

# Resolving Gender Bias in Criminal Defences

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*Woman was made to yield to man and put up with his injustice*

Jean Jacques Rousseau

Legal history and precedent have formulated many of the common criminal defences to account for male experiences alone. Consequently, women defendants fail to successfully plead these defences or they have to distort their experiences to fit the male stereotypical mould. This article examines three possible responses to such gender inequality. The first response is to maintain the strict male-gendered defences. The second is to create special defences for women. Thirdly, existing defences could be modified to include the experiences of women in addition to those of men. It is argued that the developments of these flexible gender-sensitive defences is the best solution to reducing gender inequality in the criminal law.

## INTRODUCTION

The past decade has witnessed growing attention by lawmakers to women as offenders and victims of violent crime. This attention has been prompted by the findings of several studies which reveal the alarming extent of domestic violence occurring in Australia. For example, the National Committee on Violence regarded it to be 'widespread, almost to the point of being a normal, expected behaviour pattern in many homes' with between one in three and one in ten families being affected by domestic violence.<sup>1</sup> Such findings have led to a host of legislation which seeks to protect women against their batterers<sup>2</sup> and the creation of services to meet the needs of women in crisis arising from such violence.<sup>3</sup> Whilst a vast majority of battered women do not fight back, some do, even to the extent of killing their abusers. This small group of women turn from being crime victims into defendants and must rely on existing criminal defences to acquit themselves of the crime charged.

However, there is a major problem confronting women who seek to rely on these criminal defences. It is that the defences have been developed through a long history of judicial precedents on the basis of male experiences and definitions of situations. Consequently, female defendants whose experiences and definitions fall outside these male-inspired defences are confronted with the prospect of either failing to plead them successfully or having to distort

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<sup>1</sup> National Committee on Violence, *Domestic Violence*, Issues Paper No 2 (1989), p 3.

<sup>2</sup> For example, court injunctions obtained by women for personal protection. For a full discussion of these legislative measures, see N Seddon, *Domestic Violence in Australia: The Legal Response* (Sydney, Federation Press, 1989).

<sup>3</sup> The Domestic Violence Crisis Service (DVCS) which began operating in Canberra in 1988 is a good example. For a critique of the Service, see H McGregor and A Hopkins, *Working for Change: The Movement against Domestic Violence* (Sydney, Allen & Unwin, 1991).

their experiences in an effort to fit them into the defences. In the following passage, Stella Tarrant has described this persisting gender inequality in the criminal law in the context of domestic violence:

the primary structural requirements of the defences work to reproduce the silencing of women in domestic violence because the defences fail to contemplate the power dynamics involved in that violence. A woman's experience of her marital relationship and the killing itself is likely to be systematically skewed. This skewing may preclude access by the woman to the defence; however, even where the defence is available (and even where it is successful) her experience may be presented and understood in a distorted way.<sup>4</sup>

This problem of gender bias in criminal defences is the subject of a fast growing literature.<sup>5</sup> The assertions of gender inequality against women such as those expressed by Tarrant are strongly supported by theoretical legal discourse, legal history and practice. The problem can no longer be ignored by our lawmakers, especially when it could wreak injustice on half of the general population.

This article evaluates the criminal defences of provocation, duress, self-defence and other related pleas as they apply to female defendants in the common law jurisdictions of Victoria, New South Wales and South Australia. In most of the cases under consideration, the offence was committed in a setting of domestic violence with the female defendant claiming that her criminal conduct was a reaction to batterings from her spouse.

The ensuing Parts consider possible responses to the problem of gender inequality contained in these defences. Part I comprises a brief review of those requirements of provocation, duress and self-defence which have traditionally made them 'strict male-gendered defences'. These requirements were derived from male experiences and definitions of situations. For the criminal law to maintain them is to continue to ignore the bias which it has against female defendants. Fortunately, much of the law has now been revised to take cognizance of women's experiences. Part II considers several of these recent revisions. They may be described as 'strict female-gendered defences' and include the defence of marital coercion and the concept of battered woman syndrome. These responses may be seen as efforts to rectify, at least partially, the current imbalance by creating special defences for women. Part III points to recent changes to the defences of provocation, duress and

<sup>4</sup> S 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, 585.

<sup>5</sup> For example, see E Sheehy, J Stubbs and J Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16 *Criminal Law Journal* 369; J Tolmie, 'Provocation and Self-Defence for Battered Women who Kill?' in S Yeo (ed), *Partial Excuses to Murder* (Sydney, Federation Press, 1991), 61; K O'Donovan, 'Defences for Battered Women Who Kill' (1991) 80 *Journal of Law and Society* 219; H Maguigan, 'Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals' (1991) 140 *University of Pennsylvania Law Review* 379; J Greene, 'A Provocation Defence for Battered Women Who Kill?' (1989) 12 *Adelaide Law Review* 145; K Kinports, 'Defending Battered Women's Self-Defense Claims' (1988) 67 *Oregon Law Review* 393; P Crocker, 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defense' (1985) 8 *Harvard Women's Law Journal* 121.

self-defence which enable women's experiences and definitions of situations to be recognised alongside those of men. These changes have laid the groundwork for developing what might be described as 'flexible gender-sensitive defences'. It will be argued that this last response holds the best promise for achieving gender equality in the application of criminal defences frequently pleaded by battered women.

## I. STRICT MALE-GENDERED DEFENCES

The defences of provocation, duress and self-defence are the creation of the common law. That creative process has been male-oriented and dominated because both judges and legal practitioners are predominantly men. Accordingly, the traditional requirements for these defences are the result of legal arguments and deliberations stemming from male experiences and perspectives. Another explanation for the bias in the law favouring men is the fact that the courts have almost entirely fashioned the defences in the light of circumstances involving male defendants. This is because the vast majority of violent offences are committed by men. The male-specific character of these defences is presented in the following brief review of the defences as they stood as recently as a decade ago and, in some respects, as they stand now. Later on, Parts II and III will show that the process of adjusting the defences to account for women's experiences has begun. While aspects of what follows immediately below may therefore have ceased to be good law, the discussion is important because it highlights the injustices which the law inflicts on female defendants whenever it ignores their experiences.

### (a) Provocation

The defence of provocation is a partial excuse which reduces a charge of murder to manslaughter. The requirements of the defence were developed to meet standard cases such as killings immediately following a sudden quarrel or upon the defendant unexpectedly discovering his wife in bed with her lover. Thus, the law required the provocative conduct of the deceased to have occurred suddenly or unexpectedly and for the defendant to have killed very shortly thereafter.<sup>6</sup> This requirement does not account for women experiencing what one commentator aptly describes as 'constipated rage' resulting in delayed retaliation.<sup>7</sup> Furthermore, the law confined the provocative conduct to the incident occurring just prior to the killing.<sup>8</sup> This ignored the social reality of many battered women's experiences. Such women may have endured months or years of physical and psychological abuse from their

<sup>6</sup> See *Parker v R* (1964) 111 CLR 665 for a discussion of case authorities. See also generally, G Coss, "'God is a righteous judge, strong and patient; and God is provoked every day": A Brief History of the Doctrine of Provocation in England' (1991) 13 *Sydney Law Review* 570.

<sup>7</sup> C Ewing, *Battered Women Who Kill: Psychological Self-Defense as Legal Justification* (Massachusetts, Lexington Books, 1987), 70-3.

<sup>8</sup> fn 6.

batterers. The last seemingly minor episode of violence might have been the 'straw which broke the camel's back'; yet the law confined the provocative incident to the event immediately before the killing. Another requirement which promoted the defence as male gender specific was the objective test. From its inception in the early 19th century until the late 1970s, the test was framed in terms of the power of self-control of a *reasonable man*.<sup>9</sup> Whether gender equality would be enhanced by recognising a reasonable woman's power of self-control will be discussed in the next two Parts of this article.

### (b) Duress

The defence of duress concerns defendants who complied with the orders of their threateners to commit the offences for which they were charged. Currently, the law confines the types of threats to those of death and serious bodily harm.<sup>10</sup> These are the kinds of threats which battered women are invariably subjected to. However, there may be other types of pressures placed on women by their spouses which the law fails to recognise. For instance, the spouse might threaten to leave the relationship thereby placing immense psychological pressure on a woman seeking to maintain the ideals of marriage and motherhood. The threats could also be of an economic nature, depriving the woman of her financial investment in the relationship and of the standard of living and the financial protection it brings. There may be moral constraints as well, compelling the woman to prevent her children from becoming fatherless following his threat to walk out on the family. These pressures are precisely the same ones which prevent a woman leaving a violent relationship.<sup>11</sup> Hence, under the present law, the defence would be unavailable to a woman who, for example, committed social security fraud when her husband threatened to leave her and their children if she refused to do so.

Another requirement of the defence of duress which ignores women's experiences is the duty to seek police protection from the threatener should a reasonable opportunity to do so arise.<sup>12</sup> For many female defendants, the social reality at the time of the offence was that they were living with their threateners. However efficacious police protection might generally be, it

<sup>9</sup> In *R v Welsh* (1869) 11 Cox CC 336, 339, Keating J expressed what is considered to be the forerunner of the current test when he said: 'In law it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter . . . something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act.'

<sup>10</sup> This is the position at common law: for example, see *R v Hurley and Murray* [1967] VR 526; *R v Lawrence* [1980] 1 NSWLR 122; *R v Brown* (1986) 43 SASR 33. It is also the law in the Code jurisdictions with the exception of the Northern Territory: see *Criminal Code* 1899 (Qld), s 32; *Criminal Code Compilation Act* 1913 (WA), s 32; *Criminal Code Act* 1924 (Tas), s 20(1); *Criminal Code Act* 1983 (NT), s 40.

<sup>11</sup> A Wallace, *Homicide: The Social Reality* (Sydney, NSW Bureau of Crime Statistics and Research, 1986), p 119; K O'Donovan, 'Defences for Battered Women who Kill' (1991) 18 *Journal of Law and Society* 219, 235.

<sup>12</sup> This requirement is confined to the common law: for example, see *R v Brown* (1986) 43 SASR 33, 39-40 and the case authorities cited there. The Codes do not have this requirement because they require instead that the threatener be physically present at the time of the offence: see provisions cited in fn 10. *Contra* the Northern Territory defence.

stands little chance in cases where a woman intends to continue the relationship with her threatener. Even when women do leave the relationship and have sought police protection against their threateners, studies have shown that such protection is largely ineffective.<sup>13</sup>

### (c) Self defence

Turning next to self-defence, several of its requirements are based on the supposition that the defendant was responding to an isolated and extraordinary assault. The usual scenario envisaged by the law is of an isolated contest between two strangers, presumably males. For example, there is the condition that the defensive action had to be taken when the assault was in progress or was just about to begin.<sup>14</sup> This fails to acknowledge the circumstances of many battered women who are subjected to assaults as part of their *ordinary* existence. These women live in perpetual danger and fear of being assaulted. For the defence to accommodate the experiences of these women, it must recognise the legitimacy of taking defensive action well after a battering has occurred or well before the next one. This aspect of delayed retaliation by female defendants is also found in the defence of provocation. A related aspect of the defence is the requirement of reasonableness of the defendant's belief as to the nature of the attack. For many years, our courts were governed by the High Court formulation of the defence in *Viro* which expressed this requirement in terms of 'not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself'.<sup>15</sup> We may observe that the 'reasonable man' is rejected not on account of gender bias but because a greater subjectivity of belief was considered necessary by the High Court. It is noteworthy that this form of belief is still very much male gender specific. Hence the law envisages the assessment of violent encounters through male perceptions and definitions of situations.

Yet another aspect of self-defence which reflects its bias toward males is the requirement of proportionality between the attack and the defensive action taken.<sup>16</sup> This requirement imposes a need to balance with some precision the force threatened by the assailant with that countered by the defender. It would therefore deny the defence to defendants who used a weapon, for example, an axe or a gun, when the assailant was unarmed. This would be so even if the defendant was shown to have been physically weaker than the assailant, as female defendants normally are when compared to their male batterers.

This review of the defences of provocation, duress and self-defence clearly bears out the claim by Tarrant and other commentators that women pleading

<sup>13</sup> S Hatty, *Male Violence and the Police: An Australian Experience* (Kensington, School of Social Work, University of NSW, 1988), p 184; J McCulloch, 'Police Response to Domestic Violence, Victoria' in S Hatty (ed), *National Conference on Domestic Violence* (Canberra, Australian Institute of Criminology, 1986) 523.

<sup>14</sup> *Viro v R* (1978) 141 CLR 88, 146.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Id* 147.

these defences are silenced. The male experiences and definitions of situations which have been instrumental in formulating these defences have effectively shut out the experiences and definitions of women. Duly informed of this situation, law-makers can no longer permit the defences to continue in their strictly male-gendered forms. A failure to revamp the law to take account of women's experiences is to deny the human and social reality in which battered women live and to perpetuate the grave injustice which results from this. Fortunately, law-makers have acknowledged the need to revise the law to remove this gender inequality. Parts II and III present two different ways by which they have sought to meet such a revision.

## II. STRICT FEMALE-GENDERED DEFENCES

The law-makers have occasionally sought to rectify the gender imbalance of criminal defences by devising special pleas for women. Two such pleas will be considered here, namely, the defence of marital coercion and the concept of battered woman syndrome.

The defence of marital coercion is a creation of the common law but has largely been superseded by legislation.<sup>17</sup> The best formulation of the defence appears in s 336 of the Victorian *Crimes Act* 1958, the relevant parts of which read:

(2) Where a woman is charged with an offence . . . that woman shall have a complete defence to such charge if her action or inaction (as the case may be) was due to coercion by a man to whom she was then married.

(3) For the purposes of this section 'coercion' means pressure, whether in the form of threats or in any other form, sufficient to cause a woman of ordinary good character and normal firmness of mind, placed in the circumstances in which the woman was placed, to conduct herself in the manner charged.

(4) Without limiting the generality of the expression 'the circumstances in which the woman was placed' in sub-section (3), such circumstances shall include the degree of dependence, whether economic or otherwise, of the woman on her husband.

It may be observed that this defence fills in the gaps left by the defence of duress, mentioned in Part I, in respect of women's experiences. The husband's threats are not confined to physical violence but may extend to threats which affect the wife psychologically, emotionally, financially or present her with a moral dilemma. Also, the defence does not impose a duty on the wife to seek police protection before it can succeed.

However, there are features of this defence which cast women in a mould *fashioned by men*, thereby failing to eradicate the inequality of the law toward

<sup>17</sup> See *Crimes Act* 1958 (Vic), s 336(1); *Criminal Law Consolidation Act* 1935 (SA), s 328(a); *Criminal Code Act* 1924 (Tas), s 20(2); *Criminal Code* 1899 (Qld), s 32; *Criminal Code Act Compilation Act* 1913 (WA), s 32. Compare *Crimes Act* 1900 (NSW), s 407A of which is silent on the matter. For a critique of the defence, see S Yeo, 'Coercing Wives into Crime' (1992) 6 *Australian Journal of Family Law* 214.

female defendants. These features are contained in the objective test specified under s 336(3) of a 'woman of ordinary good character and normal firmness of mind'. Dealing first with 'good character', it is difficult to justify the relevance of this to the issue of coercion. Surely we can envisage a prostitute possessing the strongest compunctions against committing child abuse or incest because of her own personal traumatic experiences. Not only is this requirement overly moralistic but it smacks of male chauvinism toward 'well-bred ladies'. This is borne out further by the defence being limited to legally married women as opposed to those in de facto relationships.

Then there is the requirement of a 'woman of normal firmness of mind'. The inevitable implication of such a gender specific objective test is that the law views women as possessing less fortitude than men in the face of threats. This can only be a bald assertion of a most generalised nature, and one made by men. It is not difficult to envisage a woman resolutely resisting the gravest threats to protect her or another's physical safety or integrity when many men in her position would have succumbed. This same criticism may be directed at the defence of duress. In the recent case of *Abusafiah*, the New South Wales Court of Criminal Appeal specified as a requirement of the defence that 'such was [the threat's] gravity that a person of ordinary firmness of mind and will, and of the same sex and maturity as the accused, would have yielded to that threat in the way in which the accused did.'<sup>18</sup> While maturity (or age) could conceivably affect a person's fortitude, there is no sound basis for asserting the same for her or his gender. Certainly, the *Abusafiah* ruling would enable the defence of duress to succeed more readily for female defendants because the level of ordinary firmness expected of them would be lower than for male defendants. But this is achieved at too great a price. The cost to the law is that it may be held up to ridicule for basing itself on a contentious and unproven assertion of fact. For womankind, the cost is that the law is allowed to portray women as possessing less fortitude than men.

The above pronouncement from *Abusafiah* may be usefully compared with another in relation to the defence of provocation. That other pronouncement is the following classic statement by Lord Diplock (1978) in *DPP v Camplin* on the objective test in provocation: 'the reasonable man . . . is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him'.<sup>19</sup> In its effort to render the ordinary person test gender specific, the House of Lords actually increased the inequality between female and male defendants pleading the defence.<sup>20</sup> Once again, while age as a characteristic affecting the power of self-control may be justified on the ground that it is a good measure of a person's emotional stability, sex has no such claim.

<sup>18</sup> (1991) 56 *A Crim R* 424, 438.

<sup>19</sup> [1978] AC 705, 718 and approved of by several Australian decisions, for example, *R v Romano* (1984) 36 SASR 283; *R v Dincer* [1983] 1 VR 460; *R v Croft* [1981] 1 NSWLR 126.

<sup>20</sup> See H Allen, 'One Law for All Reasonable Persons?' (1988) 16 *International Journal of the Sociology of Law* 419.

Furthermore, female defendants would be unfairly disadvantaged by this proposition since it implies that ordinary women (being supposedly the gentler sex) have a higher tolerance level than ordinary men to provocation. This would result in female defendants finding it more difficult than men to successfully plead the defence.

### Battered woman syndrome

We turn next to consider the concept of battered woman syndrome which was recently adopted by the courts of South Australia and New South Wales following North American developments.<sup>21</sup> The syndrome is not a defence as such but assists in proving certain requirements of defences. A woman manifesting the syndrome is said to be in a depression-like state, becoming immobilised, passive and unable to improve her situation or to escape from her batterer. The syndrome is presented in court through clinical expert opinion evidence. The courts have taken this course on the basis that ordinary jurors are not by themselves sufficiently equipped to appreciate the psychological state of battered women. For instance, it was feared that, without expert assistance, jurors would not understand why a frequently battered woman continued to remain with her batterer.

The syndrome certainly does account for the experiences of battered women. But, with due respect to its judicial supporters, the law's reliance on the syndrome could be construed as a product of men's manipulation to reaffirm the law's bias against women. Consequently, its recognition by our courts has perpetuated the inequality of the criminal law towards female defendants. These assertions are borne out in several ways.<sup>22</sup> First, it may be questioned whether our jurors are ignorant of the psychological state of battered women. This runs counter to observations such as those of the National Committee on Violence that domestic violence is so prevalent in Australia as to be normal or expected behaviour in many homes. Even if they were ignorant, jurors would surely be capable of appreciating the mental state of a battered woman when they hear her testimony or are informed by defence counsel. The law's insistence on the use of expert witnesses has the effect of rendering domestic violence an exceptional and unfamiliar occurrence when the reality is that it is so common as to be a norm. Secondly, by giving the syndrome such a prominent role, the courts have created a real danger of the law denying the experiences of many battered women who do not manifest the clinical symptoms of the syndrome. Thirdly, there is the silencing of the woman herself who suffers from the syndrome. She is portrayed as an unreliable witness whose testimony has to be supported by an expert. Furthermore, her experiences have to be reconstructed in the form of a scientific or medical discourse. Fourthly, the syndrome labels the female defendant as

<sup>21</sup> *Runjanjic and Kontinnen* [1991] 53 A Crim R 362; *R v Hickey* (1992) 16 Crim LJ 271; *Kontinnen* (1992) 16 Crim LJ 360.

<sup>22</sup> For a more detailed critique, see E Sheehy, J Stubbs and J Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16 *Criminal Law Journal* 369.



irrational, ill and helpless when she may have actually been none of these. Her act of self-help which constituted the crime charged clearly runs counter to being helpless and is more likely the work of a rational and reasonable mind. There could be other explanations as to why a battered woman remained in the relationship. An obvious explanation could be that she simply had nowhere safe to go and no one she could turn to for protection. The failure of welfare agencies and the police to provide effective support and protection is a very real experience of many battered women. This experience is ignored when the courts rely solely on the syndrome, with its connotations of psychological abnormality, to explain why these women did not leave a violent relationship.

The above discussion highlights some of the main criticisms against such female gender specific pleas as marital coercion and the battered woman syndrome. There is another major criticism shared by all such efforts to recognise women's experiences through specially formulated female gender specific pleas. It is that they leave unchallenged the strictly male-inspired requirements contained in such defences as provocation, duress and self-defence. For instance, in respect of duress, law-makers might be reluctant to recognise threats of a psychological or financial nature because the defence of marital coercion already recognises these kinds of threats. The result would be that unmarried women who are confronted with such threats would be left without any defence. With regard to self-defence, law-makers might continue to interpret the requirement of reasonable belief as to the type of attack from a male defendant's perspective, given the availability of the battered woman syndrome to female defendants. This forces battered women who do not manifest the syndrome to skew their experiences in an attempt to fit the stereotypical test of the reasonable man acting in self-defence.

There is a far more cynical way of viewing the development of strict female gender specific defences. It is that they are mere tokens to pacify the feminist critics of the current criminal defences. But even these tokens have hidden barbs for women. Thus for marital coercion, women are regarded as having less fortitude than men, and the defendant is compared with an ordinary woman of 'good' or upright character. As for the battered woman syndrome, it presents a woman acting in defence against her batterer as irrational and cowed. This image stands in stark contrast to a male defender whose actions are often portrayed as rational and heroic against an unlawful aggressor. These criticisms of strictly female-gendered defences pave the way for another and better response to the problem of gender inequality in the criminal law.

### III. FLEXIBLE GENDER-SENSITIVE DEFENCES

There are several recent legal developments which show that law-makers are prepared to adjust defence requirements to enable the experiences of women to be recognised. The distinct advantage of this response over the creation of

strict female-gendered defences is that women's experiences are accounted for within the framework of the general defences themselves. Some instances of modifications to the defences of provocation, duress and self-defence which enhance gender equality will now be described.

The defence of provocation was revised substantially by legislation in New South Wales following the recommendations of a parliamentary Task Force on domestic violence.<sup>23</sup> Under the revised law, the act of killing need not have occurred immediately after the provocative incident. Provided the defendant killed while suffering a loss of self-control, the defence would succeed even though the retaliation was delayed. This would account for the battered woman's experience of 'constipated rage' which connotes intense anger continuing over a period of time in a pent-up state and exploding when the act of killing eventuates. The New South Wales provision also enables the provocation offered to be interpreted in the light of past provocative incidents. Hence what might appear as a relatively minor act of provocation when seen in isolation, for example a slap on the face, could justifiably be construed otherwise by a woman who had endured a long period of violence and abuse from the provoker.

There is another recent modification to provocation well worth noting which was initiated by the High Court. It concerns the objective test in provocation and applies to both Code and common law jurisdictions. In *Stingel v R*, the High Court by a unanimous decision held that the power of self-control of an ordinary person should not, contrary to the House of Lords in *Camplin*, be gender specific. The Court relied on the principle of equality before the law in support of its ruling:

The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accused are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.<sup>24</sup>

The High Court was prepared to acknowledge that members of one sex might have higher or lower average powers of self-control than members of the other sex. But it regarded this as irrelevant to the objective test because the test was concerned with the minimum level of self-control expected of ordinary people as a whole rather than with averages of different groups of people. As the Court put it, 'the differences between different classes or groups [should] 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.'<sup>25</sup> This expression of the gender-neutrality of the ordinary person's

<sup>23</sup> The amendments to the New South Wales *Crimes Act* were introduced in 1982 by the *Crimes (Homicide) Amendment Act 1982* following the *Report of the New South Wales Task Force on Domestic Violence* (1980).

<sup>24</sup> *R v Hill* (1986) 25 CCC (3d) 322, 345 and cited with approval by the High Court in *Stingel* [1990] 65 ALJR 141, 145.

<sup>25</sup> *Id* 147.

power of self-control constitutes a significant advance toward dispelling male gender bias in the law of provocation. Under this approach, it is no longer relevant what the psychological make-up of women is when compared to men since everyone is measured by the same minimum standard of self-control. Consequently, the injustice of evaluating female defendants according to a higher level of self-control than the one expected of men has been removed. However, it does not follow that the different experiences of men and women are likewise irrelevant. These experiences are material when evaluating the *gravity* of the provocation (an entirely separate matter from power of self-control) toward an ordinary person of the same sex as the defendant.<sup>26</sup> For instance, in a South Australian case, the deceased husband had sought to caress the defendant while saying that theirs should be 'one big happy family'.<sup>27</sup> The court was prepared to interpret this seemingly innocuous statement in the light of the defendant's experience. To her, the deceased was saying that he intended to continue the violence and other abuse on her and their daughters which he had inflicted over the past years.

The defence of duress has also undergone changes which take account of women's experiences. The most enlightened formulation of the defence appears in the Northern Territory *Criminal Code Act* 1983.<sup>28</sup> The provision does not specify the types of threats which can activate the defence, thereby enabling threats other than those of physical violence to be recognised. Furthermore, while there is a requirement to seek police protection, the provision exempts persons from this duty if a reasonable person similarly circumstanced would not have sought such protection. The notorious practice of police non-intervention in domestic altercations should normally lead the courts to regard the case as falling within this exemption.<sup>29</sup> The provision also specifies an objective test, namely, that 'a reasonable person similarly circumstanced would have acted in the same or a similar way'. The gender neutrality of this test may be contrasted with the gender-specific one advocated by the New South Wales Court of Criminal Appeal in *Abusafiah*.<sup>30</sup> Following along the lines of the High Court's decision in *Stingel*, the principle of equality should require men and women to be measured by the same limits or range of human fortitude which can be characterised as ordinary. The law would thereby also avoid the quagmire of determining whether men are more or less courageous than women, and, resolving the practical difficulties encountered by triers of fact in applying such a difference, if any, to a real case. With the psychological state of fortitude held constant for both sexes, triers of fact can concentrate on the task of evaluating the gravity of the threat to the defendant. In this exercise, the different experiences of men and women are significant. For example, the threat by a spouse to leave might have a greater adverse impact on the female partner of the relationship, because of such factors as her social conditioning to be the main carer of their children, or

<sup>26</sup> Id 146.

<sup>27</sup> *The Queen v R* (1981) 28 SASR 321.

<sup>28</sup> Section 40.

<sup>29</sup> See also the common law case of *Goddard v Osborne* (1978) 18 SASR 481.

<sup>30</sup> (1991) 56 A Crim R 424.

because she would be worse off financially, as the family arrangements had made the male partner the sole breadwinner.

The plea of self-defence has lately seen several significant erosions to its strict male-inspired requirements.<sup>31</sup> The imminence of the attack is now much more liberally construed, the law no longer requiring the attack to have started or be just about to commence when the defendant took defensive action. The attack would be regarded as imminent if the defendant honestly and reasonably believed that the assailant 'remained in a position of dominance and in a position to carry out the threatened violence at some time not too remote, thus keeping the apprehension . . . ever present in the victim's mind'.<sup>32</sup> This development clearly accommodates the circumstances of a battered woman who lives in perpetual terror of the next attack which she reasonably believes could occur at any time.

Another modification is the removal of the male-gendered formulation of reasonable belief as to the nature of the attack contained in *Viro v R*.<sup>33</sup> The law now asks what *this* particular defendant could have regarded as reasonably necessary force, taking into consideration her or his particular circumstances. Applying this to a battered woman defendant, when deciding whether she could have reasonably believed her action to be necessary, a jury must take into account her history of violent abuse in the hands of the victim. Juries will also be directed that, due to the difficulty of evaluating in the calmness of a courtroom the stressful encounter experienced by a person subjected to an assault, an honest and instinctive belief that the defensive measure was necessary is 'most potent evidence that only reasonable defensive action had been taken'.<sup>34</sup>

Still another modification to the law of self-defence favouring women is the relegation of the principle of proportionate force from a legal requirement to merely a factor to be taken into account when considering the broader issue of the need for the defensive action. This development is particularly relevant to female defendants who have killed their batterers with a weapon when they were unarmed or asleep.

There are certainly further ways in which these defences could be altered to recognise the experiences of women. For instance, we have noted the New South Wales development permitting the provocative conduct to be viewed in the context of past provocative episodes. While this is an advancement of previous law, women's experiences would be more fully accounted for if past provocative conduct were regarded as a primary source of provocation rather than being merely incidental to the latest provocation. The same may be said for self-defence where previous assaults only provide a setting for the female defendant's perception of the gravity of the latest attack. A truer position

<sup>31</sup> These recent innovations are the work of the High Court in *Zecevic v DPP (Victoria)* [1987] 162 CLR 645.

<sup>32</sup> Borrowing the words of *Zanker v Vartzokas* [1988] 34 *A Crim R* 11, 18, a case on the requirement of imminent threat in the crime of assault.

<sup>33</sup> (1978) 141 CLR 88, 146 per Mason J and referred to in Part I of this article.

<sup>34</sup> *Zecevic v DPP (Victoria)* (1987) 162 CLR 645, 650 per Mason CJ, citing the Privy Council case of *Palmer v R* [1971] AC 814, 832.

would be for the law to regard the battered woman as defending herself against the cumulative effect of the last assault, plus the numerous previous assaults by her batterer. As for duress, much of the progressive law contained in the Northern Territory provision has yet to be adopted by other jurisdictions, for example, the extension of the recognition of threats beyond those of death or serious bodily harm, to threats of a psychological, emotional, financial or moral nature.

Once these defences have attained sufficient flexibility to accommodate women's experiences, the need for strict female-gendered pleas would be obviated. Hence, the defence of duress could be pleaded in place of marital coercion as is currently being done in the Northern Territory. As for the battered woman syndrome, it need no longer be relied upon to establish the reasonableness of the defendant's belief as to the nature of the threatened danger and the necessity of her defensive action. Instead, such reasonableness may be established by focussing on the woman's circumstances, including her lack of alternative means of protection, rather than on her psychological state.

## CONCLUSION

Highlighting the flexible gender-sensitive aspects of defences is one thing; it is quite another thing for them to be so construed in practice. This is because men still comprise the vast majority of our judges and legal practitioners. The fact is that a huge effort is required by legally trained men to change their legal traditions, practices and established ways of doing and seeing to accommodate women's experiences. But large as this effort might be, it must be made for the sake of justice and equality, two cardinal principles of the law which its custodians are duty-bound to achieve.

The task ahead then is for judges, lawyers, and indeed the general community, to be educated to displace their male stereotypical perceptions of defence situations and to adopt perceptions which integrate women's circumstances and experiences. This task is greatly facilitated by there already being in existence defence requirements which are gender-sensitive. There is the utmost urgency in achieving this goal of gender equality in the criminal law. For far too long already, the law has caused woman to be subjected to man and to his injustice. Our criminal law must move quickly to set in place the following Article contained in the *Convention on the Elimination of All Forms of Discrimination against Women*:

State Parties [of which Australia is one<sup>35</sup>] condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake . . . to take all appropriate measures . . . to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.<sup>36</sup>

<sup>35</sup> The Convention was ratified by Australia in 1983 and comprises the Schedule to the *Sex Discrimination Act 1984* (Cth).

<sup>36</sup> Article 2(f).