the provocation doctrine is to push for the complete abolition of the defence. That this is suggested at a time when even the common law is starting to take account of the circumstances in which women kill may be somewhat ironic. There has been a tendency, at least in Australia, to characterise the responses of women who kill their violent batterers in the terms of provocation, a partial defence, rather than self-defence, a complete defence.[181] There is little doubt that as a matter of 'law' (if this exists apart from 'facts'), women's homicidal response to battering can fit within the existing formulation of the defence of self-defence.[182] Indeed, the abolition of provocation (at least in jurisdictions without the defence of diminished responsibility) could force defence counsel into pushing the bounds of the doctrine of self-defence as there would be little other choice of defence.[183]

181 See, eg, Tolmie, above n 10.

182 See, eg, *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645. See also Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16 *Criminal Law Journal* 369; Ian Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self-Defence' (1993) 15 *Sydney Law Review* 403; Katherine O'Donovan, 'Law's Knowledge' (1993) 20 *Journal of Law and Society* 427; Julie Stubbs and Julia Tolmie, 'Race, Gender and the Battered Woman Syndrome: An Australian Case Study' (1995) 8 *Canadian Journal of Women and the Law* 122.

183 In relation to gender and the self-control part of the objective test, Yeo has argued that the self-control part of the objective test can be further broken down to not just include capacity for self-control, but must also take into the response patterns of various different groups, including women. He argues that there is evidence that women are more likely to respond in a 'slow burn reaction' to 'provocation': Yeo, 'Sex, Ethnicity', above n 138, 313. Gleeson CJ (with whom Finlay and Abadee JJ agreed) in *R v Muy Ky Chhay* (1994) 72 A Crim R 1, 11 (discussed by Yeo, 'Sex, Ethnicity', above n 138, 314) stated that '[t]o extend the metaphor, the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion'. While it is important to recognise that many women may react differently to many men in circumstances of 'provocation', it seems even more important to focus on the second part of Gleeson CJ's quoted remarks, the circumstances in which women kill. As the data I have reproduced above shows, women are much more likely to kill their partners in response to violence against them, rather than because of sexual possessiveness. Hence it is that violence against them, rather more than the nature of their responses to it, which must remain the focus of discussion. (To be fair to Yeo, he too recognises this context, noting that '[w]omen are usually the targets rather than the instigators of violence': Yeo, 'Sex, Ethnicity', above n 138, 315.)Yeo ties the responses of women clearly to these circumstances, stating that '[t]he underlying emotion of fear may explain the choice of weapons used by women, the timing of the homicidal act, the stealth in carrying it out and the apparent appearance of calmness and deliberation displayed by these women during and after the killing': Yeo, 'Sex, Ethnicity', above n 138, 315. My question is, why call this a response to 'provocation'? Why is it not action in self-defence?

Jeremy Horder, after a detailed analysis of the historical development of provocation and an exploration of the role of anger concludes that 'the doctrine as a whole cannot survive an attack from the perspective of gender politics'.[184] He continues:

> One must now ask whether the doctrine of provocation, under the cover of an alleged compassion for human frailty, simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular *women's* natural aggressors. Unfortunately, the answer to that question is yes ... I am ... concerned with the values commonly thought by men, in particular, to be central to their conceptions of self-worth. For it is threats to those values which are most likely to produce the desire for retaliatory suffering, and thus the violence that is characteristically a male response to provocation ... It is absolute possession of a woman's sexual fidelity, of her labour, and of (on demand) her presence, love, and attention in general that lies at the heart of many men's conception of their self-worth.[185]

He points out that:

> It is thus largely from a male-centred perspective that the reduction of an intentional killing from murder to manslaughter is capable of being regarded as a compassion to human infirmity. From a feminist perspective the existence of such mitigation simply reinforces in the law that which public institutions ought in fact to be seeking to eradicate, namely, the acceptance that there is something natural, inevitable, and hence in some (legal) sense-to-be-recognised forgivable about men's violence against women, and their violence in general.[186]

He concludes that 'the doctrine of provocation should be abolished, and the effect of provocation in murder cases left as a matter for mitigation in sentence' stating:

> The morality of retribution will then be left to the institutions of state punishment and we shall say to the provoked killer, 'Provocation ought no more to be regarded as inviting personal retaliation than a woman's style of dress invites rape. It is one thing to feel great anger at provocation; but quite another (ethical) thing to experience and express that anger in retaliatory form. For you there can be no mitigation of the offence.[187]

I, too, think there is serious merit in abolishing the defence of provocation. The difficulty I have with Horder's proposal is that leaving 'provocative' facts to the discretion of a judge in sentencing (where there is no longer a mandatory life sentence for murder), will do nothing to remove the gendered assumptions embodied in the current use of the provocation defence by men in situations of 'sexual jealousy'. To be sure, the removal of these considerations to the realms of sentencing does send an important cultural message: these men remain

[184] Horder, above n 88, 192.
[185] Ibid 192–3.
[186] Ibid 194.
[187] Ibid 197.

murderers.[188] And it is this fact that seems to motivate Horder's proposal. Such a proposal may well have a double effect. Appeal judgments on legal questions are more likely to be reported, to be easily accessible, than are decisions, even appeal decisions, on sentence. In that sense, the (proposed) cultural story that killing a spouse because she is leaving you and has 'taunted' you can lead to mitigation of your sentence will be less available, and arguably then have less effect in reinforcing violence against women. But at the same time, it will be harder for us to discern whether gendered violence continues, in some senses, to be condoned by sentencers; that is, whether and how it is described by judges as mitigatory in sentencing. We need to be vigilant to ensure that the much less publicly available sentencing process does not become the new vehicle for the playing out of 'gender politics'. Hence, if provocation were to be abolished, its abolition should be accompanied by a clear statement of the general irrelevance of sexual jealousy as a mitigating factor in sentencing.

[188] This statement is easier to make in a jurisdiction that does not have the defence of diminished responsibility (for example, my own — Victoria, Australia). I speculate that at least some of the cases I am concentrating on here play themselves out under this defence where it is available. For a description of English cases where both provocation and diminished responsibility were pleaded, almost all of which involve men killing their wives, see R Mckay, 'Pleading Provocation and Diminished Responsibility Together' [1988] *Criminal Law Review* 411. However, as Christine Boyle pointed out to me, the role of the prosecution also needs to be scrutinised as their charging discretion may well be exercised with little or no scrutiny.