J. Greene*

A PROVOCATION DEFENCE FOR BATTERED WOMEN WHO KILL?

Introduction

A successful defence of provocation reduces murder to manslaughter. The policies which the defence serves have not been completely articulated. Today a new category of defendants who claim provocation — battered women who kill their abusers — compels an examination of these policies.

Part 1 of this article proposes a policy basis for the law of provocation which would extend the benefit of the defence to these defendants even though they might not fall within the traditional provocation doctrine. Part 2 examines the various approaches the law has taken to killings by battered women. Part 3 makes proposals for the implementation of the provocation defence in these cases.

PART 1 WHY SHOULD BATTERED WOMEN WHO KILL THEIR ABUSERS HAVE THE DEFENCE OF PROVOCATION?

The defence of provocation reflects a compromise in the criminal law. It is the result of a balancing of competing values and interests. On the one hand are the value we place on human life, society's interest in maintaining order, and the state's interest in its own preservation. These concerns militate toward severe punishment of those who kill. What can a defendant who has killed due to provocation offer to counterbalance these concerns? What is the justification for mitigating the harshness of the law of murder for these defendants? Traditionally the courts have viewed provocation as a concession to human frailty in that killing due to certain human frailties is considered less blameworthy than other killings and also less susceptible to the deterrent effects of punishment. A few commentators believe the victim's own fault in precipitating the killing tips the scales of justice somewhat in favour of the provoked killer.

Because the law of provocation developed through common law processes, no one theory could explain the result in each case. The human frailty/degrees of blameworthiness model, however, is patently inadequate in that it leaves much of provocation law unexplained. The theory is that the law must make concessions to the fact that a person may be provoked to kill by the conduct of another and that such hot-blooded killings are less blameworthy than pre-meditated killings. However, a great many provoked killings are or have traditionally been excluded from the benefits of the provocation defence. These include killings provoked by words alone,[1] those provoked by the conduct of children,[2] and those in which the loss of self control was contributed to by the defendant's drunkenness[3] or mental deficiency or instability.[4] None of these exclusions has been universally or permanently applied. Their existence, though, highlights the inadequacy of concession to human frailty as a theoretical basis for the defence. Unspoken policy considerations determine which frailties will get the benefit of provocation law.

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* Senior Tutor in Law, University of Adelaide.

1 For a discussion of the common law rule against mere words or gestures amounting to provocation, see *Parker v The Queen* (1963) 111 CLR 610 per Dixon CJ 631.

2 For a discussion of the common law principle that the conduct of children could not provoke the intent to kill, as opposed to the intent to inflict punishment which resulted in death, see J Horder 'The Problem of Provocative Children' Crim LR 1987 at 655.

3 *Camplin v DPP* [1978] AC 705 per Lord Simon 726.

4 See for example *Rex v Lesbini* [1914] 3 KB 1116.

There are also unarticulated premises inherent in the proposition that provoked killing is less blameworthy than cold-blooded killing. The proposition is conclusory and should be questioned. What interests of the state are served by treating these two types of killing differently? To what degree is the proposition grounded in the law's understanding of and acceptance of male behaviour patterns?

A less widely accepted (in academic circles) explanation of provocation law is that it is based, in part, on the fact that the victim got what he or she deserved — to a degree. Ashworth is the main proponent of this theory that the provocation defence is partial justiciation as well as partial excuse.[5] Insofar as he views provocation as excuse, he accepts that human frailty may lead to provoked killings and that these killings are less blameworthy than unprovoked ones. The justification element of the defence focuses on the victim's culpability rather than the defendant's.

Again, there are provocation cases which do not fit this model, cases in which the victim's conduct was not unlawful or even morally wrong.[6] The larger problem with Ashworth's theory is that it is morally dissatisfying. The victim's blame or fault is not an acceptable indicator of the degree of punishment the defendant should suffer. A justified killing (self-defence) must be completely justified. Partial justification is merely vigilanteism.

Returning to the balancing metaphor, Ashworth can be seen to be reducing the weight of the considerations which militate toward punishment (partial justification) as well as trying to counterbalance those concerns (partial excuse). This approach can only be premised on a belief that the manslaughter victim's life is worth less than a murder victim's and that society's purposes are served rather than thwarted by a provoked killing.

An alternative justification for the defence of provocation is that certain categories of people are placed by society itself in situations in which they well might be provoked to kill. Victims of domestic violence, for example, suffer directly at the hands of their abusers. Indirectly, however, battered women and children are victimised by widespread societal acceptance of wife and child beating coupled with the failure of the legal system to effectively intervene on their behalf.[7] Society therefore ought not be heard to condemn completely the battered wife or child who is provoked to kill her or his abuser.

To lay part of the responsibility for these killings at the door of society is not to accept a determinist view of human conduct. Most battered women do not kill. The point is rather that society cannot justly insist on giving full weight to its own concerns with preserving human life and social order when these are counterbalanced by society's having placed the defendant at high risk of being provoked to kill.

Clearly not all successful provocation pleas have a basis in some systemic disadvantage suffered by the defendant. Many of the traditional categories of legally sufficient provocation do, however, reflect a concession to a general societal difficulty which has contributed to the defendant's being provoked to kill.

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5 Ashworth 'The Doctrine of Provocation' (1976) 35 Cambridge LJ 292.

6 In *Doughty* (1986) 83 Cr App R 319 (CA), the crying of an infant was held to be legally sufficient provocation.

7 See Roy, *Battered Women* (1977) for a collection of essays on both the social and legal context of woman abuse.

An early discussion of these catergories of sufficient provocation is found in *R v Mawgridge*.[8] Lord Holt CJ summarized the cases in which the defence had been successful and offered a brief justification of each result.

His first examples of provocative conduct giving rise to a defence were assaults coupled with angry words. The assaults he mentions are nose-pulling and forehead fillipping. The man who responded to such insulting usage by killing was a manslaughterer, not a murderer.[9] Similarly, a man who found another in adultery with his wife might kill and escape the extreme penalty and stigma of murder[10] 'for jealousy is the rage of a man, and adultery is the highest invasion of property'.[11] The next case cited as an appropriate one for the provocation defence concerned a debtor who was detained by one debt collector while another went to fetch the bailiff to arrest the debtor. The debtor killed the man who was detaining him, and the verdict was manslaughter.[12] Holt justified this result on the ground that the defendant was resisting being deprived of his liberty without due process of law. Another defendant who killed a press gang member in order to rescue a man who was being unlawfully impressed into naval service was held to have been quite justifiably provoked by the sight of a fellow citizen's being deprived of his liberty unlawfully.[13]

Why did the courts allow the provocative conduct in these cases to work the legal effect of lessening the punishment and societal disapproval of taking a life? This question must be answered in light of the prevailing practices and attitudes of the day.

Men commonly went armed and the premium on male honour was high. These factors led to much duelling and other casual violence between men. The law was very concerned with this problem and endeavoured to deter men from fighting. Duelling was made illegal;[14] a killing in the course of a duel was often treated as murder and was at least manslaughter;[15] and the notorious Statute of Stabbing imposed the death penalty without benefit of clergy on a vast array of assaults.[16]

Without question, any efforts to bring about a less violent, less swordhappy society were commendable. And yet, until such social change occurred, what of the men who continued to kill in response to conduct which prevailing mores deemed highly provocative? The courts fashioned a compromise: such men would be convicted of a serious offence and punished for it, but both offence and punishment would reflect a lesser degree of blameworthiness than attached to murderers.

Killing a man found in adultery with one's wife was similarly reflective of maintaining male honour as well as of the attitude that wives were sexual property that men quite normally wanted to keep and protect. Killing to do so was not allowed, but the reality that a man might kill to do so was allowed for in determining his degree of blameworthiness.

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8 *R v Mawgridge* (1707) 84 ER 1107.
9 Ibid 1114.
10 *Maddy's* case 84 ER 524.
11 *Mawgridge* 1115.
12 *Buckner's* case Stiles 467.
13 *Huggett's* case 18 Car 2.
14 Halsbury *The Law of England* vol 9, 468.
15 *Egarton v Morgan* (1610) 1 Bulst 84.
16 Stabbing Act 1 Jac 1, C 8 (1604). Application of Statute discussed in Radzinowicz, *A History of English Criminal Law and its Administration from 1705*, vol 1 (1948) 695-698.

The cases involving killings to prevent wrongful deprivation of liberty seem not to reflect a troublesome attitude of the day but rather a troublesome fact of life in that era. There were few safeguards for individual liberties in the form of police and access to legal remedies.[17] Thus, while society perhaps could not afford (in terms of law and order) to countenance wholesale killing of press gangs and high-handed debt collectors, it could make some concession in such cases.

These concessions need not be viewed in the traditional way as concessions to individual human frailties. They are often explicable as a concession to categories of people in particularly provocative sets of circumstances. The value of such an analysis is that it emphasizes the remedial potential of the provocation defence. Human weakness cannot be remedied; social problems which encourage human weaknesses can be. The availability of the defence to certain defendants can be used as leverage to remedy these problems. For example, battered women who kill can collectively demand the concession of a provocation defence *until* society deals effectively with the problem of pervasive domestic violence. Judges and juries can bring pressure to bear by making the defence available.

Another advantage of looking to the role of society in contributing to a type of provoked killing is that it offers some guidance in the more morally difficult areas of provocation law. One example is the question whether the defence ought to be available to defendants who are provoked by children or babies. The recent English case of *Doughty*[18] has revived interest in Ashworth's theory that the victim's fault is central to a provocation defence.[19] In *Doughty* the defendant killed a seventeen day old baby. His defence was that the baby's incessant crying provoked him. There is obviously no question of blame attaching to the baby, and yet the killing was due to the human frailty of the defendant and is arguably less blameworthy than a pre-meditated killing.

The moral dilemma presented by such cases is a real one and no easy answer exists. However, inquiring into the role of society in failing to support socially and financially disadvantaged parents, especially young and unexperienced ones, through their difficulties would shed some measure of light on the moral and political implications of these cases.

Another difficult question, that of the legal relevance of the defendant's drunkenness to the reasonableness of his or her provocation can also be re-examined in this light. Should 'voluntary drunkenness' have the same significance for the Aboriginal or Maori or American Indian who lives in a community where drinking commonly begins in early childhood as it has for the middle class professional?

If defendants fall into one of these socially created 'high risk' groups, to whom must they address their demand that the defence of provocation be available to them? In other words, who decides what circumstances and conduct amount to provocation in law? Who sets the policies of the criminal law in this area? At first judges controlled the issue entirely. They determined whether the alleged provocation in a given case could mitigate murder to manslaughter. If so, the jury decided the factual questions

17 Tobias, *Crime and Police in England* (1979) 3.
18 Supra n 6.
19 Supra n 2.

including whether the defendant actually was provoked. As *Mawgridge's* case indicates, judges did not always articulate the policy considerations inherent in the choice of types of provocative conduct which would reduce murder to manslaughter.

The early and mid 19th century cases saw the role of the jury expanding.[20] Within broad, general categories of legally sufficient provocation (determined by judges), juries decided if the specific provocation alleged was sufficient. Jurors were guided in this policy decision by considerations of reasonableness and rationality.[21] In 1869, in *R v Welsh*,[22] the reasonable man was invoked by the court as an objective standard against which the jury should measure the defendant's reaction to the alleged provocation.

Judges continued to refuse to put the defence to the jury in some cases, particularly those in which the defendant's provocation was dependant upon his or her mental or emotional impairment or drunkenness.[23] The courts excluded these frailties from the mitigating effect of the defence. When the defence was put to the jury, its role as policy-maker was (and is) limited in law by the objective standard and in practice by judges' comments on the evidence and general jury instructions which leave wide scope for informing the jury of the judge's view of the sufficiency of the provocation in a given case.

The following instruction is taken from *R v Duffy*.[24] Duffy was a woman who killed an abusive husband. She and her husband had quarrelled on the night of the killing and blows were struck.[25] She had attempted to leave and take their child. Her husband prevented her. After some unspecified lapse of time (she had changed her clothes), Duffy attacked her sleeping husband with a hatchet and a hammer. The jury instruction was given by Devlin J (as he was then) and was commended as impeccable by Lord Goddard on appeal.

> 'Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind. Let me distinguish for you some of the things which provocation in law is not. Circumstances which merely predispose to a violent act are not enough. Severe nervous exasperation or a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation in law. Indeed, the further removed an incident is from the crime, the less it counts. A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here — the blame attaching to the dead man. You are not standing in judgment on him. He has not been heard in this

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20 *Russell on Crime* vol 1 (1964) Turner (ed) 526-529.
21 See Coleridge J's instructions to the jury in *R v Kirkham* (1837) 173 ER 422.
22 *R v Welsh* (1869) 11 Cox 336.
23 Supra n 3 and 4.
24 *R v Duffy* [1949] 1 All ER 932.
25 The court reported this fact in neutral terms. Who struck whom and the severity of the blows were not viewed as material.

> court. He cannot now ever be heard. He has no defender here to argue for him. It does not matter how cruel he was, how much or how little he was to blame, except in so far as it resulted in the final act of the appellant. What matters is whether this girl had the time to say: 'Whatever I have suffered, whatever I have endured, I know that Thou shalt not kill'. This is what matters . . . Provocation being, therefore, as I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is what is sometimes called time for cooling . . . Secondly, . . . you must consider the retaliation in provocation — that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon.'[26]

Duffy was, of course, convicted of murder. Lord Goddard was pleased with the way the instruction gave the jury 'an opportunity of vindicating the law' in a case where their sympathies might lead them astray.[27] The possibility that the law might be shaped by the jury's ideas of reasonableness and fairplay was not raised.

The passing of the Homicide Act (UK) 1957 enlarged the role of the jury in cases where the sufficiency of the provocation was questionable. Section 3 provides that:

> 'Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything done and said according to the effect which, in their opinion, it would have on a reasonable man.'

English judges could no longer withhold the provocation issue from the jury unless there was no evidence the defendant was actually, subjectively provoked. The rule against words as provocation was abrogated. The only limitations the Act placed on jury freedom to choose which conduct to view as provocation was the reasonableness requirement. However judges are still free to stress to juries the relevance of considerations such as suddenness and cooling time and proportionality of response to the ultimate question of reasonableness.[28]

In Australia the decision in *R v Parker*[29] removed traditional strictures on the availability of the provocation defence. The question of sufficiency of provocation is now as in England normally left to the jury, again within the confines of the objective test. It should be noted that the objective

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26 *Duffy* 933-4.

27 Ibid 934.

28 While these are no longer elements of the defence, the relevance of cooling time and suddenness is admitted in *Parker* per Windeyer J and, the High Court in *R v Johnson* (1976) 136 CLR 619 and *R v Moffa* (1978) 138 CLR 601 admits the relevance of proportionality. Also see Victorian Law Foundation, *Collected Directions in Criminal Trials* (1986) 12.1.4/1-2, which stresses these three considerations.

29 Supra n 1.

standard in Australia is quite often expressed in terms of the ordinary person, not the reasonable person. Barwick CJ expressed his preference for the ordinary person test in *R v Johnson*[30] and again in *R v Moffa*[31] on the ground that the objective test is 'better related to human nature than to reason'.[32] The ramifications of this distinction have not yet been fully explored.[33]

Section 3 of the Homicide Act has had another, less direct, effect on the policy-making powers of both judge and jury in English and Australian provocation cases. The removal of the common law restrictions on words as provocation enabled the House of Lords in *Camplin v DPP*[34] to conclude that the reasonable person to whom the jury looks as a gauge must be imbued with the defendant's relevant characteristics. As provocative words would normally be insults or taunts concerning some characteristic of the defendant, the court felt that, to give effect to the legislative intent, any characteristics of the defendant which would give those provocative words particular emotional thrust must be considered by the jury.

In *Camplin* the defendant was a fifteen-year-old boy who was forcibly sodomized; his attacker then laughed at his distress. The boy hit the attacker with a frying pan, killing him. At trial the jury was instructed that the defendant's reaction to the alleged provocation must have been that of a reasonable man if the provocation defence were to succeed. The jury convicted the boy of murder. The House of Lords held that the jury instruction should have referred to a reasonable boy of the defendant's age and with any characteristics of his which might be relevant to the gravity of the provocation. In so doing, they overruled *Bedder v DPP*[35] in which an impotent man who killed upon being taunted regarding his impotence was held to the standard of the reasonable man (and convicted of murder) — not that of the reasonable impotent man.

The court in *Camplin* established a dichotomy in terms of relevance of the defendant's characteristics. Age and sex of the defendant are to go to the reasonableness or ordinaries of loss of self-control. In other words, a jury might well determine that a reasonable grown man would not have lost his temper due to being sodomized and taunted about it, but that a reasonable fifteen-year-old boy might have so reacted. The other catergory of characteristics goes to the gravity of the provocation offered. For example, in *Bedder*, taunts about lack of sexual ability might have been far more provocative to an impotent man than to a man not suffering that problem.

Camplin has been expressly adopted in the Australian common law states of New South Wales, Victoria, and South Australia.[36] In the High Court, Barwick CJ considered the defendant's 'ethnic derivation' relevant to the sufficiency of the provocation in *Moffa* (decided one year before *Camplin*).

The judges now must decide precisely which of each defendant's characteristics are relevant to the gravity of the alleged provocation. The

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30 Supra n 28.
31 Supra n 28.
32 *Johnson* 635.
33 Infra n 43.
34 Supra n 3.
35 *Bedder v DPP* [1954] 1 WLR 1119.
36 *R v Dutton* (1979) 21 SASR 356; *R v Croft* (1981) 1 NSWLR 126; *R v Dincer* [1983] VR 460.

House of Lords in *Camplin* rejected at least 'exceptional excitability or pugnacity or illtemper or . . . drunkenness' as characteristics which should modify the objective test.[37] The New Zealand courts have drawn the line at temporary mental or emotional characteristics.[38] In Australia the South Australian Supreme Court, per Cox J has held that, in order to retain any objectivity in the objective standard, the characteristic of 'an abnormally quick temper, and all that this implies' must be excluded.[39]

Today, then, it is the courts once again who exercise a large degree of the policy-making power in terms of the provocation defence. They decide whether bad temper, drunkenness and mental deficiencies are human frailties which the law should make concessions for. Jurors now, once the judge has given them the appropriate objective standard — the reasonable fifteen-year-old boy, the ordinary Italian Australian with a history of mental illness,[40] the reasonable Pitjintara Aborigine in a tribal community,[41] etc, decide whether such a notional person might have been provoked to act as the defendant did.

English juries determine the reasonableness of the defendant's action; this allows scope for evaluation and imposing of norms as it is the jury's prerogative to define reasonableness. Australian juries are instructed to determine the ordinariness of the defendant's act, a determination which ought to be factual, not evaluative. Australian juries are however denied information regarding the ordinary person with the defendant's characteristics[42] and so their determination must be evaluative to the extent they do not know what an ordinary person of the defendant's type might do.[43]

And so it is, in Australia today, both judge and jury who play a role in setting the policy of the criminal law with respect to provoked killings. It is then both judges and jurors who must be convinced of the appropriateness of making a concession to defendants who are placed by social realities at a high risk of being provoked to kill. Part 2 will look at the approaches currently taken by courts to battered women who kill their abusers and will suggest an approach for the Australian cases which are certain to arise. Part 3 focuses on the education of jurors so that they may perceive and implement the policy of ensuring the provocation defence is available to these battered women.

PART 2 CURRENT ATTITUDES OF COURTS TOWARD DEFENCES FOR BATTERED WOMEN WHO KILL

Battered women who kill their abusers are receiving a variety of treatments by the criminal law. Some such defendants fall neatly into existing self-

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37 *Camplin* supra n 3.

38 Brown, 'Provocation, Characteristics and Diminished Responsibility' (1982-83) 10 NZULR 378.

39 *The Queen v Griffin* (1980) 23 SASR 264, 266.

40 *The Queen v Romano* (1984) 36 SASR 283.

41 Three unreported Northern Territory cases discussed in Howard, 'What Colour is the Reasonable Man?' [1961] Crim LR 41.

42 Infra n 82.

43 It is acknowledged in Part 3 that jury verdicts reflect value judgments even if little scope is left for them to do so and that this is probably good. However, adoption of the ordinary person standard ought to limit the role of the jury somewhat in evaluating the defendant's conduct. See the comments of Cox J regarding application of an ordinary person test in *Romano*, supra n 40, 293-4.

defence or provocation defences depending on when and in what state of mind they kill. Other battered women, however, kill in circumstances that make the availability of either of these defences as traditionally applied questionable. They kill a man who is sleeping or drunkenly unconscious. They may kill before any fresh assault has taken place or well after one has ended. Sometimes the intent to kill was admittedly formed some time before the killing.[44]

Quite a number of these more troublesome cases have arisen in the United States in recent years.[45] They attract widespread publicity for a variety of reasons. The killing of a man by a woman is viewed as aberrational, and, within the microcosm of the family, the killing of husband by wife symbolises a threat to social order.[46] It is, however, the legal argument that such killings might be justified as self-defence that is the newsworthy aspect of the American cases.

To date several American states have made the defence of self-defence available to battered women whose killings did not fall squarely into pre-existing self-defence doctrine.[47] Self-defence has also been argued by battered women defendants in two Canadian cases of this type but no pattern has emerged there as yet.[48]

Inevitable debate has sprung up in America concerning the desirability of fashioning a special or different law of self-defence for battered women. On the one hand is the argument that if women are to receive constitutionally guaranteed equal protection of the law, situations in which a woman defendant claims to have acted in self-defence must be examined 'in the light of her own perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination" (*State v Wanrow*).[49] Wanrow was not a battered wife but rather an average sized woman who used a weapon to kill a large, unarmed man. The Washington Supreme Court viewed the trial judge's standard instruction on self-defence as giving the jury the impression that Wanrow was to be measured by a standard 'applicable to an altercation between two men'[50] and thus reversed her conviction of murder.

Opponents of modifying self-defence law for women or battered women offer an array of arguments. These range from the technically legal — that

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44 *The Queen v R* (1981) 28 SASR 321. *Pridham's* case, unreported, WA Supreme Court, discussed in Harding, 'Not Murder, She Quoth', *The Bulletin* (29 Aug 1989) 40.

45 Coffee, 'A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Wife Syndrome' (1986/87) 25 J Fam L 373. As of 1986, 16 states and the District of Columbia had ruled on the admissibility of expert evidence on the battered wife syndrome.

46 The 12th century statute, 25 Edward III c 2, made the killing of husband by wife petit treason.

47 Supra n 45. The expert evidence is at least conditionally admissible in 12 states and the District of Columbia.

48 In *R v Whynot (Stafford)* (1983) 37 CCC (3d) 198, the defendant was acquitted by a jury considering self defence. On appeal a new trial was ordered as imminence of danger not shown on the evidence. Defendant pleaded guilty to manslaughter at second trial. See discussion of this case in Boyle and others, *A Feminist Review of Criminal Law* Russell (ed) (1985) 39-40.
In *R v Lavallee* (1988) CCC (3d) 113, the defendant was acquitted by jury considering self-defence. On appeal a new trial was ordered as the jury had not been properly instructed regarding weight to attach to expert evidence.

49 *State v Wanrow* (1977) 559 P 2d 548, 559.

50 Ibid.

self-defence in theory should justify the act but that it is being used to excuse the actor[51] — to the much more pragmatic concern that it is now 'open season on men'.[52] They also are concerned that self-help is being encouraged, that a societal view of women as victims is perpetuated, and that juries are being asked to decide difficult cases on sympathy grounds rather than on established legal principles.[53]

The argument that justice will be served only if self-defence is made realistically available to women defendants is not answered by cataloguing potential negative repercussions of so doing. One argument against modifying criminal defences for battered women does address the equal protection point: 'there should not be one law of murder for men and another for women'.[54] Paradoxically, however, equal protection of the law may require special treatment of a positive nature for women or any other group whom the law has treated specially in a negative way. Arguably the law of murder and the defences of self-defence and provocation have developed in recognition of male behaviour patterns. Women have been treated specially by simply being ignored. A law of murder for women in this sense is long overdue. The possibility exists in the United States for Supreme Court decision as to the implications of the equal protection clause of the Fourteenth Amendment in this area.

One American commentator who criticized the extension of self-defence to cover battered women defendants argued that provocation is the more appropriate defence in these cases. He accepted that some modification of traditional concepts of cooling time and proportionality would be required, and noted that expert evidence concerning battered women generally would achieve this result.[55]

In Australia, however, it is not at all clear that battered women will have easy access to even a provocation defence unless they fit into the traditionally recognized patterns of provoked killers. Those who do fit are of course often allowed to plead guilty to manslaughter and their cases receive little attention. The reported cases of battered women who kill their abusers and are charged with murder are still relatively few.

The one notable Australian case in which the defendant killed her sleeping husband and then sought to rely on a provocation defence is the South Australian case of *The Queen v R.*[56] In that case the deceased and the defendant had been married for twenty-seven years and had five daughters and one son. The deceased was brutally domineering and manipulative of both his wife and children. Unknown to the defendant until the day before the killing, her husband had long committed incest with all of his daughters which had resulted in the eldest two leaving home some time previously. When the next two in age decided to leave home, family tensions escalated and the husband violently threw them out of the house but then the next day threatened them with death if they did in fact move away. After several days of these conflicts, one daughter told the

51 Mihajlovich, 'Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defence' (1986/87) 62 Indiana LJ 1271.
52 Eber, 'The Battered Wife's Dilemma: To Kill or Be Killed' (1981) 32 Hastings LJ 895 n 190.
53 Mihajlovich 1278-81.
54 Harding, supra n 44.
55 Supra n 53.
56 Supra n 44.

defendant of the years of incest. This daughter had first been interfered with at age six; intercourse had begun when she was ten. The daughter also showed her mother injuries the deceased had inflicted on her with a knife and recounted his most recent acts of forcible sexual interference. All this was told to the defendant on a Wednesday morning. This was her first knowledge (if not inkling) of the years of incest. In the early hours of Thursday morning the deceased spoke to his wife in a conciliatory manner saying that he and the daughters had settled their differences and that they would be 'one big happy family'. He promised to take the appellant to England soon and mentioned a second honeymoon. Shortly after this, while her husband slept, the defendant attacked him with an axe and killed him.

At the trial in the South Australian Supreme Court, the defence of provocation was raised. Sangster J, however, instructed the jury that the situation which the defendant had described did not raise any kind of a defence in law. The defendant was convicted of murder and the mandatory life sentence was imposed. A public outcry ensued and the case became a cause celebre.

On appeal, the South Australian Supreme Court in a three-to-one decision quashed the conviction and ordered a new trial. The basis of this decision was that the jury should have been instructed on provocation. Critically undermining the effect of this decision, however, is the rigidly traditional approach taken to provocation by King CJ. In discussing what constitutes provocation in law he commented that:

> 'the loss of self control which is essential to provocation, is not to be confused with the emotions of hatred, resentment, fear[57] or revenge. If the appellant, when in control of her mind and will decided to kill the appellant because those emotions or any of them had been produced in her by the enormity of the deceased's past behaviour and threatened future behaviour or because she considered that was the only way in which she or her children could be protected from the deceased's molestations in the future, the crime would nevertheless be murder. The history of incest occurring in the absence of the appellant cannot of itself amount to provocation, even though recounted to her later. Words or conduct cannot amount to provocation unless they are spoken or done to, or in the presence of, the killer.'[58]

The Chief Justice then conceded that the family history and the build up of tensions and emotion in the appellant were, however, relevant 'as part of the background against which what is said or done by the deceased to the killer is to be assessed'.[59] He concluded that the ostensibly affectionate words and caresses of the deceased shortly before the killing could amount to provocation in law. He was then comfortable discounting the lapse of time (approximately twenty to twenty-five minutes) between the provocative words and actions and the fatal attack, observing that 'in the words of Windeyer J in *Parker v The Queen*, passion and emotion were mounting not declining'.[60]

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57 It has since been established in *R v Van Den Hoek* (1986) 69 ALR 1 per Mason J that fear can provoke the intent to kill.

58 *The Queen v R* 325-6.

59 Ibid 326.

60 Ibid.

Jacobs J essentially agreed with the Chief Justice, stating that 'all the events leading up to the evening of the killing were too remote in time to amount to provocation' and in any event evoked a relatively calm and self-controlled response from the accused.[61] Those events could not, however, be discounted as background against which to gauge the effect of the deceased's final words and actions because to do so would be to take a 'fragmented view of the evidence' contrary to the approach adopted in *Moffa* and *Parker*.[62]

It is submitted that this approach, while opening up the defence of provocation for Mrs R, will have the effect of foreclosing it for other equally deserving defendants. Or, at best, it will force other battered women to disingenuously search for some provocative word or action immediately preceding the killing on which to hang their defence. South Australia has taken the position that a mother, upon learning that her five daughters had been sexually abused over a twenty-year period by her husband could not be provoked to kill him in the first place because of the fact that he was not present when she learned this information and could not then remain provoked for a period of less than one day.

This is not a desirable state of the law. For the policy reasons outlined above, courts can and should make provocation an available defence to any woman who presents evidence of a history of abuse and claims to have been provoked by that abuse to kill her abuser.

PART 3 THE ROLE OF THE JURY IN IMPLEMENTING POLICY

Once a trial judge has determined that provocation is an available defence, the jury must make two determinations. First, was the defendant actually, subjectively, provoked? The second determination involves an objective test: would a reasonable or ordinary person have been so provoked?

Both these questions may be stumbling blocks to battered women who have killed their abusers other than during or immediately following an assault. In order to satisfy the subjective test, the defendant can of course communicate directly with the jury through her evidence and describe her feelings of provocation at the time of the killing. However, if the defendant's experiences and emotions are outside the jurors' range of experience, they may not find her evidence credible.[63]

The objective component of the defence poses even bigger problems. How is the jury to know whether the defendant acted as an ordinary or reasonable battered woman would have? The difficulty inherent in defining and constructing a notional ordinary person against whom to measure a provocation of defendant have led some to call for the abolition of the objective component of the defence. Justice Murphy put this position in *R v Moffa*:

> 'The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all,

61 Ibid 343.
62 Ibid.
63 See discussion of *R v Hill* infra.

> individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances.'[64]

A completely subjective test would deprive both the courts and juries of any evaluative or normative role in this area. Any killing due to a loss of self-control would be, in theory, manslaughter. Jurors, though, may not fit neatly into this theory. Jurors considering an abused wife who killed her husband while he slept, several hours after the last assault, may perform an evaluative function even though they have not been instructed to do so. The value judgment implicit in their verdict might be that killing is not the answer to domestic violence. Conversely, it may be that the husband got what he deserved and an acquittal could result.[65] Both possibilities are disturbing. The first effectively nullifies the provocation defence (in its hypothetical subjective form). The second is a perverse verdict.

Presumably those in favour of abolishing the objective test in provocation hope to see the defence made more accessible, not less. The first possibility above (a murder conviction because the jury thought killing is not the answer for battered women) is therefore the frightening one. [Perverse verdicts which reflect perverse prosecutions[66] and/or perverse rules of law are always available, with or without an objective standard. Mrs R, whose case was discussed in Part Two, was acquitted at her second trial even though no theory allowing for acquittal was put to the jury.][67] The frightening possibility is that jurors will play an evaluative part without any guidance from the court. They would then be the sole arbiters of the categories of sufficiency of provocation. This would be very troubling in any society where there are groups whose motivations are not understood and accepted by the entire society.

Alternatively, as is conceded above, a jury might apply only a subjective test in a provocation case and not make any moral distinction between one provoked killer and another. Any conduct would then be legally sufficient to reduce murder to manslaughter: lawful arrest, awarding low marks to a student, etc. The law would have abdicated its role of governing human behaviour in this area. The abusive husband who in anger beat his wife to death would be treated as leniently as the battered wife who shot her husband.

A completely subjective test, therefore, is untenable. It may be possible to formulate a provocation defence that has a normative or evaluative component that does not involve the problematic reasonable/ordinary person. The American Law Institute has undertaken the task in its Model Penal Code which classifies as manslaughter:

> '[a] homicide which . . . is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such

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64 *Moffa* 626.

65 For a comment on the seemingly arbitrary nature of jury verdicts in cases of battered women who kill their abusers, see Creach, 'Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why' (1982) 34 Stanford Law Review 615, 626.

66 Gobert, 'The Embattled Jury' (1989) University of Adelaide Continuing Legal Education Seminar.

67 Loff, 'Provocation and Domestic Murder: The Axe Murder Case' (1982) 7 Legal Services Bulletin 52.

> explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.'[68]

Here it is the defendant's reason for being provoked that must be reasonable. In deciding this issue, the jury decides the sufficiency of the provocation. It is limited in this policy-making power by the policy decision inherent in the Code: the jury is not to be free to ignore the perspective of a person situated as is the defendant. Is this very different from the approach taken in England and Australia since *Camplin*? Both tests focus jury attention on a notional person who must be to a large degree modelled on the defendant.

One advantage of the Model Penal Code approach is that it recognises that the notional person can completely mirror the defendant and still be required to behave reasonably. In other words, to attribute all the defendant's characteristics to the ordinary person need not completely subjectify the defence.

It is clear that each of these permutations of the objective standard involves instructing the jury to view the provocative conduct from the defendant's perspective. Today in Australia or England a battered woman who killed her abuser and claimed provocation would be entitled to a jury instruction regarding the ordinary or reasonable battered woman in this defendant's circumstances. Will such an instruction insure that the defence is truly available to her? Two impediments will arise. One is the tendency of trial judges to emphasise the relevance of cooling time and proportionality of response to the question of reasonableness. The other is the likely refusal of the courts to admit expert evidence to help the jury know what an ordinary battered woman tends to think, feel or do.

The emphasis on cooling time in both *Duffy* and *The Queen v R* and on proportionality in *Duffy* cuts against the battered woman defendant who has killed well after the last assault and has used a weapon against an unarmed assailant. Strictly speaking, if the objective standard were simply one of ordinariness or reasonableness of the defendant's reaction to the provocation, these problems would not arise. Cooling time and proportionality, though, have long been mentioned in jury instructions to help the jury decide the reasonableness question.[69] The thinking is that it is patently unreasonable to be provoked to the point of killing well after the provocative conduct has occurred. The unreasonableness of answering fists with weapons is equally obvious.

These traditional legal notions of when and how and why people lose self-control are based on notional confrontations between two men who are roughly equally matched and on notions of honourable fairplay between these men. Peter Brett pointed out in 'The Physiology of Provocation'[70] that, in light of modern scientific understanding of physical responses to anger, these notions were probably never valid. Research into the typical responses of battered women to episodes of violence clearly indicate that these notions have no validity in this context.

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68 American Law Institute, Draft Model Penal Code (1962) section 210.3.
69 Supra n 28.
70 Brett, 'The Physiology of Provocation' [1970] Crim LR 624.

The research of Lenore Walker[71] who pioneered this field of research into patterns of behaviour in battered women indicates that episodes of domestic violence typically occur in three stages. First is a period of escalating tension in which the batterer displays hostility but does not assault the woman. The woman, knowing what this behaviour signals, attempts to defuse the situation and may be temporarily successful. Eventually, however, she will be unable to continue making the effort to control his anger, and she will begin to withdraw. This withdrawal normally sparks the second stage — that of explosive anger and physical abuse. When the battering stops, stage three begins. The man is now contrite and promises this will never happen again. He may well believe he will keep this promise; the woman certainly wants to believe it and probably does believe it early in the relationship. The relevance of these stages to the notion of cooling time is that the woman will probably not begin to feel rage until the terror and pain of stage two have subsided. Stage three brings such relief that the beating has stopped that feelings of anger are further delayed.[72]

Notions of proportionality are even less at home in a domestic violence situation. Women's lesser size and physical strengh as well as their lack of training and experience in fighting with their hands make a mockery of Lord Devlin's admonition to answer fists with fists. In addition to answering fists with weapons, women tend to commit crimes of violence by stealth. They also tend to do the job quite thoroughly. Mrs Ryan explained her use of an axe and the eleven blows she delivered on the ground that an unsuccessful attempt to kill her husband would have been fatal to herself.

There are two possible solutions to the problem posed by jury instructions on cooling time and proportionality. One is to admit expert evidence of the ordinary emotions and conduct of battered women in order to counteract the prejudice inherent in the instruction. The other is for the courts to rethink the fairness and effect of such instructions. Equal treatment under the law requires that the provocation defence be accessible to women defendants even though they did not kill as and when a man might have done.

The less easily overcome obstacle for battered women defendants is lack of jury knowledge about the 'ordinary battered woman' that the jury is to use as its measure of blameworthiness. Not only would the average juror not understand the battered woman's situation, but he or she may be hostile to accepting any information that essentially highlights a major failure of our society.[73] Preconceived beliefs that battered women must like it or they would leave and that they have effective redress through the legal system can be damning to a provocation defence. These beliefs are not technically relevant to the determinations the jury will be asked to make. Instead they will affect the value judgments that will be implicit in the verdict. Current provocation law requires these value judgments to be shaped by an understanding of what ordinary battered women might do in the defendant's circumstances. But if the jury does not have information

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71 Walker, *The Battered Woman* (1979).

72 Brodsky, 'Educating Juries: The Battered Woman Defense in Canada' (1987) 25 Alberta LR 461.

73 For a demonstration of this problem in the form of interviews with jurors, see Bochnak, *Women's Self Defense Cases* (1981).

about the ordinary battered woman on which to base a judgment of the defendant, the converse must occur: the jury will create in its mind an ordinary battered woman who conforms to its pre-existing values. The defendant will then be judged by a reasonable juror standard, and the effect of *Camplin* and its progeny is nil.

It is possible that the defendant might be credible and sympathetic and the jury well-disposed toward her. In such a case the jury may return a verdict of manslaughter or even an acquittal (*The Queen v R*) even though the jury has no idea of what an ordinary battered woman would have done in this defendant's situation. The objective standard would not have come into play. While such a result may or may not be upsetting, its converse is upsetting and is just as likely.

R v Hill[74] is a case of a woman who lived with a man who tended to be very violent when he was drinking. He had a long record of violence offences. Ms Hill did not allow him to stay in her home if he were drinking. He lived with her partly to keep himself out of trouble. Despite her rule against drinking, there had been several incidents of his getting drunk and abusing her. On the day of the killing, the couple argued and the man left to go to a pub. Hill took a gun from the closet and told a friend that she was frightened of what the man might do when he returned. When he did return drunk, she met him in front of the house and told him he could not come in. He went in anyway and Hill got the gun and told him to leave. He advanced toward her; she told him not to come any nearer. He continued advancing and she shot him. At her trial Hill's argument was that she had shot in self-defence. Witnesses testified as to the man's brutal treatment of her in the past. The jury heard graphic descriptions of how he had dragged her about by her hair and of other abuse. They heard of his fear that he would kill her eventually. They then convicted her of murder.

The trial judge in *Hill* had instructed the jury on provocation as well as self-defence. The jury of eleven men and one woman (the Crown had used all twenty of its pre-emptory challenges)[75] obviously felt that the killing had been neither in self-defence nor sufficiently provoked. The Supreme Court of New South Wales quashed the conviction as unsafe. A manslaughter verdict was substituted, and Hill was sentenced to four years with a one-year non-parole period.

Hill is an example of a jury which was either unable or unwilling to apply a reasonable or ordinary battered woman standard. If the standard is to be kept, and some objective standard which asks the jury to step into the defendant's shoes is needed, then there is a need for evidence which will give the jury information about the notional battered woman. It is an illusory benefit to defendants to tailor the objective standard to their characteristics or situations while refusing to give the jury the means to interpret that standard. It is also unfair to demand this impossible task of juries.

The Australian courts, however, are hostile to the use of expert evidence. They have clung to rules that exclude such evidence even though the rules have long been criticised by commentators and have been abandoned to a

74 *R v Hill* (1981) 3 A Crim R 397.
75 Note, 'Domestic Homicide Revisited' (June 1981) 6 Legal Services Bulletin 149.

large extent in both the United States and Canada.[76] The two rules which work to exclude evidence which might interpret the objective standard in provocation are the common knowledge rule and the ultimate issue rule. Both these rules exist to insure that certain determinations remain the prerogative of the jury or trier of fact.

It is hard to take issue with the common knowledge rule if one takes it at face value: jurors do not need to hear experts testify on matters of common knowledge. The problem is not the rule itself but its application in instances where the knowledge in question is, in fact, not common. This tends to happen when the jury-oriented catch words like 'reasonable' or 'ordinary' are invoked. As jurors are reasonable and ordinary by definition, they should not need experts to tell them about the reasonable or ordinary person. But juries are not reasonable, ordinary battered women, and so the use of the catch words should not bring the common knowledge rule into play.

In *Camplin* the prosecution argued that a jury instruction on the reasonable fifteen-year-old boy would open the door for evidence to interpret that standard. Lord Simon rejected this argument on the ground that the juror's basic common sense would enable him or her to think in terms of a reasonable fifteen-year-old, a reasonable pregnant woman or a reasonable hunchback.[77] Lord Diplock agreed.[78] This bit of obiter is problematical on two levels. First, it is not common sense that enables jurors to construct these models; it is experience and/or observation of the conditions mentioned. Secondly, the three examples given may in fact be conditions that jurors have experienced or observed to a considerable extent (treating a hunchback as any visible physical defect). The reliance on common sense, though, has extended to cases in which the defendant's condition or characteristics will have been experienced or observed by few or no jurors.

In *R v Dincer*,[79] the defendant was a Turkish Moslem who killed his daughter following a dispute concerning her decision to live with her boyfriend. The defence argued essentially that the defendant's ethnic background and religious beliefs made his daughter's conduct highly provocative to him.

The jury was instructed to measure Dincer's conduct against that of an ordinary conservative Turkish Moslem. The judge then said, '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'.[80]

76 Freckelton, *The Trial of the Expert* (1987) 68.
77 *Camplin* 727.
78 Ibid 716.
79 *R v Dincer* [1983] 1 VR 460.
80 Ibid 468.

This can hardly be a desirable position for the law to take. The jury is left to flounder. It may be, as was the jury in *Hill*, unwilling or unable to understand that the defendant did in fact respond as any ordinary person with his or her characteristics might have, and so convict of murder a person the law deems a manslaughterer. On the other hand the jury may simply assume the defendant is representative of his or her category of ordinary people and convict of manslaughter a person the law deems a murderer.[81] This is distinguishable from a perverse verdict which is based on a value judgment not a mere lack of information.

The application of the ultimate issue rule in a provocation case would reserve for the jury the issue of the ordinariness of the defendant's response to the alleged provocation.[82] Such protection of the jury from the feared control by experts can only be rationalized if the jury does, in fact, have the common knowledge required to determine the factual issue of ordinariness. As pointed out above, the jury will not have the necessary knowledge in a great many provocation cases, including those of battered women.

The question whether to admit expert evidence in these cases highlights the policy concerns discussed in Part 1. In asking that expert testimony be admitted as to their ordinariness, provocation defendants are implicitly saying to the legal system and to society generally: 'you do not understand us, we are outside your main stream.' This message is accusatory when sent by defendants who have not chosen to be outside the mainstream but have been put there by society.[83] Once it is accepted that such defendants ought to have the provocation defence available to them, impediments to admitting expert evidence regarding their group characteristics and circumstances become patently injust.

Thus insofar as these rules of evidence would prohibit expert evidence concerning the notional ordinary battered woman in a provocation case, they would work an injustice. Popular conceptions of the battered woman's condition are largely myth which can be shattered by appropriate expert testimony. The expertise is available; Lenore Walker published her seminal work on battered women in 1979, and the topic has been the subject of

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81 In theory, if the jury has no knowledge whether the ordinary person with the defendant's characteristics might have killed, the allocation at common law of the burden of proof on the Crown to rebut provocation requires a manslaughter verdict. For a discussion of the effect of statute (NSW) placing burden on defendant to establish provocation, see *R v Johnson* supra n 28.

82 Freckelton 68.

83 Cases in which exceptions are made to the ultimate issue rule involve conditions voluntarily assumed (such as trades or professions) or conditions not thrust upon the defendant by society (such as insanity or diminished responsibility). These defendants, when claiming to be outside the mainstream in some way, are not making any attack on society or the legal system and therefore do not engender defensiveness. For citations see Freckelton 70-71, n 14-18.

intense study and academic reflection ever since.[84] The use of expert testimony would make trials of these defendants more expensive and more time-consuming, it is true, but it would make them more fair as well. It is also true that a degree or 'trial by expert' would be inevitable, but the adversarial processes of the trial should safeguard against abuses of this nature.

In conclusion, the battered women defendants whom the Australian courts are beginning to have to cope with should have the benefit of the law of provocation. Ensuring the fair and just application of the law to these defendants will require the recognition by courts of the fact that the provocation defence, as it has evolved, does not reflect the experiences, attitudes and tendencies of women, and of the fact that juries do not understand the ordinary battered women. Judges must take the responsibility for educating both themselves and jurors with respect to a meaningful provocation defence for all defendants.

84 For a review of recent American literature on medical and legal issues raised by spouse abuse, including psychological studies of battered women, see Frazer, 'Domestic Violence: a Medicolegal Review' [1986] Journal of Forensic Sciences 1409.